Dever, R v. EnCana Oil & Gas

COLORADO COURT OF APPEALS

Court of Appeals No.: 08CA2131
City and County of Denver District Court No. 05CV2753
Honorable Norman D. Haglund, Judge

Raymond Miller; Sally Miller; Barclay Farms, L.L.C.; Joan Elaine Brehon; Janette Foote; Niles Miller; U.S. Bank, N.A., as trustee for the T.E. McClintock Trust; and White River Royalties, LLC, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

Richard Thomas Dever and Dever Family Minerals, LLC,

Plaintiffs-Appellants,

v.

EnCana Oil & Gas (USA) Inc.,

Defendant-Appellee.

ORDER AFFIRMED

Division VI
Opinion by: JUSTICE ROVIRA*
Furman and Booras, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: June 11, 2009

Law Offices of George A. Barton, P.C., George A. Barton, Kansas City, Missouri; Charles Carpenter, Denver, Colorado for Plaintiffs-Appellees

Dufford, Waldeck, Milburn & Krohn, L.L.P., John R. Pierce, Nathan A. Keever, Grand Junction, Colorado, for Plaintiffs-Appellants

Holland & Hart LLP, John F. Shepherd, Marcy G. Glenn, Craig Stewart, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

In this class action, Richard Thomas Dever and Dever Family Minerals, LLC (collectively, Dever) appeal the district court's order approving a settlement between the class of royalty interest owners and defendant, EnCana Oil & Gas (USA) Inc. We affirm.

I. Background and Procedural History

This case was based on allegations by the class that EnCana breached contracts with the class by underpaying royalties for natural gas it produced. Specifically, the class alleged that the contracts did not authorize EnCana to deduct from royalty payments the costs incurred to market natural gas after it was severed from the wellhead.

After the class was certified by the district court, notice of the certification was mailed to approximately 6,000 class members, including Dever. The notice included a form to fill out if the recipient wished to opt out of the class. Approximately 150 class members opted out of the class, but Dever choose not to do so.

In 2008, after the opt out period ended, the class and EnCana reached a settlement agreement. EnCana agreed to pay $40 million to settle the claims for royalty underpayments on natural gas production through December 31, 2008, and also agreed to

implement new methods for calculation of royalty payments to class members on and after January 1, 2009. The district court granted preliminary approval of the class settlement.

Subsequently, a notice of the proposed settlement was mailed to the class members informing them of the terms of the settlement and the right to object to the settlement. Dever objected on several grounds including, as relevant here, that the release of class member claims in the settlement was too broad. The class and EnCana filed responses to Dever's objections and Dever filed a reply brief. For the first time, in the reply brief, Dever specified that the release was too broad because it included decimal interest claims.

The district court held a hearing to address Dever's objection to the settlement and consider final approval of the settlement. At the hearing, several witnesses gave testimony regarding the calculations of royalty payments, including class members and experts presented by the class and Dever.

On cross-examination, Dever's counsel asked a class member about her decimal ownership interest. She testified that a decimal interest is the percentage ownership interest in the entire area covered by the agreement with the operator, here EnCana. She

further explained that EnCana was responsible for calculating the decimal interest and sending it to her to verify. She testified that in order to determine whether the calculation was correct, the information included "the entire unit agreement":

> I have a schedule of every lease in the unit agreement along with the acreage in every lease. I have – I know what acreage I have in the unit. And I know what my mineral interest is in the unit. And I know what my royalty interest is in the unit.

Using that information, she testified she could determine whether the decimal interest was correct. She went on to testify that a calculation based on that information would be different for every class member.

Dever presented one witness at the hearing, Mary Ellen Denomy, a certified public accountant. Denomy testified that decimal interests were calculated on a person-by-person basis because the decimal interest was based on "what you own and how -- what -- how -- what percentage you own of those minerals."

After the hearing the court issued an order approving the settlement and denying Dever's objection. This appeal followed.

II. Standard of Review

C.R.C.P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

A trial court's approval of a settlement will not be overturned absent a clear abuse of discretion. *Bruce W. Higley Defined Benefit Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 891 (Colo. App. 1996) (*Higley*). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

Dever contends the district court abused its discretion because (1) the settlement released claims not included in the complaint, (2) the notice of the settlement did not give class members an opportunity to opt out, and (3) the settlement was not fair because the district court lacked evidence of value of the decimal interest claims. We disagree with all these contentions.

