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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001851-MR

HOLLY CREEK PRODUCTION CORP. APPELLANT

v. APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 07-CI-00191

DOWIE BANKS AND
MARTHA BANKS APPELLEES

OPINION
AFFIRMING IN PART AND
VACATING IN PART

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Despite provisions in the rules of civil procedure allowing for the liberal amendment of pleadings, Kentucky Rules of Civil

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Procedure (CR) 5.01 requires that parties in default be given notice and served with summons or warning order when "new or additional claims for relief [are asserted] against them." The question before the court in this case is whether the complaint filed by Appellees and upon which a default judgment was entered against Appellant was sufficiently broad to support additional claims for nonpayment of royalties and punitive damages, without additional process.

In October 2007, Appellees filed a complaint in the Wolfe Circuit Court against Appellant for nonpayment of oil and gas royalties and possible lease termination. They claimed that no royalty payments had been made since September 19, 2005, pursuant to Appellant's long-term oil and gas lease on property owned by Appellees. Process was issued and served upon Appellant, but no answer or any response was made other than a telephone call from Appellant's president to Appellees' attorney to advise that money was unavailable at that time to pay the royalties due. Several months later an interlocutory default judgment was entered and a hearing on damages was set for August 19, 2008. After receiving the default judgment, but before the hearing, Appellant paid Appellees $6,879.37 as royalties for the years 2005 through 2007.

At the August 19, 2008, hearing on damages at which Appellant did not appear, Appellee, Dowie Banks, acknowledged the recent payment, but also claimed there were unpaid royalties going back to 1994 through 1998. After this evidence was allowed, Appellees orally moved to amend their complaint to include an additional royalty claim for $8,600 and a claim for punitive damages. The trial

court granted the motions to amend and thereafter entered judgment awarding Appellees $8,600 as royalties for 1994 through 1998 and the additional sum of $25,800 in punitive damages for a total of $34,400 in compensatory and punitive damages. In its final judgment and order, the trial court noted that $6,879.37 had been paid for the 2005 through 2007 period and the judgment was for only 1994 through 1998. The lease was ordered terminated.

At the outset, we recognize that Appellant was in default for failure to appear and that the next proper step was to determine damages pursuant to CR 55.01. We also recognize that CR 15 authorizes the amendment of pleadings in various circumstances and that CR 15.01 provides that leave to amend "shall be freely given when justice so requires." Thus, the amendment of pleadings is not disfavored; rather, it is encouraged in pursuit of the goals of the rules of civil procedure, provided other parties are not unfairly prejudiced and due process of law is observed.

The essential elements of due process of law are notice and opportunity to be heard. *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006).

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed.2d 865 (1950). In painstaking detail, the rules of civil procedure

describe the processes by which parties to civil actions shall be given notice and provided an opportunity to be heard. It is fundamental that no judgment shall be entered against a party unless that party has been given a full measure of due process of law. To guarantee this principle, CR 5.01 provides that even parties who are in default and whose rights are thereby diminished are not subject to liability for damage claims unless their due process rights are fully observed. CR 5.01 provides, in part, "[p]arties so in default shall be given notice of pleadings asserting new or additional claims for relief against them by summons or warning order issued thereon as provided in Rule 4." This Court has held that "a default judgment is void if entered on an amended complaint which asserts new or additional claims and no summons has been served on the amended complaint." *Roadrunner Mining, Engineering & Development Co., Inc. v. Bank Josephine*, 548 S.W.2d 153, 154 (Ky. App. 1977).

