

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

JEFFERY CARLOS HALE, ETC.,)

Plaintiff,)

v.)

CNX GAS COMPANY, LLC, ET AL.,)

Defendants.)

Case No. 1:10CV00059

OPINION AND ORDER

By: James P. Jones
United States District Judge

David S. Stellings, Steven E. Fineman, and Daniel E. Seltz, Lieff, Cabraser, Heiman & Bernstein, LLP, New York, New York, for Plaintiff; Jonathan T. Blank and Lisa M. Lorish, McGuireWoods LLP, Charlottesville, Virginia, and James R. Creekmore and Blair N.C. Wood, The Creekmore Law Firm PC, Blacksburg, Virginia, for CNX Gas Company LLC.

The defendant CNX Gas Company LLC (“CNX”) has filed a Motion for a More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e) and to Dismiss Plaintiff’s First Amended Class Action Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7). The motion has been fully briefed by the parties.¹ For the reasons set forth, the motion will be denied.

¹ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

The court granted leave to file the Amended Complaint over the objections of CNX. *Hale v. CNX Gas Co.*, No. 1:10CV00059, 2012 WL 4127615 (W.D. Va. Aug. 1, 2012). CNX now moves the court to require a more definite statement of the plaintiff's ownership of the property in question. It also moves to dismiss the Amended Complaint on the grounds that (1) it fails to join indispensable parties; (2) certain claims are barred by the applicable statute of limitations; (3) the plaintiff's request for court appointment of an expert is premature; and (4) the injunctive relief sought is contrary to the Virginia Gas and Oil Act. It also asserts that the claims (5) that royalties due under the lease were improperly calculated and (6) that CNX failed to deposit certain royalties into an escrow account as required, fail to state any cognizable basis for relief.

Upon careful consideration of the parties' arguments, I find that the motion should be denied.

In the first place, I hold that the plaintiff's recitation of ownership is adequate for pleading purposes.

Moreover, the court has previously considered and rejected CNX's arguments concerning the failure to add as parties the applicable coal owners. *Id.* at *3. The statute of limitations defense has similarly been considered and overruled in the court's ruling on a prior motion to dismiss. *Hale v. CNX Gas Co.*,

No. 1:10cv00059, 2011 WL 4527447, at *28-29 (W.D. Va. Jan. 21, 2011), *report and recommendations accepted*, 2011 WL 4502262 (W.D. Va. Sept. 28, 2011).

I also find that at this pleading stage of the case, the requests for a court-appointed expert and for injunctive relief are at least plausible.

One of the plaintiff's claims is that the royalties paid were improperly calculated in that they did not reflect the actual price for which the gas was sold. He alleges that CNX "used gas prices that were less than the actual proceeds received by CNX, including prices and proceeds CNX realized/received through swap contracts and other hedging and marketing activities." (Am. Compl. ¶ 72.)

CNX argues that pursuant to the pooling orders issued by the Virginia Gas and Oil Board, royalties are due from the production and sale of specific gas, less certain post-productions deductions, and not to any "market speculation that CNX may be engaged in with its own capital and at its own risk." (Mem. in Supp. of Mot. 21.) The plaintiff responds that because CNX was obligated under the law to obtain the highest price for the gas, to the extent it was rewarded by related derivative arrangements, those arrangements may be considered in determining whether CNX has met its obligation.

While CNX may be ultimately correct on the merits, I find that as a pleading matter, the claim cannot be dismissed at this stage of the case.

Similarly, I agree with the plaintiff that on the present record I cannot rule adversely on the claim that severance taxes are not a proper post-production cost deductible from royalties due, or on the claim that CNX improperly produced and sold gas prior to the issuance of a pooling order by the Virginia Gas and Oil Board.

Finally, I find that the plaintiff adequately alleges a plausible claim that CNX failed to properly pay royalties into escrow.

For these reasons, it is **ORDERED** that the defendant's motion (ECF No. 184) is DENIED.²

ENTER: October 15, 2012

/s/ James P. Jones
United States District Judge

² To the extent that the Amended Complaint asserts other claims that were earlier dismissed, those claims remain dismissed without the necessity of response by CNX. *See* 2012 WL 4127615, at *3 n.3.