NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0708

PENNZOIL EXPLORATION AND
PRODUCTION COMPANY

VERSUS

LOUISIANA STATE MINERAL BOARD

JKW

BJC

Judgment Rendered: May 2, 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 446,056

Honorable Timothy Kelley, Judge

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

JJP Pettigrew, D. concurs

WELCH, J.

In this dispute concerning gas royalties owed to the State of Louisiana ("the State") pursuant to State Lease No. 7873 ("the mineral lease"), the Louisiana State Mineral Board ("the Board") appeals a partial summary judgment in favor of Pennzoil Exploration and Production Company, now Devon Energy Production Company, L.P. ("Pennzoil/Devon"),[1] and Mosbacher USA, Inc., Mosbacher 1987 Corp., Mosbacher Energy Company, R. Bruce Mosbacher, the executor of the estate of Emile Mosbacher, Jr. and the Mendell Family Partnership, Ltd. ("the Mosbacher Group"). After a *de novo* review of the record, we reverse the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The underlying facts of this case are not in dispute. On November 8, 1978, the Board, acting on behalf of the State as lessor, granted the mineral lease to Ecee, Inc. Cockrell Corporation and Pennzoil/Devon became the successors in interest to the mineral lease. The mineral lease covered a portion of State Tract No. 15242 situated in Plaquemines Parish, Louisiana. Provision 6(b) of the mineral lease provided as follows:

> 6. Unless Lessor elects to take in kind all or any part of the portion due Lessor as royalty on minerals produced and saved hereunder, which option is hereby expressly reserved by Lessor pursuant to [La. R.S. 30:127(A)(4)], and which is to be exercised by written notice by Lessor to Lessee at any time and from time to time while this lease is in effect and either prior or subsequent to acceptance by Lessor of royalties other than in kind, it being understood that nothing contained in this lease or in the rider attached hereto shall ever be interpreted as limiting or waiving said option, Lessee shall pay to Lessor as royalty:
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> ....
>
> (b) Twenty Percent (20%) of the value as hereinafter provided, of all gas, including casinghead gas, produced and saved

[1] Pennzoil Exploration and Production Company merged into Pennzenergy Exploration and Production, L.L.C. Thereafter, Pennzenergy Exploration and Production, L.L.C. and Devon Energy Corporation (Nevada), merged into Devon Energy Production Company, L.P.

> or utilized by methods considered as ordinary production methods at the time of production. When such gas is sold by Lessee to an independent party under an arms' length contract prudently negotiated under the facts and circumstances existing at the time of its execution, the value of such gas and of gas utilized by Lessee shall be the price received by Lessee for such gas under the contract....

An addendum to the mineral lease ("the 1975 rider") provided, in pertinent part as follows:

> (a) ... During the Initial Period [eighteen months after the completion of the well], Lessee agrees to make a diligent and good faith effort to obtain [an] intrastate market for the gas and, if such a market can be obtained, to enter into a gas sales contract for the intrastate marketing of said gas....
>
> ....
>
> (i) Lessor may waive any of the time periods provided for herein if it becomes satisfied that an intrastate gas market is not and will not be available, or if such waiver appears to be in the best interest of the State of Louisiana....

On September 11, 1979, the Board certified that the well on the property of the mineral lease was commercially productive and gave notice to the Lessee that the eighteen-month period for the 1975 rider provision had commenced on July 18, 1979. The mineral lease was certified as capable of producing gas in paying quantities on September 11, 1979. On October 24, 1979, the Lessee requested that the Board waive the requirement that the Lessee obtain an intrastate market for the gas. Pursuant to that request, the Board adopted a resolution on November 14, 1979 (the "resolution"), which provided, in pertinent part, as follows:

> WHEREAS, the Marketing Committee of the Board has reviewed the application of Cockrell Corporation for waiver of the intrastate gas marketing provisions of the [1975 rider] attached to [the mineral lease], and
>
> WHEREAS, Cockrell Corporation submitted documentation to the Marketing Committee explaining its inability to obtain an intrastate market for gas produced from all reservoirs to a depth of 8600' underlying [the mineral lease].

> NOW THEREFORE BE IT RESOLVED that [the Board], based upon the recommendation of the Marketing Committee, waive the intrastate gas marketing provisions of [the mineral lease] insofar as they relate to the production of the **working interest portion** of the gas from all reservoirs underlying [the mineral lease] to a depth of 8600', not to exceed 10 BCF, subject to and to become effective upon the operator negotiating and obtaining an intrastate market for the **royalty** gas and upon negotiation of satisfactory terms for the transportation or exchange of the royalty gas to that market by the operator's interstate transporter.
> (Emphasis added.)