III. Decimal Interest Claims

Dever contends that the district court abused its discretion by approving a settlement that encompassed decimal interest claims, which were not addressed in the class complaint. We disagree.

EnCana contends Dever did not preserve this claim for appeal. We disagree. Dever objected to the broad coverage of the settlement in its initial objection to the settlement agreement and then elaborated on the claim in its reply to support the objection to the settlement agreement by specifically taking issue with the inclusion of the decimal interest claims. The district court addressed the issue in its findings of facts and conclusions of law approving the class settlement. Therefore, we conclude the issue was preserved for appeal. *See generally Titan Indem. Co. v. Sch. Dist. No. 1,* 129 P.3d 1075, 1078 (Colo. App. 2005).

Dever contends the decimal interest claims were included in the settlement, but not the complaint, based on the broad coverage of the settlement. The complaint alleged that EnCana breached the royalty agreements by failing to pay based upon the prices received by EnCana on its sale of natural gas and gas liquids at the commercial market. In its prayer for relief the class requested damages and a declaratory judgment determining the appropriate methods for EnCana's calculation of future royalty payments. The notice to class members regarding the settlement stated: "Upon final Court approval, all members of the Class will receive the

benefits of the Class Settlement and will be bound by the resulting Order in the Lawsuit, barring them from bringing any claim against EnCana related to royalty calculations which are covered by the Settlement Agreement." The settlement also contained a release and a covenant not to sue based on claims settled pursuant to the agreement.

"Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106-07 (2d Cir. 2005). Class action plaintiffs' authority to release claims is limited by the identical factual predicate doctrine, which allows plaintiffs to release claims that share the same integral facts as settled claims. *Id.* The identical factual predicate doctrine serves an important purpose because without this doctrine, in the face of a defendant's nearly limitless liability, class action settlements would not occur. *Id.* All the parties agree the factual predicate doctrine is applicable here.

To support its contention Dever relies on the testimony of Denomy that she conducted audits of EnCana several years earlier for royalty owner clients and encountered situations where the

decimal interest was wrong and needed to be recalculated. The district court considered her testimony and observed that "Ms. Denomy admitted that she brought no documents to the Hearing to substantiate her testimony," and "also admitted she had never told EnCana during the audits about her belief that EnCana was substantially underpaying royalties." Further, the court noted her testimony was contradicted by substantial evidence in the record, specifically, by the testimony of Don Phend, a certified public accountant retained by the class to provide an analysis of the alleged royalty underpayments, and Mary Viviano, General Counsel for EnCana, who was familiar with EnCana's general policies and methods for calculating royalties. Accordingly, the district court concluded Denomy's testimony was not persuasive.

In its findings of fact and conclusions of law regarding the class's motion for final approval of class settlement, the court discussed Dever's contention that the decimal interest claim could not be brought in a class action suit. The district court concluded:

> [T]he question of a royalty owner's decimal interest is necessarily intertwined with the calculation of the amount to be paid to each Class member pursuant to the Settlement Agreement, as reflected in the Preliminary Allocation Schedule. Without reliance on the decimal

> interest shown in EnCana's records, it would be impossible to determine how much to pay each of the Class members under the Settlement. Accordingly, the release of decimal interest claims prior to January 1, 2008 is appropriate in this case.

In light of the court's consideration of the testimony provided at the hearing and its explanation of why it did not find Dever's witness persuasive, we perceive no abuse of discretion in that conclusion.

Dever also relies on *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9 (2d Cir. 1981), to support its contention. In that case, involving potato futures contracts, a class action settlement released claims for both liquidated and unliquidated contracts. *Id.* at 11, 14. However, "[t]he complaint did not state any claims based on any contracts other than those liquidated." *Id.* at 17. Likewise, the notice only referred to claims based on liquidated contracts. Therefore, the court concluded that the settlement improperly released claims based on unliquidated contracts. *Id.* at 21.

