

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Claugus Family Farm, L.P.,	)	Case No. 2014-0423
)	
	)	IN MANDAMUS AND PROHIBITION
Relator,)	
)	
v.)	
)	
Seventh District Court of Appeals, et al.,)	
)	
Respondents,)	
)	
and)	
)	
Clyde A. Hupp, et al.,	)	Case No. 2014-1933
)	
Plaintiffs/Appellants,	)	On Appeal from the Monroe County
	)	Court of Common Pleas, Seventh
v.	)	Appellate District
)	
Beck Energy Corporation,	)	Court of Appeals Case Nos. 12 MO 6
	)	13 MO 2
Defendant/Appellee.	)	13 MO 3
	)	13 MO 11

**RELATOR CLAUGUS FAMILY FARM, L.P.'S RESPONSE TO APPELLEE/
INTERVENING RESPONDENT BECK ENERGY CORPORATION'S MOTION
TO TOLL ALL TERMS OF THE OIL AND GAS LEASES AND APPELLEE XTO
ENERGY INC.'S MOTION FOR FURTHER TOLLING**

Daniel H. Plumly (S.Ct. #0016936)
(Counsel of Record)
Andrew P. Lycans (S.Ct. #0077230)
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street, P. O. Box 599
Wooster, OH 44691
(330) 264-4444; Fax No. (330) 263-9278
plumly@ccj.com; lycans@ccj.com

*Counsel for Relator The Claugus Family
Farm, LP*

Michael DeWine (S.Ct. #0009181)
Ohio Attorney General
Sara Pierce (S.Ct. #008799)
(Counsel of Record)
Tiffany Carwile (S.Ct. #0082522)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2862; Fax No. (614) 728-7592
sarah.pierce@ohioattorneygeneral.gov
tiffany.carwile@ohioattorneygeneral.gov

*Counsel for Respondents The Seventh
District Court of Appeals, et al.*

Richard V. Zurz, Jr. (S.Ct. #0007978)
(Counsel of Record)
Mark A. Ropchock (S.Ct. 0029823)
Slater & Zurz, LLP
One Cascade Plaza, Suite 2210
Akron, OH 44308-1135
(330) 762-0700; Fax No. (330) 762-3923
rzurz@slaterzurz.com;
mropchock@slaterzurz.com

James W. Peters (S.Ct. #0009360)
Peters Law Offices
107 West Court Street
Woodsfield, OH 43793
(740) 472-1681; Fax No. (740) 472-1718
judgejpl@scglobal.net

*Attorneys for Plaintiffs/Appellants
Clyde A. Hupp, et al.*

Scott M. Zurakowski (S.Ct. #0069040)
(Counsel of Record)
William G. Williams (S.Ct. #0013107)
Gregory W. Watts (S.Ct. #0082127)
Aletha M. Carver (S.Ct. #0059157)
Krugliak, Wilkins, Griffiths & Dougherty
Co., LPA
4775 Munson Street NW, P. O. Box 36963
Canton, OH 44735
(330) 497-0700; Fax No. (330) 497-4020
szurakowski@kwgd.com;
bwilliams@kwgd.com; gwatts@kwgd.com;
acarver@kwgd.com

*Attorneys for Defendant/Appellee/ Intervening
Respondent Beck Energy Corporation*

Clair E. Dickinson
(Counsel of Record)
Brouse McDowell
388 South Main Street, Suite 500
Akron, OH 4311

Kevin C. Abbott
Reed Smith LLP
Reed Smith Center
225 Fifth Avenue
Pittsburgh, PA 15222-2716

Attorneys for XTO Energy, Inc.

