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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RHONDA PENNINGTON, STEVEN NELSON, DONALD NELSON, AND CHARLENE BJORNSON,	
Plaintiffs / Appellants	**Supreme Court No. 20200318**
vs.	**McKenzie County District Court No. 2017-CV-00440**
CONTINENTAL RESOURCES, INC.,	
Defendant / Appellee	

APPELLANTS' OPENING BRIEF

Appeal from a Judgment entered October 15, 2020, and the underlying Order dated October 2, 2020, Northwest Judicial District, McKenzie County, State of North Dakota, The Honorable Daniel El-Dweek Presiding

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STATEMENT OF THE ISSUES

[¶ 1] Whether the oil and gas leases in this matter required the operator to obtain production within the primary term to prevent expiration or was the commencement of drilling operations sufficient to prevent expiration.

[¶ 2] Whether an oil and gas operator can rely on a force majeure event to extend the oil and gas lease's primary term when the event affected the operator prior to the operator obtaining an interest in the leases.

STATEMENT OF THE CASE

[¶ 3] This case involves the application of a force majeure event to four identical oil and gas leases to determine if the leases expired automatically prior to the end of the leases' extended primary term or were continued into the leases' secondary term.

[¶ 4] Appellants Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson who are all siblings ("Nelsons") commenced this action in McKenzie County District Court against Continental Resources, Inc. seeking a determination that the leases had expired. (App. 10)

[¶ 5] This Court previously reversed the district court's grant of summary judgment and remanded this matter holding: 1) the force majeure clause applied to both the primary and secondary terms of the lease, thereby preventing summary judgment for the lessors, and 2) fact issues existed regarding the application of the force majeure clause thereby precluding summary judgment for the lessees. *Pennington v. Continental Resources, Inc.,* 2019 ND 228, 932 N.W.2d 897. (App. 41)

[¶ 6] At trial, Continental stipulated that the mineral owners could establish a *prima facia* case for lease expiration but asserted an affirmative defense that the leases' primary term had been sufficiently extended by a permitting delay to prevent expiration of the leases. (App. 113: line 20 - 114: line 9)

[¶ 7] While there was agreement that a permitting delay had occurred, the parties disagreed on the length of the delay, the legal significance of any permitting delay prior to assignment due to Continental's lack of an interest in the Leases, and whether the delay was sufficient in time to extend the primary term long enough to prevent automatic expiration of the leases. (App. 107, ¶ 57)

[¶ 8] In opposition to Continental's affirmative defense that the Leases did not expire based on the force majeure clause, Nelsons argued at trial among other points that: 1) Continental could not count any time prior to acquiring the Leases on September 1, 2014 in its period of delay, because Tracker did not undertake any efforts to develop the Leases, and 2) Continental was required to obtain production to maintain the Leases beyond the primary term as extended by the force majeure clause. (App. 107, ¶ 57) The substance of those two issues, which are raised in this appeal, were only briefly addressed in paragraph 59 of the district court's Order. (App. 108, ¶ 59)

[¶ 9] The district court accepted Continental's proposed findings and conclusions of law almost verbatim – striking only an irrelevant paragraph 10 regarding the amounts the Nelsons have been paid to date for the removal of their minerals. (App. 52, ¶ 10) The district court did not make one change to the remaining 62 paragraphs submitted by Continental, and ultimately held that the Leases had not expired. (App. 109, ¶ 60)

STATEMENT OF THE FACTS

[¶ 10] Each of the Nelsons are the owner of an undivided 25 percent of 160 mineral acres in Section 8, Township 153 North, Range 94 West, 5th P.M., McKenzie County North Dakota. (App. 80, ¶ 1)

[¶ 11] On October 25, 2011, each of the Nelsons entered a "Paid Up Oil and Gas Lease" with Tracker Resources Development III, LLC. (App. 16) The four leases are in all respects identical except for the name of the lessor, signature, and notarization. Each lease contains a *habendum* or duration clause containing a three-year primary term.

[¶ 12] Paragraph 3 of the Leases set out an initial primary term of three years:

> 3. Term of Lease. This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof. Production in paying quantities shall be determined under the terms of this lease by the following two factors: (1) whether the production yields a profit after deducting operating and marketing costs and (2) whether a prudent operator would continue, for profit and not speculation, to operate the well as it has been operated.

(App. 16)

[¶ 13] Tracker, the original lessee, did not commence drilling on the Leases during the primary term. Tracker also did not give the Nelsons notice of any events that would prevent it from drilling on the Leases. (App. 51, ¶ 7)

[¶ 14] Effective September 1, 2014, just one month prior to the approaching expiration of the primary term on October 25, 2015, Tracker assigned the Leases to Continental. (App. 51, ¶7).

