

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PENNLICO, LTD.,	:	NO. 12 – 02,428
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
SOUTHWESTERN ENERGY PRODUCTION COMPANY,	:	
Defendant	:	Preliminary Objections

OPINION AND ORDER

Before the court are preliminary objections filed by Defendant on January 7, 2013. Argument on the objections was heard March 19, 2013.

Plaintiff brought an action against International Development Corporation (“IDC”) based on a transfer of certain mineral rights from its former tenant in common (with respect to those rights) to IDC.¹ According to the Complaint, transfer of the rights was subject to a right of first refusal and since the transfer took place without notice to Plaintiff and the opportunity for Plaintiff to purchase the rights, such violated the right of first refusal. In that action, Plaintiff seeks specific performance of the right of first refusal, imposition of a constructive trust on the mineral rights, an accounting of any profits resulting from ownership of the rights since the transfer, and damages for breach of the right of first refusal. In the instant action, Plaintiff contends Defendant is a successor in interest to IDC and that it has an interest in some of the mineral rights at issue in the other suit. Similar to the other suit, here Plaintiff seeks the imposition of a constructive trust, an accounting, a declaratory judgment that the lease between IDC and Southwestern is void, and damages for what it deems to be a cloud on its title. In its preliminary objections, Defendant raises eight issues. These will be addressed in turn.

First, Defendant contends Plaintiff is not entitled to relief as the right of first refusal is limited to the original parties thereto. IDC made the same argument in its preliminary objections in the first suit, and as was found therein, the right of first refusal *does* provide that the right itself (and not just the consequence of any exercise of that right by the original holder of such) is binding on successors and assigns. This objection will therefore be overruled.

Next, Defendant contends Plaintiff is not entitled to relief as the right of first refusal was extinguished by merger in 1983 when Clarence Moore (Plaintiff's former tenant in common) acquired 100% of the oil and gas rights in the affected warrants. Defendant argues that under Pennsylvania law, a burden on one property owner in favor of another property owner is extinguished when various fragments and interests are merged into one common interest by a unity of title, citing Kieffer v. Imhoff, 26 Pa. 438 (1856). This claim fails for two reasons. First, it appears that Moore acquired 100% of only the oil and gas rights, and not 100% of all mineral rights, and thus there was not a complete unity of title. Second, and more important, the right at issue here, a right of first refusal, was granted by all interest holders to all other interest holders and cannot be described as a burden on one property owner in favor of another property owner. Kieffer is thus distinguishable, and this objection will also be overruled.

Next, Defendant contends that Plaintiff is not entitled to relief as the right of first refusal was not specifically mentioned in its deed. The deed into Plaintiff did state, however, that the conveyance was "expressly subject to all encumbrances of record" and to "all contracts and agreements" relating to or affecting the production of oil, gas and minerals. The right of first refusal was both an encumbrance of record, and an agreement affecting the production of oil and gas. This objection will therefore also be overruled.

Next, Defendant contends the right of first refusal is not enforceable as it violates the Rule Against Perpetuities. In a strikingly similar case, however, the Superior Court held the rule to *not* apply to the "preferential right to purchase" contained in a Joint Operating Agreement. Power Gas Marketing & Transmission, Inc. v. Cabot Oil & Gas Corporation, 948 A.2d 806 (Pa. Super. 2008). Following Power, this objection will therefore also be overruled.

Next, Defendant contends Plaintiff is not entitled to relief as it has failed to support its allegation of ownership with factual allegations. In response, Plaintiff argues that its ownership is a matter of public record by virtue of deeds recorded in the Office of the Register and

¹ That action is filed to Lycoming County number 12 – 02,326.

Recorder, and that the court can take judicial notice of such deeds. As Plaintiff has alleged ownership, at this stage nothing further is required. This objection will be overruled.²

Next, Defendant demurs to Count III, the request for a declaration that the lease between Southwestern and IDC is void. That request is based on an assertion that at the time of the lease, IDC's interest in the oil and gas was not recorded. Recording of a deed is not essential to conveyance of title, however. *See Graham v. Lyons*, 546 A.2d 1129 (Pa. Super. 1988). Therefore, this objection will be sustained and Count III will be dismissed.

Next, Defendant demurs to Count IV, Damages for Cloud on Title, arguing there is no such cause of action. It is clear from the allegations of the Complaint, however, that Plaintiff seeks damages in the form of the requested accounting for the cloud on its title created by the lease between Southwestern and IDC, alleging that formation of the lease was a breach of the right of first refusal, for which breach it is entitled to seek damages. This objection will therefore be overruled.

Finally, Defendant contends in the alternative that the Complaint is insufficiently specific to allow it to defend. The court believes that a fair reading of the Complaint provides sufficient information to allow Defendant to answer and defend, and that the discovery process will adequately serve to fill in any gaps. This objection will therefore also be overruled.

ORDER

AND NOW, this 4th day of April 2013, for the foregoing reasons, the objection to Count III is hereby SUSTAINED and Count III is DISMISSED. The remaining objections are hereby overruled. Defendant shall file an Answer within twenty (20) days of this date.

cc: J. David Smith, Esq.
Jerry Chariton, Esq.
138 South Main Street
Wilkes-Barre, PA 18703
Gary Weber, Esq.
Hon. Dudley Anderson

BY THE COURT,

Dudley N. Anderson, Judge

² This same objection, raised by IDC in the first suit, was overruled for the same reason.