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Claugus Family Farm, L.P.,	)	Case No. 2014-0423
)	
Relator,	)	IN MANDAMUS AND PROHIBITION
)	
v.)	
)	
Seventh District Court of Appeals, et al.,)	
)	
Respondents,)	
)	
and)	
)	
Clyde A. Hupp, et al.,	)	Case No. 2014-1933
)	
Plaintiffs/Appellants,	)	On Appeal from the Monroe County
	)	Court of Common Pleas, Seventh
v.	)	Appellate District
)	
Beck Energy Corporation,	)	Court of Appeals Case Nos. 12 MO 6
	)	13 MO 2
Defendant/Appellee.	)	13 MO 3
	)	13 MO 11

**RELATOR CLAUGUS FAMILY FARM, L.P.’S RESPONSE TO APPELLEE/
INTERVENING RESPONDENT BECK ENERGY CORPORATION’S MOTION
TO TOLL ALL TERMS OF THE OIL AND GAS LEASES AND APPELLEE XTO
ENERGY INC.’S MOTION FOR FURTHER TOLLING**

Now comes Relator Claugus Family Farm, L.P, by and through its undersigned counsel, to respond to *Appellee/Intervening Respondent Beck Energy Corporation’s Motion to Toll All Terms of the Oil and Gas Leases* (hereinafter “Beck Energy Motion”) and *Appellee XTO Energy Inc.’s Motion for Further Tolling* (hereinafter “XTO Motion). For the reasons stated below, the motions as proposed should be denied.

I. FACTS

On September 14, 2011, four individuals filed suit against Beck Energy in the Monroe County Common Pleas Court. (Complaint, Stipulations at Exhibit 1.) The complaint alleged that the Form G&T (83) oil and gas leases the plaintiffs signed with Beck Energy are invalid. (*Id.*) On September 29, 2011, the complaint was amended to assert claims on behalf of a class of landowners who had signed Form G&T (83) oil and gas leases with Beck Energy, thereby potentially transforming the case of four individuals into a class action brought on behalf of hundreds of property owners. (First Amended Complaint, Stipulations at Exhibit 2.)

On July 12, 2012, the Common Pleas Court granted summary judgment to the named plaintiffs, holding that the Form G&T (83) leases signed by the named plaintiffs constituted leases in perpetuity in violation of Ohio public policy. (Entry Granting Summary Judgment, Stipulations at Exhibit 5.) On July 19, 2012, one week after obtaining summary judgment, the named plaintiffs filed a motion for class certification pursuant to Ohio Civil Rule 23(B)(2). (Motion for Class Certification, Stipulations at Exhibit 6.) On February 8, 2013, the Common Pleas Court granted class certification. (Entry Granting Class Certification, Stipulations at Exhibit 14.)

On October 1, 2012, Beck Energy filed its first motion to toll leases, which related to the named plaintiffs only, even though those plaintiffs had filed an amended class action complaint more than a year before the motion to toll was filed. (Motion to Toll Leases of Named Plaintiffs, Stipulations at Exhibit 12.) Over nine months later, on July 16, 2013, Beck Energy filed a second motion, asking the Common Pleas Court to toll the leases of all the proposed class members. (Motion to Toll Leases of Class Members, Stipulations at Exhibit 24.) On August 2, 2013, the Common Pleas Court filed an entry tolling the leases of only the named plaintiffs pending the

outcome of Beck Energy's appeals. (Entry Tolling Leases of Named Plaintiffs, Stipulations at Exhibit 27.)

On September 26, 2013, the Seventh District issued a Tolling Order, which modified the Common Pleas Court's tolling order of August 2, 2013, to include the leases of all proposed class members. (Tolling Order, Stipulations at Exhibit 33.) That Tolling Order led to the Original Action in Prohibition and Mandamus based upon the Seventh District's failure to afford the absent class members due process before awarding interim relief against them by tolling their leases without notice of such action.

