

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AMERICAN CANADIAN EXPEDITIONS,
LTD, a West Virginia corporation,

Appellant,

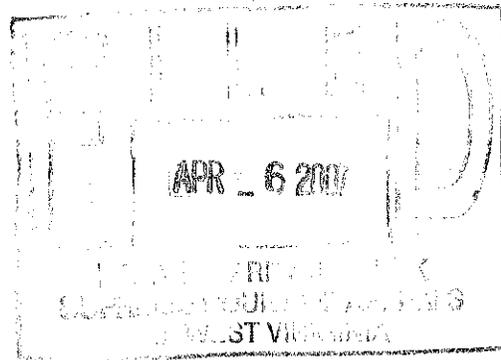
v.

THE GAULEY RIVER CORPORATION,
a West Virginia corporation, and
MOUNTAIN RIVER TOURS, INC., a
West Virginia corporation,

Appellees.

Appeal Number: 33246

Civil Action Number: 04-C-67H



REPLY BRIEF OF APPELLANT AMERICAN CANADIAN EXPEDITIONS, LTD,
a West Virginia corporation, Appellant

Respectfully Submitted:

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**REPLY BRIEF OF APPELLANT AMERICAN CANADIAN EXPEDITIONS, LTD,
a West Virginia corporation**

Now comes Appellant, American Canadian Expeditions, LTD, a West Virginia corporation, Plaintiff below, and presents the following as and for its Reply to the Brief of Appellees.

STATEMENT OF THE CASE

The parties are in agreement that the Order of the Honorable Paul M. Blake, Jr., Judge of the Circuit Court of Fayette County, entered on May 18, 2006 granted Appellee, Gauley River Corporation, its Motion to Dismiss Or For Summary Judgment.

STATEMENT OF THE FACTS OF THE CASE

Appellee mis-characterizes the facts and chronology of the events. Appellee summarily concludes that an appraisal done in the late 1990's and generally referred to in a deposition is indicative of an appraised value of Three Hundred Thousand Dollars (\$300,000.000) in 2005,

and thereafter leaps to the conclusion that after timbering one sixth (1/6) of the property no damage occurred, which is a question of fact in dispute. Appellee admits that following execution of the Deed of Easement and Option Agreement on May 1, 2002, Appellee contracted to timber the property in July of 2002. In fact, Appellee agreed to an arm's length sale of the property for the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), which is an indication of the property's decreasing value. Whether or not the property would have appraised for more or less than that amount is immaterial in light of the sale price itself and provides no excuse for the Appellees' removal of standing timber which was a part of the real estate.

Appellant contends that the receipt of over Forty Two Thousand Dollars (\$42,000.00) from the timber sale establishes at least a *prima facie* case of damages. Appellee has provided no proof of its use of the proceeds to improve the property.

Appellee tries to excuse and justify its conduct by asserting that it timbered only one-sixth of the real estate while constructing modifications to the real estate, without consultation with Appellant. As alleged in Appellant's verified complaint, Appellant believes the property has been damaged and has never agreed that the Appellee improved the property in any manner whatsoever.

Appellees' conduct is further reflected in the testimony of Appellees' President Breuer that he recalled a discussion with Mr. Kincaid about a better road to the river, but no discussions about the logging operations. Further, Appellee asserts on page 3 of its brief as follows:

"No formal protest or objection was made by the Appellant about the timbering for over one year after the timbering operation had ceased."

It is apparent from the affidavit of Ernest Kincaid, (Attachment 2 to Appellant's Brief), with the email from Breuer attached, that Appellant did protest and place Appellees on notice, as follows:

"... After execution of the option agreement dated May 1, 2002, between Gauley River Corporation and Mountain River Tours, Inc. and American Canadian Expedition, LTD at the office of the attorney Lynn Pollard of the law firm Hamilton, Burgess, Pollard, Hewitt, and Salvatore, I learned that timbering activities were taking place on the real estate which was the subject matter of Option. I discussed the matter with Paul Breuer, president of the Gauley River Corporation and Mountain River Tours, Inc. and told him that the timbering of the option property was a problem. Breuer told me that he had discussed the matter with his lawyer and said that he would have to discuss the matter further with his attorney. I then sent an email to Mr. Breuer regarding our protest to which he responded, a copy of which response is attached hereto ..."

Contrary to his testimony, the response email to Kincaid from Paul Breuer dated August 15, 2002 (attached to Kincaid's Affidavit, Attachment 2 to Appellant's Brief) did acknowledge discussion about logging with Kincaid as follows:

"On logging - I have talked with Lynn Pollard and she is confused about your concerns- but I assure you that all logging is being done to best forestry practices and we will be re-seeding and we are only select cutting 16 inch or larger the 72 acres on Goldie Walk-Ups former property and then only out of sight except the landing which will be reclaimed and replanted. Plus we are going to haul in two loads for gravel for the road. Let me know if you all want to meet for lunch and talk."

