

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001067-MR
AND
NO. 2004-CA-001072-MR

ELLA FULMER

APPELLANT

V. APPEALS FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
CIVIL ACTION NOS. 02-CI-00410 AND 02-CI-01656

JIMMY MEADE AND BARBARA MEADE;
EASTERN STATES OIL & GAS, INC.,
N/K/A EQUITABLE PRODUCTION COMPANY;
AND PHYLLIS McANALLEN

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: A clause in an oil and gas lease providing for free gas for domestic use on the premises has been universally held to create a covenant running with the land that attaches to the surface of the land. Ella Fulmer appeals the summary

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

judgment granted in favor of Jimmy and Barbara Meade in which the circuit court applied this rule. The circuit court concluded that the Meades, as the "beneficial owners" of the surface land, were entitled to the benefit of the "free gas clause" in an oil and gas lease. Because the circuit court correctly applied the law to undisputed facts, we affirm.

THE TOM WILLIAMSON LEASE

A full recitation of the facts in this case is necessary for an understanding of our holding. In 1918, Tom Williamson acquired by deed approximately 300 acres in Pike County. The conveyance included the surface land, as well as the subsurface coal, oil, gas, and minerals.

Nine years later, in 1927, Williamson deeded a portion of the surface ownership to his daughter, Fannie Meade, and her husband, Buff. The deed to Fannie explicitly stated that only the surface land was "sold and conveyed."

In 1934, Williamson entered into an oil and gas lease with B.M. James and A.H. Allen ("the Oil and Gas Lease"). The lease included all rights to the oil and gas underneath Tom's entire, original 300-acre tract and provided, in part, as follows:

[T]hat while gas is being produced from the said land under this lease, the Lessors may have by making their own connections at the well, free gas for domestic use in three

dwelling or outbuildings upon the leased premises for the use and benefit of the Beneficial [sic] owner of said land, their tenants or assigns, so long as and while the Lessees shall operate the same, if they so long produce more gas than the Lessee may use in operation thereon.

At some point, the rights under the Oil and Gas Lease were transferred from B.M. James and A.H. Allen to Equitable Production Company ("EPC"). EPC is the current owner/lessee of the Oil and Gas Lease.

In 1949, Williamson's widow, Myrtle Parker, and his heirs conveyed all of the oil and gas rights underlying the property to Lawrence Edmonds; thus, Edmonds became the lessor under the Oil and Gas Lease. By the same deed, Parker and Williamson's heirs conveyed to Edmonds the remainder of the surface property not already deeded to Fannie.

Sometime later, Edmonds conveyed all of his rights in the surface property, oil, and gas to his daughter, Phyllis McAnallan. McAnallan is the current owner of approximately 100 acres of the original Williamson surface property and all of the oil and gas estate. She is also the current lessor under the Oil and Gas Lease.

Then, in 1977, Fannie conveyed a portion of her property to Violene Blackburn. And, in 1993, Blackburn conveyed that same parcel to Ella Fulmer. The rest of Fannie's original surface property was later sold in parcels to several different

people. These "other owners," who are parties to this action, include Henry Pennington, Johnny Meade, and Jimmy Meade.

According to a map provided by EPC, it appears that the original EPC gas well, "Tom Williamson 1," was drilled on surface property owned by Pennington. While the well was operational, free gas was provided to Pennington, Fulmer, and Johnny Meade. But sometime during 2001 or 2002, EPC stopped production at Tom Williamson 1 and plugged the well. Free gas service to Pennington, Fulmer, and Johnny Meade ceased; and the parties were required to begin paying for service. EPC then drilled a second well, "Tom Williamson 2," on surface property owned by Jimmy Meade.

THE PROCEEDINGS IN CIRCUIT COURT

After Tom Williamson 2 was drilled on his property, Jimmy Meade and his wife, Barbara, (hereinafter "the Meades") sued EPC in circuit court alleging that under the Oil and Gas Lease, they were entitled to free gas for domestic use. The Meades claimed they were the "beneficial owners" of the land and, therefore, the successors to the free gas rights allowed by the lease.

Shortly after the Meades filed their complaint, Fulmer also sued EPC in circuit court. In her complaint, Fulmer claimed that she was the successor to the free gas rights under

the Oil and Gas Lease. Fulmer argued that because she had previously received free gas and because she was the owner of a portion of the surface property, she was entitled to continued use of the free gas.

The circuit court consolidated the two actions.² And Fulmer filed an amended complaint naming the Meades; Pennington and his wife, Sherry; Johnny Meade and his wife, Vitreecy (identified in the complaint as "Teresa"); and Phyllis McAnallan as defendants.

The Penningtons responded to Fulmer's amended complaint by stating they had no claim against EPC, nor against the other parties named in Fulmer's complaint. Johnny and Vitreecy Meade filed an answer and a cross-claim asserting an entitlement to the free gas rights. And Phyllis McAnallan responded by stating that as the lessor under the Oil and Gas Lease, she was the rightful beneficiary of the free gas rights.