We agree with EnCana that *National Super Spuds* is distinguishable because here we are not dealing with two separate contracts. Rather, if EnCana improperly calculated decimal interests it would ultimately affect the royalty payment under the

only contracts between EnCana and the class. Furthermore, although the decimal interest might be different for each party, the royalty payments are still based on the same calculation and the same contract. Accordingly, Dever's reliance on *National Super Spud* is misplaced.

The district court did not abuse its discretion by approving a settlement that encompassed decimal interest claims.

IV. Second Opt Out Opportunity

Dever contends that the class members should have been given a second opportunity to opt out of the class on receiving notice of the settlement. We disagree.

The first notice complied with C.R.C.P. 23(c)(2), which provides in relevant part:

> [T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The class action notice provided, as relevant here, (1) "To be excluded from the EnCana Class, you must provide a written election to be excluded . . . on or before January 30, 2008"; (2) "[Y]ou will be bound by the judgment and final disposition . . . regardless of whether the outcome is favorable to you"; and (3) "Any Class member who does not request exclusion may, however, enter an appearance herein thorough their [sic] own separate counsel." This notice is consistent and in compliance with C.R.C.P. 23.

We recognize that the settlement occurred after the opt out period expired. However, the notice of the settlement provided an opportunity for class members to object, as Dever did here.

Further, in its final judgment and order of dismissal with prejudice, the district court evaluated the suitability of the notice:

> In accordance with the Court's Preliminary Order and Modified Notice Order, Class Counsel caused to be mailed to members of the Class . . . notices in the forms approved by the Court . . . and caused to be published a summary notice of the proposed settlement of this action in the form and manner approved by the Court . . . . The Court finds that the notice provided to Class Members constituted the best and most practicable notice under the circumstances and included individual notice to all Class Members who could be identified by reasonable effort.

The district court also considered Dever's contention that a second opt out period was required in its findings of facts and conclusions of law regarding the class's motion for final approval of class settlement:

> The Court also rejects the Dever Objectors' argument the Court was required to give Class members a second opportunity to opt out of the Class once the proposed class settlement was made. Although Fed. R. Civ. P. 23(e), the counterpart to C.R.C.P. 23(e), was amended in 2003 to provide the federal district courts with discretion to allow class members a new opportunity to request exclusion from a proposed class settlement under Fed. R. Civ. P. 23(b)(3), no such amendment has been adopted for C.R.C.P. 23(e). This Court finds that the Notice of Class Certification mailed in December 2007 informed the Dever Objectors that they had the option of excluding themselves from the certified Class by submitting a written exclusion request to Class Counsel by January 30, 2008. The Class Certification Notice further informed the Dever Objectors that if they chose to remain in the certified Class, they would be bound by the judgment and final disposition of the EnCana lawsuit, regardless of whether the outcome was favorable to them. Thus, the December 2007 Class Certification Notice fully informed the Dever Objectors of their options to opt out of the certified Class, and the conditions which would be imposed if they remained in the certified Class. The Dever Objectors offer no reason why a second opt out opportunity should have been provided in connection with the Notice of Proposed Class Settlement in May 2008, and the Court finds that a second opt out opportunity was neither necessary nor appropriate.

We agree with the district court. The advisory committee notes explain Fed. R. Civ. P. 23 was amended in 2003 to authorize courts to refuse to approve a settlement unless the settlement afforded a new opportunity to elect exclusion in a case that settled after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. C.R.C.P. 23 was also amended in 2003 to include a provision regarding appeals of class certifications, but no provision comparable to that of Fed. R. Civ. P. 23(e) was added. Moreover, we note that the provision in Fed. R. Civ. P. 23(e) is discretionary with the court, not mandatory. *See generally* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1797.5 (3d ed. 2005). As a result, we are not persuaded the applicable rule required a second opt out period, particularly in light of the proper notice that was initially sent.

Further, we agree with the class that Dever's reliance on *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), is misplaced. Dever cites *Dunlop* for the proposition that a settlement agreement releasing a claim beyond those included in a complaint is inappropriate where class members did not have an

opportunity to opt out of the settlement and associated release. In that case, the court considered whether a settlement agreement could be amended to clarify that settlement of the federal claims against Pan American Airlines did not bar a pending law suit in state court by several employees. *Id.* at 1047. The court made the requested clarification. *Id.* at 1053. The case was not a class action. Here, in contrast, Dever is not asking us to clarify the settlement: it is asking us to conclude the district court abused its discretion in approving the settlement. Moreover, there is no pending case based on decimal interest claims. Therefore, *Dunlop* is inapplicable and we conclude no second opt out period was required.

