IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MARION STONE and
BRIAN CORWIN,

Plaintiffs,

v.

Civil Action No. 5:12-CV-102
Judge Bailey

CHESAPEAKE APPALACHIA, LLC,
STATOIL USA ONSHORE PROPERTIES, INC., and **JAMESTOWN RESOURCES, INC.**,

Defendants.

ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Pending before this Court is Defendants' Motion for Summary Judgment (Doc. 26), filed on behalf of all three defendants. The Motion has been fully briefed and is ripe for decision. In the Motion, the defendants contend that they are entitled to judgment as a matter of law on all claims for relief.

On May 30, 2012, the plaintiffs filed this action in the Circuit Court of Brooke County, West Virginia (Doc. 1-1). The Complaint asserts three claims for relief: (1) breach of contract inasmuch as the defendants are pooling and unitizing the Marcellus Shale formation underlying plaintiffs' property in violation of their lease; (2) trespass by engaging in hydraulic fracturing on plaintiffs' property; and (3) that the defendants failed to protect plaitiffs' property from drainage.

The plaintiffs are each the owners of property that together encompass a 217.77 acre tract of real property located in Buffalo District, Brooke County, West Virginia. On or about August 22, 2001, the plaintiff, Marion Stone, the sole owner of the property at the time, executed a lease for the oil and gas within and underlying the property to Phillips Production Company. The lease was originally a five (5) year lease. Before it expired, Ms. Stone agreed to extend it a further five (5) years, until August 21, 2011. The rights acquired by Phillips Production Company have since been assigned and are now held by the defendants in this action.

The Stone lease contains a unitization provision which reads as follows:

> "Unitization. Lessee is hereby granted the right to pool and unitize the Onondaga, Oriskany or deeper formations under all or any part of the land described above with any other lease or leases, land or lands, mineral estates, or any of them whether owned by lessee or others, so as to create on or more drilling or production units…"

Inasmuch as the Marcellus Shale formation lies above the Onondaga and Oriskany formations, this provision has no application to drilling and capturing oil and gas from the Marcellus Shale formation.

Chesapeake drilled a horizontal well on the neighboring Hupp property, near the property line with the plaintiffs. The vertical wellbore on the Hupp property is approximately 200 feet from the Stone property, with the horizontal aspect of the bore within tens of feet of the property line.

In 2010, defendants approached Marion Stone about amending her lease to allow for pooling and unitization of the Marcellus Shale formation. The parties were unable to

agree to a modification of the lease.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Anderson***, 477 U.S.at 250.

Rule 56(e) provides that "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must– by affidavits or as otherwise provided in this rule– set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986). That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a

genuine issue for trial. Fed. R. Civ. P. 56(c); ***Celotex Corp***., 477 U.S. at 323-25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted).

This Court will apply the above standards to each of the claims asserted by the plaintiffs, albeit in different order.

The Trespass Claim

The defendants in this case contend that the plaintiffs' claim for trespass is barred by the "rule of capture." West Virginia has adopted the rule of capture:

> West Virginia recognizes the venerable common law doctrine of capture: [Oil and gas] belong to the owner of the land, and are part of it, so long as they are on it or in it subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.

Energy Development Corp. v. Moss, 214 W.Va. 577, 591 S.E.2d 135 (2003), quoting ***Powers v. Union Drilling, Inc.,*** 194 W.Va. 782, 787, 461 S.E.2d 844, 849 (1995) in turn quoting, ***Trent v. Energy Dev. Corp.***, 902 F.2d 1143 (4th Cir. 1990) (citation and internal quotations omitted).

