

15-1139

IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA

DEBORAH L. WYCKOFF,

Plaintiff,

v.

CIVIL ACTION NO. 10-C-40

DAVID EARL BOWYER,

Defendant,

v.

DEBORAH L. WYCKOFF, and HELEN BUFF, et al.,

Counter-Claim and Third-Party Defendants.

**ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF  
AND THIRD-PARTY DEFENDANTS AND DENYING  
DEFENDANT'S MOTION TO AMEND**

On August 31, 2015, the parties appeared before the Court for argument on the Plaintiff and Third-Party Defendants, Deborah Wyckoff, Thomas Swiger, Joyce Swiger, Patricia Ann Swiger, Ralph Dewayne Swiger, George J. Buff, III, John Charles Buff, the Estate of Helen Buff, Alex Semenik, Erin Brown, Maribel Pontious, Nelson Swiger, The Seventh Day Baptist Memorial Fund, Janice Hurst, and Ron Cumberledge's Motion for Summary Judgment, as well as the Defendant, David Bowyer's Motion to Amend. After considering all of the arguments set forth, the Court hereby finds as follows:

I. FINDINGS OF FACT

1. The parties to this proceeding are the owners of undivided interests in the oil, gas and minerals underlying the parcels, the surface of which is assessed in New Milton District, Doddridge County, West Virginia as New Milton Map No. 8, Parcel 13 (96.25 acres); and Map 18, Parcels 3, 9, 10, 13, 14, 15 and 16 (433.5 acres) (hereinafter referred to as the "Subject Lands").

2. This Action was initially filed in 2010 as a claim for a surface partition between the plaintiff and counterclaim defendant, Deborah Wyckoff, and the defendant and counterclaim and third-party plaintiff, David Bowyer.

3. On August 2, 2012, Bowyer filed a counterclaim and third-party complaint, seeking a partition by sale or allotment to him, of the minerals underlying the Subject Lands. Significantly, Bowyer did not request partition in kind.

4. On July 15, 2013, Bowyer amended his complaint, to include all of the present parties to this action.

5. According to Bowyer's July 2013 complaint, ownership in the minerals in dispute under the Subject Lands were owned as set forth in Table A, attached to and made a part of this Order.

6. At a hearing on March 31, 2015, this Court indicated that in the event that the parties were unsuccessful

in resolving the matter at mediation, it was inclined to grant the third-party defendants' summary judgment motion absent some showing that the parties could not agree to a plan to develop the minerals.

7. The third-party defendants, Erin Brown, Alex Semenik, Patricia Ann Swiger, Thomas Swiger, Joyce Swiger, Ralph Dewayne Swiger, and the heirs of Maribel Pontious, as well as plaintiff and counterclaim defendant, Deborah Lynn Wyckoff, have all leased their oil and gas interests to Antero Resources Corporation.

8. The third-party defendants, Ronald Cumberledge, Janice Hurst, George J. Buff, III, Jon Charles Buff, the Estate of Helen Buff, and The Seventh Day Baptist Memorial Fund are all interested in leasing to Antero Resources Corporation, but have been unable to do so due to the pendency of this litigation.

9. Likewise, the third-party plaintiff, David Bowyer, would like to lease his oil and gas interests in the subject properties, has indicated a preference for dealing with Antero, and has negotiated other agreements in the past with Antero, but has not yet leased his interests to date.

10. On March 10, 2015, counsel for George J. Buff, II, Jon Charles Buff, and the Estate of Helen Buff filed a Motion for Summary Judgment. Third-party defendants, Erin Brown, Alex Semenik, Ronald Cumberledge, Janice Hurst, Patricia

Ann Swiger, Ralph DeWayne Swiger, Thomas Swiger, Joyce Swiger, Nelson Swiger, The Seventh Day Baptist Memorial Fund, the Heirs of Maribel Pontious and the plaintiff and counter-claim defendant Deborah Wyckoff all joined in that motion or filed a similar one.

11. The parties mediated this case on April 8, 2015, and were unable to reach a resolution, although all parties are in agreement that they desire the minerals to be developed and further that the Marcellus strata that has not already been leased to Antero Resources should be leased to and developed by Antero Resources.

12. On May 8, 2015, David Bowyer filed his "Motion for Leave to Amend and Refile Counterclaim and Third-Party Complaint" along with an attached proposed amended counterclaim and complaint.

13. The attached complaint is nearly identical to the July 2013 amended third-party complaint, save two paragraphs, 111 and 112. In paragraph 111, Bowyer alleges that the parties are unable to arrive at a "common plan of development." In paragraph 112, Bowyer alleges that the partition or allotment would promote his interest by allowing him to personally develop the oil and natural gas resources within and underlying the Subject Lands.

