IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BLACK WOLF ROD & GUN CLUB, INC., Plaintiff,	:	DOCKET NO. 15-00,411
	:	CIVIL ACTION
vs.	:	
INTERNATIONAL DEVELOPMENT CORPORATION, PENNLYCO, LTD., SOUTHWESTERN ENERGY PRODUCTION COMPANY,[1] AND VIRGINIA ENERGY CONSULTANTS, LLC,	:	QUIET TITLE
Defendants	:	PRELIMINARY OBJECTIONS

O R D E R

Before the Court are preliminary objections to the complaint in the nature of demurrers filed or joined by Defendants, International Development Corporation ("IDC"), Pennlyco, Ltd. ("Pennlyco") and Southwestern Energy Production Company ("SWN"). Upon consideration of the pleadings, argument and briefs, the Court SUSTAINS the objection and demurrer as to the subsurface rights at issue being reserved by the 1925 deed as a matter of law. The following opinion is provided in support of this Court's rulings.

Background

On February 11, 2015, Black Wolf filed a one count complaint seeking to quiet title pursuant to Pa. R.C.P. 1061 and the Declaratory Judgment Act, 42 Pa. C.S.A §§ 7532, et. seq. as to the oil, gas and other minerals ("Subsurface Rights") underlying property known as warrant numbers 1602 and 1605, consisting of about 1,717.37 acres located in Pine and Jackson Townships in Lycoming County (collectively, "Property").[2] Black Wolf claims ownership in fee simple to the Property by virtue of a deed from B.L. Miller, et ux., et al to Black Wolf dated April 26, 1926, recorded in the Lycoming County Recorder of Deeds at Deed Book 264, Page

[1] Effective November 24, 2014, Southwestern Energy Production Company became SWN Production Company, LLC.
[2] SWN references the Property as consisting of about 1,958.5 acres.

395 ("1926 Deed"). Black Wolf's source of title to the Property arises from a serious of deed transfers, summarized as follows.

1893 Deed from Samuel P. Davidge, et. ux., et al., to Elk Tanning Co.

1894 Treasurers Deeds (tax sales) to G.W. Childs as to a portion of Warrant No. 1605;

1898 Quit Claim Deed transferring above tracts from G.W. Childs to Elk Tanning Co.;

1903 Deed from Elk Tanning Co. to Central Pennsylvania Lumbar Company (CPLC);

1906 Treasurer Deed (tax sale) to Calvin H. McCualey, Jr. as to Warrant No. 1602;

1908 Treasurer Deed (tax sale) to Calvin H. McCualey, Jr. as to Warrant No. 1605;

1908 Quitclaim Deed from Calvin H. McCualey, Jr., et. ux. to CPLC at to Warrant 1602;

1910 Quitclaim Deed from Calvin H. McCualey, Jr., et. us. to CPLC as to Warrant 1605;

1925 Deed from CPLC to R.N. Miller, et. ux., et. al.;

1926 Deed from B.L. Miller, et ux., et al to Black Wolf.

The 1983 Deed provides the following in pertinent part.

> Excepting and reserving, however from this conveyance on all the lands described above for the benefit of the said parties of the first part, their heirs and assigns forever, all minerals, oils and gases in, upon or under said lands with the perpetual right of ingress egress and regress over, upon and across said lands for the purpose of mining, boring for and removing said minerals, oils or gases.

The parties agree that the 1893 Deed from Samuel P. Davidge created a horizontal severance of the Subsurface Rights. However, since the severed oil and gas interests were not separately assessed from the surface of the property and since the Property constituted unseated lands pursuant to An Act Directing the Mode of Selling Unseated Lands for Taxes, Act of 3 April 1804, 4 Sm. L. 201, as amended ("1804 Act"), the effect of the tax sales under the 1804 Act was that the horizontal severance was extinguished by the tax sales of the Property to Calvin H. McCauley and the surface and subsurface estates of the Property merged. As a result, Warrant

1602 and Warrant 1605 were conveyed to CPLC with the Subsurface Rights in 1908 and 1910 respectively.

All parties claim title to the Property from CPLC and all parties agree CPLC owned the Subsurface Rights to the Property by the conveyances in 1908 and 1910. Defendants contend that the 1925 Deed severed and reserved the Subsurface Rights in and under the Property to CPLC in the same manner that the 1893 Deed did for Samuel P. Davidge. Black Wolf contends that the 1925 Deed from CPLC to R.N. Miller, et. ux., et. al. did not effectuate a severance of the Subsurface Rights because the 1925 Deed excepted and reserved the Subsurface Rights only "as fully as" those rights were excepted and reserved by the 1893 Deed and the Subsurface Rights excepted and reserved in the 1893 Deed were subsequently extinguished by the tax sales of 1908 and 1910.