[¶ 15] Paragraph 17 of the Leases sets out an option to extend the initial primary term for an additional term of one (1) year:

> 17. Renewal Lease. Lessee has the option to extend this lease for an additional term of one (1) years from the expiration of the primary term of this lease, and as long thereafter as oil and/or gas ~~and/or coalbed gas~~ is produced ~~or deemed produced~~ from the lease premises by the Lessee, its successors and assigns, said renewal to be under the same terms and conditions of this lease. Lessee, its successors or assigns, may exercise this option to extend if, on or before the expiration of the primary term of this lease, Lessee pays or tenders to the Lessor ~~or the Lessor's credit,~~ a sum equal to the net minerals acres covered by this lease multiplied by the bonus per net mineral acre originally given for this lease. ~~In the event this lease is being maintained by any provision hereof at the expiration of the primary term, Lessee shall have a period of thirty (30) days from the date this lease ceases to be so maintained with which to exercise this option.~~

(App. 19, ¶ 17, strikeouts in original) Continental exercised the option under paragraph 17 of the Leases on October 21, 2014. (App. 31)

[¶ 16] By exercising the option, Continental extended the primary term of the Leases from October 25, 2014 until October 25, 2015. (App. 82, ¶ 7)

[¶ 17] Paragraph 12 of the Leases is a force majeure clause, which provides in part:

> When drilling, reworking, production, or other operations are prevented or delayed . . . by inability to obtain necessary permits, . . . this lease shall not terminate because of such prevention or delay, and at Lessee's option, the period of such prevention or delay shall be added to the term hereof.

(App. 18, ¶12)

[¶ 18] Four days prior to the end of the extended primary term under paragraph 17, on October 21, 2015, Continental recorded an affidavit of regulation and delay, stating its operations had been delayed by an inability to obtain permits. (App. 36, ¶ 8)

[¶ 19] On October 22, 2015, just three days prior to the expiration of the primary term, Continental requested the North Dakota Industrial Commission to terminate the

then existing 2560-acre spacing unit from 2560-acres and create a new 1920-acres by removing Section 20. (App. 83, ¶ 11)

[¶ 20] By October 25, 2015, the end of the extended primary term, Continental had not commenced drilling and no oil or gas had been produced from the leased premises or from lands pooled or unitized with the leased premises. (App. 80, ¶ 1)

[¶ 21] On November 23, 2015, by Order No. 26915, the Commission (a) terminated the 2560-acre spacing unit, and (b) created the 1920-acre spacing unit comprised of all of Sections 5, 8, and 17 of Township 153 North, Range 94 West, McKenzie County. (App. 83, ¶ 11)

[¶ 22] On January 28, 2016, the Commission pooled the 1920-acre spacing unit by Order No. 27157. (App. 38)

[¶ 23] Continental did not begin producing from the leased premises until July 30, 2017. (App. 76, ¶ 57); (App. 117, line 15)

[¶ 24] Continental's force majeure event was that Continental was delayed from obtaining the necessary permits due to BLM and the U.S. Forestry Service and U.S. Fish and Wildlife Service's laws, rules, regulations, or orders related to permitting. (App. 36, ¶ 5)

[¶ 25] The district court found "that Continental's drilling operations were prevented or delayed from June 1, 2013 to August 1, 2015, or 791 days." (App. 96, ¶ 40) The district court added the period of 791 days to the primary term of the Leases "extending them from October 25, 2015, to December 24, 2017." (App. 97, ¶41)

STANDARD OF REVIEW

[¶ 26] Where the issue on appeal is the interpretation of a contract such as an oil and gas lease, the "Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it." *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861, 864; *see also Pennington v. Continental Resources, Inc.*, 2019 ND 228, ¶ 9, 932 N.W.2d 897 ("Contract interpretation is a question of law, fully reviewable on appeal.")

SUMMARY OF ARGUMENT

[¶ 27] A force majeure event can only extend the Leases' primary term for the length of the event. Once that additional time is added to the primary term the requirements to prevent automatic expiration of the Lease must still have been satisfied by the operator. The district court erred in finding that the Leases only required Continental to "commence drilling" prior to the expiration of the Leases' primary term. Instead, pursuant to the express language of the Leases, and this Court's previous holdings, Continental was required to obtain production prior to the end of the extended primary term to prevent the automatic expiration of the Leases, and not simply commence drilling.

