

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. CLAUGUS)	
FAMILY FARM, L.P.,)	Case No. 2014-0423
)	
Relator,)	Original Action in Mandamus and
)	Prohibition
v.)	
)	
SEVENTH DISTRICT COURT OF APPEALS,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**RELATOR CLAUGUS FAMILY FARM, L.P.'S MEMORANDUM IN RESPONSE TO
RESPONDENTS' MOTION TO DISMISS**

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I. INTRODUCTION

The Claugus Family filed this suit to vindicate elementary and fundamental requirements of due process; namely, the right of interested parties to notice that a proceeding affecting their rights has been filed and an opportunity to present objections to the proposed resolution of that proceeding. In this case, four individuals filed a lawsuit against Beck Energy on September 14, 2011. Beck Energy later requested that the leases of approximately 700 landowners who were not parties to that lawsuit (and who were not provided notice of that lawsuit) be tolled for years past the expiration dates set forth in the leases. The Seventh District Court of Appeals granted that request, retroactively tolling hundreds of leases affecting thousands of acres without making any effort to inform the hundreds of affected landowners what it had done or that their property rights (worth hundreds of millions of dollars) would be negatively affected by the Court's order. The Seventh District now suggests that, if and when the affected property owners become aware of the Tolling Order, seeking to intervene in the Beck Energy litigation will provide them with an adequate remedy at law. It would perhaps provide the Seventh District with its just desserts if the 700 affected landowners did all move to intervene and deluged the Court with briefs explaining why its actions (while no doubt well intended) are nonetheless blatantly unconstitutional. That proposed course of action, however, does not constitute an adequate remedy at law under this Court's precedent. Thus, the motion to dismiss must be denied.

II. STATEMENT OF FACTS

On September 14, 2011, four individuals filed a lawsuit against Beck Energy contending the Form G&T (83) oil and gas leases they had signed with Beck Energy were void *ab initio*, because they constituted leases in perpetuity in violation of Ohio public policy. Complaint at ¶¶9, 11. On February 8, 2013, the Monroe County Court of Common Pleas certified a class

action under Civil Rule 23(B)(2), with the absent class members being 615 to 715 landowners across the State of Ohio who had signed Form G&T (83) oil and gas leases with Beck Energy Company. *Id.* at ¶16. According to the Court, in Monroe County alone, these leases cover approximately 32,280 acres. *Id.*

The Court had already determined on summary judgment (prior to certifying the class) that such Form G&T (83) leases were void *ab initio*. *Id.* at ¶11. Thus, the effect of granting class certification was to allow these landowners to sign new leases. *Id.* At current market rates, based upon the Court's estimate of the acreage involved, landowners in Monroe County alone would therefore receive over \$225 million in bonus money as a result of the ruling; they would also have the right to negotiate a royalty which exceeds the 12.5% landowner royalty provided by the Form G&T (83) lease. *Id.* at ¶16, 33; Relator's Exhibit 1. Despite the astronomical sums involved, the Common Pleas Court determined that the landowners were not entitled to notice of the lawsuit, presumably because holding the leases invalid would not *negatively* affect their property rights. *Id.* at ¶24.

At Beck Energy's request, the Common Pleas Court agreed to toll the leases of the named plaintiffs in the class action, but declined to toll "leases that may eventually be included in [the] class," i.e., the leases of absent class members. *Id.* at ¶22. On September 26, 2013, at Beck Energy's request, the Seventh District Court of Appeals expanded the lower court's very limited tolling order to include the leases of all proposed class members, despite the fact that the proposed class members had received no notice of the lawsuit or Beck Energy's various requests that their leases be tolled. *Id.* at ¶25. The Seventh District's Tolling Order retroactively tolled the leases as of October 1, 2012 (when Beck Energy had first requested that the leases of the *named plaintiffs* be tolled) until the conclusion of any appeals. *Id.* at ¶25. In doing so, the Appellate

Court revived a number of leases which had previously expired under their own terms, prevented other leases from expiring under their own terms, and negatively affected the property rights of hundreds of people without any notice whatsoever. *Id.* at ¶20.

The Claugus Family is one of the landowners negatively affected by the retroactive Tolling Order. It owns 60.181 acres in Monroe County subject to a Form G&T (83) lease, which was set to expire at midnight on February 3, 2014. *Id.* at ¶30. Anticipating that Beck Energy would not act to preserve the lease prior to the deadline by producing oil or gas in paying quantities, on September 30, 2013, the Claugus Family signed a new lease with Gulfport Energy, which would result in a bonus payment of \$7,000 per net mineral acre (a total of \$421,267) plus a royalty of 20% from any oil and gas ultimately produced. *Id.* at ¶¶32-33. Because neither the Common Pleas Court nor the Seventh District had deigned to provide notice of the proposed class action to the landowners, the Claugus Family was unaware of the Tolling Order at the time it signed this lease. Complaint Memorandum at 8. The Claugus Family subsequently brought this action in mandamus and prohibition after its Form G&T (83) lease with Beck Energy had expired based upon the terms of the lease.

III. ARGUMENT

A. Standard

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St. 3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶8. “In order for the moving party to prevail on such a motion, it must appear beyond doubt from the face of the complaint that the plaintiff can prove no set of facts entitling him to relief.” *Carr v. Toledo Police Patrolman's Ass'n*, 2008-Ohio-2213, ¶8 (6th Dist.). When considering a motion to

dismiss, a court must treat all of the factual allegations of the complaint as true, and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E.2d 753 (1988).

