No. 20110305

IN THE SUPREME COURT OF NORTH DAKOTA

FILED
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JANUARY 25, 2012
STATE OF NORTH DAKOTA

COME BIG OR STAY HOME, LLC,

Appellant/Plaintiff,

vs.

EOG RESOURCES, INC.,

Appellee/Defendant.

APPEAL FROM SUMMARY JUDGMENT
DISTRICT COURT OF MOUNTRAIL COUNTY
NORTHWEST JUDICIAL DISTRICT
CASE NO. 31-09-C-129
HONORABLE RICHARD L. HAGAR, PRESIDING

APPELLANT'S REPLY BRIEF

James M. Chaney, *Admitted Pro Hac Vice*
KIRK & CHANEY
101 Park Avenue, Suite 800
Oklahoma City, OK 73102
(405) 235-1333 Telephone
(405) 235-5914 Facsimile
chaney@kirkandchaney.com

John J. Petrik, ND Bar #03096
Vogel Law Firm
PO Box 2097
Bismarck, ND 58502-2097
(701) 258-7899
(701) 258-9705 (fax)
jpetrik@vogellaw.com

ATTORNEYS FOR APPELLANT

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Restatement (Second) of Contracts, §204, Comment (b) 17,18

¶ 2 **REPLY TO EOG'S STATEMENT OF THE CASE**

¶ 3 EOG, at p. 3, ¶2 of its Brief ("EOG3/2"), implies that CBSH did not seek damages until it filed its Third Amended Complaint. However, CBSH sought damages throughout the case. *See*: RA #2, at ¶22.

¶ 4 EOG, at EOG4/4, acknowledges that the district court did not deny CBSH's motion to compel on its merits; the district court instead found the motion to compel was moot. App. 230-31.

¶ 5 **REPLY TO EOG'S STATEMENT OF THE FACTS**

¶ 6 EOG, at EOG5/7, claims "[t]he following are the undisputed material facts that were presented" relating to EOG's motion. EOG then states alleged undisputed facts that are not the same as those set forth in EOG's motion. CBSH has stated the problems with the alleged undisputed facts EOG submitted to the district court. CBSH10-15/41-54. EOG should not be allowed to rely on different facts than were set forth in its motion.

¶ 7 The standard and non-standard JOA provisions and EOG's letter containing the same non-standard language are quoted at CBSH12-13,15/46,47,51. These provisions speak for themselves, but the latter two (2) provisions give EOG the "sole discretion" to decide whether a non-operator can disclose information to any third party (including a non-employee expert). CBSH13,15/47,51. EOG claims (EOG8/17) it sent CBSH a non-disclosure letter agreement relating to all wells, but there is no support such a letter was sent other than one letter relating to the Burke 7-3H.

¶ 8 EOG claims that there are "three wells for which information is in the record." EOG7/note2. However, the record reveals there are eighteen (18) wells at issue. A127-128/3-5.

¶ 9 EOG claims that much of the information was confidential. EOG7/15. There is no support for this assertion. Instead, EOG withheld **any** useful information. App. 128/6-7. EOG admitted the well information CBSH sought was the same type of information participating owners routinely seek. CBSH7-8/32.

¶ 10 At EOG8/17, EOG notes that CBSH signed the first JOA. CBSH has thoroughly explained that it unwittingly signed this JOA relating to the Burke 6-4 well because it purported to be a 1982 form JOA and the non-disclosure provision was not an indicated change. CBSH12-14/46,47,50. ***CBSH sought no relief in this case relating to the Burke 6-4 well***. CBSH14/50. This case relates solely to eighteen (18) other wells where there are no signed JOAs. *Id.*

¶ 11 **THEORIES OF RELIEF NOT ADDRESSED IN EOG'S MOTION FOR SUMMARY JUDGMENT**

¶ 12 CBSH has explained that EOG did not in its motion address CBSH's claim for declaratory relief nor its claim for a constructive trust. CBSH15-16/55-56. If this Court reverses summary judgment in favor of EOG, then these theories of relief should be remanded.

¶ 13 **ARGUMENT AND LAW**

¶ 14 **I. EOG was Not Entitled to Summary Judgment on CBSH's Breach of Contract Claim.**

¶ 15 CBSH established that the eighteen (18) contracts had terms intentionally left open by the parties. CBSH17-23/60-76. EOG ignores this. EOG sent well proposals to CBSH that stated, if a well proposal was accepted, "[a]n Operating Agreement . . . for your execution will be sent under separate cover. . . ." CBSH5/25.

¶ 16 EOG ignores applicable provisions of the Restatement (Second) of Contracts, North Dakota law and the law of other jurisdictions establishing that, where parties intentionally omit terms of their agreement, reasonable terms will be supplied. CBSH18-23/66-76. EOG is content to make incorrect statements that it was undisputed there were no other terms in the agreements. EOG12-13/26. CBSH has always maintained the parties' agreements at issue all expressly contained intentionally omitted terms.