V. Value

Dever contends that even if we conclude the decimal interest claims were properly included in the settlement, the district court abused its discretion because the settlement was not fair. Specifically, Dever contends there was no evidence of value of the decimal interest claims and there was no evidence that the class's counsel investigated the value of those claims, and therefore, the

court could not properly evaluate the fairness of the settlement. We disagree.

On review of a class action settlement agreement, "[t]he 'universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable.'" *Helen G. Bonfils Found. v. Denver Post Employees Stock Trust,* 674 P.2d 997, 998 (Colo. App. 1983) (quoting *Officers for Justice v. Civil Service Commission,* 688 F.2d 615 (9th Cir. 1982)). In determining fairness, several factors are considered, including (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the experience and views of counsel; and (7) the reaction of the class members to the proposed settlement. *Higley,* 920 P.2d at 891.

We conclude that although the court did not mention the value of the decimal interests involved in calculating the royalty payments, it did consider the relevant factors, and accordingly Dever's contention fails.

First, we address the district court's discussion of discovery. The district court recognized that there had been extensive discovery by class counsel, including data on calculating and paying royalties, evidence from class counsel's expert, and additional depositions from fourteen witnesses, including EnCana employees. Yet, Dever, relying on *Polar International Brokerage Corp. v. Reeve,* 187 F.R.D. 108 (S.D.N.Y. 1999), contends that there was not sufficient discovery done regarding value of decimal interest claims.

In *Polar* the court stated, "In order to approve a settlement, a court need not find that the parties have engaged in extensive discovery. The parties must, however, have engaged in sufficient investigation of the facts to enable the court to 'intelligently make . . . an appraisal' of the settlement." *Id.* at 114 (citation omitted) (quoting *Plummer v. Chemical Bank,* 668 F.2d 654, 660 (2d Cir. 1982)). There, the court concluded that although the pretrial investigation done by the parties would "offset concerns that the settlement occurred so early in the case," the other factors to be evaluated outweighed the sufficient discovery in favor of not approving a settlement. *Id.* Those factors included ability to

withstand greater judgment, risk of maintaining class action, reasonableness of the settlement, risk of establishing liability, and damages. *Id.* at 114-15. In contrast, as discussed, here those factors support approving the settlement. Therefore, Dever's reliance on *Polar* is misplaced and we turn to the remaining factors.

Considering the strength of each parties' case and the risks associated with further litigation, the district court concluded there would be extensive expert testimony supporting all the parties' claims and,

> ultimately, the outcome of a jury trial would be predicated on the jury's assessment of each side's evidence regarding the location of the first commercial market for the natural gas produced in Colorado . . . . [T]here would have been conflicting evidence concerning the amount of damages to which the Class members are entitled, even assuming that the Class members prevailed on their arguments regarding the location of the first commercial market.

Thus, the district court concluded the case was uncertain and risky for both sides.

Next, considering the costs and extent of further litigation, the court noted that litigation would be costly because of the need for experts. Further, the court explained that in the absence of settlement it could be several years before a trial on the merits.

The court also considered the settlement itself and noted that in addition to a monetary settlement, the parties agreed to a new method for calculation of future royalties to benefit class members.

In addition, the court pointed out that both parties had experienced counsel and that the class counsel believed the settlement was "a very good outcome for the members of the Class on the claims at issue, both for the past and the future."

Finally, the court considered the number of class members opposed to the settlement. Of the over 6,000 members notified of the settlement by mail, the Dever objectors were the only two members to submit an objection to final approval of the settlement.

Further, both the court's orders, preliminary and final approval of the settlement, concluded that the settlement was fair, reasonable, and adequate.

Thus, the extensive findings of the district court were sufficient to comply with the required fairness evaluation and do not constitute an abuse of discretion.

The order is affirmed.

JUDGE FURMAN and JUDGE BOORAS concur.