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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' REPLY 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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SUMMARY OF REPLY

[¶1] The maximum force majeure period legally available is 334 days – the date of assignment, September 1, 2014, through the end of the force majeure event, August 1, 2015. Applying that period of force majeure to the primary term extends the primary term from October 25, 2015 until June 30, 2016. Production was required to prevent automatic expiration of the Leases on June 30, 2016. Continental did not obtain production until July 30, 2017, and as such the Leases had already automatically expired.

ARGUMENT

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

[¶2] The specific language in Paragraph 3 (the habendum clause) requires "production" for the Leases to continue past the primary term (App. 16, ¶ 3). Because Continental had not acquired production by June 30, 2016, Continental argues that pursuant to Paragraph 4 (the operations clause, App. 16-17, ¶ 4), initiating drilling nonetheless prevents automatic expiration of the Leases. (Brief of Appellee, ¶ 54).

[¶3] But Continental's argument ignores this Court's specific holding in the first appeal that the use of the phrase "after the primary term" in Paragraph 4 of the Leases indicates that it applies only during the secondary term of the Leases (App. 46, ¶ 14). Under the principle of law of the case, legal determinations of this Court "will not be differently determined on a subsequent appeal in the same case where the facts remain the same." (*Viscito v. Christianson*, 2016 ND 139, ¶ 7, 881 N.W.2d 633 (quoting *Carlson v. Workforce Safety & Ins.*, 2012 ND 203, ¶ 16, 821 N.W.2d 760)). As such, without production prior to the end of the primary term, the Leases did not enter the secondary term and Paragraph 4 is not applicable.

[¶4] Continental also contends that this Court should interpret Paragraph (a) of Exhibit A to the Leases as something other than a Pugh clause. (Brief of Appellee, ¶ 59). To make its argument Continental asks this Court to read only the second sentence of Paragraph (a) in isolation. But the last sentence of Paragraph (a) of Exhibit A ties the entire paragraph together and specifically provides, "Upon failure to maintain said continuous drilling program, this lease shall then automatically terminate as to such nonproductive part of the leased premises as provided above." (App. 20, Exhibit A, ¶ (a)). When read as a whole it is clear that Paragraph (a) is a Pugh clause designed to function as most Pugh clauses do – if there is production which allowed the Lease to continue into the secondary term, but there are "nonproductive" parts of the leased premises, those "nonproductive" parts of the leased premises will be released unless the operator is engaged in a continuous drilling program to also bring those "nonproductive" parts of the leased premises under production. This Pugh clause does not prevent automatic expiration of the Leases as a whole if there is no production anywhere on the leased premises by the end of the primary term.

[¶5] Continental's argument ignores the language in Paragraph 17 (the option clause) of the Leases, which also specifically requires production at the end of the one-year extended primary term to prevent automatic expiration if the option is exercised. The option clause reads:

> Lessee has the option to extend the lease for an additional term of one (1) year 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 leased premises by the Lessee . . . .

(App. 19, ¶ 17)(strikeouts in original). The strikeouts in Paragraph 17 again confirm that the parties intended that the only way for the operator to prevent automatic expiration of

the Leases was if there was actual production prior to the expiration of the primary term, especially when as here the primary term was extended for yet another year by the exercise of the option.

[¶6] As such, when the Leases are read as a whole it is clear that production was required prior to the end of the primary term to prevent automatic expiration of the Leases.

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.

[¶7] Continental concedes that 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 also is not available to Continental during that time period. (Brief of Appellee, ¶ 44). To hold otherwise would allow Continental greater rights as the assignee than were held by the assignor. Continental also apparently concedes that there was no evidence presented that Tracker took any steps to develop the Leases when it was the lessee. (Brief of Appellee, ¶ 45).

[¶8] Continental states that it "is not attempting to claim greater rights than those held by Tracker under the Leases." (Brief of Appellee, ¶ 44). Yet Continental, without legal basis, nonetheless argues that a conditional pooling order that never went into effect should somehow increase Continental's rights under the Leases, prior to it being a party to the Leases. (Brief of Appellee, ¶ 39).

