United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 29, 2022
Lyle W. Cayce
Clerk

No. 21-20677

In the matter of: PetroQuest Energy, Incorporated

Debtor,

Sanare Energy Partners, L.L.C.,

Appellant,

versus

PetroQuest Energy, L.L.C.,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-2443

Before Graves, Willett, and Engelhardt, *Circuit Judges*.

Don R. Willett, *Circuit Judge*:

Appellant Sanare Energy Partners, L.L.C. agreed to purchase a mineral lease and related interests from Appellee PetroQuest Energy, L.L.C. Later, PetroQuest filed bankruptcy, and Sanare filed an adversary suit in that proceeding. Sanare argued that the lack of certain third-party consents rendered PetroQuest liable for costs associated with some "Assets" whose

transfer the sale envisioned. The bankruptcy court and the district court each disagreed with Sanare, and so do we. We therefore AFFIRM.

I

A

Sanare is a mineral exploration and production company whose strategic focus includes acquiring mature, offshore oil-and-gas interests. PetroQuest owned just such an interest, a federal lease in the Gulf of Mexico known as "Lease WD 89 – OCS-G 1088" (the Lease). PetroQuest agreed to sell the Lease to Sanare. Sanare also agreed to purchase, among other things, five mineral wells (the D Wells) and the "West Delta 89 D Platform No. 2443" (the Platform). The D Wells and the Platform both sit within the Lease's boundaries.

PetroQuest also agreed to sell to Sanare, "to the extent they may be assigned, all Applicable Contracts." Two such contracts are relevant here, each concerning the Lease: a Platform Use and Production Processing Agreement (Platform Agreement), and a Participation Agreement (together, the Agreements). Each Agreement requires PetroQuest to obtain consent from a third party, Eni US Operating Co. (Eni), before assigning any of PetroQuest's rights under the Agreement.

Sanare and PetroQuest documented these bargains in a Purchase and Sale Agreement (PSA). Following the parties' convention, we use the term "the Properties" to encompass the Lease, the D Wells, and the Platform.[1] The PSA, in turn, uses the defined term "Assets" to refer to the Properties,

[1] We recognize that the PSA uses the defined term "Properties" to refer to a different subset of Assets, but we neither invoke that definition nor express any opinion on its scope.

the Agreements, and everything else that PetroQuest agreed to sell to Sanare. The PSA has several sections that play a role in this appeal.

Section 2.1 defines the "Assets" that Sanare agreed to buy. Those Assets include the Lease, "all oil and gas wells located on the Lease[]," the Platform, and all contracts that "b[i]nd" the Properties. PetroQuest agreed "to sell"—and Sanare agreed "to purchase"—PetroQuest's entire "right, title, and interest in and to" each of the Assets.

Section 4.4 requires PetroQuest to obtain some specific third-party consents to assign certain of the Assets to Sanare. The Agreements are among those Assets for which PetroQuest must obtain third-party consent. By contrast, the requirement does not apply to "Customary Post-Closing Consents." That defined term refers to "consents and approvals from Governmental Authorities . . . that are customarily obtained after the assignment of properties similar to the Assets."

Section 9.2(d) explains what happens if PetroQuest fails to obtain one of the consents that section 4.4 requires:

> If [PetroQuest] fails to obtain a consent prior to the Closing (except for Customary Post-Closing Consents) and the failure to obtain such consent would cause the assignment of such Asset to [Sanare] to be *void ab initio* or the termination of a Lease, then the portion of the Assets subject to such failed consent shall be excluded from the Assets to be conveyed to [Sanare] to the extent of the interest affected by the consent . . . .

Put simply, if PetroQuest fails to obtain a required consent *and* that consent satisfies the description in section 9.2(d), then the Asset (or portion thereof) is "excluded from the Assets to be conveyed" to Sanare.

Section 11.1 describes Sanare's "Assumed Obligations" regarding the Assets. It reads in relevant part as follows:

> [Sanare] assumes and hereby agrees to fulfill, perform, pay and discharge (or cause to be fulfilled, performed, paid or discharged) the following: (a) . . . ; (b) all obligations and Liabilities, known or unknown, with respect to the Assets, arising prior to, on, or after the Effective Time, to the extent relating in any manner to the obligation to (i) properly plug and abandon any and all Wells . . . drilled on the Properties or otherwise pursuant to the Assets, (ii) . . . , (iii) . . . , (iv) . . . , (v) . . . and (vi) perform all obligations applicable to or imposed on the lessee, owner, or operator under the Leases and the Applicable Contracts, or as required by Laws[.]

