Supreme Court of Ohio Clerk of Court - Filed January 14, 2015 - Case No. 2014-1933

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al.	)	
	)	Case No. 2014 - 1933
Plaintiffs-Appellants	)	
	)	
vs.	)	On Appeal from the Monroe County Court of Appeals
	)	
BECK ENERGY CORPORATION	)	
	)	Seventh Appellate District
Defendant-Appellee	)	
	)	Case Nos. 12 MO 6
and	)	13 MO 2
	)	13 MO 3
XTO ENERGY, INC.	)	13 MO 11
	)	
Proposed Intervenor-Appellee	)	

MOTION OF APPELLANTS CLYDE A HUPP, ET AL.
TO STRIKE, AND TO CORRECT THE RECORD

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MOTION

Appellants respectfully move the Court to correct misinformation contained in Appellee Beck Energy Corporation's (Beck's) "Memorandum in Response to Jurisdiction" by striking paragraph III.A.1. on page 12 therein. The grounds for this motion, set forth in the following Memorandum, are that Beck has misstated facts bearing on Appellants' challenge to the Court of Appeals' September 26, 2013 interlocutory tolling order, incorporated and merged into its September 26, 2014 opinion and judgment entry, tolling all class members' leases as of October 1, 2012, in order to manufacture an argument that Appellants waived their right to challenge tolling.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

In its opposition to this Court's jurisdiction herein, Beck asserts that Appellants waived their right to challenge the tolling of absent class members' leases:

Appellants waived any challenges concerning tolling because Appellants stated at pp. 1-2 of their Response to Beck Energy's Motion to Toll All Terms of the Oil and Gas Leases filed on October 9, 2012 that "[p]laintiffs concede to tolling, but only from the date of Beck's motion asking for equity." That date was October 1, 2012, which is the effective date of the court of appeals' tolling order. For this same reason, the Court

should also disregard Appellants' request to amend the tolling order to make it effective from June 13, 2013.

Memorandum in Response to Jurisdiction at 12.

On October 1, 2012, Beck moved the trial court to toll the named plaintiffs' leases only. No class had been certified at that time, and in this first request for tolling, Beck made no reference to the absent class members' leases. Appellants could not have waived the issue of tolling as to the absent class members when no such remedy was sought.

In their October 9, 2012 response to Beck's request that the named plaintiffs' leases be tolled, which Beck cites in support of its waiver argument, Appellants generally agreed that Beck may be entitled to equitable tolling as to the named plaintiffs, subject to three important caveats:

(1) Tolling should not commence until the date when Beck first moved to have the named plaintiffs' leases tolled; and

(2) Tolling should apply to the named plaintiffs only. No class members' leases could be tolled unless and until a class was certified. If certification was granted, then any request for tolling of class members' leases would have to be revisited; and

(3) Because tolling inherently presumes that the lessee is prevented from exercising its leasehold rights during the pendency of litigation, Beck should be barred from drilling on the named plaintiffs' property or including their properties in drilling units during said period.

Beck did not request in the trial court that all class members' leases be tolled until July 16, 2013, after summary judgment voiding the leases had been granted, after the

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class had finally been certified, and after all of Beck's appeals had been filed, thereby depriving the trial court of the ability to consider tolling in making its class certification decisions. Appellants promptly challenged Beck's motion on equitable grounds, inter alia, that tolling class members' leases "would work an undue hardship upon class members, and would contravene the fundamental principles of fairness and equity."

After the trial court in its August 2, 2013 Decision and Entry (Exhibit A) tolled only the named plaintiffs' leases, but declined to toll the leases of the absent class members, Beck on August 16, 2013, moved the Court of Appeals to toll the absent class members' leases by an "Emergency Motion for Injunctive Relief Pursuant to App.R. 7(A)." Again, Appellants opposed this tolling request, asserting that "[t]o indefinitely extend class members' leases without providing them any notice of this case would be antithetical to the notion that 'he who seeks equity must do equity.'" On September 26, 2013, the Court of Appeals tolled the absent class members' leases by an interlocutory judgment (Exhibit B), which was ultimately incorporated and merged into its September 26, 2014 opinion and final judgment entry.

At no time did Appellants agree to the tolling of absent class members' leases, especially in light of the fact that Beck had steadfastly opposed notifying those class members of the existence of this litigation, and had resisted discovery of the identities of those individuals even though that information was readily accessible to Beck. Beck's assertion that Appellants, on October 9, 2012, waived in the trial court the right to challenge the tolling of class members' leases, which was not sought until July 16, 2013, misrepresents irrefutable facts and should be stricken.

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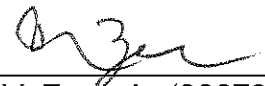
Accordingly, Appellants respectfully request that the Court correct the record by striking paragraph III.A.1. on page 12 of Beck's Memorandum in Response to Jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served by first-class U.S. mail on January 14, 2015, on all the following:

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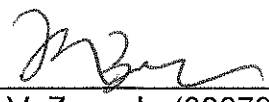

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