¶ 17 Comment (b) to §204 of the Restatement (Second) of Contracts explains:

¶ 18 > *b. How omission occurs.* **The parties to an agreement . . . may have expectations but fail to manifest them . . . *because discussion of it might be unpleasant or might produce delay or impasse.*** (emphasis supplied).[1]

¶ 19 EOG did not state in the offer letters that CBSH would have to agree to a non-standard JOA non-disclosure provision in order to participate in the wells. Presumably, EOG determined that, if it stated such a condition, it would lead to an unpleasant result, a delay or an impasse. By intentionally leaving terms open, EOG and CBSH became bound to have reasonable terms supplied. It was well established in the factual materials that EOG's non-disclosure provision is not a reasonable one in the industry. CBSH6-9/29-34.

¶ 20 EOG claims CBSH knew EOG would not supply well information unless CBSH agreed that it had to obtain EOG's written consent before doing so. EOG13/27. Only one other operator, Hunt, had the audacity to include such a non-disclosure provision in their

[1] This observation is not controversial. *See: e.g., Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 619-620 (7th Cir. 2006) ("Filling gaps is a standard activity of courts in contract cases"); *NEA-Coffeyville v. Unified School District No. 445, Coffeyville, Montgomery County,* 996 P.2d 821, 829-30 (Kan. 2000) (Quoting Comment (b) of §204 of the Restatement (Second) of Contracts and noting that parties omit terms because reaching an agreement concerning them might be unpleasant or result in a delay or impasse); *Kosilla v. Kosilla*, 2011 W.L. 5041323, at *p. 3 (N.J.Super.A.D. 2011) (same); *Costello v. Cook*, 852 P.2d 1330, 1331-33 (Col.App. 1993) (same).

JOAs. CBSH6-7/31. However, even though CBSH also refused to sign Hunt's JOAs, Hunt nevertheless provided CBSH with well information. *Id.*

¶ 21 EOG cites a law review article originally drafted in 2010 by a 2005 law school graduate. *See*: Larson, *Horizontal Drilling: Why Your Form JOA May Not be Adequate for Your Company's Horizontal Drilling Program*, 48 RockyMtnMin.LFound.J. 1 (Spring, 2011). The author basically acknowledges that it is industry custom and reasonable for ***participating*** owners paying their way to receive well information. *Id.*, at discussion associated with footnotes 27-32. "[N]on-operators who have consented to a particular operation will typically insist on the right to receive all information obtained in connection with such operation." *Id.*, at sentence following footnote 31. The author, not attempting to state what is reasonable in the industry nor industry custom, then merely suggests that an operator could consider adding a non-disclosure provision. *Id*, at discussion following footnote 34.

¶ 22 This article does not help EOG's cause. The author essentially states participating owners require well information. Despite knowing this, EOG did not indicate in its invitations to participate that CBSH could not participate unless it agreed to the non-disclosure provision. Instead, EOG intentionally left terms open.

¶ 23 EOG cites little case law in support of its contention that intentionally omitted terms cannot be supplied. EOG14-15/29. None stands for EOG's proposition that intentionally omitted terms cannot be supplied. It suffices to note that this Court, in *Tong v. Borstad*, 231 N.W.2d 795, 800 (N.D. 1975), found that customs and usages are routinely implied in agreements "if nothing is said to the contrary." Also, in *Urbana Farmers Union Elevator Co. v. Schock*, 351 N.W.2d 88, 92 (N.D. 1984), this Court noted that "courts have,

in fact, been quite liberal in finding that **additional terms**, usages, and other dealings between the parties could be harmonized with apparently contradictory express terms." (Emphasis supplied).

¶ 24 Here, not one of the eighteen (18) offers to participate at issue negated (expressly or otherwise) the reasonable and customary concept that participating owners would have access to well information. At EOG15-16/31-33, EOG nonsensically contends the offers to participate did not leave terms open. They each, however, indicated that a JOA would be sent later. Additional terms were expressly contemplated.

¶ 25 **II. EOG Was Not Entitled to Summary Judgment on CBSH's Breach of Fiduciary Duty Theory.**

¶ 26 At EOG17-24/34-51, EOG contends no fiduciary duty could exist for a wide variety of alleged reasons. However, the district court relied upon only one reason – its finding that EOG had not breached any contract and its holding that *Grynberg* required the breach of a contract term. App. 222-26. Thus, if this Court finds that the district court erred in granting summary judgment on the contract claim, this Court should remand the breach of fiduciary duty theory.

¶ 27 Reply brief page/word limits make it impossible for CBSH to reply to all of EOG's fiduciary-duty arguments. CBSH addressed this issue at CBSH28-32/90-102. EOG contends there was no proof that the parties derive title from a common source, which is allegedly required for parties to be cotenants. North Dakota law does not have any such rigid requirement. As explained in *Schank v. North American Royalties, Inc.*, 201 N.W.2d 419, 429 (N.D. 1972), a statute, §47-02-08, N.D.C.C., provides that tenants in common are simply those owning property "not in joint ownership or partnership." Further, "mineral

lessees of different cotenants become cotenants of each other." *Id.* at 430. EOG made no such contention in its motion and only stated this concept in its reply brief filed three (3) days before the hearing. RA #74. The district court did not rely on this contention and, even if this is a requirement, CBSH should be allowed the opportunity to demonstrate the parties do derive title from a common source.