In ***Trent***, however, the Fourth Circuit left open the issue of whether the rule of capture includes oil and gas recovered by hydraulic fracturing. The Court stated:

> EDC argues that the production of the Cassady well should not fall within the rule of capture because the flow of gas from the landowners' tract was unnaturally enhanced by hydrofracturing, a process whereby the producing strata is fractured to increase the strata's permeability and, as a consequence, the flow of gas into the well. Short of committing a trespass, however, the law of capture allows a landowner "to use artificial means of stimulating production even though the effect is to increase the drainage from the land of another." Kuntz, The Law of Oil & Gas, § 4.1 (1978). Although not alleged here, any trespass cause of action based upon hydrofracturing, if in fact such a cause of action exists in the common law of West Virginia, would belong to the landowners, not EDC.

902 F.2d at 1147, n. 8.

In determining whether the rule of capture applies to hydraulic fracturing which takes place on a neighboring property, it is necessary to briefly discuss the nature of the Marcellus Shale formation as well as the process of hydraulic fracturing or "fracking." In conducting this discussion, this Court will borrow liberally from two student notes found in the West Virginia Law Review.

"Geologists have long been aware of the existence of the Marcellus Shale--a black shale geological formation that 'starts at the base of the Catskills in upstate New York, stretches across the upstate toward Marcellus, New York (the town from which the formation is named) and southwest to West Virginia, Kentucky, and Ohio.'" Note, The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia, 115 W.Va.

Law Review 491, 494 (2012)[1] (citation omitted).

"Although the formation was recognized as being potentially rich in fossil fuels, it was not until recently that advancements in drilling and gas production technology allowed energy producers to tap into the vast reservoir of natural gas trapped within the rock formation." ***Id***. (citations omitted).

"The current Marcellus Shale gas 'play" appears to have begun in 2003, when Range Resources drilled a natural gas well in Washington County, Pennsylvania. Range had not intended to tap the Marcellus Shale at that time; however, the rock formation showed potential and the company completed a Marcellus well in 2004. Range first began production from the well in 2005, and it soon drilled additional wells and began experimenting with horizontal drilling and hydraulic fracturing methods that had been developed for use in the Barnett Shale in Texas. By the end of 2007, 'more than 375 gas wells with suspected Marcellus intent had been permitted in Pennsylvania' alone. Following the initial discovery, interest in the Marcellus skyrocketed, and natural gas producers across the country began to acquire land and business interests in the region and to drill vertical and horizontal wells in order to evaluate the gas potential of the Marcellus." ***Id***., at 494-495 (citations omitted).

"This production boom would not have been possible without the help of a novel drilling technique--horizontal drilling." ***Id.***, at 495.

"Two technologies have made gas production possible in the once-unusable Marcellus region - horizontal drilling and hydraulic fracturing. These techniques, which saw

[1] The author of the student note is Jason A. Proctor.

their first significant action in natural gas production in Texas's Barnett Shale, are relatively new to the Appalachian Basin. While the first true horizontal oil well was completed in Texas in 1929, there was little use for the technique until the 1980s, when the invention of downhole telemetry equipment and improved drilling motors turned what was once a far-fetched idea into an economically viable practice. Horizontal drilling has been described as:

> the process of drilling a well from the surface to a subsurface location just above the target oil or gas reservoir called the 'kickoff point', then deviating the well bore from the vertical plane around a curve to intersect the reservoir at the 'entry point' with a near-horizontal inclination, and remaining within the reservoir until the desired bottom hole location is reached.

The partner technique, hydraulic fracturing (also known as 'hydrofracking,' or simply 'fracking'), involves pumping high volumes of water and chemical additives into the well at extremely high pressures in order to fracture the rock formation and release the trapped gas." ***Id.***, at 496-497 (citations omitted).

"Horizontal gas wells offer several advantages over traditional vertical wells. Horizontal wells create maximum surface area contact between the gas-bearing rock formation and the well itself. The 'pay zone' of the well--the area where the gas can flow into the well from the shale--is significantly increased if the well is drilled linearly with the length of the shale. When coupled with hydraulic fracturing, this allows for an exponential increase in reservoir contact. These wells are most efficient when drilled in a direction that intersects the maximum number of fractures in the well. A single horizontal well, when located in a permeable reservoir such as the Marcellus Shale, can gather significantly more

underground gas than a single vertical well in the same location. These higher production rates can equate to a higher return on investment for horizontal well projects than for vertical well projects when used in the proper manner." ***Id.***, at 497 (citations omitted).

