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I. Introduction

There were few significant New York cases involving oil and gas in the past year due to New York's continuing moratorium on high-volume hydraulic fracturing operations, which are necessary for development of unconventional oil and gas formations. The most notable decision was the U.S. District Court for the Southern District of New York's decision to permit an exploration and production company to reject midstream gathering contracts in a Chapter 11 reorganization. The *Sabine* case is of special significance because of the impact on future agreements between exploration and production companies and midstream companies, particularly when an exploration and production company would like a midstream company to incur significant capital expenditures to extend its pipelines service to a producer. In another case, a landowner attempted to challenge the moratorium, but was held to lack standing because he had not applied for a drilling permit.

II. Cases

A. In re Sabine Oil & Gas Corp., 567 B.R. 869 (S.D.N.Y. 2017).

The U.S. District Court for the Southern District of New York affirmed the Bankruptcy Court for the Southern District of New York's decision that an exploration and production company in a Chapter 11 reorganization could reject its midstream gas contracts.[1] In the Chapter 11 bankruptcy proceeding, an exploration and production company, the debtor-in-possession, sought to reject midstream gas gathering agreements as "executory contracts" under 11 U.S.C. § 365 of the Bankruptcy Code.[2]

The court reviewed the law of real covenants under Texas law. In Texas, a covenant runs with the land when (1) it touches and concerns the land; (2) it relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended by the original parties to run with the land; and (4) the successor to the burden has notice.[3] There are two tests under Texas law for determining if a covenant "'touches and concerns the land.'"[4] First, a covenant touches and concerns the land "if it affects the nature, quality or

1. In re Sabine Oil & Gas Corp., 567 B.R. 869, 877 (S.D.N.Y. 2017).
2. *Id*. at 871.
3. *Id*. at 874 (quoting Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 635 (Tex. 1987)).
4. *In re Sabine*, 567 B.R. at 874 (quoting Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982)).

value of the thing demised, independently of collateral circumstances, or if it affects the mode of enjoying it."[5] Second, a covenant touches and concerns the land "if promisor's legal relations in respect to the land in question are lessened" or "if the promisee's legal relations in respect to that land are increased." [6]

The court rejected objector's argument that the dedication of gas in the agreements conveyed property rights lessening debtor's rights.[7] The nature of objector's interest was distinct from a mineral royalty interest in that the dedication did not convey any share in the natural gas, but instead entitled objector to process the gas in exchange for a fee.[8] In addition, debtor's leasehold interest was not lessened, because debtor was free to produce as much or as little gas as it desired, subject only to a contractual penalty of making a deficiency payment.[9] Finally, the court concluded that the dedication did not affect the nature or quality of the debtor's leasehold interest because it did not restrict debtor's ability to use or alienate its leasehold.[10]

B. Matter of Morabito v. Martens, 149 A.D.3d 1316 (N.Y. App. Div. 2017).

The Supreme Court of New York, Appellate Division, affirmed a lower court decision concluding that a landowner had no standing to challenge New York's ban on hydraulic fracturing ("HVHF").[11] New York has had a ban on HVHF since 2010.[12] In 2014, the landowner wrote to New York's Commissioner of Environmental Conservation ("Commissioner"), seeking permission to conduct HVHF on his property.[13] Landowner filed a second petition in 2015 to determine if the HVHF ban only applied to commercial operators.[14] The Commissioner responded that the HVHF ban applied to all property owners, commercial or non-commercial.[15] Landowner then commenced proceedings against the Commissioner.[16]

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5. *In re Sabine*, 567 B.R. at 874.
6. *Id*.
7. *Id*.
8. *Id*. at 875.
9. *Id*. at 876.
10. *Id*. at 877.
11. Matter of Morabito v. Martens, 149 A.D.3d 1316, 1317 (N.Y. App. Div. 2017).
12. *See id*. at 1316.
13. *Id*.
14. *Id.*
15. *Id*.
16. *Id.*

The trial court held that the petitioner lacked standing and the appellate court affirmed that decision: "At the time of commencement of this proceeding, petitioner had not applied for a permit nor offered any proof that he met any of the requirements to obtain a permit."[17] The court reached this decision because the landowner "offered no proof of any plans to move forward with the process and conceded that any plans would necessarily involve commitments by oil and gas exploration companies, of which he had none."[18] This was no different, the court analogized, to the petitioner's position in *Matter of Association for a Better Long Island*, because "standing at the time of filing was no different than that of any landowner in the state; [and therefore] he lacked standing to challenge the determination."[19]

C. Champlain Gas & Oil, LLC v. People, 148 A.D.3d 1260 (N.Y. App. Div. 2017).

The Supreme Court of New York, Appellate Division, affirmed a lower court decision holding that a conveyance of mineral rights included the right to extract sand and gravel, but reversed summary judgment because of insufficient description of the boundaries of the mineral interest.[20]

In 2007, a surface owner granted a conservation easement to the State, which prohibited mining on 13,700 acres of land.[21] However, a Producer alleged ownership to the portion of the mineral rights underlying the land subject to the easement with the State.[22] The Developer, to support its contention, entered into evidence maps which depicted surface ownership but did not specifically reference mineral ownership.[23] The trial court granted summary judgment in favor of the Developer, declaring that the rights of surface owner and the conservation easement with the State were subject to the its mineral rights.[24]

The surface owner appealed. The court first held that, "as sand and gravel are 'inorganic substances . . . [that] can be taken from the land,' they

17. *Id.* at 1317.

18. *Id.*

19. *Id.* (citing Matter of Association for a Better Long Is., Inc. v. N.Y. State Dept. of Envtl. Conservation, 23 N.Y.3d 1, 9 (2014)).

20. *See* Champlain Gas & Oil, LLC v. People, 148 A.D.3d 1260, 1264 (N.Y. App. Div. 2017).

21. *Id*. at 1260.

22. *Id*.

23. *Id*.

24. *Id*. at 1261.

fall within the mineral rights conveyed by the 1917 deed."[25] However, even though the Developer owned some of the mineral rights under a portion of the easement property, the court concluded that "[in] their complaint seeking a declaratory judgment, [the Developers] offered no meaningful description of the boundaries of their mineral rights."[26] Thus, the court reversed summary judgment because the Developers introduced insufficient evidence of the boundaries of their interest.[27]

25. *Id*. at 1262 (quoting White v. Miller, 200 N.Y. 29, 39 (1910)).
26. *Champlain Gas*, 148 A.D.3d at 1262.
27. *Id.* at 1263-64.