¶ 28 CBSH is not stating that EOG owed it fiduciary duties for all purposes. As it relates to this case, CBSH only contends that it was totally reliant upon EOG to supply it with the well information that CBSH had paid for, and EOG owed CBSH a fiduciary duty not to withhold this well information while EOG used it to evaluate and obtain for itself adjacent leases.

¶ 29 **III. EOG was Not Entitled to Summary Judgment on CBSH's Conversion Claim.**

¶ 30 CBSH has established this point. CBSH32-34/104-108. Based upon the same cases, EOG argues otherwise. EOG25-26/52-54. There is nothing to add in a reply.

¶ 31 **IV. EOG was Not Entitled to Summary Judgment on CBSH's Claim for Damages/Disgorgement of Profits.**

¶ 32 At CBSH25-28/83-89, CBSH established that the district court agreed with CBSH that it did not need to establish the amount of its damages, that CBSH raised a triable issue concerning whether it was damaged and entitled to a disgorgement of EOG's profits, and that the district court never addressed CBSH's Rule 56(f) affidavit seeking more time to obtain discovery to further prove damages.

¶ 33 EOG first contends that the element of causation was lacking because CBSH did not specifically ask EOG if it would allow CBSH to disclose information to its outside experts. EOG27-28/56-58. EOG's argument [1] incorrectly assumes that EOG had the right

to unilaterally declare that CBSH could not have nor disclose any information, [2] ignores that CBSH sent EOG well requirement lists, which EOG admitted were reasonable, and [3] makes the illogical leap that one must, as a matter of law, do everything possible despite another's clear breach of contract to mitigate damages. This is an argument for the trier of fact in considering an affirmative defense, not an argument in support of an order granting summary judgment. This argument, with the new supporting alleged facts, was first raised below in EOG's reply.

¶ 34 At EOG28-31/59-63, EOG argues that CBSH's damages were too speculative. However, CBSH presented sufficient evidence for summary judgment purposes that it was damaged and/or that it was entitled to a disgorgement of EOG's profits. CBSH25-28/83-89. The district court even agreed CBSH was not required to prove the amount of its damages. *Id.*, at ¶84.

¶ 35 Because EOG refused to provide discovery, CBSH did all that it could. It identified from the public record 111 leases that EOG had taken using well information CBSH had paid its part to obtain, and CBSH provided testimony that CBSH would undoubtedly have obtained some of those leases had it had the opportunity to evaluate basic well information withheld by EOG while EOG leased the acreage. *Id.,* at ¶83.

¶ 36 EOG attempts to justify a finding that the "basis" for CBSH's damages was too speculative, claiming that CBSH's John Garrett's affidavit was inconsistent with his deposition testimony. EOG30/note 12. The district court, however, never made such a finding. It is perfectly consistent to maintain that you undoubtedly would have obtained some of the 111 leases had you had the well information to make the decision (like EOG

had) to seek them, but that you could not make the decision to seek leases (including what bonus to offer) without the well information.

¶ 37 EOG also apparently maintains that restitutionary relief is not available in North Dakota. CBSH would refer the Court to CBSH26-28/87-89 to refute this assertion. CBSH would also note [1] that the United States Supreme Court has no problem citing tentative drafts of Restatements [*See: Cigna Corp. v. Amara,* __ U.S. __, 131 S.Ct. 1866, 1880, 179 L.Ed.2d 843 (2011)], and [2] that the principles discussed in the tentative drafts of the Restatement (Third) of Restitution are derived from the Restatement (First) of Restitution, §160, which this Court has quoted with approval. CBSH26-27/87.

¶ 38 The district court erred in not addressing CBSH's Rule 56(f) affidavit. CBSH34-35/111-113. EOG has no response other than to suggest that the district court denied CBSH's Motion to Compel on its merits. However, the district court held that CBSH's Motion to Compel was moot; it did not reach its merits.

¶ 39 **CONCLUSION**

¶ 40 WHEREFORE, for the reasons stated in CBSH's original brief and herein, CBSH respectfully prays that the Court reverse the district court's Order granting EOG's Motion for Summary Judgment, and remand the case for further proceedings.

Respectfully submitted,

s/ James M. Chaney
James M. Chaney, *Admitted Pro Hac Vice*
KIRK & CHANEY
101 Park Avenue, Suite 800
Oklahoma City, OK 73102
(405) 235-1333 Telephone
(405) 235-5914 Facsimile
chaney@kirkandchaney.com

John J. Petrik, ND Bar #03096
Vogel Law Firm
PO Box 2097
Bismarck, ND 58502-2097
(701) 258-7899
(701) 258-9705 (fax)
jpetrik@vogellaw.com

ATTORNEYS FOR APPELLANT/ PLAINTIFF

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