The email from Breuer asks for copies of the plans of ACE for "an outhouse", an offer to Kincaid of a beer in exchange for such plans, and ends with:

"Anything else going on? How is Gauley season looking for you?"

The email, which is in a "chatty" and friendly vein, illustrates that the principals involved in Appellant and Appellee were friends, and Appellant's informal protest, both verbal and email,

rather than file a lawsuit against a friendly competitor, should not be penalized. Appellees were clearly warned by Kincaid's conversation with Breuer and follow-up email that the timbering was, in the words of Breuer, an expression of "concerns", placing Appellee on notice.

REPLY TO APPELLEES' ARGUMENT IN RESPONSE TO
APPELLANT'S ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in Finding of Fact No. 14 that:

"Having no legal or equitable interest in such real estate prior to March 1, 2005, the Plaintiffs have no valid or justifiable claim to the proceeds of such sale of timber".

Appellant admits that an option does not grant an interest in the real property itself, but rather is a personal right; however, Appellee ignores, and the Circuit Court ignored, the fact that that personal right gives rise to a claim for damages. In West Virginia Pulp & Paper Company, et al v. Cooper, 87 W. Va. 781, 106 S.E. 55 (1921), this Court addressed the issue of what rights an optionee holds, and stated that: "Such a contract transfers to the optionee no title to the property. His right is not *in rem*, but *in personam*." (At 59). It is not a claim to the proceeds themselves, but the proceeds are indicative of the value of the timber (part of the real estate) removed therefrom and of the personal claim for damages.

2. The Circuit Court erred as a matter of law in Finding of Fact No. 21:

"... that plaintiff has failed to carry his burden of proof and establish a *prima facie* case of damages against Gauley River, as he (sic) has failed to make a sufficient showing that ACE had either a legal or equitable interest in the real estate in question at the time timber was removed and sold by Gauley River".

The Circuit Court concluded that, because an optionee has no interest in the real estate before the option is exercised, the optionee is not damaged by the breach of the option, which

is not correct as a matter of fact or law. Appellant admits that an option to purchase is not a contract of purchase, but the breach of an option still gives rise to an *in personam* right for damages, in this case in part established by the value of the timber removed from the option property.

3. The Circuit Court erred as a matter of law in Finding of Fact No. 12:

"That the granting of an exclusive right to purchase to ACE was not '*in rem*' but was '*in personam*' in nature, vesting neither legal or equitable title in such real estate. While Gauley River may have been morally or ethically obligated to notify ACE of the timbering operation in 2002, it was not legally obligated to do so, under the terms and conditions set forth in option contract."

Perhaps Appellees had no legal obligation to give Appellant notice of the timbering action, but Appellees' surreptitious conduct in entering a timber contract shortly after the option without notice to Appellant raises questions concerning the transaction and Appellees' unclean hands. In Jerry Cook's Affidavit, Attachment 1 to Appellant's Brief, Cook stated that he asked about timbering at the closing and was misled, as follows:

"...I also asked about timber and mineral rights and Paul Breuer said that George Legg had cut some hemlock in exchange for dozer work on the access road, and that was all Breuer planned to do. I then asked Lynn Pollard if the documents protected American Canadian Expeditions, LTD from the property being mined, timbered or rights of ways or land being sold, to which she responded that it did. I stated that I just wanted to make sure that when American Canadian Expeditions, LTD exercised the Option, we get the property as is without any diminishing of its value."

4. The Circuit Court erred as a matter of law in Finding of Fact No. 13:

"That the exercise of its right to purchase by ACE on March 1, 2005, does not relate back to the date of option, that is to say, May 1, 2002."

Appellant acknowledges that the issue of whether the exercise of its right to purchase creates an executory contract with beneficial interest in the real estate relating back to the date of the option is unclear as a matter of law. As both Appellant and Appellee have acknowledged, there is a split of authority on this issue, and the Appellant's interpretation of Leslie v. Grose, 151 W. Va. 872, 157 S.E.2d 582 (1967), which discussed the split of authority, was that the Court did so as *dicta*. Nevertheless, this particular case illustrates the basis for making the option date the effective transfer of equitable title upon its exercise. If the Court were to accept Appellees' argument *in toto*, Appellant has no *in rem* right to the real estate itself, no equitable interest, no executory contract, and hence, no right to injunctive relief to seek the protection of equity. Appellee seems to further argue that Appellant has no *in personam* rights to damages for the actions of the optionor Appellee. Retroactivity would give those rights to the Appellant and insure a just and proper accounting for the damage suffered by the Appellees' action.