"Drilling horizontally allows producers to reach target gas locations that could not be reached using traditional vertical drilling. A large pocket of gas situated under a residential neighborhood may have been inaccessible via vertical drilling; however, horizontal drilling might allow the producer to reach this gas by drilling the well at another location and directing the well bore to reach the target gas pocket." ***Id.*** (citation omitted).

"Hydraulic fracturing is a commonly used technology in modern oil and gas drilling operations, particularly with deep shale formations where its use is essential. Hydraulic fracturing involves injecting fluid at high pressure into an oil and gas well. The force of the fluid fractures, or cracks, the rock thereby producing fissures throughout the rock strata. Into these fissures is further injected small proppants, usually sand, which remain behind to ensure that the fissures remain open. As a result of this procedure, oil and gas are more easily liberated from the rock allowing it to flow towards the well head, thus increasing the rate of extraction. But with the benefits of hydraulic fracturing also comes the potential for trespass." Note, Hydraulic Fracturing Goes to Court: How Texas Jurisprudence on Subsurface Trespass Will Influence West Virginia Oil and Gas Law, 112 W.Va. L. Rev. 599 (2010).[2]

The defendants in this case urge this Court to follow the lead of the Supreme Court of Texas, which, in ***Coastal Oil & Gas Corp. v. Garza Energy Trust***, 268 S.W.3d 1 (Tex.

[2] The author of the student note is Travis Zeik.

2008), held that the landowners' claims of trespass where the operator extended hydraulic fracturing underlying the landowners' property was barred by the rule of capture. The Court in ***Garza*** stated the issue as being "whether subsurface hydraulic fracturing of a natural gas well that extends into another's property is a trespass for which the value of gas drained as a result may be recovered as damages." 268 S.W.3d at 4.

In its decision the Court noted that "[t]he Vicksburg T is a 'tight' sandstone formation, relatively imporous and impermeable, from which natural gas cannot be commercially produced without hydraulic fracturing stimulation, or 'fracing,' as the process is known in the industry. This is done by pumping fluid down a well at high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants - sand, ceramic beads, or bauxite are used - that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracing in effect increases the well's exposure to the formation, allowing greater production." ***Id.***, at 6-7.

In determining that a landowner has no right to sue another for oil and gas drained by hydraulic fracturing that extends beyond the lease lines, the Supreme Court of Texas stated four justifications:

1. The law already affords the owner full recourse. The landowner can drill a well of his own to offset the drainage from his property. If there is already a lease, the

landowner can sue the lessee for violation of the implied covenant in the lease to protect against drainage. In addition, he may offer to pool, and if the offer is rejected, apply to the Texas Railroad Commission for forced pooling.

2. Allowing recovery for the value of the oil and gas drained by hydraulic fracturing usurps to the courts the lawful and preferable authority of the Railroad Commission to regulate oil and gas production.[3]

3. "[D]etermining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle. One difficulty is that the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened. Such difficulty in proof is one of the justifications for the rule of capture. But there is an even greater difficulty with litigating recovery for drainage resulting from

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[3] The Texas Supreme Court, in discussing the authority of the Railroad Commission stated:

> The Commission has never found it necessary to regulate hydraulic fracturing, a point to which we will return below, but should it ever choose to do so, permitting fracturing that extended beyond property lines, however reasonable in terms of industry operation, would be met with the objection that the Commission had allowed the minerals in the drained property to be confiscated. While "'all property is held subject to the valid exercise of the police power' and thus not every regulation is a compensable taking, ... some are." "Physical possession is categorically, a taking for which compensation is constitutionally mandated". We need not hold here that without the rule of capture, all regulation of drainage would be confiscatory and thus beyond the Commission's power. We observe only that the rule of capture leaves the Commission's historical role unimpeded. "It is now well settled that the Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights." The Commission's role should not be supplanted by the law of trespass.

