IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

THE COUNTY COMMISSION OF
FAYETTE COUNTY, WEST VIRGINIA, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:21-cv-00307

NATIONAL GRID NE HOLDINGS 2 LLC, et al.,

Defendants.

ORDER

Pending before the Court are Defendant Quercus West Virginia, LLC's Motion for Summary Judgment, (ECF No. 362), and Defendant Pardee and Curtain Realty LLC's Motion for Summary Judgment, (ECF No. 365). For the reasons set forth below, these motions are **GRANTED**.

I. BACKGROUND

Plaintiff The County Commission of Fayette County, West Virginia initiated this action on May 18, 2021. (ECF No. 1.) The County then filed an Amended Complaint on July 16, 2021, (ECF No. 31), and a Second Amended Complaint ("SAC") on June 15, 2022, (ECF No. 499).

The action alleges contamination of the Johnson Fork of Loop Creek Watershed, located in Fayette County, West Virginia. (*See* ECF No. 499 at 33, ¶ 18.) Specifically, the SAC asserts

violations of the Resource Conservation and Recovery Act, West Virginia common law, and a county-level nuisance ordinance. (*See id.*)

According to the SAC, from "no later than the late 1920s . . . until at least the mid-1950s," Eastern Gas and Fuel Associates ("EGFA")—the entity which is now Defendant National Grid Holdings 2 LLC—conducted "extensive coal mining operations throughout the . . . Watershed." (ECF No. 499 at 36-37.) During these operations, EGFA allegedly created, operated, and maintained "at least five . . . separate, associated piles of coal mining waste," ("CMW"). (*Id.* at 37, ¶ 30.) The County claims that these piles of CMW were constructed and maintained without appropriate safety and prevention measures. (*Id.*) First EGFA and then its subsidiary, Eastern Associated Coal, LLC ("EAC"), owned and conducted the mining operations on the land for another half-century.

However, in 2003, EAC sold the land to Pardee, and from 2003 to 2013, Pardee owned and managed much of the surface estate within the Watershed—where four of the five piles allegedly sit. (*See* ECF No. 499 at 45-46, ¶¶ 70-74.) Pardee acquired the land via a "special warranty deed" that included eight maps as exhibits labelled C-1 to C-8 which "excepted and reserved several sections of the surface from the general grant of the surface estate." (ECF No. 363 at 2, *see also* ECF No. 362-1.) These so-called "Reserved Surface Tracts" included the abandoned mine lands of the previous owners and are expressly depicted in the 2003 Deed granting Pardee ownership. (*See* ECF No. 362-1 at Quercus000251-60.) These exceptions ostensibly left EAC as the owner of the Reserved Surface Tracts.

Then, in June 2013, Pardee conveyed its interest in the surface estate to Quercus, again by "special warranty deed." (ECF No. 363 at 2, *see also* ECF No. 362-2.) The 2013 Deed

transferred to Quercus *only* the interests Pardee had received from EAC in the 2003 Deed. As a result, the Reserved Surface Tracts remained the property of EAC.

Pardee ensured the land would remain excepted in the 2013 Deed by commissioning a map drawn by a surveyor of the locations of the Reserved Surface Tracts. (*See* ECF No. 362-3.) The agreement between Quercus and Pardee also emphasized that the Reserved Surface Tracts "described in [the maps depicted in the 2003 Deed] and comprising 387.72 acres . . . were reserved in the [2003 Deed] from [EAC] to [Pardee]." (ECF No. 362-4 at 4.)

Finally, in October 2015, EAC—still owner of the Reserved Surface Tracts—sold its remaining interest in the excepted land to ERP Mineral Reserves, LLC. (*See* ECF No. 362-5 at 263 and ECF No. 362-6.] The 2015 deed states that EAC conveyed to ERP "[a]ll those Reserved Surface Tracts depicted on [the 2003 Deed] between [EAC] and Pardee." (ECF No. 362-6 at 5.) To this day, ERP continues to own the Reserved Surface Tracts containing the abandoned mining land which were excepted in the 2003 Deed.

The last event relevant to these motions occurred in June 2019. At that time, the County—through its expert Dr. Simonton—conducted an inspection of the Watershed. During the inspection, Dr. Simonton collected eight samples from various locations. (*See* ECF No. 362-7.) Of these eight samples, six were located on the Reserved Surface Tracts, and the remaining two showed "[n]o regulatory violation." (ECF No. 362-9 at 4-7.)

Quercus filed its pending Motion for Summary Judgment on February 23, 2022. (ECF No. 362.) Pardee followed suit with a similar motion of its own on February 24, 2022. (ECF No. 365.) On April 21, 2022, the Court directed the County to respond to these motions, (ECF No. 404), and soon after, granted an extension of the deadline for doing so, (ECF No. 424).