1925 Deed from CPLC to R.N. Miller, et. ux., et. al. states the following.

> THE two pieces of land above described being part of the same lands conveyed by Samuel P. Davidge et. al. to the Elk Tanning Company by deed dated December 7th, 1893 recorded in the office for the Recording of deeds in and for the County of Lycoming in Deed Book 600 No. 139 at page 259 on January 19th, 1894 and part of the same lands conveyed by the Elk Tanning Company to the Central Pennsylvania Lumber Company by deed dated May 25, 1903, recorded in the office for the recording of deeds in and for the County of Lycoming in Deed Book No. 183 at page 328 on June 12, 1903. This conveyance is subject to all the reservations in said last recited deed.
>
> EXCEPTING AND RESERVING, however, from this conveyance on all the lands above described, all minerals, oils, and gases in, upon or under said lands, with the perpetual right of ingress, egress and regress over, upon and across said lands, for the purpose of mining, boring for and removing said minerals, oils, or gases ***as fully as*** said minerals, oils and gases and rights were excepted and reserved in deed from Samuel P. Davidge et. al. to the Elk Tanning Company dated December 7th, 1893 above recited.
>
> ALSO excepting and reserving unto the Central Pennsylvania Lumber Company, its successors and assigns all necessary rights of way for wagon roads, sled roads, log slides and tramroads through over and across the lands above described for the purpose of getting to and from other lands now owned by the Central Pennsylvania Lumber Company, or hereafter acquired by said Lumbar Company.

> THIS conveyance is made and delivered in pursuance of an agreement between the Central Pennsylvania Lumbar Company, of the first part and R.N. Miller and B.L. Miller, co-partners of the second part, dated June 24, 1920. (emphasis added)

Black Wolf contends ownership of the Subsurface Rights by the conveyance by the 1926 Deed from B.L. Miller to them. Defendants contend that the Millers never had ownership of the Subsurface Rights under the 1925 Deed and therefore had no interest to convey to Black Wolf. Instead, Defendants claim ownership of the Subsurface Rights through a serious of deed transfers, beginning with the 1942 Deed from CPLC. Pennlyco claims ownership of an undivided 12.5% interest in the Subsurface Rights to the Property by Deed in 1984 and corrective deed in 1992 from Kenneth F. Yates to Pennlyco. Similarly, IDC claims ownership of an undivided 87.5% interest in the Subsurface Rights to the Property by Deed dated August 3, 2005 from Gerard J. Barrios, Administrator for the Estate of Clarence W. Moore to IDC. Finally, SWN and Virginia Energy claim an interest in the Subsurface Rights underlying the Property pursuant to an Oil and Gas Lease between IDC and Virginia Energy, dated December 1, 2005, recorded at Book Volume 6197, Page 327.

Preliminary Objections

On March 5, 2015, IDC filed a preliminary objection in the nature of a demurrer to the complaint in essence contending that the deeds of record establish IDC's interest in the Subsurface Rights by establishing that the Subsurface Rights were severed by the 1925 Deed and reserved by CPLC and subsequently transferred to them through a chain of title in the amount of 87.5%. On March 18, 2015, Southwestern Energy Production Company ("SWN") filed preliminary objections in the nature of a demurrer on the grounds that the action must be commenced by an ejectment action rather than a quiet title action, that Black Wolf failed to name and joined all necessary parties and that the exception and reservation language in the 1925 Deed

reserved the Subsurface Rights in and under the Property to CPLC, from whom a chain of title resulted in their lease to the rights. On March 26, 2015, Pennlyco Ltd ("Pennlyco") joined the preliminary objections of IDC and SWN.

Legal Standards

Preliminary Objections

A party may file preliminary objections based on the legal sufficiency or insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4). A demurrer tests the legal sufficiency of the complaint. Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa.Super. 2005). When reviewing preliminary objections in the nature of a demurrer, the court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012), *citing*, Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007). In deciding a demurrer "it is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit a recovery. If there is any doubt, it should be resolved by the overruling of the demurrer." Melon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994) (citations omitted). "Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are **clear and free from doubt**." Bower v. Bower, 611 A.2d 181, 182 (Pa. 1992)(emphasis added).

Discussion

There are essentially three demurrers before the Court. The first demurrer is that this action must be commenced by an ejectment action rather than a quiet title action. The second demurrer is that Black Wolf failed to name and join all necessary parties. The final objection is that, as a matter of law, the 1925 Deed reserved the Subsurface Rights in and under the Property

to CPLC such that Black Wolf's claim to the Subsurface Rights may not be sustained as a matter of law. This Court will discuss the demurrers in turn.