The sale closed on January 31, 2018. Sanare began operating the Properties the next day. Around the same time, PetroQuest and Sanare started reaching out to the third parties whose consents the PSA required in connection with the various Asset transfers that the PSA contemplated.

Because the Lease is on federal lands, the Bureau of Ocean Energy Management (Bureau) must consent before record title for the Lease can transfer from PetroQuest to Sanare. The PSA requires the parties to "cooperate" in "actively pursu[ing]" this and other Customary Post-Closing Consents. The parties asked for the Bureau's consent, but they did not receive it.

Eni, too, initially refused to grant consent for the Agreements to transfer to Sanare. Eni withheld consent because it had not received payment for services that it had earlier rendered to PetroQuest. Although Eni eventually granted its consent for PetroQuest to assign the Agreements to Sanare, it did not do so until August 2018—seven months *after* the sale closed. Meanwhile, Sanare's operation of the Properties was generating a net loss. The D Wells stopped producing in August 2018, and the Lease terminated about a year later. PetroQuest delivered a final settlement

statement to Sanare on May 24, 2018, and the parties reached a final agreement regarding the final settlement statement later that year.

B

PetroQuest declared bankruptcy in November 2018. Sanare filed this suit as an adversary action a few months later. Among other things, Sanare sought a declaration that "PetroQuest never transferred to Sanare its rights and obligations under [the Platform Agreement] with Eni and, consequently, Sanare is not obligated to Eni under that agreement." PetroQuest counterclaimed, seeking a declaration that: "Pursuant to Section 11.1 of the [PSA], Sanare agreed to fulfill, perform, pay and discharge all obligations and liabilities with respect to the [D] Wells."

Sanare and PetroQuest each filed motions for partial summary judgment. Sanare asked for a declaration that "the agreement under the PSA for PetroQuest to transfer the [Platform Agreement], the Participation Agreement, and its interest in the [L]ease is *void ab initio*," and that "Sanare has no plugging and abandonment obligations with respect to [the Lease], which does not constitute an 'Asset,' as that term is defined in the PSA." PetroQuest asked the bankruptcy court to declare that "Sanare is responsible for fulfilling, performing, paying and discharging all obligations and liabilities relating to the plugging and abandonment of the D Wells, including the [] Platform, and the [] Lease."

The bankruptcy court sided with PetroQuest at an oral hearing on May 10, 2021. The court found that the PSA is "unambiguous," "about as straightforward as it can possibly be," and "very, very clear." The bankruptcy judge found that the Lease and the Wells are "Assets" for which Sanare assumed "all obligations and liabilities" under section 11.1 of the PSA. But the judge went no further. The bankruptcy judge did not, for instance, decide who is *presently* liable for plugging and abandoning the

Properties. Instead, the bankruptcy found that "there are a host of other issues that can affect ultimately what liability exists."

The bankruptcy court entered a written order finding that the PSA is "unambiguous" and declaring that: "The Lease[], the [D Wells], and [the Platform] constitute 'Assets' as that term is defined in the PSA, and as such, under Section 11.1 of the PSA, they were Assets to which all obligations and Liabilities were assumed as set forth in Section 11.1 . . . ."

PetroQuest and Sanare then stipulated to dismiss their remaining claims, without waiving their rights to reassert them. The bankruptcy court approved that stipulation, and the earlier order issuing partial summary judgment for PetroQuest thereby became final and appealable. Sanare appealed, asking the district court to "vacate" both the bankruptcy court's order and that court's finding that the Properties constitute "Assets" under the PSA's section 11.1.

The district court affirmed. This appeal timely followed.

II

We review the district court's decision de novo, "applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court."[2] Summary judgment is appropriate where there is "no genuine dispute as to any material fact" and the movant "is entitled to judgment as a matter of law."[3] "[T]he question of contractual

[2] *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003).

[3] FED. R. CIV. P. 56; *see In re Crocker*, 941 F.3d 206, 210 (5th Cir. 2019) ("Federal Rule of Civil Procedure 56 is incorporated into the Federal Rules of Bankruptcy Procedure.").

interpretation is answered as a matter of law,"[4] and "[w]hether contract language is clear or ambiguous is a question of law."[5]

III

A

Sanare argues that the Properties still belong to PetroQuest, and that as a result, they are not "Assets" under the PSA. We recognize that the Bureau never consented to the Lease's transfer, and that the Bureau's files still show that PetroQuest holds record title to the Lease. Even so, the Properties are "Assets" under both the PSA generally and under section 11.1 in particular.[6] Section 11.1 refers to "Assets," and the PSA's definition of that term plainly includes the Properties. The Bureau's missing consent does not change the PSA's definitions.

