20130375
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 8, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Greggory G. Tank, Plaintiff/Appellee, v. Citation Oil & Gas Corp., Citation 2004 Investment Limited Partnership, Northern Oil and Gas, Inc., Otter Creek, LLC, G.G. Rose, LLC, Ralph Cuellar and Sylvia Cuellar, DJB Investment Company, LLC, Kevin P. Doyle, Cyan Brakhage, Barbara Boaz, Margaret Sumter, Petro-Hunt, L.L.C., Pillar Energy, LLC, Sasrana Oil and Gas, Howard Gray, Linda Goldner, Scot Farber, Paladin, Inc., Thomas Family Limited Partnership, BB Management, LLC, Magic Merlin Energy Investments, LLC, Blue Ridge Energy, LLC, BF Energy, LLC, M Code, LLC, J and J Energy, LLC, Jim Whitehead Oil & Gas, LLC, and other persons/companies "John Doe" whose interest does not appear of record, Defendants, Citation Oil & Gas Corp., Citation 2004 Investment Limited Partnership, Northern Oil and Gas, Inc., Otter Creek, LLC, G.G. Rose, LLC, Ralph Cuellar and Sylvia Cuellar, DJB Investment Company, LLC, Kevin P. Doyle, Cyan Brakhage, Barbara Boaz, Margaret Sumter, Sasrana Oil and Gas, Howard Gray, Linda Goldner, Scot Farber, Paladin, Inc., Thomas Family Limited Partnership, BB Management, LLC, Magic Merlin Energy Investments, LLC, Blue Ridge Energy, LLC, BF Energy, LLC, M Code, LLC, J and J Energy, LLC, Jim Whitehead Oil & Gas, LLC, Petro-Hunt, L.L.C. and Pillar Energy, LLC, Appellants.	)	Supreme Court No. 20130375

Appeal from Order Denying Motions for Summary Judgment entered
on April 17, 2013 and Judgment entered on September 19, 2013
Civil No. 27-2011-CV-00154
County of McKenzie, Northwest Judicial District
Honorable Joshua B. Rustad, Presiding

PETITION FOR REHEARING OF DEFENDANTS/APPELLANTS CITATION OIL & GAS CORP., ET AL.

FREDRIKSON & BYRON, P.A.
Lawrence Bender, ND Bar #03908
Amy L. De Kok, ND Bar #06973
Jillian Rupnow, ND Bar #06937
200 North 3rd Street, Suite 150
P. O. Box 1855
Bismarck, ND 58502-1855
Phone: (701) 221-4020
lbender@fredlaw.com
adekok@fredlaw.com
jrupnow@fredlaw.com
Attorneys for Defendants/Appellants Citation Oil & Gas Corp., et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

STATE STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES

I. Whether the Court incorrectly held the interpretation proffered by Citation, *et al*. rendered the Pugh clause meaningless.

II. Whether the Court relied upon the wrong definition in interpreting the term "undeveloped" in the Pugh clause.

III. Whether the Court's interpretation of the Pugh clause creates an absurdity.

STATEMENT OF CASE

[¶ 1] The procedural history of this case can be found in the briefs of the parties and the Court's opinion in *Gregory G. Tank v. Citation Oil & Gas Corp., et al.*, 2014 ND 123, -- N.W.2d --. Appellants Citation Oil & Gas Corp., Citation 2004 Investment Limited Partnership, Northern Oil and Gas, Inc., Otter Creek, LLC, G.G. Rose, LLC, DJB Investment Company, LLC, Kevin P. Doyle, Cyan Brakhage, Barbara Boaz, Sasrana Oil and Gas, Howard Gray, Linda Goldner, Scot Farber, Paladin, Inc., BB Management, LLC, Magic Merlin Energy Investments, LLC, Blue Ridge Energy, LLC, BF Energy, LLC, M Code, LLC, J and J Energy, LLC, and Jim Whitehead Oil & Gas, LLC (hereinafter collectively referred to as, "Citation, *et al*.") respectfully submit the Court has overlooked or misapprehended the law and facts in the case in three respects. First, the Court incorrectly held the interpretation proffered by Citation, *et al*. rendered the Pugh clause meaningless. Second, the Court relied upon the wrong definition in interpreting the term "undeveloped" in the Pugh clause. Finally, the Court's interpretation of the Pugh clause creates an absurdity.