Quiet Title.

As to the first demurrer, Black Wolf commenced a quiet title action as to the Subsurface Rights pursuant to Pa. R.C.P. 1062 to determine rights and interests to the land, to invalidate any deeds affecting the title to the land. "An action to quiet title may be brought only where an action in ejectment will not lie." Moore v. Duran, 455 Pa. Super. 124, 134, 687 A.2d 822, 827 (Pa. Super. 1996) "Ejectment is an action filed by a plaintiff who does not possess the land but has the right to possess it, against a defendant who has actual possession." Wells Fargo Bank, N.A. v. Long, 2007 PA Super 254, 934 A.2d 76, 78 (Pa. Super. 2007)(citation omitted.) Possession is case specific and depends upon "the character of the land in question." Id. (citation omitted) "In general, however, actual possession of land means dominion over the property; it is not the equivalent of occupancy." Moore v. Duran, 455 Pa. Super. 124, 134, 687 A.2d 822, 827 Id. (citation omitted) "[T]he trial court must determine which party exercised dominion and control over the property before determining what is the proper form of action in such a case." Id. Possession between a lessor and lessee is "the one who controls the gas has it in his grasp." Hicks v. American Natural Gas Co., 207 Pa. 570, 579, 57 A. 55 (Pa. 1904) Where party "had put down a well: and "tapped the gas-bearing strata" that party had the gas "in their control, for they had only to turn a valve to have it flow into their pipe ready for use." Hicks, supra 207 Pa. at 580. Even if quiet title is the wrong form of action, the Court may amend the pleadings to conform to the proper form of action at any time, even on appeal. Moore v. Duran, 455 Pa. Super. 124, 135, 687 A.2d 822, 827 (Pa. Super. 1996)

In the present case, SWN contends that an oil and gas lease is sufficient to put them in possession of the Subsurface Rights and therefore Black Wolf must oust them by ejectment. Black Wolf avers that Defendants are not in possession of the property because they have not attempted to extract any subsurface substances. This Court agrees that the lease alone, without a well or tapping, does not put Defendants in possession or control of the Subserface Rights. *See e.g.,* Hicks, supra. Accepting the averments in the pleadings as to possession and extraction as true, as the Court must, the Court concludes that the action to quiet title is appropriate. However, even if quiet title is the wrong form of action, the Court may amend the pleadings to conform to the proper form of action at any time, even on appeal. Moore v. Duran, 455 Pa. Super. 124, 135, 687 A.2d 822, 827 (Pa. Super. 1996)

Indispensable Parties.

The second demurrer is that parties, whose interest in the Subsurface Rights was extinguished by the tax sales in 1906 and 1908, must be named and joined to this action because they are indispensable parties. "Whenever it appears by suggestion of the parties or otherwise that … there has been a failure to join an indispensable party, the court shall order that … the indispensable party be joined, but if that is not possible, then it shall dismiss the action." Pa. R.C.P. No. 1032. "In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction." Cry, Inc. v. Mill Serv., 536 Pa. 462, 640 A.2d 372 (Pa. 1994)(citations omitted.) To determine whether a party is indispensable, the Court must consider the following:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?

4. Can justice be afforded without violating the due process rights of absent parties? Cry, Inc., supra, 640 A.2d at 375.

The Pennsylvania Supreme Court "has held that in a quiet title action, all parties who claimed title to the property at issue must be joined as indispensable parties." Orman v. Mortg. I.T., 2015 PA Super 130, 118 A.3d 403 (Pa. 2015), *citing*, Hartzfeld v. Green Glen Corp., 380 Pa. Super. 513, 552 A.2d 306, 310 (Pa. Super. 1989).

In the present case, the absent parties identified do not have a right or interest in whether the 1925 Deed conveyed Subsurface Rights because their interest in the surface or subsurface of the Property was divested prior to the 1925 Deed. The issue of the tax sale divestiture in 1906 and 1908 is not contested by the parties. Nor has there been any allegation that the absent parties have any known dispute as to the tax sales or claim an interest in the Subsurface Rights to the Property. Therefore, the Court concludes that Black Wolf named and joined all necessary parties to the instant quiet title action.

Exception and Reservation of Subsurface Rights in 1925 Deed.

As to the last demurrer, upon examination of all of the circumstances and the chain of title, the Court concludes that Black Wolf's claim to title of the Subsurface Rights may not be sustained as a matter of law. As acknowledged by Black Wolf, "[r]esolution of this matter turns upon the interpretation of the 1925 Deed, and whether CPLC retained the Subsurface Rights, when it conveyed the Property to Black Wolf's predecessor-in-title." See, Plaintiff's Brief, at 9. Therefore, the Court must construe the 1925 Deed.