To determine whether the trial court's final judgment was within the reasonable scope of the complaint filed by Appellees, we must examine the complaint in detail. The complaint consists of six numbered paragraphs and the *ad damnum* clause likewise consists of six paragraphs. The first three paragraphs of the complaint merely identify the parties and Appellant's agent for service of process. Paragraph four alleges that two oil and gas leases were entered into on April 15, 1969; that the leases covered two parcels of Wolfe County property owned by Appellees; and it sets forth the fee schedule for royalty payments. Paragraph five states that "the defendant [Appellant herein] did pay the payments

according to a schedule, annual payments with the last payment being made in the amount of $1,473.15 on September 19, 2005." Paragraph six alleges that Appellants continued to remove gas from the property since September 19, 2005, but that no payments had been received after that date and that, as a result of Appellant's failure to pay, Appellees suffered damages in an amount exceeding the jurisdictional threshold of the court.

The *ad damnum* clause contains a demand for judgment in a sum exceeding the jurisdictional threshold of the court. It also demands "[t]hat the Defendants be required to present an accounting to the Plaintiffs for all gas removed from the well;" [t]hat the lease with the Defendant be followed correctly or be terminated, and that if the lease is terminated, that the wells be properly capped and environmental problems properly cured.

The only reasonable construction of the complaint is that damages are claimed for a period beginning on September 19, 2005. No reasonable person reading paragraphs five and six could reach a different conclusion. Indeed, Appellees do not argue that the six numbered paragraphs of the complaint seek damages for any period other than September 19, 2005, forward. Their only contention with respect to an earlier period is that they sought an accounting in the *ad damnum* clause and point out that the accounting prayer was not limited to a specific period of time.

This is not enough to support the additional compensatory and punitive damages claims, particularly in view of the admonition of CR 8.06 that

"All pleadings shall be so construed to do substantial justice." For the final judgment of the trial court to have been proper, one would have to construe the demand for an accounting in the *ad damnum* clause as sufficiently broad to support a judgment for $8,600 in compensatory damages for a term pre-dating any date identified in the complaint; and a $25,800 punitive damage judgment when there is not even a hint that punitive damages were sought or justified. No such construction would be reasonable and these damages awards must be vacated.

Finally, we must determine whether termination of the oil and gas lease as ordered by the trial court was proper. As stated hereinabove, the complaint alleged the existence of an oil and gas lease and demanded that it be followed correctly or terminated.

The Kentucky Rules of Civil Procedure embrace the concept of notice pleading. CR 8.01. This concept is well expressed in *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968).

> Since the adoption of the civil rules liberality and simplicity in pleadings is the style in Kentucky. *Johnson v. Coleman*, Ky., 288 S.W.2d 348 (1956). Only a concise statement of facts is required (CR 8.01) because the "complaint need only give fair notice of a cause of action and the relief sought." *Security Trust Co. v. Dabney*, Ky., 372 S.W.2d 401 (1963); 6 Kentucky Practice, Clay, 128.

And, in *Pierson Trapp Co. v. Peak*, 340 S.W.2d 456, 460 (1960), the Court said,

> Under the theory of "notice" pleading adopted by the Civil Rules a complaint will not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff would not be entitled to relief under any state

> of facts which could be proved in support of his claim. *Spencer v. Woods*, Ky., 282 S.W.2d 851; Clay, CR 12.02. It is immaterial whether the complaint states "conclusions" or "facts" as long as fair notice is given.

Applying the liberal pleading standards of CR 8.01, we have no doubt that Appellees' assertion of the existence of an oil and gas lease and their demand that it be followed correctly or terminated was sufficient notice to Appellants that the viability of the lease was in controversy. Nevertheless, despite being served with legal process in which possible lease termination was placed in issue, Appellants defaulted and remained in default for many months and until after entry of the trial court's final judgment. Evidence presented at the CR 55.01 hearing on damages and other relief was sufficient to justify the trial court's determination that the lease between the parties should be terminated.

Accordingly, the trial court's termination of the oil and gas lease between the parties is affirmed. With respect to all sums in damages, compensatory and punitive, the trial court's judgment is void; and it is therefore vacated.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Frank C. Medaris, Jr. Hazard, Kentucky	Patrick E. O'Neill Jackson, Kentucky