268 S.W.3d at 15-16 (citations omitted).

fracing, and it is that trial judges and juries cannot take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law. 268 S.W.3d at 16.

4. Noone in the oil and gas industry appears to want or need a change in the application of the rule of capture to hydraulic fracturing operations.

The ***Garza*** Court held "that damages for drainage by hydraulic fracturing are precluded by the rule of capture." The Court added "[i]t should go without saying that the rule of capture cannot be used to shield misconduct that is illegal, malicious, reckless, or intended to harm another without commercial justification, should such a case ever arise. But that certainly did not occur in this case, and no instance of it has been cited to us."

The dissenting opinion in ***Garza*** criticized the justifications for the decision. Justice Johnson noted that "[t]he rule of capture precludes liability for capturing oil or gas drained from a neighboring property 'whenever such flow occurs solely through the operation of natural agencies in a normal manner, as distinguished from artificial means applied to stimulate such a flow.' ***Peterson v. Grayce Oil Co.,*** 37 S.W.2d 367, 370-71 (Tex.Civ.App.-Fort Worth 1931), *aff'd,* 128 Tex. 550, 98 S.W.2d 781 (1936). The rationale for the rule of capture is the 'fugitive nature' of hydrocarbons**.** ***Halbouty v. R.R. Comm'n,*** 163 Tex. 417, 357 S.W.2d 364 (1962). They flow to places of lesser pressure and do not respect property lines. The gas at issue here, however, did not migrate to Coastal's well because of naturally occurring pressure changes in the reservoir. If it had, then I probably would agree that the rule of capture insulates Coastal from liability. But the jury found that Coastal trespassed by means of the hydraulic fracturing process, and Coastal does not contest that

finding here." 268 S.W.3d at 42, citing Laura H. Burney & Norman J. Hyne, *Hydraulic Fracturing: Stimulating Your Well or Trespassing?,* 44 Rocky Mtn. Min. L. Inst. 19-1, 19-45 (1998) ("Under both common law and modern definitions, a trespass occurs if a 'thing' physically crosses property boundaries.... [T]his definition is satisfied when fracing extends beyond lease or unit lines.").

With regard to the four reasons "not to change the rule of capture," the dissent states that the fundamental disagreement with the majority opinion is that the Court is in fact changing the rule of capture.

Perhaps the most significant and compelling criticism of the majority opinion is the dissent's criticism of the majority's first rationale - that the law already provides full recourse - through drilling his own well, suing the lessee[4] for violation of the covenant to protect against drainage, or applying to the Railroad Commission for forced pooling.[5] The dissent points out that not all property owners are sophisticated enough or have the resources to drill their own well.

The ***Garza*** opinion gives oil and gas operators a blank check to steal from the small landowner. Under such a rule, the companies may tell a small landowner that either they sign a lease on the company's terms or the company will just hydraulicly fracture under the property and take the oil and gas without compensation. In the alternative, a company may just take the gas without even contacting a small landowner. In this Court's prediction of West Virginia law, this Court simply cannot believe that our West Virginia Supreme Court

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[4] This Court notes that in this case, the plaintiffs' lessee is the defendant.

[5] Of course, West Virginia has no Railroad Commission with the authority to force pooling.

would permit such a result.