B. Respondents' Proposed Remedy is not Complete, Beneficial and Speedy

The sole basis for Respondents' motion to dismiss is that the Claugus Family had an alternative to filing an action in mandamus and prohibition. Namely, the Seventh District contends that, once the Claugus Family became aware of the Tolling Order extending its lease obligations, it should have filed to intervene in the Beck Energy case. This contention fails, however, because "[i]n order for an alternative remedy to constitute an adequate remedy at law, it must be complete, beneficial, and speedy." *State ex rel. Shemo v. Mayfield Hts.*, 93 Ohio St. 3d 1, 5, 752 N.E.2d 854 (2001).

If the alternative action would not provide a complete remedy, the right to intervene and appeal any resulting judgment does not constitute an adequate remedy in the ordinary course of law. *See State ex rel. Deiter v. McGuire*, 119 Ohio St. 3d 384, 2008-Ohio-4536, 894 N.E.2d 680, ¶20. There are times when relegating a relator to the appellate process simply does not afford the required speedy remedy. *Shemo*, 93 Ohio St. 3d at 5; *see also State ex rel. Smith v. Cuyahoga County Court of Common Pleas*, 106 Ohio St. 3d 151, 2005-Ohio-4103, 832 N.E.2d 1206, ¶20.

In this case, the ability to file a motion to intervene does not constitute an adequate remedy at law. First, the denial of any motion to intervene would not necessarily constitute a final appealable order. *See Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶1. Accordingly, the adjudication of the constitutional violations worked by the Tolling Order could become bogged down in the five appeals already filed by Beck

Energy, the first of which was filed on August 28, 2012, which would prevent a speedy remedy of those violations.

Further, even if the Claugus Family were allowed to intervene, this alone does not provide the Claugus Family with an adequate remedy at law. If the Claugus Family were allowed to intervene, it would then have to file a motion to modify or vacate the Tolling Order. As the history of this case demonstrates, Beck Energy intends to fight any effort to afford the affected landowners with due process of law because it would rather have the leases extended for years without the landowners' knowledge. Relator has been unable to locate any authority regarding whether the Seventh District's refusal to modify or vacate the Tolling Order would be subject to immediate appeal to this Court. Thus, the possibility exists that the Claugus Family would have to wait until the underlying appeal is resolved before a discretionary appeal can be filed with this Court. None of this suggests a speedy remedy.

More importantly, intervention will not provide the Claugus Family with a complete and beneficial remedy. The Claugus Family has until June 27, 2014, to clear title to its acreage in order to claim the bonus money and the royalty agreed to by Gulfport Energy. There is no guarantee that these favorable terms will be available from either Gulfport Energy or anyone else after that date. However, Beck Energy and the Seventh District are apparently not volunteering to write checks to the Claugus Family in the event the issues created by the unconstitutional Tolling Order have not been resolved by that date. For this single landowner, compensation could total \$421,267 in bonus money, plus millions in lost royalties—and the order in question affects approximately 700 other landowners. The Seventh District has chosen to alter the contractual rights of hundreds of landowners without providing those individuals with notice or an opportunity to be heard. Allowing them to intervene and seek to alter the offending order after

the fact, which could take years, is simply not adequate, complete, beneficial or speedy. Thus, the “remedy” proposed by the Seventh District actually compounds the constitutional violations which have occurred to date.

Finally, at its core, the Claugus Family’s argument is that the Seventh District lacks jurisdiction over it because the Claugus Family was not provided with notice of the action and the class was not properly certified under Civil Rule 23(B)(2). The United States Seventh Circuit Court of Appeals has previously noted that, where a class action was improperly certified, the absent class members were never actually before the courts. *See Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 550-52 (7th Cir. 2012). As nonparties who were never afforded notice or the opportunity to be heard, these proposed class members cannot be bound by any rulings of the courts in the “class action” because of a lack of jurisdiction and a lack of due process. *Id.* (holding absent members of a class were not bound by any orders issued in an improperly conducted class action). This Court has previously held that a determination by a body which lacks jurisdiction over the relator is not an adequate remedy at law, and a mandamus action is therefore proper. *See State ex rel. Minor v. Eschen*, 74 Ohio St. 3d 134, 137, 656 N.E.2d 940 (1995). Since the body lacks jurisdiction and any orders issued by it are void, those orders cannot possibly afford an adequate remedy at law. *Id.*

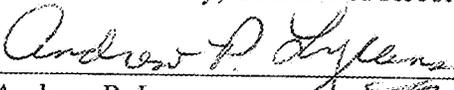
IV. CONCLUSION

The due process provisions of both the United States and Ohio Constitutions provide that the courts of this State must afford parties notice that an action has been filed and an opportunity to be heard before issuing orders which negatively affect the property rights of such parties. The Claugus Family did not (and does not) have an obligation to search out legal actions where its contractual lease rights might be affected and seek to intervene. Rather, it is the constitutional

duty of a court to ensure that parties who will be affected by the court's rulings are granted notice of the action and an opportunity to participate. Telling affected parties who happen to stumble upon covert court rulings that they can seek to intervene after the fact provides neither a complete nor a speedy remedy, and certainly not an adequate one. That is especially the case where the court lacks jurisdiction over the affected party and its orders affecting third parties are void. The motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the above *Relator Claugus Family Farm, L.P.'s Memorandum in Response to Respondents' Motion to Dismiss* to the following by regular U.S. Mail this 18th day of April, 2014:

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