Before the County could file its brief, Quercus also provided the Court with a Notice of Supplemental Authority on April 28, 2022. (ECF No. 416.) The County then filed its opposition on May 12, 2022. (ECF No. 436.) Finally, Quercus and Pardee submitted a joint reply on May 23, 2022. (ECF No. 468.) As such, this motion is fully briefed and ripe for adjudication.[1]

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment. It states, in pertinent part, that a court should grant summary judgment if "there is no genuine issue as to any material fact." "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News & Observer Publ. Co. v. Raleigh–Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). Summary judgment should not be granted if there are factual issues that reasonably may be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Thus, at the summary judgment phase, the pertinent inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Variety Stores, Inc. v. Wal-Mart Stores*, Inc., 888 F.3d 651, 659 (4th Cir. 2018) (alteration and internal quotation marks omitted).

The nonmoving party bears the burden of showing there is a "genuine issue of material fact for trial . . . by offering 'sufficient proof in the form of admissible evidence[.]' " *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 216 (4th Cir. 2016). When ruling on a motion for

[1] Though the SAC was filed after the pending motions, the allegations in the SAC do not materially change the claims subject to these motions. Further, during a status conference on November 11, 2022, the parties stipulated that the Court may rule on the motions based on the existing briefing.

summary judgment, the Court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

III. DISCUSSION

The claims in the SAC are based on eight samples taken throughout the Watershed in Fayette County. It is undisputed that two of these samples discovered "[n]o regulatory violation" in those areas. Thus, Defendants' motions hinge on whether the other six samples—which allegedly did find a regulatory violation—were taken on land that was at one point owned by Quercus or Pardee. As explained further below, the Court finds that there is no evidence that either Quercus or Pardee ever owned the land where alleged environmental violations occurred, and so the County's claims against those parties fail as a matter of law.

A. Ownership of the Reserved Surface Tracts

From 2003 on, ownership of the Reserved Surface Tracts was severed from ownership of the remainder of the surface estate. Three separate deeds align on this and provide overwhelming support for this conclusion. The Court will examine each in turn.

a. *2003 Deed*

By far the most important deed in this analysis is the 2003 Deed between ECA and Pardee. To determine the effect of this deed, the Court must "ascertain the true intent of the parties as expressed by them in the deed." *Davis v. Hardman*, 133 S.E.2d 77, 81 (W. Va. 1985). This process starts by looking to the text of the deed itself. In West Virginia, a "valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation." Syl. Pt. 1, *Sally-Mike Props. v. Yokum*, 332.

S.E.2d 597, 598 (W. Va. 1985) (citation omitted). Instead, the instrument must only be "applied and enforced according to such intent." *Id.*

As with any other provision, this plain language approach applies to exceptions in a deed, too. An exception is a long-recognized means of "withholding . . . title to part of the property described in the deed." *White Flame Coal Co. v. Burgess*, 102 S.E. 690, 691 (W. Va. 1920). In other words, "part of the property conveyed" is "withdraw[n]" from the grant and remains with the grantor. *Klein v. McCullough*, 858 S.E.2d 909, 914 (W. Va. 2021).

By its plain terms, the 2003 Deed includes an exception for the Reserved Surface Tracts. It states that "[EAC] EXCEPTS and RESERVES the surface and timber only of those tracts of real property depicted on Exhibits C-1 to C-8 attached hereto." (ECF No. 362-1 at 3.) As mentioned above, Exhibits C-1 to C-8 are maps that actually *depict* the property withheld by EAC. (*See* ECF No. 362-1 at Quercus000251-60.) Further, the 2003 Deed only grants Pardee the land "after deduction of the . . . Reserved Surface Tracts." (ECF No. 362-1 at 1.) By including straightforward language and even maps, the 2003 Deed leaves no question that the Reserved Surface Tracts were excluded from the grant to Pardee.

As it must, the County does not contest this reading and instead attempts to circumvent it entirely by asserting that another portion of the 2003 Deed destroys the exception entirely. The County points out that in the 2003 Deed, EAC and Pardee agreed to "obtain surveys or otherwise develop mutually acceptable metes and bounds descriptions of each of Reserved Surface Tract within 90 days . . . and to execute and deliver a corrected deed reflecting such descriptions." (ECF No. 436 at 15 (referencing ECF No. 362-1 at Quercus 000217-18).) However, after the 2003 Deed's execution, it appears that no corrected deed was ever filed. The County believes

this lack of a corrected deed means that there was a contingency that was never met and thus invalidates the exception in the 2003 Deed.

To the contrary, there is nothing in the 2003 Deed which suggests that the lack of a corrective deed voids the deed. The deed lacks "apt and proper words importing a condition subsequent" the failure of which to satisfy would cause the land to revert ownership to EAC. *Engel v. S. Penn Oil Co.*, 146 S.E. 385, 389 (W. Va. 1928). In fact, there are no "words of reverter" at all. *Id.* Nothing in the 2003 Deed hinges on the execution of a corrective deed or suggests that the absence of one causes the property to return to EAC.