When a deed contains both of the terms "excepting" and "reserving" subsurface rights, the term "excepting" generally protects the grantor from warranting in the conveyance of something not within the subsurface estate at the time of conveyance and the term "reserving" generally creates in the grantor an estate in the oil and gas. Sheaffer v. Caruso, 544 Pa. 279, 284,

676 A.2d 204, 206 n.3, n.4, (Pa. 1996), citing, P. Wood, "Deeds of Conveyance in Pennsylvania," 21 P.S. at 22. However, the terms "excepting" and "reserving" may be limited. Trowbridge v. Hopkins, No. 09-00114, 2010 WL 3940311 (Lyco. C.P. 2010)(The exception/reservation clause was limited to those rights "as set forth in the chain of title."), *citing*, Songer v.Erickson, 25 D & C 3d 499 (1981). In Trowbridge, it was undisputed that there were no Subsurface Rights reserved in the chain of title and therefore the reservation was as to the same.

In the present case, Black Wolf contends that the 1925 Deed did not reserve the Subsurface Rights because the "excepting and reserving" language in the 1925 Deed references the 1893 Deed for the Davidge Reservations which were subsequently divested through tax sales. Black Wolf contends that by referencing an estate that was divested of all Subsurface Rights through a tax sale, the "excepting and reserving" language had no subsurface rights to convey.

Upon review of the chain of title and circumstances, the Court concludes, however, that the reference to the 1893 Deed supports Defendants' claim that the Subsurface Rights were reserved. This is because the 1893 Deed effectuated the reservation of Subsurface Rights. Both parties agree that the Subsurface Rights were reserved until 1906 and 1908, when they were divested by the tax sales. The Court concludes that the language in the 1925 Deed "EXCEPTING AND RESERVING, however, from this conveyance …. [the Subsurface Rights]… as fully as said minerals, oils and gases and rights were excepted and reserved in deed from Samuel P. Davidge et. al. to the Elk Tanning Company dated December 7th, 1893 above recited[,]" like the 1893 Deed it referenced, reserved the Subsurface Estate. Only through some other force, such as the tax sales in the case of the 1893 Deed, would the reservation become divested. Thus, the Court concludes that just as the language in the 1893 Deed effectuated a

reservation of Subsurface Rights that were with the Property at the time of the Deed, so too did the 1925 Deed effectuate a reservation of the Subsurface Rights that all parties agree were with the Property at the time of the 1925 Deed.

In addition to the previous argument, Black Wolf further contends that, even if the divestiture of the Subsurface Rights had no impact on the construction of the 1925 Deed, textual differences must be construed to mean that the 1925 Deed did not reserve the Subsurface Rights. Black Wolf identifies textual differences between the 1893 Deed and the 1925 Deed in that the 1893 Deed is excepted and reserved "for the benefit of the said parties of the first part, their heirs and assigns forever." By contrast the 1925 Deed excepted and reserved the Subsurface Rights "as fully as said minerals, oils and gases and rights were excepted and reserved in deed from Samuel P. Davidge et. al. to the Elk Tanning Company dated December 7th, 1893 above recited[,]" but did not mention the heirs and assigns of CPLC. The Court interprets the 1925 Deed as referencing the 1893 Deed in the manner and extent to which the grantor contains the reservation. It essentially incorporates the manner set forth in the 1893 without reciting it again in full in the 1925 Deed. Therefore, the textual differences appear to be intended as a reference without having to restate the body of the referenced material. Black Wolf also identifies the textual difference between clauses within the 1925 Deed. The clause reserving Subsurface Rights differs from that reserving an easement. The later specifically refers to CPLC. The Court concludes that the reservation was set forth specifically for the easement because there was no easement in the 1893 Deed to other lands owned by CPLC to incorporate by reference. In that context, it is not inconsistent for the Deed to specify the easement as applying to CPLC.

Accordingly, the Court enters the following Order.

ORDER

AND NOW this **16th day** of **October**, **2015**, it is ORDERED and DIRECTED as follows.

1. The demurrer as to the nature of the action sounding in ejectment as opposed to quiet title is OVERRULED.
2. The demurrer as to the failure to name and join all necessary parties is OVERRULED.
3. The demurrer as to the effectiveness of the exception and reservation in the 1925 Deed is GRANTED. Accordingly, the Complaint is dismissed with prejudice.

BY THE COURT,

October 16, 2015
Date

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Richard A. Gray, J.

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