STATEMENT OF FACTS

[¶ 2] The facts of this case are stated in this Court's Opinion, as well as the parties' briefs.

LAW AND ARGUMENT

I. The Interpretation of Citation, *et al*. Does Not Render the Pugh Clause Meaningless.

[¶ 3] The Court concluded the interpretation proffered by Citation, *et al*. rendered the Pugh clause meaningless. *See* Opinion, ¶ 28. This conclusion is erroneous. The first sentence of the Pugh clause provides as follows:

> Notwithstanding anything in this lease contained to the contrary, if, at the end of the one year period from the end of the primary term hereof, this lease is maintained in full force and effect by virtue of production of oil and/or gas, this lease shall nevertheless expire as to all that part of said lands not included in a producing unit unless operations for the drilling of a well have been conducted during such one-year period.

(App. 21) In July 1989, at the end of the primary term of the Subject Lease, the NW/4 contained a producing well—the Tank 3-10 well. (App. 24) At the same time, the SW/4 contained a producing well—the Tank 13-10 well. (App. 26–36) Pursuant to the first sentence of the Pugh clause, the Subject Lease was extended into the secondary term as to the NW/4 and the SW/4. At the end of the primary term, the SE/4 did not contain any producing wells and was not included within a producing unit. (App. 12) Further, Citation did not conduct any operations for the drilling of a well on said lands during the one year period following the expiration of the primary term (July 1989 – July 1990). (*Id.*) Accordingly, the Subject Lease covering the SE/4, which constituted one-third of the acreage covered by the Subject Lease, expired by virtue of the first sentence of the Pugh clause. The Pugh clause, therefore, functioned as it was designed and caused the Subject Lease to expire as to the SE/4.

[¶ 4] The second and third sentences of the Pugh clause provide as follows:

> Lessee may continue to hold this lease in full force and effect as to all of said lands for subsequent and successive periods of one year by conducing [sic] additional drilling operations on undeveloped portions of said lands during each preceding one-year period. Should Lessee fail to conduct drilling operations during each preceding one-year period, then this lease shall expire as to said lands not included in producing units at the end of the one-year period during which no drilling operations were conducted.

(App. 21) (emphasis added). Under the facts in this case, this language did not come into play because the NW/4 and the SW/4 each contained a producing well prior to the expiration of the primary term in July 1989 and Citation did not conduct any further operations to drill a well in the SE/4 during the one year period following the end of the primary term (July 1989 – July 1990). The Subject Lease thereby expired as to the SE/4 at the end of said one-year period.

[¶ 5] The Pugh clause could, however, have had application beyond the one year period following the end of the primary term under other conditions or factual situations. Citation, *et al.* did not argue to the contrary. For example, assume *arguendo* that, at the end of the primary term of the Subject Lease (July 1989), the necessary condition in first sentence of the Pugh clause—"this lease is maintained in full force and effect by virtue of production of oil and/or gas"—was satisfied by the drilling and production of a well in the NW/4. Such drilling and production would have resulted in the Subject Lease being in full force and effect for a period of one year (July 1989 – July 1990). If operations to drill a well were conducted on either the SW/4 or the SE/4 within one year after the expiration of the primary term, the Subject Lease would continue to be effective as to all lands covered by the Subject Lease for at least another year. If, however, no such operations to drill a well were conducted on either the SW/4 or the SE/4, the Subject

Lease would terminate as to the SW/4 and SE/4 pursuant to the Pugh clause. If Citation had conducted operations to drill a well in the SW/4 during the one year period following the primary term (July 1989 – July 1990), the entire Subject Lease would remain in effect for one more year (July 1990 – July 1991). If Citation had then conducted operations to drill a well on the SE/4 between July 1990 and July 1991, the Subject Lease would have been extended for another year (July 1991 – July 1992). If no drilling operations had been conducted between July 1991 and July 1992, the Subject Lease would, however, have expired as to all lands not contained in a producing unit at that time.

