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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000873-MR

DANNY POTTER — APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 11-CI-00567

BLUE FLAME ENERGY CORPORATION;
EQT PRODUCTION COMPANY;
JAMES SIDNEY JOHNSON;
AND LINDA (JOHNSON) WILEY — APPELLEES

AND NO. 2015-CA-000874-MR

JAMES SIDNEY JOHNSON; AND
LINDA (JOHNSON) WILEY — APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 11-CI-00567

BLUE FLAME ENERGY CORPORATION;
AND EQT PRODUCTION COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Danny Potter brings Appeal No. 2015-CA-000873-MR and James Sidney Johnson and Linda (Johnson) Wiley bring Appeal No. 2015-CA-000874 from a March 13, 2015, Summary Judgment of the Pike Circuit Court concluding that they did not possess any ownership interest in the mineral estate of certain real property. We reverse and remand.

The present controversy surrounds ownership of the oil and gas estates in two tracts of real property located in Pike County, Kentucky. Believing that it had acquired the mineral estate in the real property at issue, EQT Production Company entered into a Farmout Agreement with Blue Flame Energy Corporation. Under the Farmout Agreement, Blue Flame eventually drilled four oil and gas wells upon the disputed real property in 2002.

Some nine years later, in 2011, Danny Potter, James Sidney Johnson and Linda (Johnson) Wiley (collectively referred to as appellants) filed a complaint and cross-claim against EQT and Blue Flame.[1] Appellants asserted that EQT did not own the oil and gas estates in the disputed real property. Rather, appellants contended that they each owned an undivided interest in the oil and gas estates, as

[1] Danny Potter initially filed a complaint and named James Sidney Johnson and Linda (Johnson) Wiley as defendants. Johnson and Wiley then answered and filed a cross-claim against Blue Flame Energy Corporation and EQT Production Company.

well as the surface estate. Appellants raised myriad claims based upon their ownership of the oil and gas and sought damages against both EQT and Blue Flame. EQT and Blue Flame filed answers that denied appellants' claims and raised various affirmative defenses. EQT specifically maintained that it owned the entire mineral estate in the disputed real property and properly contracted with Blue Flame to extract oil and gas thereupon.

By Stipulations filed April 25, 2013, all parties conceded that their respective interests in the real property were dependent upon the circuit court's interpretation of an August 12, 1918, deed from Consolidation Coal Company to Richard and Winnie Potter recorded at Book 94, Page 215, in the Pike County Clerk's Office. The Potters are appellants' predecessors in title, and appellants solely derive their interests in the real property from them.[2] The Stipulations provided in part:

> If the Deed recorded at Book 94, Page 215, [1918 deed] in the Office of the Pike County Clerk, is adjudged not to convey the oil and gas estates to the grantees, then the oil and gas estates at issue in this litigation are owned by EQT Production Company.

The parties filed motions for summary judgment concerning the proper interpretation of the 1918 deed. Appellants maintained that Consolidation Coal did not except the oil and gas estates but rather conveyed same to the Potters under the 1918 deed. Conversely, appellees argued that Consolidation Coal only

[2] Consolidation Coal Company is a common-grantor to both appellants and appellees. Consolidation Coal conveyed mineral estates in various tracts of land to R.J. Graf by deed dated August 12, 1926. R.J. Graf is a predecessor in title to EQT Production Company.

conveyed the "surface" estate to the Potters and excepted the whole of the mineral estate, including oil and gas.

By a March 13, 2015, summary judgment, the circuit court determined that the 1918 deed merely conveyed the surface estate to the Potters and that Consolidation Coal reserved the entire mineral estate:

> The language contained in the deed at issue clearly conveyed only the surface to Plaintiffs' predecessor in title. Kentucky and especially eastern Kentucky has had a long history that predated this 1918 deed involving the deeds that sever the surface from one or minerals. In this case, the deed the granting language conveyed the surface only. This is an unambiguous term which meaning would not have been lost on the parties to the deed. Its meaning is not expanded to other minerals just because there is a specific reservation of coal and mining rights.
>
> The Plaintiffs argue that the reservation by the grantor of the coal and mining rights without reference to retention of the oil and gas and other minerals constitutes an ambiguity with the Court should employ to hold that the oil and gas was conveyed to their predecessor, Richard and Winnie Potter. That argument fails simply because the deed makes it clear that the grantor intended to convey and the grantees receive only the surface estate and nothing more.

These appeals follow.

Appellants contend that the circuit court erred in its interpretation of the 1918 deed. Appellants maintain that Consolidation Coal only intended to reserve the ownership of the coal from the conveyance and otherwise did not sever the remaining mineral estate from the conveyance, including oil and gas. Consequently, appellants believe that the Potters obtained the surface estate and all

of the mineral estate except the reserved coal through the 1918 deed. For the following reasons, we agree.

It is well-established that interpretation of a deed presents an issue of law for the court, and our review proceeds *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524 (Ky. App. 2003); *Smith v. Vest*, 265 S.W.3d 246 (Ky. 2007). When interpreting a deed, the intention of the parties is paramount and should be gleaned from the four-corners of the instrument. *Kentucky-West Virginia Gas Co. v. Browning*, 521 S.W.2d 516 (Ky. 1975). And, any ambiguity in a deed should be interpreted against the grantor and "in favor of passing a complete title." *Gabbard v. Short*, 351 S.W.2d 510, 511 (Ky. 1961); *Childers v. Welch*, 304 Ky. 700, 202 S.W.2d 169 (Ky. 1947); *Williams v. Williams*, 259 S.W.2d 53 (Ky. 1953).