In arguing otherwise, Sanare posits that the Properties cannot be "Assets" under the PSA's definition if a consent failure prevents them from *actually transferring* to Sanare. But the PSA itself repudiates that position. Section 9.2(d) expressly contemplates that PetroQuest might "fail[] to obtain a consent prior to Closing." And the same section gives a remedy: "Assets subject to such failed consent shall be excluded from the Assets to be conveyed." But this remedy is unavailable for failures to obtain "Customary Post-Closing Consents" such as the Bureau's. Assets that require only the

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[4] *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So. 3d 507, 558 (quoting *Sims v. Mulhearn Funeral Home, Inc.*, 2007–0054 (La.5/22/07), 956 So.2d 583, 590). The parties agree that Louisiana law governs.

[5] *Hoffman v. Travelers Indem. Co. of Am.*, 2013-1575 (La. 5/7/14), 144 So. 3d 993, 997–98.

[6] Neither party separately addresses the D Wells or the Platform as distinct from the Lease. Rather, the parties assume, it seems, that the D Wells and the Platform share whatever status applies to the Lease. We see no reason to disturb that assumption.

Bureau's consent are still classified as "Assets to be conveyed"—and therefore "Assets"—even if consent fails.

Sanare gives two more reasons why the Lease is not an Asset. Neither succeeds.

First, under section 2.1 of the PSA, Sanare argues that the Lease is an Asset "only insofar as [it is] 'subject to the [Lease's internal] terms, conditions, covenants, and obligations.'" Under this view, because the Lease cannot formally transfer without the Bureau's consent, it also cannot become an "Asset" under the PSA's definitional sections without the Bureau's consent. That conclusion does not follow. If the Bureau denies consent, the Lease's record title stays with PetroQuest—but the Lease is still an "Asset" under the PSA's definition. Furthermore, under section 2.1, the "subject to" language applies only to "the leasehold estate[]"—not to the "lease[]" itself and not to the "lands" that the Lease covers. The Bureau's withheld consent may prevent a post-closing transfer from occurring, but it does not change the PSA's definitions.

Second, Sanare argues that several "absurd results" follow if the PSA's definition assigns liabilities to Sanare for Assets that belong to PetroQuest. Sanare says that such a definition would "violate[] the rights of non-parties" and would "def[y] reality" because the transfer "cannot occur" without the Bureau's consent. But these absurdities do not arise from the PSA's internal *definition* of "Asset." Rather, they arise (if at all) only if the PSA requires an Asset to *actually transfer* between the parties even without the necessary consents. The PSA contains no such requirement.

B

The Agreements are "Assets" too.[7]

Each party grants that the Agreements are among what the PSA defines as "Applicable Contracts." "Applicable Contracts" are "Assets," but only "to the extent that they may be assigned." We conclude that each Agreement "may be assigned," because each is expressly assignable. Sanare argues that the phrase "may be assigned" means that an Applicable Contract becomes an Asset not by being *assignable*, but only by being *actually assigned*. The PSA's text forecloses this argument. For example, section 9.2(d) discusses what happens if PetroQuest fails to obtain consent to transfer an Asset. If a property or contract does not even become an Asset until consent arrives, then the section would have no meaning.

Sanare's primary argument regarding the Agreements relies foremost on section 9.2(d). The argument has three premises: (a) PetroQuest failed to obtain Eni's timely consent to transfer the Agreements; (b) PetroQuest's failure rendered the assignment of the Agreements void ab initio; and (c) when the attempted assignment of an Asset is void ab initio, that Asset loses its status as an "Asset" under the PSA (including section 11.1). We reject the second premise.

Closing occurred on January 31, 2018. Eni did not give consent for PetroQuest to assign the Agreements to Sanare until seven months later—in August 2018. And while the PSA's section 9.2(d) includes a grace period for

[7] The bankruptcy court's order mentions only the Properties, *i.e.*, the Lease, the D Wells, and the Platform. That order does not mention the Agreements. We thus fail to see how the Agreements could bear on the order that Sanare appeals from, or on the PSA's definition of the Properties as "Assets." But because Sanare has focused on whether the Agreements are "Assets," our disposition of this appeal relies solely on our conclusion that the Agreements meet the PSA's definition of that term.

consents that arrive after closing but before the sale's "Final Settlement Date," that date also passed before Eni consented. PetroQuest thus "failed to obtain [Eni's] consent prior to the Closing."