[¶ 6] Accordingly, the interpretation proffered by Citation, *et al*. does not render the Pugh clause meaningless.

II. The Court's Interpretation of the Pugh Clause Creates an Absurdity.

[¶ 7] The Court's interpretation of the Pugh clause, particularly in light of its definition of the term "undeveloped," creates an absurdity. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. "The words of a contract are to be understood in their ordinary and popular sense. . .unless a special meaning is given to them by usage, in which case the latter must be followed." N.D.C.C. § 9-07-09.

[¶ 8] The Court correctly notes the term "undeveloped" is not defined in the Subject Lease. *See* Opinion, ¶ 18. The Court looked to the oft-cited Williams & Meyers treatise for the industry definition of the term "developed." *Id*. The Court, however, relied upon the definition of the phrase "developed unit" as opposed to the definition of the term "develop." As used in the oil and gas industry, the phrase "developed unit" has a separate and distinct usage and meaning than the term "develop." The term "develop" is defined as "any step taken in the search for, capture, production and marketing of

hydrocarbons." *See* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law Manual of Terms*, 258 (2013). The term "undeveloped," therefore, means no steps have been taken in the search for, capture, production or marketing of oil or gas. This is important because the Court's definition of the term "undeveloped" is the lynchpin of its ultimate determination that the Subject Lease expired as to the SW/4 by operation of the Pugh clause.

[¶ 9] Based on the definition of "undeveloped," the Court determined the SW/4 became "undeveloped" in October 2008 after the Tank 13-10 well ceased to produce in paying quantities. *See* Opinion, ¶ 25. Setting aside the sufficiency of the Court's definition of "undeveloped," there is nothing in the record indicating the Tank 13-10 well was no longer ***capable*** of producing oil or gas in paying quantities. The record reflects the Tank 13-10 well ceased continuous production in October 2008 as a result of mechanical failures. (App. 221-222) The record further reflects that due to sharply rising oil prices and high costs associated with operating the well, it was not reasonable or prudent for Citation to continue operating the well at that time. (*Id.*) Thus, although the Tank 13-10 well was no longer producing in paying quantities, there is no evidence in the record the Tank 13-10 was incapable of producing oil or gas in paying quantities.

[¶ 10] Second, there is no evidence in the record that following the cessation of production in paying quantities from the Tank 13-10 well, the SW/4 was no longer included within a producing unit. The Court correctly notes the Subject Lease defines "producing unit" as "[t]he number of acres in the drilling and spacing unit allocated to each producing well as determined by the appropriate governing body of the State of North Dakota." (App. 21) The spacing unit for the Tank 13-10 well is the SW/4 of

Section 10 as established by the North Dakota Industrial Commission. (App. 12, 26) Even though the Tank 13-10 well stopping producing in paying quantities in October 2008, the SW/4 constitutes to this day the spacing unit for the well. The Court, therefore, incorrectly held the SW/4 was no longer included within a producing unit as defined by the Subject Lease.

[¶ 11] Finally, the Court's definition of the term "undeveloped" and its interpretation of the second and third sentences of the Pugh clause create an absurdity. The second and third sentences of the Pugh clause provide as follows:

> Lessee may continue to hold this lease in full force and effect as to all of said lands for subsequent and successive periods of one year by conducing [sic] additional drilling operations on undeveloped portions of said lands during each **preceding** one-year period. Should Lessee fail to conduct drilling operations during each **preceding** one-year period, then this lease shall expire as to said lands not included in producing units at the end of the one-year period during which no drilling operations were conducted.