[¶9] In contrast, the Nelsons' position is that Paragraph 12 cannot be interpreted to extend the term of the Leases prior to the lessee taking any action to further development of the Leases or suffering any force majeure event which prevented that action (App. 18, ¶ 12). Here it is undisputed that there was no legal relationship between

Tracker and Continental prior to the assignment of the Leases, and likewise it is undisputed that Continental had no legal interest in the Leases prior to the assignment of the Leases (App. 82, ¶ 7).

[¶10] Without a legal interest in the Leases, Continental cannot obtain greater rights as the assignee than were held by the assignor and any period of force majeure could not begin as to Continental prior to the date of assignment – September 1, 2014.

III. The issues Appellants raise do not exceed the scope of the prior mandate.

[¶11] Continental concedes the issues Appellants raise were not resolved by the Court in the first appeal. (Brief of Appellees, ¶ 33). Instead, Continental argues that these issues would have been resolved had they been properly presented in the first appeal. But at the time of the first appeal, these issues could not have been raised because Continental had not yet articulated the time period it was claiming a force majeure event existed in support of its affirmative defense, which would have made requesting summary judgment on these issues improper.

[¶12] In its Brief of Appellee in the first appeal to this Court, Continental stated:

> Continental acknowledges that there are different possible dates that could be used to determine the end point of the period of delay occasioned by Continental's inability to obtain permits from the BLM: August 24, 2015 (the date of the U.S. Fish and Wildlife Service's Biological Opinion indicating the issues with the Dakota skipper), October 22, 2015 (the date Continental requested modification of the 2560 Spacing Unit to the 1920 Spacing Unit), or December 22, 2015 (the date the BLM approved Continental's operations within the 1920 Spacing Unit). This does not present a genuine issue for dispute, however, because all of these dates would place the end of the Leases' primary term well into 2019.

(Case 20190063, May 17, 2019, Brief of Appellee, ¶28, footnote 4). On remand the district court accepted Continental's altered period of claimed force majeure "that

Continental's drilling operations were prevented or delayed from June 1, 2013 to August 1, 2015." (App. 96, ¶ 40).

[¶13] At the point of the first appeal – which arose on an order from cross motions for summary judgment – written discovery had not been complete, depositions had not been taken, and no experts had been disclosed. In short, until Continental presented its affirmative defense at trial, the disputed issues related to the maximum beginning and ending date of the force majeure event could not be determined, nor could the resulting end of the primary term.

[¶14] In contrast to Continental's ever-shifting time periods for its claimed force majeure event, the Nelsons' position that actual production was required to extend the Leases beyond the primary term has remained consistent throughout this litigation. In paragraph 1 of the Appellants' Reply Brief on the first appeal the Nelsons stated:

> Continental concedes that the condition precedent to extend the Leases beyond the primary term – production – had not commenced by October 25, 2015. Continental's argument is that the Leases' paragraph 12, the *force majeure* clause, extended the primary term thereby preventing automatic expiration of the Leases. Continental's argument fails as a matter of law.

(Case 20190063, May 30, 2019, Appellants' Reply Brief, ¶ 1).

[¶15] While the Nelsons' position that production during the primary term was required to prevent automatic expiration of the Leases has remained constant, Continental's position on this issue has continued to evolve. Continental originally argued that additional time under Paragraph 12 (the force majeure clause) alone would be sufficient to allow it to extend the Leases into the secondary term, yet Continental now seeks an additional ruling in its favor under Paragraph 4 that, as discussed above, would

be directly contrary to this Court's previous ruling in this matter and could have been raised by Continental at that time.

CONCLUSION

[¶16] Extending the primary term for the maximum legal time period available of 334 days – the date of assignment, September 1, 2014, through the end of the force majeure event, August 1, 2015 – extends 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. Therefore, Nelsons are entitled to a declaratory judgment that the Leases automatically expired on June 30, 2016.

DATED this 5th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

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' Reply Brief, hereby certifies, in compliance with Rule 28 of the North Dakota Rules of Appellate Procedure, that the Appellants' Reply Brief is 10 pages in length.

Dated this 5th day of April, 2021.

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STATE OF COLORADO)
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COUNTY OF MESA)

I hereby certify that on April 5, 2021, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

Appellant's Reply Brief

and served the same electronically as follows:

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