[¶ 28] The district court found that the force majeure period of permitting delay ended August 1, 2015, and that finding is not disputed on appeal by the parties. (App. 97, ¶41) However, the district court erred in crediting Continental with the time for delays that the district court found Continental suffered prior to Continental having any interest in the Leases. After an assignment, the assignee acquires no greater rights than those held by the assignor, and the assignee merely stands in the shoes of the assignor.

Continental's predecessor, Tracker, took no actions to develop the Leases. As such, any period of permitting delays Continental suffered prior to Continental having obtained any interest in the Leases cannot be counted as a period of force majeure under the Leases.

[¶ 29] As such, even if the primary term were extended for the maximum time period available of 334 days -- date of assignment, September 1, 2014, through the end of the force majeure event, August 1, 2015 -- that would only extend the primary term from October 25, 2015 until June 30, 2016. Production, however, was not obtained by Continental until July 30, 2017, over a year later, and as such the Leases had already automatically expired. (App. 107, ¶ 56)

ARGUMENT AND AUTHORITIES

I. Production was required prior to the end of the primary term to prevent automatic expiration of the Leases.

[¶ 30] An oil and gas lease is a contract by which a lessee is granted the right to explore for and produce mineral resources on the lands of another. The duration of a contemporary oil and gas lease is typically fixed by the habendum clause, i.e., the clause in a lease setting forth the duration of the lessee's interest in the premises. A habendum clause is typically divided into two parts, the definite or primary term, and the indefinite or secondary term. The primary term is the period of time at the end of which the leasehold estate granted will automatically expire unless there is production of oil and gas by that time. *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶3 616 N.W.2d 861.

[¶ 31] Under a paid-up oil and gas lease, "the lessee has no obligation to commence operations during the primary term of the lease." *Irish Oil and Gas, Inc. v.*

Riemer, 2011 ND 22, ¶ 22, 794 N.W.2d 715, 721. Expiration at the end of the primary term does not constitute a forfeiture for breach of a lease covenant but is simply a conditional limitation on the lease term. *Id.*

[¶ 32] All four of the Leases are paid up oil and gas leases. Paragraph 3 of the Leases contains the habendum clause that provides:

> **Term of Lease**. This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof. Production in paying quantities shall be determined under the terms of this lease by the following two factors: (1) whether the production yields a profit after deducting operating and marketing costs and (2) whether a prudent operator would continue, for profit and not speculation, to operate the well as it has been operated.

(App. 16)

[¶ 33] Like most habendum clauses, the Leases' habendum clause consists of two parts – the primary term and the secondary term:

> **Term of Lease**. This lease shall be in force for a primary term of three (3) years from the date hereof, [primary term]
>
> ***and for as long thereafter*** as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof. [secondary term]

(App. 16, ¶ 3)

[¶ 34] Because the Leases were executed on October 25, 2011, the three-year primary term would end on October 25, 2014.

[¶ 35] Paragraph 17 of the Leases sets out an option to extend the initial primary term for an additional term of one (1) year:

> 17. Renewal Lease. Lessee has the option to extend this lease for an additional term of one (1) years from the expiration of the primary term of this lease, and as long thereafter as oil and/or gas ~~and/or coalbed gas~~ is produced ~~or deemed produced~~ from the lease premises by the Lessee, its successors and assigns, said renewal to be under the same terms and conditions of this lease. Lessee, its successors or assigns, may exercise this option to extend if, on or before the expiration of the primary term of this lease, Lessee pays or tenders to the Lessor ~~or the Lessor's credit,~~ a sum equal to the net minerals acres covered by this lease multiplied by the bonus per net mineral acre originally given for this lease. ~~In the event this lease is being maintained by any provision hereof at the expiration of the primary term, Lessee shall have a period of thirty (30) days from the date this lease ceases to be so maintained with which to exercise this option.~~

(App. 19, ¶ 17) (Strikeouts in original)

[¶ 36] Continental exercised the option in October of 2014 to extend each of the Lease's primary term for one year – from October 25, 2014 until October 25, 2015. (App. 31). By October 25, 2015, Continental had not commenced drilling, and as such, no oil or gas had been produced from the leased premises or from lands pooled or unitized with the leased premises.

[¶ 37] The condition required to prevent expiration of the Leases at the end of the primary term and instead extend the Leases into the secondary term under Paragraph 3 is production. Paragraph 3, the habendum clause, specifically provides that the Leases can extend into the secondary term only if "substances covered hereby are produced in paying quantities." *Pennington v. Continental Resources, Inc.,* ¶ 10. The phrase "production in paying quantities" is further defined in the same clause to mean production that "yields a profit." (App. 16)

[¶ 38] Paragraph 17, the option paragraph that was exercised by Continental and extended the primary term for one year, also provides that the Leases can extend into the secondary term only if there is "production." Furthermore, by striking the words "or deemed produced" in that paragraph the parties were expressly agreeing that only by obtaining production within the primary term would the lease extend into the secondary term and not automatically expire. *Id.,* ¶17.