(App. 21) (emphasis added). Accepting the Court's definition of the term "undeveloped," Citation would have had to conduct operations to drill a new well on the SW/4 in the preceding year in order to maintain the Subject Lease as to said lands. It is absurd to require drilling operations in the year preceding the date the well stopped producing to prevent the Subject Lease from terminating. An operator cannot always predict when a well may cease producing. The Court avoided this absurdity by substituting the word "proceeding" for "preceding" and holding that Citation had to drill a new well between October 2008 and July 15, 2009 or lose the SW/4. The Pugh clause clearly states operations must be conducted in the *preceding* year. Under the Court's interpretation, if the Tank 13-10 well had ceased to produce on July 14, 2009, Citation would have had only twenty-four hours to commence operations or lose the Subject

Lease as to the SW/4 on July 15, 2009. Such an interpretation of the Pugh clause is an absurdity and is in violation of Section 9-07-02 of the North Dakota Century Code.

CONCLUSION

[¶ 12] Citation, *et al.* respectfully request the Court grant this Petition for Rehearing.

DATED this 8th day of July, 2014.

FREDRIKSON & BYRON, P.A.

By */s/ Amy L. De Kok*

Lawrence Bender, ND Bar #03908
Amy L. De Kok, ND Bar #06973
Jillian Rupnow, ND Bar #06937
200 North 3rd Street, Suite 150
P. O. Box 1855
Bismarck, ND 58502-1855
Phone: (701) 221-4020
lbender@fredlaw.com
adekok@fredlaw.com
jrupnow@fredlaw.com

Attorneys for Defendants/Appellants Citation Oil & Gas Corp., et al.

ADDENDUM

9-07-02. Language of contract governs if clear.

The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.

9-07-09. Words to be interpreted in ordinary sense.

The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Greggory G. Tank, Plaintiff/Appellee, v. Citation Oil & Gas Corp., Citation 2004 Investment Limited Partnership, Northern Oil and Gas, Inc., Otter Creek, LLC, G.G. Rose, LLC, Ralph Cuellar and Sylvia Cuellar, DJB Investment Company, LLC, Kevin P. Doyle, Cyan Brakhage, Barbara Boaz, Margaret Sumter, Petro-Hunt, L.L.C., Pillar Energy, LLC, Sasrana Oil and Gas, Howard Gray, Linda Goldner, Scot Farber, Paladin, Inc., Thomas Family Limited Partnership, BB Management, LLC, Magic Merlin Energy Investments, LLC, Blue Ridge Energy, LLC, BF Energy, LLC, M Code, LLC, J and J Energy, LLC, Jim Whitehead Oil & Gas, LLC, and other persons/companies "John Doe" whose interest does not appear of record, Defendants, Citation Oil & Gas Corp., Citation 2004 Investment Limited Partnership, Northern Oil and Gas, Inc., Otter Creek, LLC, G.G. Rose, LLC, Ralph Cuellar and Sylvia Cuellar, DJB Investment Company, LLC, Kevin P. Doyle, Cyan Brakhage, Barbara Boaz, Margaret Sumter, Sasrana Oil and Gas, Howard Gray, Linda Goldner, Scot Farber, Paladin, Inc., Thomas Family Limited Partnership, BB Management, LLC, Magic Merlin Energy Investments, LLC, Blue Ridge Energy, LLC, BF Energy, LLC, M Code, LLC, J and J Energy, LLC, Jim Whitehead Oil & Gas, LLC, Petro-Hunt, L.L.C. and Pillar Energy, LLC, Appellants.	Supreme Court No. 20130375 **CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on July 8, 2014, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

PETITION FOR REHEARING OF DEFENDANTS/APPELLANTS CITATION OIL & GAS CORP., ET AL.

and served the same electronically as follows:

Dennis Edward Johnson
Ariston E. Johnson
JOHNSON & SUNDEEN
dennis@dakotalawdogs.com
ari@dakotalawdogs.com

John W. Morrison, Jr.
Paul J. Forster
CROWLEY FLECK, PLLP
jmorrison@crowleyfleck.com
pforster@crowleyfleck.com

/s/ Amy L. De Kok
AMY L. DE KOK

50891099_7.docx