NOT DESIGNATED FOR PUBLICATION

BETTY D. BLANCHARD, ET AL

VERSUS

THE ATLANTIC RICHFIELD CO., ET AL

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. CA 89 1283

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, NO. 77,796, IN AND FOR THE PARISH OF ST. MARY, STATE OF LOUISIANA, HONORABLE RICHARD T. HAIK, JUDGE.

BEFORE: COVINGTON, C.J., LANIER AND VIAL LEMMON, J.J.*

VIAL LEMMON, J., PRO TEMPORE

APR 29 1991

This is an action by a landowner-mineral lessor against the lessees and operators of a mineral lease (1) to cancel the lease for failure to produce in paying quantities and (2) to enforce the lessee's obligation to restore the surface of the leased property. Plaintiff has appealed from the trial court's judgment granting the mineral lessee's motion for summary judgment and dismissing her suit.

PRODUCTION IN PAYING QUANTITIES

In maintaining the summary judgment on the paying quantities issue, the trial court reasoned:

> ". . .The established Louisiana jurisprudence places the burden on the lessor to establish a failure in producing and paying quantities. The jurisprudence further indicates that this is a heavy burden in order for the Courts to cancel an ongoing lease. . . .
>
> This court clearly finds that the Blanchard lease did produce in paying quantities of a significant amount. This Court should also consider the serious down flux of production during this period and cannot isolate one period to the entire term of the lease. . . .This Court is required to look at the activity on the lease as a whole. And as a whole this lease has certainly been maintained in paying quantities. . . ."

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*Judge Mary Ann Vial Lemmon is serving as judge pro tempore by special appointment of the Louisiana Supreme Court to fill the vacancy created by the death of Judge Steve A. Alford, Jr.

Lanier J. concurs in the result.
Covington, C.J., concurs in the result.

EXHIBIT O

La. R.S. 31:124 defines production in paying quantities sufficient to maintain a lease beyond its primary term as follows:

> When a mineral lease is being maintained by production of oil or gas, the production must be in paying quantities. It is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss.

The comment to Article 124 of the Louisiana Mineral Code cites Clifton v. Koontz, 325 S.W.2d 648 (1959) as articulating the appropriate test to determine whether a lease is producing in paying quantities:

> "...[T]he standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.
>
> "In determining paying quantities, in accordance with the above standard, the trial court necessarily must take into consideration all matters which would influence a reasonable and prudent operator. Some of the factors are: The depletion of the reservoir and the price for which the lessee is able to sell his produce, the relative profitableness of other wells in the area, the operating and marketing costs of the lease, his net profit, the lease provisions, a reasonable period of time under the circumstances, and whether or not the lessee is holding the lease merely for speculative purposes.
>
> "The term "paying quantities" involves not only the amount of production, but also the ability to market the product. ... Whether there is a reasonable basis for the expectation of profitable returns from the well is the test. If the quantity be sufficient to warrant use of the [product] ... in the market, and the income therefrom is in excess of the actual marketing cost, and operating costs, the production satisfies the term 'in paying quantities.'"

A lessor seeking cancellation of a lease for failure to maintain production in paying quantities has the burden of proving that a lessee is holding the lease solely for speculative purposes and not in a reasonable effort to

secure a return on his investment or minimize any loss. A determination must be made based on the particular facts of each case whether a reasonably prudent operator would continue production to maximize any profit or minimize any loss on his capital investment in the lease.

Both parties presented strong factual data to support contrary conclusions on the paying quantities issue. For example, lessor presented the affidavit of one expert to demonstrate that during various periods the operating loss before write-off on the whole lease was as much as $312,637. Lessees presented evidence that during the period in question lessor was paid $56,835.08 in royalties.

The fact of a substantial operating loss does not of itself establish failure to produce in paying quantities just as the fact of the payment of substantial royalties does not of itself establish production in paying quantities. The conflict in the concurrent existence of both sets of facts set forth above clearly illustrates this case is inappropriate for summary judgment because a resolution of issues of material facts is necessary to adjudicate this case.

The trial judge correctly pointed out that another valid factor to be considered in determining whether there has been production in paying quantities is the "serious down flux of production during this period," apparently referring to the state of the economy in the oil and gas industry during the period in which lessor claims there was failure to produce in paying quantities. The acknowledgment of this factual consideration further points to the inappropriateness of summary judgment in this case.

In a motion for summary judgment, the moving party has the burden of proving that (1) there is no genuine issue of material fact and (2) the mover is entitled to judgment

as a matter of law. La. C.C.P. art. 966. In determining whether a material issue of fact exists, any doubt is to be resolved against the granting of the summary judgment and in favor of a trial on the merits. In this case the mover requested a summary judgment on the basis that there was production in paying quantities. In granting the motion for summary judgment, the trial judge wrongly placed the burden on the opposing party to prove there was not production in paying quantities. (That is the correct burden to apply at a trial on the merits.) A proper determination of whether there has been production in paying quantities depends upon an evaluation of eighteen volumes of technical data and differing expert interpretation thereof. It is inappropriate to make this factual analysis on a motion for summary judgment.

RESTORATION OF SURFACE

The summary judgment additionally held that any obligation to restore the surface arises only upon termination of the lease. The trial judge stated:

> ". . .With respect to the plaintiff's claim of environmental damages, the defendants have submitted affidavits that no such environmental damages exist and that any facility existing on the Blanchard lease have future utility in the operation of the lease. This Court certainly understands that in order to produce in paying quantities there must be some surface damages and these damages must be corrected at the termination of the lease but not before."

The pleadings allege there are several wells on the leased acreage which have been plugged and abandoned. Once a lessee ceases operations on a well, whether because the well was a dry hole or because it has ceased to produce in paying quantities, the lessee has an implied obligation to restore the premises to its condition when the lessee began operations. L. McDougal III, Louisiana Oil and Gas Law 231 (1991). A mineral lessee has no right to interfere with the surface owner's full enjoyment of his property, except to the extent necessary for

conducting the lessee's operations. Edwards v. Jeems Bayou Production Co., 507 So.2d 11 (La. App. 2d Cir. 1987); Smith v. Shuster, 66 So.2d 430 (La. App. 2d Cir. 1953). The mineral lessee may only use as much of the surface as is reasonably necessary to conduct its operations and is obligated (as a prudent administrator) to restore the surface to its original condition at the earliest reasonable time. La. R.S. 31:22.

La. C.C. art. 2710 binds a lessee to enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease. A mineral lessee may not occupy surface area no longer needed for the proper conduct of mineral operations, and must restore the surface area after cessation of operations in each particular area. See Concurrent Right to Surface Use in Conjunction with Oil and Gas Development, 33 La. L. Rev. 655 (1973).

The obligation of the lessee to restore the surface is an ongoing obligation as to portions of the lease not under production and does not depend upon the termination of the lease to come into effect. See Edwards v. Jeems Bayou Production Co., supra. The trial judge erred as a matter of law in ruling that surface damages "must be corrected at the termination of the lease but not before."

The judgment of the district court is reversed, the motion for summary judgment is denied, and the case is remanded for trial on its merits. Costs of the appeal are assessed against the mineral lessee.

REVERSED AND REMANDED.