[¶ 39] The district court ignored this Court's previous Order and instead found that pursuant to Paragraph 4 "Operations" the condition of the primary term is met once Continental commenced drilling. (App. 77, ¶ 58) In *Pennington v. Continental Resources, Inc.* this Court specifically found the "lease term is governed under Paragraph 3" which provides that the Leases can extend into the secondary term only if "substances covered hereby are produced in paying quantities." (App. 44, ¶ 10). In addition, this Court specifically found that Paragraph 4 of the Leases uses the phrase "after the primary term," indicating that provision applies only during the secondary term of the leases. (App. 46, ¶ 14)

[¶ 40] Again ignoring this Court's prior Order, the district court also held that Paragraph (a) of Exhibit A provides that drilling is sufficient to hold the Leases. (App. 108, ¶ 59) Paragraph (a) of Exhibit A is a Pugh clause. *Johnson v Statoil & Gas LP,* 2018 ND 227 ¶ 10, 918 N.W.2d 58. Mr. Donald Nelson confirmed that Paragraph (a) of Exhibit A was a Pugh clause. (App 127: line16 - 128:1) A Pugh clause provides that if a portion of property identified in an oil and gas lease is in a unit in which the operator has obtained production for which the lessor is obtaining royalties from production, but there are other portions of the property identified within that same lease that are not within the unit for

which the lessor is obtaining royalties from production, those portions of the lease outside of unit for which the lessor is obtaining royalties from production shall terminate. *Johnson v Statoil & Gas LP,* 2018 ND 227 ¶ 10, 918 N.W.2d 58. Here there was no unit where oil production existed prior to the expiration of the Leases, therefore the Pugh Clause is irrelevant and cannot be used to extend the Leases beyond the primary term.

[¶ 41] Consistent with the plain reading of Paragraphs 3 and 17 of the Leases and this Court's previous holdings in this matter, "production" is required under the Leases to extend the Leases from the primary term into the secondary term. Production of minerals under these Leases, or in lands pooled with these Leases, did not occur until July 30, 2017. (App. 108, ¶ 59) It took Continental 644 days (October 25, 2015 until July 30, 2017, i.e., over 21 months) after the express end of the primary term, to obtain production. Therefore, to prevent automatic expiration of the Leases, Continental had the burden of establishing a force majeure event under the Leases that resulted in at least a 644-day delay.

II. The district court erred in crediting Continental with the time for permitting delays that the district court found Continental suffered prior to Continental having any interest in the Leases.

[¶ 42] A force majeure clause is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled." *Pennington v. Continental Resources, Inc.,* ¶ 12, citing *Entzel v. Moritz Sport and Marine,* 2014 ND 12, ¶ 7, 841 N.W.2d 774 (quoting *Black's Law Dictionary* 718 (9th ed. 2009)).

[¶ 43] To establish a defense of force majeure in this case Continental Resources had the burden to show by a preponderance of the evidence that there was a period of delay caused by a qualifying force majeure event sufficient to account for the period of time following October 25, 2015 (the express date of the end of the extended primary term) until the conditions of the primary term were satisfied – production – on July 30, 2017.

[¶ 44] The Leases were assigned from Tracker to Continental effective September 1, 2014. Prior to assignment, Tracker took no actions to develop the Leases. Tracker also made no claim to any force majeure event, nor did it claim it was prevented from developing the Leases in any way.

[¶ 45] When the Leases were assigned to Continental, Continental could have availed itself to any of the Lease provisions. Continental did not give notice of a claimed force majeure event at that time. Instead, Continental exercised the option to extend the primary term one year under Paragraph 17 of the Leases by paying the Plaintiffs $400,000 to extend the four Leases for that one additional year. (App. 31) Continental's exercise of the option in October 2014 was inconsistent with Continental's later reliance on the force majeure clause. In addition, Continental did not record notice of a claimed force majeure event until October 21, 2015, just four days before the Leases were to expire. (App. 82, ¶8)

[¶ 46] Nonetheless, the Court found that a force majeure event began in June 2013 (notably a date that was 28 months prior to Continental recording notice of a claimed force majeure event and 15 months prior to it having any interest in the Leases). Based on this June 2013 start date of the force majeure event, the district court found that the claimed

force majeure event caused 26 months of delay – from June 2013 until August 25, 2015. (App. 96, ¶ 40)

[¶ 47] However, any claimed force majeure event under Paragraph 12 of the Leases could not effectively begin earlier than when Continental became a party to the Leases by assignment – September 1, 2014. (App 23). After an assignment, the assignee acquires no greater rights than held by the assignor, and the assignee merely stands in the shoes of the assignor. *Collection Ctr., Inc. v. Bydal*, 2011 ND 63, ¶ 15, 795 N.W.2d 667, 672–73.