In ***Young v. Ethyl Corp.***, 521 F.2d 771 (8th Cir. 1975), a similar case involving injection rather than hydraulic fracturing, the Eighth Circuit stated:

> [W]e do not believe that the Arkansas Supreme Court would extend a rule developed in the field of oil and gas to the forced migration of minerals of different physical properties. The rule of capture has been applied exclusively, so far as we know, to the escape, seepage, or drainage of "fugacious" minerals which occurs as an inevitable result of the tapping of a common reservoir. The rule was adopted near the turn of the century primarily as a rule of necessity when courts concluded that the amount of oil and gas which drained toward a production well from neighboring tracts was incapable of measurement. See generally I Summers, The Law of Oil and Gas s 63 & n. 37 (1954). With the development of more sophisticated knowledge of geology and a greater ability to measure the amount of drainage, the absolutism with which some courts continue to apply the rule of capture to oil and gas has been criticized. See, e. g., id. at s 63. We agree with the defendants that the Arkansas Supreme Court foreclosed such arguments with respect to the drainage of minerals from adjacent lands. But Young does not claim that he is losing minerals due to seepage or drainage toward the defendants' production wells. Rather, he asserts, and has established to the satisfaction of the District Court, that the brine solution under his land would not migrate to the defendants' production wells but for the force exerted by the injection wells; in other words, that the brine is

> primarily "non-fugacious." We believe that it would be unwise to extend the rule to situations in which non-fugacious minerals are forced from beneath a landowner's property.

521 F.2d at 774.

The Eighth Circuit noted that "the common law rule of capture is not a license to plunder." ***Id.***

The other justifications for the ***Garza*** majority are equally unconvincing. With regard to the second justification, it appears that the Texas Railroad Commission has far more regulatory power than West Virginia's regulatory authority.

With regard to the third justification - that judges and juries will not take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law - the issue in this case is not whether hydraulic fracturing should be against the law. The issue is whether an operator may use hydraulic fracturing on neighboring property, thereby taking the neighbor's oil and gas without compensation.

In its third justification, the majority also cited the difficulty of proving damages. As Justice Johnson noted in the dissent:

> The Court also says that proving the value of oil and gas drained by hydraulic fracturing deep under the ground is difficult. But similarly, proving the value of damages from breach of the implied covenant to protect from drainage requires expert testimony about a hypothetical well that should have been drilled to protect the lease, and calculation of the hypothetical effects that

> hypothetically would have taken place deep underground. *See* ***Kerr-McGee Corp. v. Helton****,* 133 S.W.3d 245, 254 (Tex. 2004). Difficulty in proving matters is not a new problem to trial lawyers.

268 S.W.3d at 45, n. 3.

The fourth justification is that everyone in the industry wants the rule of capture to apply to this situation. This Court sees no reason why the desires of the industry should overcome the property rights of small landowners.

In that regard, it is significant that the Texas Supreme Court stated that the maxim - "'*cujus est solum ejus est usque ad coelum et ad inferos*' - has no place in the modern world." Significantly, the West Virginia Supreme Court of Appeals as recently as 2003 reaffirmed the maxim, stating that "we are considering the case of a lessor who owned from the heavens to the center of the earth. '*Cujus est solum, ejus est usque ad coelum et ad inferos.*' *See,* ***Dolan v. Dolan****,* 70 W.Va. 76, 73 S.E. 90; ***Drummond v. White Oak Fuel****,* 104 W.Va. 368, 140 S.E. 57 (1927)." ***Energy Development Corp. v. Moss***, 214 W.Va. 577, 585 n. 14, 591 S.E.2d 135, 143 n.14 (2003).

"Under West Virginia law, to constitute a trespass, the defendant's conduct must result in an actual, nonconsensual invasion of the plaintiff's property, which interferes with the plaintiff's possession and use of that property. ***Hark*** [***v. Mountain Fork Lumber***, 127 W.Va. 586,] 34 S.E.2d at 352 [(1945)]." ***Rhodes v. E.I. DuPont De Nemours & Co.***, 636 F.3d 88, 96 (4th Cir. 2011). "Under West Virginia law, trespass is 'an entry on another man's grounds without lawful authority, and doing some damage, however inconsiderable, to his real property.'" ***Hagy v. Equitable Production Co.***, 2012 WL 1813066, *4 (S.D.

W.Va. May 17, 2012) (Goodwin, J.), citing ***Rhodes****, supra*.