All the parties to the action, except the Penningtons and Johnny and Vitreecy Meade, eventually filed motions for

² Before consolidation, EPC sent the Meades a letter informing them that because Tom Williamson 1 was being plugged, their gas service would be terminated. EPC told the Meades they would need to "locate an alternate source of energy or re-apply for Domestic Gas Service." The letter indicated that the Meades may be able to retain gas service if they provided "the required equipment." In response, the Meades moved for a temporary injunction and for summary judgment. But before the court could rule on either motion, the parties, apparently, entered into a settlement. Later motions to enforce the settlement were filed, and the matter was eventually resolved by the circuit court. Neither party has appealed the court's judgment on this issue.

summary judgment. In ruling on the motions, the court recognized the competing interests to the free gas rights under the Oil and Gas Lease. But relying upon the rule that "covenant[s] for free gas run[] with the land," the court concluded that the Meades were the beneficial owners of the land; therefore, citing the language in the Oil and Gas Lease, the court held that the Meades were entitled to the free gas. This appeal follows.

ANALYSIS ON APPEAL

Fulmer asserts that the circuit court erred in holding a covenant for free gas runs with the land; that her right to free gas was not abrogated by the relocation of the gas well, that the gas company had no legal right to plug Tom Williamson 1, that she is the "beneficial owner" of the land, and that she is entitled to the free gas rights over subsequent surface owners.

It is an established rule that "[a]ll covenants having to do with realty or the use thereof are either real or personal."³ Real covenants are said to "run with the land," meaning the covenant "binds the heirs and assigns of the original covenantor."⁴ In contrast, personal covenants "create[]

³ 20 Am.Jur.2d *Covenants* §12, 483 (1995).

⁴ *Id.*

a personal obligation or right enforceable at law only between the original covenanting parties"⁵ The difference between real and personal covenants "depends upon the purpose and effect of the covenant substantially to alter the legal rights which otherwise would flow from ownership of land and which are connected with the land."⁶

Covenants to furnish gas are generally deemed "real covenants," meaning they run with the land.⁷ This rule appears to be universally accepted and has been adopted by the courts in Kentucky. In Warfield Natural Gas Co. v. Small, the Court held that a clause providing for free gas "sufficient for domestic use on the premises" was "a covenant running with and attached to the *surface* of the land."⁸ Precisely, the Court concluded:

A covenant or agreement in a gas lease that the lessor shall have a part of the gas free is a covenant running with the land. As the free gas covenant is a covenant running with the land, it runs with the surface of the land and not with the oil, gas and mineral rights since the covenant could be a benefit only to one occupying and using the surface of the land.⁹

⁵ *Id.*

⁶ *Id.* at 484.

⁷ *Id.* at §21, 490.

⁸ 282 Ky. 347, 138 S.W.2d 488, 489 (Ky. 1940).

⁹ *Id.*

Similarly, in Salisbury v. Columbian Fuel Corporation, the Court considered a clause in a lease allowing the lessor "to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land" to be "a right incident to ownership of the surface."¹⁰

The Oil and Gas Lease in this case says that "the Lessors may have . . . free gas for domestic use in three dwelling or outbuildings upon the leased premises for the use and benefit of the Beneficial [sic] owner of said land, their tenants or assigns" There is no indication that the free gas clause was intended to create a "personal obligation" between the original parties; rather, it is clear this clause was intended to bind the "heirs and assigns" of the original covenantor. So the right to free gas under the clause in the Oil and Gas Lease runs with the land.

Because the covenant in the lease runs with the land, the holdings in Small and Salisbury establish that the free gas is a right incident to ownership of the surface of the land. The Meades are the owners of the surface property where Tom Williamson 2 was drilled. The circuit court concluded that because the Meades own the property upon which the well is located, they are the "beneficial owners" for purposes of the

¹⁰ 387 S.W.2d 864, 866 (Ky. 1965).

free gas clause. A "beneficial owner" is defined as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else."¹¹ We agree that use and title, as well as legal title, of the surface property belong to the Meades. So the circuit court correctly concluded that the Meades are the beneficial owners of the surface land and, thus, the rightful holders of the right to receive the free gas from the well.

Based on this conclusion, we believe Fulmer's right to the free gas was abrogated when the well was relocated from Pennington's property to the Meades' property. Use and title of the surface property upon which Tom Williamson 2 was drilled does not belong to Fulmer; therefore, she is not the "beneficial owner" under the free gas clause and no longer has a right to receive free gas.

Finally, Fulmer argues that EPC had no right to plug Tom Williamson 1. It does not appear that this issue was properly raised before the circuit court. CR¹² 61.02 instructs this Court only to consider an insufficiently raised or preserved argument if the issue constitutes a "palpable error which affects the substantial rights of a party." Upon review of Fulmer's assertions and the applicable law, it is apparent

¹¹ BLACK'S LAW DICTIONARY (8th ed.)

¹² Kentucky Rules of Civil Procedure.

that her argument is without merit. KRS 353.180 states “[n]o person shall abandon or remove casings from any oil or gas well, either dry or producing, without first plugging the well in a secure manner approved by the department” Under this statute, EPC had an obligation to plug Tom Williamson 1 when it decided the well was no longer operational. Thus, there is no palpable error and Fulmer’s argument fails.

For the following reasons, we affirm the circuit court’s decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEES JIMMY
MEADE AND BARBARA MEADE:

Edward B. Atkins
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BRIEF FOR APPELLEE EASTERN
STATES OIL & GAS, INC., N/K/A
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John Kevin West
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