

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 |) | |

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

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REVISED 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. Pursuant to S.Ct.Prac.R. 3.13, Appellants are filing this Revised Motion for the sole purpose of attaching Exhibits A and B referenced herein which were inadvertently not attached to the original Motion. In all other respects, the Revised Motion is identical to the original Motion.

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 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.

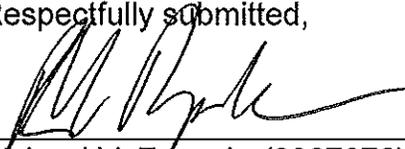
At no time did Appellants agree to the tolling of absent class members' leases, especially in light of the fact that Beck had steadfastly opposed notifying those class

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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.

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 15th, 2015, on all the following:

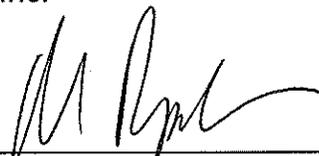
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COMMON PLEAS COURT
MONROE COUNTY, OHIO

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

2013 AUG -2 PM 1:58

BETH ANN ROSE
CLERK OF COURTS

Clyde A. Hupp, et al., :
 :
 Plaintiffs, : Case No.: 2011-345
 :
 -vs- : Judge Ed Lane
 : Sitting by Assignment
 Beck Energy Corporation, :
 :
 Defendant. : DECISION AND ENTRY

This matter is before this Court on the Motion of the Defendant, Beck Energy Corporation, to toll the operation of the original Plaintiff's leases pending this appeal. This motion was filed in this Court October 1, 2012, three months after this court's decision granting the Plaintiffs' Summary Judgment. That decision is currently on appeal. The Court of Appeals for Monroe County, Ohio, Seventh Judicial District, recently remanded the case for this Court to decide two very limited issues. This Court has now dealt with the issues presented on remand.

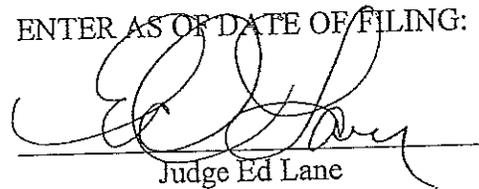
It is this Court's desire that all matters in controversy be presented to the Court of Appeals so that this case be processed as expeditiously as possible. The Plaintiffs note that this Court's failure to toll the provisions of these leases is one of the issues presented to the Court of Appeals by this Defendant.

The Defendant notes that the Monroe County Common Pleas Court has recently tolled lease provisions involving leases that may eventually be included in this class if the Plaintiffs prevail and this matter goes forward as a class action. This Court has recently granted a stay in this action, provided the Defendant posts an appellant bond.

This court believes the leases of the original Plaintiffs in this action should be tolled pending the Defendant's appeal. This is the relief previously requested by the Defendant and not decided by this court. This decision is in keeping with the current line of decisions of the Monroe County Common Pleas Court. If the Defendant desires to have this order expanded it can present that issue to the Court of Appeals.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED ACCORDINGLY.

ENTER AS OF DATE OF FILING:



Judge Ed Lane

c: Attorneys of record

NOTICE TO CLERK'S OFFICE
FINAL APPEALABLE ORDER

FILED

SEP 26 2013

SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
MONROE COUNTY) SS: SEVENTH DISTRICT
CLYDE A. HUPP, et al.,)
)
PLAINTIFFS-APPELLEES,) CASE NOS. 12 MO 6, 13 MO 3
) 13 MO 11
VS.)
)
BECK ENERGY CORPORATION,) JUDGMENT ENTRY
)
DEFENDANT-APPELLANT.)

This matter came on for hearing before this Court on September 23, 2013 on three pending motions: 1) Appellant Beck Energy Corporation's August 16, 2013 emergency motion for injunctive relief pursuant to App.R. 7; 2) Beck's August 30, 2013 emergency motion to set aside supersedeas bond; and 3) The Individual Landowners' September 12, 2013 motion to dismiss this appeal on the grounds of mootness.

On consideration of the parties' respective filings, the responses thereto and their arguments before this Court it is ORDERED:

1. The trial court's August 16, 2013 stay order is hereby modified and continued. The requirement of posting bond is hereby set aside; no bond is required. This stay of execution applies to the named plaintiffs and proposed defined class members for the following judgments: (1) the July 12, 2012 decision granting summary judgment in the Landowners' favor, including the journalization of the trial court's decision on July 31, 2012; (2) the trial court's February 8, 2013 judgment granting class certification; and (3) the trial court's June 10, 2013 judgment defining the class and finding Beck Energy's counterclaims moot and barred by res judicata.
2. The trial court's August 2, 2013, order tolling the lease terms as to the named plaintiffs only is hereby modified and continued. The lease terms are also tolled as to the proposed defined class members. The

EXHIBIT

B

tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

3. The Motion to Dismiss is denied.

Consistent with this Court's September 16, 2013 order setting a briefing schedule in these consolidated appeals, oral argument on the merits is tentatively set for November 20, 2013 before this Court.

All until further order of this Court.



JUDGE GENE DONOFRIO



JUDGE JOSEPH J. VUKOVICH



JUDGE MARY DeGENARO