The Restatement includes the following provision:

§ 158. Liability For Intentional Intrusions On Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

Restatement (Second) of Torts § 158.

The comments to this section includes the following:

"The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it." ***Id.***, Comment i.

Based upon the foregoing, this Court finds, and believes that the West Virginia Supreme Court of Appeals would find, that hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the "rule of capture," but rather constitutes an actionable trespass.

The Claim for Breach of the Implied Covenant Against Drainage

The plaintiffs assert a claim for the breach of the implied covenant against drainage. "In an oil and gas lease there is an implied covenant against permitting substantial drainage through wells on other land, but such covenant does not apply to relatively slight drainage

which is incident to exploration for oil and gas and to the production thereof after discovery." Syl. Pt. 2, ***Trimble v. Hope Natural Gas Co.***, 117 W.Va. 650, 187 S.E. 331 (1936). "'" Where the same lessee holds under two adjoining lessors, he may not fraudulently or evasively so drill his wells as to drain the property of one to the detriment of the other." ***Barnard v. Monongahela Natural Gas Co.,*** 216 Pa. 362, 65 Atl. 801.' Syllabus point 1, ***Dillard v. United Fuel Gas Company,*** 114 W.Va. 684, 173 S.E. 573 (1934)." Syl. Pt. 5, ***Croston v. Emax Oil Co.***, 195 W.Va. 86, 464 S.E.2d 728 (1995).

"This duty to protect against drainage is predicated upon the notion that, in the absence of an express provision to the contrary in a lease, there is an implied covenant in the lease that the lessee will protect lessor's property against substantial drainage. *See,* R. Donley, ***The Law of Coal, Oil and Gas in West Virginia*** *§ 97* (1951); ***Jennings v. Southern Carbon Co.,*** 73 W.Va. 215, 80 S.E. 368 (1913); and ***Hall v. South Penn Oil Co.,*** 71 W.Va. 82, 76 S.E. 124 (1910)." ***Id.***, at 195 W.Va. 91, 464 S.E.2d 733.

The defendants seek summary judgment on this claim based upon the fact that the Court in ***Croston*** found that the defendant's offer to allow the plaintiffs to become part of the pool constituted a good faith effort to avoid violation of the implied covenant against drainage and avoided liability for a breach of the covenant.

It appears that in ***Croston***, the offer of a new lease enabling the plaintiffs to become part of the pool was the offer of a lease consistent in terms with the other landowners in the pool. In this case, there is no evidence that the lease which was offered to the plaintiffs was consistent in terms with the other members of the pool. Accordingly, on the record before this Court, summary judgment is inappropriate.

The Breach of Contract Claim

The plaintiffs in this case allege that the defendants breached the implied covenant of good faith and fair dealing in hydraulicly fracturing under their property without the authority to do so. The defendants correctly contend that there can be no claim for a breach of the covenant of good faith and fair dealing without a breach of the terms of the contract. *See* ***Wittenberg v. Wells Fargo Bank, N.A.***, 852 F.Supp.2d 731, 749 (N.D. W.Va. 2012).

The plaintiffs have, however, sufficiently pled a breach of contract sufficient to sustain the tag-along claim for a breach of the covenant of good faith and fair dealing. Each oil and gas lease, unless expressly excluded, contains two implied covenants: (1) the covenant to protect against drainage (see above) and (2) the covenant of development. *See* ***Hall v. South Penn Oil Co.***, 71 W.Va. 82, 76 S.E. 124 (1912) and ***Jennings v. Southern Carbon Co.***, 73 W.Va. 215, 80 S.E. 368 (1913).

The plaintiff has alleged sufficient facts from which a jury could find a breach of the implied covenants as well as a breach of the implied covenant of good faith and fair dealing. Accordingly, summary judgment is not warranted.

For the reasons stated above, Defendants' Motion for Summary Judgment **(Doc. 26**) is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: April 10, 2013.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE