

IN THE CIRCUIT COURT OF RITCHIE COUNTY, WEST VIRGINIA

ST. LUKE'S UNITED METHODIST CHURCH,  
MARY MAXINE WELCH, and  
JAY-BEE PRODUCTION COMPANY,

Plaintiffs,

v.

Civil Action No. 03-C-65  
(Judge Robert L. Holland, Jr.)

CNG DEVELOPMENT COMPANY,  
TRI COUNTY OIL AND GAS, INC.,  
EAST RESOURCES, INC., and  
ENERVEST OPERATING, LLC,

Defendants.

**ORDER**

On the 23rd day of February, 2006, came the plaintiffs St. Luke's United Methodist Church, by Ira M. Haught, Mary Maxine Welch, in person, and Jay-Bee Production Company, by Randy Broda, and their counsel Gary W. Morris, II, and the defendant Dominion Exploration & Production, Inc. ("Dominion Exploration"), successor to CNG Development Company, by Richard K. Elswick, its Manager of Land for Northeast Gas Basins, and its counsel W. Henry Lawrence, for a trial to the Court on the merits.

Whereupon, the Court announced its decision to grant the Defendant's Motion to Dismiss and Strike the Amended Complaint, dated February 22, 2005, following its review of the memoranda of law submitted by the parties and the case law in West Virginia. The Court rules that partial rescission of the Flanagan lease is not a proper remedy available under the state of current West Virginia law in this matter based upon the allegations in plaintiffs'

amended complaint dated February 10, 2005. It is accordingly hereby ORDERED that those portions of plaintiffs' Amended Complaint relating to partial rescission, specifically paragraphs 42(C), 42(D), 45(B) and 45(C) are dismissed.

By way of background, the Court notes that it previously granted summary judgment to Dominion Exploration on January 26, 2005, and ruled that forfeiture, cancellation, termination, and removal were not proper remedies in this matter. The Court then permitted plaintiffs to file an amended complaint. In their Amended Complaint, plaintiffs added new claims for monetary damages and partial rescission of the Flanagan lease. Dominion Exploration moved to dismiss that portion of the Amended Complaint that sought partial rescission as a remedy for the reason that the Court had previously granted summary judgment on the rescission theory.

The Court notes that rescission and forfeiture are similar equitable remedies and rescission is not a proper remedy where a remedy at law exists. In their Amended Complaint, plaintiffs seek both a remedy at law of damages for defendant's alleged breach of the lease and an equitable remedy of partial rescission. The Court is mindful that several decisions in West Virginia recognize rescission as a remedy in limited circumstances but the Court concludes that plaintiffs have failed to plead facts to support such a remedy in this matter. The cases include Doddridge County Oil & Gas Co. v. Smith, et al, 154 F. 970 (N.D.W. Va. 1907); Adkins, et al. v. Huntington Development & Gas Co., 113 W. Va. 490, 168 S.E. 366 (1932); Jennings v. Southern Carbon Co., 73 W. Va. 215, 80 S.E. 368 (1913); Hall, et al. v. South Penn Oil Co.,

71 W. Va. 82 76 S.E. 124 (1912); and Core v. The New York Petroleum Company, 52 W. Va. 276, 43 S.E. 128 (1902).

The three instances where the West Virginia Supreme Court of Appeals has recognized a possible remedy of rescission include instances of fraud by a lessee, such as a lessee drilling its own wells on an adjoining tract to the detriment of its lessor, or abandonment by the lessee though clear and express acts, or undue hardship on the lessor. The Court finds that plaintiffs have not alleged fraud with the particularity required by Rule 9 of the West Virginia Rules of Civil Procedure, nor with the sufficiency to meet the requirements for a remedy of rescission. In addition, the Court finds no evidence of lease abandonment as EnerVest Operating, LLC is currently operating three active oil and gas wells on the lease. The Court further finds no evidence of undue hardship on plaintiffs.

For all of the foregoing reasons, it is hereby ORDERED that the Defendant's Motion to Dismiss and Strike the partial rescission remedy from the Amended Complaint is granted.

Whereupon, the plaintiffs, by counsel moved the Court for a stay and general continuance while they pursued an interlocutory appeal to review the Court's ruling. It appearing proper to the Court, it is hereby ORDERED that this matter is stayed and continued pending plaintiffs' application for an interlocutory appeal.

Whereupon, Dominion Exploration & Production, Inc. asked the Court to review Plaintiffs' Motion to Strike Defendant's Offer of Judgment dated February 16, 2006. The Court reviewed the Plaintiffs' Motion to Strike Defendant's Offer of Judgment and considered the

Defendant's Offer of Judgment dated February 13, 2006, whereby Dominion Exploration offered to drill eleven wells on the Flanagan lease. The Court then considered the Plaintiffs' Motion to Strike Defendant's Offer of Judgment, whereby plaintiffs asserted that Dominion Exploration lacked the legal authority to drill on the Flanagan lease without the consent of Jay Bee Production Company. Whereupon, the Court proceeded to an evidentiary hearing and the plaintiffs called as their only witness Ira B. Haught, Esquire, who qualified as an expert witness on title matters, including mineral titles. Upon examination by plaintiffs, Mr. Haught testified that he had reviewed the Deed and Assignment of the Flanagan lease dated March 1, 1943, from Hope Construction and Refining Company to South Penn Natural Gas Company, a copy of which deed and assignment is of record in the office of the Clerk of the Ritchie County Commission in Lease Book 74, at page 263. Based upon his review of the assignment and his knowledge of oil and gas, Mr. Haught offered his opinion that Dominion Exploration could drill on the Flanagan lease without the consent of the oil lessee but was required to deliver any oil produced from such wells to the credit of the oil lessee.

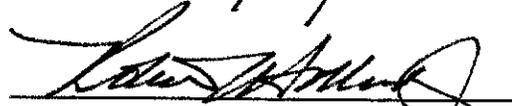
Based upon the foregoing testimony and the arguments of counsel, the Court finds no basis for Plaintiffs' Motion to Strike the Defendant's Offer of Judgment and it is hereby ORDERED denied. The Court orders the filing of the Deed and Assignment as Plaintiffs' Motion Ex. No. 1. and the Defendant's Offer of Judgment as Defendant's Motion Ex. A. The Court further explained its understanding of the nature of the split oil and gas leases to allow development of wells by either the gas or the oil lessee without the requirement of

the other so long as the non-participating lessee receives 100% of the mineral leased by such non-participating lessee with a one-eighth royalty to the lessor of such mineral.

The parties objections to any adverse rulings herein are noted. The Clerk is directed to send certified copies of this order to Gary W. Morris, II, P. O. Box 329, Weston, WV 26452; and W. Henry Lawrence, P. O. Box 2190, Clarksburg, WV 26302-2190.

ENTER: \_\_\_\_\_

11/15/2006

  
\_\_\_\_\_  
Judge, Circuit Court of Ritchie County

Order prepared and submitted by:



W. Henry Lawrence, W. Va. Bar #2156  
Steptoe & Johnson PLLC  
P. O. Box 2190  
Clarksburg, WV 26302-2190  
(304) 624-8186

Attorney for Defendant  
Dominion Exploration & Production, Inc.