On October 24, 1980, the Lessee entered into a gas purchase contract with Monterey Pipeline Company ("Monterey") expressly providing that it was only for the purchase and sale of gas attributable to the "royalty interest" of the State from the mineral lease. Additionally, on that same date the Lessee entered into a gas sales contract with Tennessee Gas Pipeline Company ("Tennessee Gas") expressly pertaining to all gas from the mineral lease, except the "royalty gas." The contract with Monterey did not define "royalty gas;" however, the contract with Tennessee Gas specifically defined "royalty gas" as "gas attributable to the royalties owned by the [State]."

From November 1979 through April 1993, the Lessee paid royalties based on the amount of gas taken each month under the contract with Monterey and the intrastate price for such gas as set forth in that contract. During a portion of that time (from April 1990 through October 1992) no royalty payments were made allegedly because of a rupture to the pipeline that prevented Monterey from taking any gas during that time period.

Beginning in April 1993 through the end of production in December 1993, the Lessees paid royalties based upon a "blended price" comprised of 80% of the interstate sales and 20% of the intrastate sales. The Lessees contended that, under the specific terms of the mineral lease (*i.e.*, provision 6(b)), the royalty to be paid to the State was to be based upon the prices of both intrastate

and interstate sales weighted by volume. However, the Board contended that when the clear and unambiguous language of the mineral lease, the 1975 rider, and the resolution waiving the intrastate restriction on the "working interest" of the gas subject to the mineral lease, are read together, the royalty payments to the Board must be based upon the sales pursuant to the contract with Monterey, *i.e.*, the 20% "royalty interest" gas sold in intrastate commerce under the terms and prices set forth in the contract with Monterey.

Unable to resolve their differences, Pennzoil/Devon commenced these proceedings on January 7, 1998, by filing a petition for declaratory judgment seeking a declaration that the gas royalties it had to pay to the State pursuant to the mineral lease be set at 20% of the value of all gas produced and saved or utilized, as expressly provided for by section 6(b) of the mineral lease and to recover any excess payments made in contravention of the payment terms in the mineral lease or in error under La. C.C. arts 2301 and 2302. The Board answered and reconvened against Pennzoil/Devon and the Mosbacher Group (the owners of the working interest in the lease) essentially claiming that Pennzoil/Devon and the Mosbacher Group owed gas royalties to the State equal to the revenue received by Pennzoil/Devon pursuant to the intrastate gas sales contract with Monterey. Thereafter, the Board filed a motion for summary judgment, and Pennzoil/Devon and the Mosbacher Group responded by filing a cross motion for summary judgment.

After a hearing on October 24, 2005, the trial court signed a judgment on December 7, 2005, granting in part and denying in part the motion for summary judgment filed by Pennzoil/Devon and denying the motion for summary judgment filed by the Board. Pursuant to a request by all parties to this proceeding and in accordance with La. C.C.P. art. 1915(B)(1), the trial court

certified the December 7, 2005 as a final judgment, after an express determination that there was no just reason to delay an appeal of that ruling.[2] The Board now appeals.[3]

II. SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact, and the summary judgment procedure is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); **Power Marketing Direct, Inc. v. Foster**, 2005-2023, p. 8 (La. 9/6/06), 938 So.2d 662, 668. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. *Id.*; La. C.C.P. art. 966(B).

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Power Marketing Direct, Inc.**, 2005-2023 at p. 9, 938 So.2d at 669.

In this case, as the facts are not in dispute, we look solely to the legal

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[2] According to the minutes of the trial court, the trial court assigned oral reasons for its determination that there was no just reason for delay. However, the oral reasons are not contained in the record before us. On *de novo* review of the matter, we note that the December 7, 2005 judgment determined the main issue in this matter (*i.e.*, the basis upon which the royalty payments were to be made under the mineral lease). The only outstanding issue to be resolved is the calculation of the amounts due under the mineral lease. Since that issue is completely dependent upon the final determination of the basis upon which the royalty payments were to be made, we find that the certification of the December 7, 2005 judgment as final was proper. See **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664, pp. 13-14 (La. 3/2/05), 894 So.2d 1113, 1122-1123.

[3] On July 24, 2006, this court dismissed the appeal by Pennzoil/Devon and the Mosbacher Group and its answer to the appeal of the Board concerning the denial, in part, of their motion for summary judgment relating to the issue of the recovery of payments it allegedly made in error. See La. C.C.P. art. 1915.

question presented by the motion for summary judgment—whether the royalty to be paid by Pennzoil/Devon and the Mosbacher Group to the State for gas produced from the mineral lease is to be based on the price paid for the sale of intrastate gas under the intrastate sales contract between the Lessees and Monterey or is it to be based upon a "blended price" from interstate and intrastate sales of the gas by the Lessees. See **Power Marketing Direct, Inc.**, 2005-2023 at p. 9, 938 So.2d at 669.