5. The Circuit Court erred as a matter of fact and law in Finding of Fact No. 6 in which the Court stated that:

"... The Defendants never received any formal, written objections from ACE about the logging once it began. (Breuer Deposition, p. 24, lines 16-18)", and in Finding of Fact No. 7 that: "... No representative of ACE, however, raised any formal, written objection to the Defendants about the logging activities".

As the Circuit Court pointed out, the option agreement itself did not require notice to Appellant when Appellee began its timbering operation. Likewise, the option agreement did not provide for any express "formal" notice or objection to Appellee when Appellant perceived that

the option property was being timbered and damaged; however, the Circuit Court erred as a matter of fact in that Kincaid did orally and by email protest (see Kincaid's Affidavit).

It should be noted that the option agreement and deed of easement were all prepared by the Appellees' counsel, and closing of this transaction took place at Appellees' counsel's office and Appellant's officer executed the document without the benefit of counsel, (see Jerry Cook Affidavit, Attachment 1 to Appellant's Brief).

In a situation where the document itself does not require any notice, much less "formal" notice, it would be inequitable to require that Appellant have undertaken some additional formal action after Appellant attempted to discuss and resolve the matter amicably and reasonably. Appellant does not have unclean hands as alleged by Appellee; it is Appellee who did not inform the optionees of his plans, and ignored their protest, whose hands are unclean.

CONCLUSION

The issues framed in the Motion to Dismiss and Motions for Summary Judgment did not revolve around the damage aspects of the case, but around the issues of the legal rights of the respective parties in and to an option to purchase real estate, and the proper procedures for addressing breach of that option agreement, as matters of law. The issue of damage to the subject real estate is clearly one of fact which is not yet fully developed on the record and upon which the parties will present conflicting theories. Appellant relies on the Forty Two Thousand Dollars (\$42,000.00) received by Appellant (not the value of the standing timber which was substantially in excess of that amount), and the damage to the real estate in the construction of timber roads and in the manner in which the roads were constructed, which damages have been

generally alleged in Appellant's verified complaint but not developed on the record; as opposed to Appellees' claim that the appraised value of the property seven years or so prior to the transaction provides a justification for removing valuable timber, and that Appellees' actions have increased the value of the property. No factual basis has been established by Appellee of the actual portion of the timber money or any other amounts spent in alleged improvement of the property. Appellant, in its verified complaint has always alleged and still maintains that the Appellees' actions damaged the property rather than improved it, which is a question of fact..

The Circuit Court erred in its interpretation and application of the law, and there were clearly genuine issues of material fact with regard to Breuer's credibility and the damages suffered by Appellant.

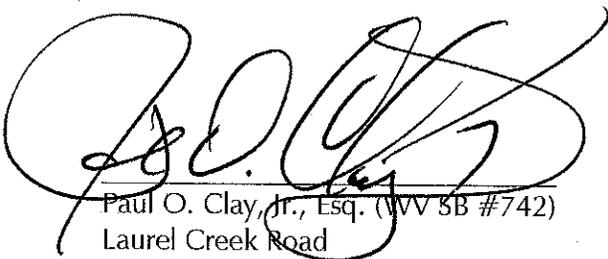
RELIEF REQUESTED

Appellant renews its request for reversal of the Circuit Court ruling.

AMERICAN CANADIAN EXPEDITIONS, LTD,
a West Virginia corporation

BY COUNSEL

Respectfully submitted:



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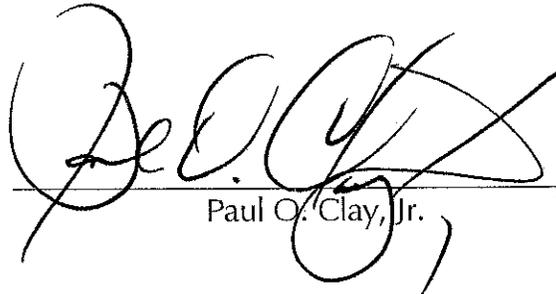
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Appellees.

CERTIFICATE OF SERVICE

I, Paul O. Clay, Jr., counsel for Appellant American Canadian Expeditions, LTD hereby certify that a copy of the foregoing Reply Brief of Appellant American Canadian Expeditions, LTD was served upon the following by mailing a true copy thereof by United States Mail, postage prepaid on this the 5th day of April, 2007.

Lynn B. Pollard, Esq.
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Paul O. Clay, Jr.