Thus, the entirety of the land surely did not revert to EAC. "So what?" the County asks. That must mean that the lack of corrective deed undoes the exception alone. Not so. In fact, the 2003 Deed is crystal clear in its goal to *not* convey the Reserved Surface Tracts. There are multiple statements to that effect and even a series of maps illustrating exactly where the land to be excepted sits. (*See* ECF No. 362-1.) In the face of all of this, the Court will not thwart the parties' plain intentions to exclude the land.

Yet even if the 2003 Deed was ambiguous—it is not—the Court would not void it just because the County interprets its terms differently than every party for the last twenty years. At least three reasons support this holding.

First and foremost, the County has no stake in the deed at all and has no grounds "to assert the rights of another" by contesting its meaning. *State ex rel. Leung v. Sanders*, 584 S.E.2d 203, 212 (W. Va. 2003). Since its inception, EAC and Pardee have maintained the same understanding of the 2003 Deed, and neither party has ever asserted that it is void because of the

lack of a corrected deed. Coupled with the statements in the deed itself, this plainly indicates that the parties intended to withhold the Reserved Surface Tracts.

Second, the County's claim that the Reserved Surface Tracts' locations are unclear withers under the light of scrutiny. (*See* ECF No. 436 at 12-13.) To begin, a deed should not be "declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, the property intended to be affected." Syl. Pt. 3, *Sally-Mike*, 332 S.E.2d at 598. The language needed to describe the conveyance must only be "sufficient to serve as a pointer or guide to the ascertainment of the location of the land." *Highway Props. v. Dollar Sav. Bank*, 431 S.E.2d 95, 99 (W. Va. 1993) (quotations omitted). This need not go so far as to "identify the land sold" but instead need only "furnish the *means* of identification." *Consol. Coal Co. v. Mineral Coal Co.*, 126 S.E.2d 194, 202 (W. Va. 1962) (emphasis added). Here, Defendants correctly note that the identification includes eight maps which display "topographical contour, nearby radio towers, property boundaries, creeks, abandoned rail lines, and strip mines." (ECF No. 468 at 7 (citation omitted).) These maps are far from just "vague circles" as the County claims, (ECF No. 436 at 15), and are more than enough to identify the Reserve Surface Tracts' locations.

Third and finally, the County makes much about the notion that "certainty above all else is the preeminent compelling public policy to be served" by property law. (ECF No. 436 at 13 (citing *Hock v. City of Morgantown*, 253 S.E.2d 386, 388 (W. Va. 1979).) No doubt, this is true. Yet Defendants are correct that "Pardee and Quercus are not the ones sowing uncertainty here." (ECF No. 468 at 8.) It is the County creating confusion by challenging a deed it has no stake in,

which contains terms that have been understood as Defendants—and the Court—interpret them by four different parties across two decades and three conveyances.

Prior to the County's interpretation, the effect of the 2003 Deed was apparent to all: EAC excepted the Reserved Surface Tracts from its conveyance to Pardee. The Court declines the County's invitation to upend this unanimous and unambiguous understanding.

b. *2013 Deed*

Having determined that the 2003 Deed left the Reserved Surface Tracts in EAC's possession, the Court will briefly touch on the effect of the 2013 Deed. Before doing so, the Court notes that the County does not argue that—assuming the validity of the 2003 Deed—the 2013 Deed is void in any other way.

In the 2013 Deed, Pardee conveyed most of the interests that it acquired in the 2003 Deed to Quercus. (*See* ECF No. 362-2.) Like the 2003 Deed, the 2013 Deed specifically excepted the Reserved Surface Tracts "which were reserved by [EAC] in the [2003 Deed] from [EAC] to [Pardee]." (*Id.* at Quercus000127.) Yet again, the 2013 Deed also included maps identifying all excepted land. (*See id.* at Quercus000128-38.)

In short, the 2013 Deed did not—and *could not*—convey the Reserved Surface Tracts to Quercus because Pardee never owned them in the first place.

c. *2015 Deed*

The last deed relevant to these motions was executed in 2015. At that time, EAC sold the Reserved Surface Tracts to ERP. (*See* ECF No. 362-6.) The 2015 Deed was clear about its effect and even referenced the 2003 Deed to ensure there was no confusion: EAC explicitly

conveyed to ERP "[a]ll those Reserved Surface Tracts depicted [in the exhibits to the 2003 Deed] between [EAC] and Pardee." (*Id.* at 5.)

Once again, the County does not assert that the 2015 Deed is void on its own merits and instead relies entirely on its argument against the 2003 Deed. Because that argument fails, there is no remaining objection to the validity of the 2015 Deed.