The Board contends that the terms of the mineral lease, together with the 1975 rider and the resolution waiving the intrastate sales requirement only for the Lessee's working interest of the gas subject to the lease, and the history of royalty payments made by the Lessees supports their position that the royalty payments are to be made solely on the basis of the terms of the contract with Monterey. On the other hand, the Pennzoil/Devon and the Mosbacher Group contend that that the history of payment is actually a history of mispayments. They further contend that the payment terms set forth in section 6(b) of the mineral lease are unambiguous and require payment of 20% of the value of all gas produced and that the "interstate" versus "intrastate" requirements set forth in the 1975 rider and the resolution were "marketing terms" meant to indicate a preference for intrastate sales over interstate sales and do not define the method of payments under the lease.

Based upon our *de novo* review of the matter, we do not find that Pennzoil/Devon and the Mosbacher Group were entitled to partial summary judgment as a matter of law. The payment terms set forth in section 6(b) of the mineral lease clearly provided that the royalty to be paid to the State is 20% "of the value ... of all gas, including casinghead gas, produced and saved or utilized by methods considered as ordinary production methods at the time of

production." The 1975 rider required the Lessee to make an effort to sell all of the gas subject to the lease in an intrastate market. However, it is clear from a reading of the 1975 rider that the Board contemplated instances where an intrastate market would not be available, and therefore, a waiver to such requirement would be necessitated. The Lessee requested that the Board waive this requirement because an intrastate market was not available for the total gas production from the well; and thus, the resolution permitted the Lessee to sell its working interest in the gas subject to the mineral lease in the interstate market. However, the resolution also required the Lessee obtain an intrastate market for the royalty gas.

The trial court concluded that the resolution was not a written agreement between the parties, and therefore, could not alter provision 6(b) of the mineral lease. To the contrary, we find that both the Board and the Lessee recognized that the request by the Lessee to waive the intrastate gas marketing provisions (which resulted in the resolution) did in fact alter the terms of the mineral lease. Otherwise, the Lessee's action in selling a portion of the gas attributable to the mineral lease under the contract with Tennessee Gas in interstate commerce would have been a direct violation of the 1975 rider's requirement to seek an intrastate market for a period of eighteen months.

Furthermore, the contract with Monterey specifically provides that it is only for the purchase of gas attributable to the royalty interest of the State under the mineral lease. However, the Tennessee Gas contract provides that it covers all gas from the mineral lease, excluding the royalty gas, which was specifically defined as "gas attributable to the royalties owned by the State." Thus, under the terms of the contract, only the State royalty gas was being sold under the contract with Monterey.

Notably, provision 6(b) of the mineral lease, providing that "such gas" is sold under an arm's length contract, applies to the State's royalty gas. The royalty gas was sold only to Monterey and the value of the royalty was based solely on the Monterey price. In fact, this is the exact manner in which the original Lessee and its successors in title, Pennzoil/Devon, paid royalties to the State from the date of production in November 1979 until April 1993. Furthermore, during the time period from April 1990 through October 1992, Pennzoil/Devon did not pay the State any royalty because Monterey did not take any of the gas during that time; however, there was significant production of gas attributable to the mineral lease sold by Pennzoil/Devon to Tennessee Gas during that period, although the State received no portion of such sales.

Accordingly, we find that summary judgment in favor of Pennzoil/Devon and the Mosbacher Group was inappropriate as a matter of law; and therefore, the trial court erred in granting the partial summary judgment. Therefore, the December 7, 2005 judgment of the trial court is hereby reversed insofar as it granted partial summary judgment in favor of Pennzoil/Devon and Mosbacher Group.

III. CONCLUSION

For all of the above and foregoing reasons, the December 7, 2005 judgment of the trial court granting partial summary judgment in favor of Pennzoil Exploration and Production Company (now Devon Energy Production Company, L.P.) and Mosbacher USA, Inc., Mosbacher 1987 Corp., Mosbacher Energy Company, R. Bruce Mosbacher, the executor of the estate of Emile Mosbacher, Jr. and the Mendell Family Partnership, Ltd. is hereby reversed.

All costs of this appeal are hereby assessed to the plaintiffs/appellees, Pennzoil Exploration and Production Company (now Devon Energy Production

Company, L.P.) and Mosbacher USA, Inc., Mosbacher 1987 Corp., Mosbacher Energy Company, R. Bruce Mosbacher, the executor of the estate of Emile Mosbacher, Jr. and the Mendell Family Partnership, Ltd.

REVERSED.