II. XTO IS NOT AN APPELLEE AND SHOULD NOT BE PERMITTED TO FILE MOTIONS AS AN APPELLEE

It is curious that XTO Energy, Inc. ("XTO") considers itself an appellee in the consolidated action. As XTO concedes, the trial court denied XTO's motion to intervene. (XTO Motion at 9.) Although XTO appealed the trial court's decision, the appellate court denied XTO's appeal as moot. *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶5 (7th Dist.). XTO did not appeal that decision to this Court. Despite this, XTO contends that it "is an appellee in these consolidated cases based upon its role as a party to the consolidated cases before the Seventh District Court of Appeals." (XTO Brief at 10.) While XTO may have been a "party" to the consolidated cases because its appeal was consolidated with Beck Energy's appeals, the Seventh District denied it the only relief it was seeking. A failed attempt to intervene does not an appellee make.

XTO did acquire an interest in the leases at issue three months after the class action was filed. (XTO's Motion to Intervene, Stipulations at Exhibit 9). The trial court refused to allow XTO to buy its way into the lawsuit and the appellate court denied the appeal as moot. Despite this, XTO is now claiming to be an appellee and is submitting duplicative filings to this Court

setting forth the position of the lessee. Not only is that unnecessary, but it is procedurally improper given XTO's failed attempt to intervene at the trial level and the appellate court's denial of XTO's appeal as moot.

III. THIS COURT SHOULD NOT TOLL THE LEASES WITHOUT PROVIDING NOTICE TO THE AFFECTED LANDOWNERS

Both Beck and XTO continue to cite run of the mill oil and gas lease cases for the proposition that, where a lessor challenges the validity of the lease, a court may toll the lease in the event that such challenge fails. In those cases, courts have held that it is the *active* assertion that the lease is invalid which justifies the equitable remedy of tolling the lease. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1341 (10th Cir.1982). This Court has explicitly recognized that “absent class members are passive parties to a class suit.” *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 76, 694 N.E.2d 442 (1998). Thus, the cases relied upon by Beck Energy and XTO are inapposite. The absent class members have neither “wrongfully repudiated” their leases or “obstructed” the leases in any way—they still have not been informed by the court system that the case even exists!

The tolling of an oil and gas lease term when the lessor brings an action to cancel or terminate a lease is a form of equitable relief in favor of the defendant against the plaintiff. *See Feisley Farms Family, L.P. v. Hess Ohio Res., LLC*, Case S.D.Ohio No. 2:14-CV-146, 2014 WL 4206487, at *4 (Aug. 25, 2014). However, the class in this case was certified under Rule 23(B)(2). Although the trial court decided not to provide absent class members with notice or the right to opt out, it ameliorated that decision by refusing to toll the leases of the absent class members. (Hearing Transcript, Stipulations at Exhibit 26, pp.19-21, 31-32, 38.)

Allowing affirmative relief to be awarded against absent parties in a Rule 23(B)(2) class action is “a monstrous perversion of the principles of civil procedure.” *See Henson v. E. Lincoln*

Twp., 814 F.2d 410, 416 (7th Cir.1987). Neither the rules of civil procedure nor constitutional limitations allow such lawsuits. *Id.* at 416 (Rule 23 and the Constitution must be used to prevent claims against absent parties). Only by providing due process can a defendant obtain an *enforceable* tolling order effective as against absent class members. *See Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 721 (5th Cir.1980) (court's failure to afford due process to an absent party would require that the order be set aside as to such party).

Where a Rule 23(B)(2) suit seeks something beyond equitable relief against the defendant, notice and an opportunity to opt out are necessary to satisfy due process and to preserve the constitutionality of the proceedings. *See Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 440 (N.D.Ill.2003); *see also Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (noting that introduction of anything other than a claim for equitable relief against the defendants creates a hybrid suit, in which minimum due process requires the right to opt-out); *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 605 (E.D.Mich.1996) (noting circumstances which may create due process concerns in a Rule 23(b)(2) class action). Troublesome issues of fairness and due process arise when a court expands the scope of a Rule 23(B)(2) action beyond the narrow issue of injunctive or declaratory relief to be awarded against the defendant. *See Marcera v. Chinlund*, 91 F.R.D. 579, 585 (W.D.N.Y.1981) (noting the constitutional issues created by subjecting absent parties in a 23(b)(2) proceeding to judicial sanctions). This is especially true where the absent parties' real property rights will be affected by any decision of the court. *See Oneida Indian Nation of Wisconsin v. State of New York*, 85 F.R.D 701, 703, 707 n.9 (N.D.N.Y.1980). The only way notice would not be required in a situation such as this is where the absent parties will not be bound by any determination. *Id.* at 708. Given that Beck Energy

and XTO clearly want to bind the absent class members by any determination to toll the leases, that is not the case here.