The 1918 deed provides, in relevant part:

> WITNESSETH: That for and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration cash in hand, paid by parties of the second part to party of the first part, receipt whereof is hereby acknowledged, and consideration of the benefits accruing and to accrue to each of the parties hereto by the execution of this instrument, the said party of the first part (subject to the exceptions and reservations hereinafter contained) doth hereby bargain, sell, grant and convey unto the said Richard Potter, his heirs and assigns, the surface of that certain tract or parcel of land lying and being in the County of Pike, State of Kentucky on the waters of Mountain Branch of Elkhorn Creek and more particularly bounded and described as follows, to-wit:
>
> . . . .

> Being a portion of the same land embraced by the Corley, Smith & Company survey of 8986 acres, dated July 15th 1870 and a portion of the same land described in deed from Northern Coal & Coke Company to The Consolidation Coal Company, dated November 28th 1910, recorded in Deed Book No. 59 page 143 Pike County Court Clerk's Office. The surface tract herein conveyed, being portions of two tracts designated and referenced to in said deed thus: "Nona C. Bowles Tract No. 707" and "C.C. Bowles Tract No. 954."
>
> NEVERTHELESS EXCEPTING AND RESERVING all the coal in, on and underlying the hereinbefore described tract or parcel of land, together with all the customary and usual mining rights and privileges for the removal of same from said land, as well as for the removal of the coal through said land from adjoining and neighboring lands, to market, and without being liable for any damage that might be caused to the surface of said land or to anything therein or thereon by reason of the mining and removal of the said coal.
>
> . . . .
>
> TO HAVE AND TO HOLD the said surface land with all privileges and appurtenances thereunto belonging or in anywise appertaining (but subject to the exceptions and reservations hereinbefore contained) unto the said Richard Potter, his heirs and assigns forever, with covenants of Special Warranty.

Under the above provisions of the 1918 deed, Consolidation Coal conveyed "the surface of that certain tract or parcel of land lying and being in the County of Pike"; and thereafter specifically excepted from the conveyance "all the coal in, on and underlying the hereinbefore described tract or parcel of land, together with all customary and usual mining rights and privileges for the removal of same." It is certainly apparent that the 1918 deed begins by reciting that

Consolidation Coal conveys the surface of certain real property to the Potters. However, the term "surface" is innately ambiguous, and its precise meaning in the 1918 deed must be gleaned by reference to the whole of the deed, particularly the exception created thereunder.[3] *See* 1 Short & Thomas, *Kentucky Mineral Law* § 37.02 (1986).

Under the exception set forth in the 1918 deed, Consolidation Coal retained from the conveyance the coal estate and "usual mining rights . . . for removal of same." Here, the term "mining rights" was specifically limited to those mining rights usual and customary for the removal of coal. Thus, under the plain language of the exception, Consolidation Coal severed and retained the coal estate and nothing more. This is pivotal to the proper interpretation of the ambiguous term "surface," as found in the 1918 deed.

As noted by appellants, there has existed a long standing common law rule that the owner of the surface land also owned all beneath. *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.*, 171 U.S. 55 (1898). And, Kentucky has long recognized that an owner of land may convey the surface estate in fee simple and reserve the estate in the minerals. *Kincaid v. McGowan*, 88 Ky. 91, 4 S.W. 802 (Ky. 1887). The reservation or exception of a separate coal estate from the remaining minerals by deed is also permitted in Kentucky. *Id.* The Kentucky Supreme Court in addressing the rights of surface and mineral estate

[3] An exception in a conveyance of real property "withholds . . . some part or parcel of the thing which, but for the exception, would pass by the general description to the grantee." 4 *Tiffany Real Property* § 972 (3d ed. 2016).

owners recognized in *General Refractories Co. v. Swetman*, 303 Ky. 427, 197 S.W.2d 908 (1946) that absent the severance from the surface estate, the mineral estate remained with the surface owner. The Court stated:

> The owner of the surface of the land and the owner of the minerals when they are severed from the surface estate have separate and distinct titles. With the ownership of these separate estates go rights of use and enjoyment which are in a sense relative and which should be exercised by each owner with due regard to the rights of the other owner. So far as it is possible, these respective rights should be adjusted to each other, so as to conduce to the full enjoyment of the property. The surface owner may use and deal with his property in any legitimate manner not inconsistent with the rights acquired by the owner of the minerals[.]

Id. at 910 (emphasis added).

As Consolidation Coal solely retained the coal estate in its deed exception and not the entire mineral estate, with such exception being unambiguous, we believe that Consolidation Coal intended to convey the entirety of its remaining interests in the real property, including the remainder of the mineral estate, to the Potters. Simply stated, the 1918 deed merely effectuated a severance of the coal estate from the surface estate and not the oil and gas and other mineral estates thereunder. Our interpretation of the 1918 deed favors the grantee and comports with the intention of the parties as gleaned from the instrument as a whole. *See Browning*, 521 S.W.2d 516; *Gabbard*, 351 S.W.2d 510; *Childers*, 202 S.W.2d 169; *Williams*, 259 S.W.2d 53. Accordingly, we interpret the 1918 deed as conveying fee simple title in the surface and mineral

estate to the Potters, excepting only the coal estate therefrom. We, therefore, hold that the circuit court erroneously rendered summary judgment in favor of appellees.[4]

For the foregoing reasons, the summary judgment of the Pike Circuit Court in Appeal Nos. 2015-CA-000873-MR and 2015-CA-000874-MR is reversed and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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[4] Upon remand, the circuit court may address any affirmative defenses, equitable arguments, or other defenses raised by appellees below. Those issues were not before this Court in this appeal.

[5] By Order entered May 16, 2016, this Court granted the Motion of James Sidney Johnson and Linda (Johnson) Wiley to adopt the appellant's brief filed by Danny Potter.