14. Discovery in this case closed on January 16, 2015, the case was originally set for a pre-trial on March 31, 2015, and that pre-trial was postponed in light of Bowyer's retention of new counsel.

15. To date, third-party plaintiff Bowyer has put forth no evidence that any of the parties do not wish to develop the property or of any disagreement between the parties as to the development of the property.

## II. CONCLUSIONS OF LAW

### A. Regarding David Bowyer's Motion to Amend.

1. Rule 15(a) of the West Virginia Rules of Civil Procedure provides that a party may amend its pleading within 20 days after it is served and thereafter "only by leave of court . . . ."

2. "The liberality allowed [under Rule 15]. . . does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time." Syl. Pt. 6 *Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005).

3. It is not an abuse of discretion to deny leave where "'there has been a delay in seeking an amendment even though the facts on which the amendment would be based have been long known by the party.'" *State ex rel. Packard v. Perry*, 221 W. Va. 526, 540, 655 S.E.2d 548, 562 (2007) (quoting Marilyn

Lugar & Lee Silverstein, *West Virginia Rules of Civil Procedure*, Rule 15(a) ,pp. 136-137 (1960)).

4. "[W]here the delay is unreasonable" the burden is "on the moving party to demonstrate some valid reason for his or her neglect or delay." Syl. Pt. 3 *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005).

5. Likewise, the Court should not grant a motion to amend, where the amendment is futile.

6. "Prejudice to the adverse party is the paramount consideration in motions to amend." Syl. Pt. 3 *State ex rel. Bd. of Ed. of Ohio Cnty. v. Spillers*, 164 W. Va. 453, 259 S.E.2d 417 (1979). If the opposing parties will be unfairly prejudiced by an amendment, the amendment should be denied.

7. The Court concludes that it has been more than five years since this action was initially filed and more than three years since Bowyer commenced his counterclaim and third-party claims. In that time, the same operative facts and law have been in issue in this case.

8. The Court concludes that Bowyer's delay in seeking leave to file his complaint is unreasonable in light of the fact that the same operative facts and law have been in issue since the inception of this action, no novel facts or legal arguments have presented themselves, and Bowyer has provided no justification for his delay.

9. The Court further concludes that Bowyer's proffered amendment is futile in light of the Court's conclusions set forth below with respect to the pending motion for summary judgment. Specifically, contrary to Bowyer's unsupported assertions, there exists no dispute as to the development of the collectively held mineral interests.

10. The Court further concludes that this case has matured well past the pleadings stage, past the discovery stage and into the dispositive motions and pre-trial stage and the parties have expended significant sums of time and expense in preparing the case for mediation, dispositive motions and trial. To allow Bowyer's proposed amendment at this time would result in a great deal of prejudice to the third-party and counterclaim defendants and indeed all parties to this action aside from Bowyer.

In light of these Conclusions of Law and Findings of Fact, the Court hereby **DENIES**, David Bowyer's Motion to Amend his Third-Party Complaint and Counterclaim.

B. Regarding the Counterclaim and Third-Party Defendants' Motion for Summary Judgment.

1. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Rule "is designed to effect a prompt disposition

of controversies on their merits without resort to a lengthy trial if there essentially is no real dispute as to the salient facts or if it only involves a question of law." *Larew v. Monongahela Power Co.*, 199 W. Va. 690, 693 (1997) (citations omitted).

2. A party desiring to compel partition through sale is required to demonstrate that the property cannot be conventionally partitioned in kind, that interest of one or more parties will be promoted by sale, and that interests of the other parties will not be prejudiced by sale. W. Va. Code § 37-4-3, *Consolidated Gas Supply Corporation v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978).

3. To force a sale, whether by allotment or public sale, violates basic tenets of individual property rights and, in this particular case, forces the exchange of an interest in real property for a sum of personal property in violation of the unqualified owner's right to have such interest remain in such condition as he sees fit. The remedy of allotment is simply a more narrow and limited version of a public sale.

4. The parties have the right to have partition by sale **considered** as a remedy, but they are not entitled to this remedy if the aforesaid requirements are not satisfied because prejudice to owners would result and/or promotion of their interests is not demonstrated. *Riley, supra*.

5. Strict compliance with the requirements permitting a partition by sale is required inasmuch as such remedy relies exclusively on statutory enactment and was unknown at common law. *Loudin v. Cunningham*, 82 W.Va 453, 96 S.E. 59 (1918); W.Va. Code §37-4-3 (1957). Therefore, absent satisfaction of the legal prerequisites to forced sale, there is no right to partition by sale and the same is properly denied notwithstanding a finding that the subject property interest is not capable of a convenient partition in kind.