Beck Energy speculates that no decision will be reached by this Court in 2015. Further, Beck Energy and XTO are still not proposing that landowners should be afforded notice of the lawsuit or an opportunity to opt out of the litigation. Apparently, Beck Energy and XTO think the poor benighted landowners should receive notice only after this Court issues its ruling and the time to file a motion for reconsideration passes. Since the requested tolling order will only be effective in the event that this Court affirms the Seventh District's *Hupp* decision, such notice would presumably read something like the following:

Dear Landowner,

Over four years ago, a class action lawsuit was brought on your behalf. The court system determined that it was neither necessary to inform you that the lawsuit had been filed nor allow you to opt out of the suit, because the only possible outcome was a declaration that your oil and gas lease with Beck Energy was invalid—something that could only benefit you. Unfortunately for you, the lawsuit ultimately proved unsuccessful.

During the course of the litigation, the courts decided your lease should be tolled as of October 1, 2012, through the end of the litigation due to your wrongful attempt to repudiate your lease with Beck Energy. Because you weren't even told about the lawsuit, we know that you didn't really attempt to obstruct Beck Energy from proceeding under the lease or do anything else wrong. However, we decided to blame you for what some attorneys you never met claimed to be doing on your behalf. It was the only way we could figure out how to protect Beck Energy's rights and you weren't around to complain.

Anyway, we have decided to add at least three years onto your lease term with Beck Energy. You won't be paid a signing bonus for this extension, nor will you have an opportunity to negotiate for the now standard 20% landowner royalty—you're stuck with the 12.5% royalty in the Beck Energy lease and no bonus payment. Also, if you signed a new lease in the three plus year period between when the courts started to toll your lease with Beck Energy and when we finally got around to telling you about that, Beck Energy might sue you for breaching the lease you thought had expired. In addition, if you signed a new lease that contained a warranty of title provision, that lessee might also sue you, even though a search of your title would not have revealed the tolling orders. Since this

CERTIFICATE OF SERVICE

I hereby certify that I served the above *Relator Claugus Family Farm, L.P.'s Response to Appellee/Intervening Respondent Beck Energy Corporation's Motion to Toll All Terms of the Oil and Gas Leases and Appellee XTO Energy Inc.'s Motion for Further Tolling* to the following by regular U.S. Mail this 18th day of February, 2015:

Sarah Pierce
Tiffany L. Carwile
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215

*Counsel for Respondents The Seventh District
Court of Appeals, et al.*

Richard V. Zurz, Jr.
Mark A. Ropchock
Slater & Zurz, LLP
One Cascade Plaza, Suite 2210
Akron, OH 44308-1135

James W. Peters
Peters Law Offices
107 West Court Street
Woodsfield, OH 43793

*Attorneys for Plaintiffs/Appellants
Clyde A. Hupp, et al.*

Scott M. Zurakowski
William G. Williams
Gregory W. Watts
Aletha M. Carver
Krugliak, Wilkins, Griffiths & Dougherty Co.,
L.P.A.
4775 Munson Street, N.W.
P. O. Box 36963
Canton, OH 44735

*Counsel for Intervening Respondent Beck
Energy Corporation*

Clair E. Dickinson
Brouse McDowell
388 South Main Street, Suite 500
Akron, OH 4311

Kevin C. Abbott
Reed Smith LLP
Reed Smith Center
225 Fifth Avenue
Pittsburgh, PA 15222-2716

Attorneys for XTO Energy, Inc.

/s Daniel H. Plumly

Daniel H. Plumly