Put simply, these three deeds demonstrate that neither Pardee nor Quercus ever owned the Reserved Surface Tracts. Absent this, the County would need to establish liability in some other way to maintain a claim against either of these parties, else they fail as a matter of law.

B. Other Evidence Alleged Environmental Violations On Defendants' Property

Undaunted by its failure to demonstrate outright ownership of the Reserved Surface Tracts, the County marshals a trio of assorted arguments designed to evade summary judgment. Two of these arguments claim that there are alleged environmental violations on the land Defendants *do* own, while the third argument presents a new theory of ownership in the hopes of establishing Quercus's dominion over the allegedly contaminated land. Each fails to create any genuine issues of material fact.

First, the County claims that the two samples—SP1 and SP2—which were taken from Defendants' land do in fact show "the presence of contaminants." (ECF No. 436 at 9.) On this, the County acts either mistakenly or deceptively by relying on a report that *does not* show an environmental violation at either SP1 or SP2. (*See* ECF No. 436-1.) In fact, by its own admission, the County has unequivocally disclaimed this possibility and said outright that "[n]o regulatory violation is represented by" either SP1 or SP2. (ECF No. 362-9 at 7.)

The County's attempt now to walk back this admission is unsupported by any law, any fact, or any evidence whatsoever. If evidence to the contrary does exist, it is the County's burden to bring it forward. They have not. As such, the Court is not impressed with the exceedingly broad—and potentially disingenuous—reference to "Dr. Simonton's report," (ECF No. 436 at 9), when the County has already been clear that the report shows "[n]o regulatory violation," (ECF No. 362-9 at 7), at either SP1 or SP2. Thus, there is still no evidence that Defendants owned any land containing the alleged environmental violations.

Second, the County continues its misplaced reliance on Dr. Simonton by alleging that "five . . . gob piles are at least in part *outside* of the" Reserved Surface Tracts. (ECF No. 436 at 9.) This claim entirely relies on Dr. Simonton's testimony alone. Yet it is that very reliance which smothers any hopes the claim has of catching fire.

To avoid summary judgment, the County needs to show that there is a genuine issue of material fact. However, Dr. Simonton himself said that "no one knows the true dimensions of the waste piles." (ECF No. 436-1 at ¶ 21.) Further undermining his testimony, Dr. Simonton reiterates that "no one . . . knows the nature and extent of the dumps. No one." (*Id.* at ¶ 28.)

Dr. Simonton's testimony that these piles are so big that they *might* be on Defendants' land is "mere speculation" and nothing more. *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Such broad and sweeping statements of possibility do not spawn genuine issues of material fact. *Cox v. Cnty. of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). Here, the County does not present any evidence apart from "speculation" and "conjecture" that either Pardee or Quercus owned the allegedly contaminated land. *Thompson Everett, Inc. v. Nat'l Cable Advert., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995).

Third, the County claims that "Quercus paid taxes on the entire [surface estate] including the [Reserved Surface Tracts]" and therefore must own all the land. (ECF No. 436 at 5.) A look at the tax receipt reveals this is not the case. That receipt established that Quercus paid taxes which were assessed by reference to the 2013 Deed—which *excluded* the Reserved Surface Tracts. (ECF No. 436-2 at 2.) This means Quercus never paid taxes on the Reserved Surface Tracts.

If that was not enough, the Fayette County Assessor's records signify that ERP was assessed for the taxes on the Reserved Surface Tracts. (*See* ECF No. 468-1.) Not only does this fact further doom the County's ownership-by-tax argument, but it also bolsters the Court's finding that Quercus and Pardee did not own the land by indicating that the Fayette County Assessor recognized the 2015 Deed's execution—which would only be possible if the 2003 and 2013 Deeds were also valid.

At bottom, the County has not shown any set of facts which would allow it to maintain its prima facie case against Pardee or Quercus. Because of this, summary judgment is appropriate.

IV. CONCLUSION[2]

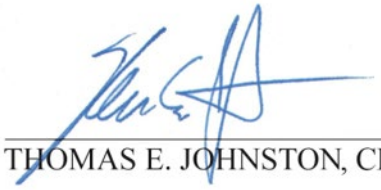
For the foregoing reasons, Defendant Quercus's Motion for Summary Judgment, (ECF No. 362), and Defendant Pardee's Motion for Summary Judgment, (ECF No. 365), are **GRANTED**. All counts in the Second Amended Complaint against those Defendants are hereby **DISMISSED**.

IT IS SO ORDERED.

[2] The meritless allegations, assertions, and arguments the County has made in connection with its claims against these two defendants nearly put them on a perilous course with Rule 11. The County should keep this in mind moving forward in this litigation.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: March 21, 2023



THOMAS E. JOHNSTON, CHIEF JUDGE