6. The question of what promotes or prejudices a party's interest when a partition through sale is sought must necessarily turn on the particular facts of each case. *Riley*, supra.

7. The forced sale of oil and gas minerals precludes the owner the benefit of lease consideration and the prospect of production proceeds, which represent the primary and perhaps the exclusive value which such ownership vests. Therefore, the public interest will not be promoted by sale.

8. It is a predicate to the partition of an oil and gas mineral interest that there be an inability of the mineral owners to agree on how to develop the mineral estate. *Cawthon, et al. v. CNX Gas Company, LLC*, No. 11-1231 W.Va. Supreme Court, Nov. 16, 2012 (memorandum decision); 2012 WL 5835068 (W.Va.). In the absence of proof showing an unwillingness or inability to

agree on the development of the mineral estate, a partition by sale or allotment is inappropriate.

9. The third-party defendants' joint motion for summary judgment further seeks summary judgment with regard to the allegations in Bowyer's July 2013 third-party complaint, wherein he also seeks the forced sale of some surface tracts involved with the underlying mineral interests. In response to a motion for summary judgment, the non-moving party has the burden of producing evidence establishing a genuine issue of material fact. The legal conclusions stated herein supporting summary judgment have equal force and application with respect to the surface tracts covered by the amended third-party complaint. Bowyer has wholly failed to produce any responsive evidence with regard to the claims for forced sale of the surface tracts. Fundamentally, there is no factual or legal basis for a forced sale of those surface tracts. Since a compelled sale cannot be supported in these circumstances, summary judgment is proper for those third-party defendants upon defendant Bowyer's third-party claims regarding these surface tracts as well.

10. Even when taken in the light most favorable to the third party plaintiff, the mere allegations of the proposed Amended Third-Party Complaint, in addition to the current state of the pleadings, is not sufficient under the controlling legal

standard to create an issue of material fact in opposition to the third party defendant's Motion for Summary Judgment.

11. The Court hereby determines and concludes pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure that there is no just reason for delay of final judgment with regard to adjudication of the claims asserted in the July 2013 third-party complaint. These third-party claims are the subject of the motions now before the Court, and are independent of those claims between Plaintiff Wyckoff and Defendant/Counterclaimant Bowyer that are the subject of Plaintiff Wyckoff's Amended Complaint and Defendant Bowyer's Amended Counterclaim.

In light of these Conclusions of Law and Findings of Fact, the Court hereby **GRANTS** the third-party defendants' Motion for Summary Judgment.

### **III. RULING**

It is hereby **ADJUDGED, ORDERED AND DECREED** that defendant and third-party plaintiff, David Bowyer's Motion for Leave to Amend is hereby denied.

It is further **ADJUDGED, ORDERED** and **DECREED** that the third-party defendants' Motion for Summary Judgment is hereby granted and that the partition claims in the July 2013 Amended Third-Party Complaint in this action shall be, as a **FINAL JUDGMENT**, dismissed with prejudice. This action shall remain on

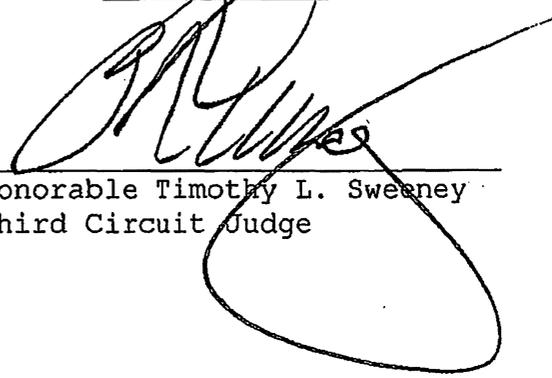
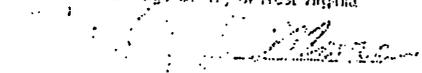
the active docket of the Court only in relation to the claims between Plaintiff Wyckoff and Defendant/Counterclaimant Bowyer that are the subject of Plaintiff Wyckoff's Amended Complaint and Defendant Bowyer's Amended Counterclaim. The Clerk is ORDERED to serve copies of this Order upon all counsel of record and pro se parties.

Enter this 13<sup>th</sup> day of OCTOBER, 2015.

I hereby certify that the enclosed instrument is a true and correct copy of the original on file in this office.

JOHN MONTGOMERY MOORE

Clerk of the Court, Judge, County of West Virginia



Honorable Timothy L. Sweeney  
Third Circuit Judge