[¶ 48] Continental had no interest in and was not a party to the Leases until September 1, 2014 by the assignment from Tracker. (App. 82, ¶7) Matt Callaway of Continental testified that prior to the assignment from Tracker Resources to Continental those parties had no contractual or other relationship, and that the assignment was a "third party assignment" that was part of a packet of leases obtained from Tracker. (App. 82, ¶ 7). Consistent with Mr. Matt Callaway's testimony, no evidence of a joint operating agreement or any other agreement between Tracker to Continental prior to the assignment was presented.

[¶ 49] Any claimed force majeure analysis under Paragraph 12 of the Leases must be made by first looking at the time period Tracker was the lessee under the Leases – October 25, 2011 through September 1, 2014. If a force majeure affirmative defense would not have been available to Tracker during the time period that Tracker was the lessee under the Leases, then a force majeure affirmative defense cannot be available to Continental during that time period. To hold otherwise would allow Continental greater rights as the assignee than was held by the assignor.

[¶ 50] Again, there was no evidence presented that Tracker took any action to develop the Leases during the time period that it was a lessee under the Leases. Likewise, Tracker did not give notice to the Plaintiffs of any claimed force majeure event while it was the lessee.

[¶ 51] The district court held that because the NDIC had issued pooling orders that Continental had requested, Continental should be deemed the operator of the unit and as such Tracker could rely on the actions of Continental as its own prior to September 1, 2014, and in turn Continental can thereby rely on its own actions to develop its other leases prior to the assignment date once the Leases had been assigned to it. (App. 109, ¶59)

[¶ 52] However, any "interested party," not just a potential operator, can apply for a pooling order. N.D.C.C. § 38-08-08. A pooling order does not specify an operator of the unit. In addition, a pooling order is only effective once a well is drilled. (App. 40, ¶ 9) Although several earlier pooling orders were entered by the NDIC that included Section 8, none of these pooling orders became effective.

[¶ 53] Two additional pooling orders were entered after the pooling order relied upon by the district court, and only last pooing order became effective. The January 2015 pooling order, (App. 32), which was never effective, and the January 2016 pooling order, (App. 38) which became effective, were both entered after the date of assignment such that neither pooling order provides support for the position of an earlier start date for a claimed force majeure event. Only the 2016 pooling order went into effect and resulted in production of the Nelsons' minerals, and it was not entered until January 16, 2016. (App. 38) As such, the pooling orders add nothing to the analysis of the effect of the assignments on the applicable period force majeure.

[¶ 54] Because Continental did not become a party to the Leases until September 1, 2014 by assignment, that is the earliest possible start date of a force majeure event under Paragraph 12 of the Leases that is available to Continental. September 1, 2014 until the end of the force majeure event on August 1, 2015 is 334 days.

[¶ 55] Therefore, even if the primary term was extended for the maximum time period available of 334 days – the date of assignment, September 1, 2014, through the end of the force majeure event, August 1, 2015 -- that would only extend the primary term from October 25, 2015 until June 30, 2016. Production, however, was not obtained by Continental until July 30, 2017, over a year later, and as such the Leases had already automatically expired.

CONCLUSION

[¶ 56] Nelsons are entitled to a declaratory judgment that the Leases automatically expired.

[¶ 57] DATED this 19th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as attorney for Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs and Appellants in the above matter, and as the author of the Appellants' Opening Brief, hereby certifies, in compliance with Rule 28 of the North Dakota Rules of Appellate Procedure, the Plaintiffs' and Appellants' Brief, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance, totals 4,474 words and is less than 38 pages.

[¶ 2] Dated this 19th day of February, 2020.

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CONTINENTAL RESOURCES, INC.,	)	
Defendant / Appellee	)	

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

I hereby certify that on February 19, 2021, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. Appellants' Opening Brief

2. Appendix to Appellants' Opening Brief

and served the same electronically as follows:

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I hereby certify that on February 22, 2021, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

Appendix to Appellants' Opening Brief - Amended

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