However, PetroQuest's failure to obtain Eni's timely consent did not render the PSA's assignment of the Agreements "void ab initio" under section 9.2(d). The parties agree that Louisiana law supplies the relevant definition. Under that state's law, a contract is "absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral."[8] "A contract that is absolutely null may not be confirmed."[9] By contrast, a contract is "relatively null when it violates a rule intended for the protection of private parties," and "[a] contract that is only relatively null may be confirmed."[10] "Confirmation" is the process of "making [a] contract valid by formal assent."[11] "[A] relative nullity . . . is voidable"—not void ab initio.[12]

Sanare agrees that if Eni had timely consented, that consent would have confirmed the assignment and would have allowed the Agreements to "transfer" from PetroQuest to Sanare. By Sanare's own logic, then, the assignments were only *relatively* null—for if they were *absolutely* null, then

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[8] La. Civ. Code art. 2030.

[9] *Id.*

[10] La. Civ. Code art. 2031.

[11] *Rowan v. Town of Arnaudville*, 2002-0882 (La. App. 3 Cir. 12/11/02), 832 So. 2d 1185, 1190; *Meaghan Frances Hardcastle Tr. v. Fleur De Paris, Ltd.*, 2004-1371 (La. App. 4 Cir. 6/29/05), 917 So. 2d 448, 450.

[12] *Mt. Airy Ref. Co. v. Clark Acquisition, Inc.*, 470 So. 2d 890, 892 (La. Ct. App. 1985) (emphasis omitted); *see Twin Par. Port Comm'n v. Berry Bros.*, 94-2594 (La. 2/20/95), 650 So. 2d 748, 749 (treating "relatively null" and "voidable" as synonyms); *Hoffpauir v. State, Dep't of Pub. Safety & Corr.*, 1999-1089 (La. App. 1 Cir. 6/23/00), 762 So. 2d 1219, 1221 (same).

confirmation by consent could not occur.[13] Because PetroQuest's assignment of the Agreements was relatively null, the assignments were voidable, not void ab initio.[14] Even absent Eni's timely consent, section 9.2(d) would not exclude the Agreements from the "Assets to be conveyed." Sanare's second premise is therefore false.

Sanare's attempts to dodge this conclusion fail. For example, Sanare says that a contract "'is deemed to never have existed' when it is either absolutely or relatively null." But a relatively null contract is deemed never to have existed only when it "has been declared null by the court."[15] A court cannot issue such a declaration "on its own initiative," but instead may do so only if the relative nullity "is invoked . . . by those persons for whose interest the ground for nullity was established."[16] Here, Eni never invoked any nullity. Instead, it consented to the transfer.

Sanare's argument goes wrong by failing to recognize that at least *three* possible outcomes are relevant whenever the PSA requires PetroQuest to obtain a consent. First, PetroQuest might succeed. Second, PetroQuest

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[13] La. Civ. Code art. 2030. In a footnote, Sanare suggests that the assignment is an "absolute nullity" because "operations on a federal oil and gas lease" are of "public interest." But this suggestion cannot be squared with Sanare's concession that Eni's consent would have confirmed the assignment. Also, the statute refers specifically to "rules of public order," not to a "public interest" in general. In any event, "[a]rguments subordinated in a footnote are . . . waived." *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020) (quoting *Arbuckle Mtn. Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016)).

[14] *See City of Baton Rouge v. Ross*, 94-0695 (La. 4/28/95), 654 So. 2d 1311, 1325 n.23 (distinguishing "voidable" from "void ab initio"); *State v. Langley*, 2006-1041 (La. 5/22/07), 958 So. 2d 1160, 1169 (distinguishing "voidable" from "absolutely null"); *Martin Marietta Materials of Louisiana, Inc. v. U.S. Fid. & Guar. Co.*, 41,280 (La. App. 2 Cir. 9/27/06), 940 So. 2d 152, 159 (distinguishing "voidable" from "void ab initio").

[15] La. Civ. Code art. 2033.

[16] La. Civ. Code art. 2031.

might fail in a manner that renders the attempted assignment void ab initio (*i.e.*, absolutely null). But third, PetroQuest might fail in a manner that *does not* render the assignment void ab initio. Sanare's argument would dispense with this third category, which consists of assignments that are merely voidable (*i.e.*, relatively null). The Agreements here belong to the third category. Because we conclude that the assignments were not void ab initio, we need not discuss the final premise in Sanare's argument.

IV

The Properties are "Assets" under the PSA, including section 11.1, even if the Bureau's withheld consent prevented record title for the Properties from transferring to Sanare. This conclusion is plain from the PSA's text, which excludes Customary Post-Closing Consents such as the Bureau's from the category of consent failures that alter the parties' bargain. Consent failures that do not produce a void-ab-initio transfer also do not alter the parties' bargain, so the Agreements, too, are Assets under the PSA's plain text. We therefore AFFIRM the district court's judgment.