COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

O. C. No. 10 DE 1885

Estate of STEPHEN GIRARD, Deceased

OPINION SUR DECREE

O'KEEFE, ADM. J.

On November 11, 1989, PAC 23 Mining Company ("PAC 23"), a partnership comprised of Joseph Kleeman ("Kleeman") and Vincent Guarna ("Guarna"), and the Girard Estate executed a contract to mine coal at the Continental Colliery in Union and Butler in Schuykill County and at the Packer Sites 2, 3, and 4 in West Mahanoy in Schuylkill County for a period of 5 years.[1] The Packer Sites 2-4 are known colloquially as the "Lost Creek" or "Brownsville" mines. Both Kleeman and Guarna are equal 50% owners of PAC 23. Additionally, PAC 23 is a 50% owner in N&L Coal Company ("N&L"), the company which held the mining permits and reclamation bonds for PAC 23's mining operations, with the other 50% being owned by Fox Coal Company, which was completely owned by Guarna.

Kleeman and Guarna had requested a term, for the aforementioned mining contract, in excess of 5 years, but were told by the Girard Estate general manager at the time, Ken Roberts, that this term length was an impossibility due to state law and the Girard Will, which limited the maximum term to 5 years. To avoid violating the maximum time period, the lease agreement stipulated that there would be a "rolling term" where, at the end of each year the contract would automatically be renewed, absent any written notification of termination by either party or exhaustion of coal reserves, for a period of 1 year. The effect of the aforementioned "rolling

1 A copy of this contract appears as Exhibit G-1 in the Record in this matter.

term" ensured that, in the event of termination by either party, PAC 23 would retain a 5-year period during which it could conclude mining operations, perform obligatory reclamation duties and vacate the land. The lease was executed without the requisite approval of the Orphans' Court, and ensured that PAC 23 would always have a 5 year period left following a termination of the lease by the Girard Estate due the "rolling term," which provided automatic one year extensions to the Agreement at the conclusion of each year absent written termination by either party.

In July of 1991, Richard Burcik ("Burcik") was appointed General Manager of the Girard Estate by the Board of Directors of City Trusts. Upon his appointment, Burcik reviewed all mining leases to update the minimum royalties and ensure that the leases were permissible under the Girard Will and Pennsylvania state statute. Under both the terms of the Will and Pennsylvania state statute regarding estate leases, all mining leases in excess of 5 years require Orphans' Court approval. Upon reviewing the PAC 23 lease, Burcik found that it was in violation of both the Girard Will and state statute. In response, Burcik issued a letter to the attorney representing PAC 23 at the time, William R. Mosolino, Esquire, on October 31, 1994 to terminate the 1989 lease agreement. On November 7, 1994, when PAC 23 had not ceased operations, Burcik sent a letter directly to PAC 23 ordering them to cease mining operations and begin reclamation work.

On November 7, 1994, in response to the termination of the lease agreement, PAC 23 filed a complaint with the Court of Common Pleas in Schuylkill County seeking injunctive relief and a determination that the 1989 lease continue to be valid.[2] The PAC 23 complaint alleged that even if the Girard Estate had terminated the lease, the written notice gave the company 5 years from the date of notice according to the lease terms. The matter was settled out of court when the

2 A copy of the Action for Declaratory Judgment appears as Exhibit G-4 in the Record in this matter.

parties executed a new mining lease on September 1, 1995.[3]

The new lease was for a fixed 5 year term, ending on August 31, 2000. The 1995 Agreement contained with higher royalties and conveyed interest in a smaller area than the previous lease. It excluded formerly granted areas of the Continental Colliery, lacked any sort of "rolling term" and expressly voided all previous leases between PAC 23 and the Girard Estate. The lease also provided that if PAC 23 failed to pay royalties for more than 10 days after a payment is due, the failure to pay would act as a default forfeiture and the lease would be terminated.

On September 1, 1997, PAC 23 and the Girard Estate entered into an agreement modifying the 1995 lease.[4] Under the modification, PAC 23 could continue mining past the original August 31, 2000 expiration date, but only on the Packer Sites. The modification stipulated that PAC 23 would not continue mining any areas of the Continental Colliery per the expiration of the original 1995 Lease terms. The Amendment lacked any sort of stipulation that any sort of "rolling term" would be a part of the lease. The 1997 Amendment was the final written lease agreement between PAC 23 and the Girard Estate.

Despite the expiration of the 1997 amendment, PAC 23 continued to mine at the Packer sites past the August 31, 2002 expiration date. On August 31, 2003 Burcik sent PAC 23 a termination notice explaining that pursuant to the 1997 Amendment that its right to continue mining had expired on August 31, 2002. Neither Kleeman nor Guarna for PAC 23 responded to Burcik's letter or asserted any legal basis for their continued mining at the Packer sites, and yet they continued their operations there. At that time, the Girard Estate had no other operator that could have presently taken over mining at the areas formerly leased by PAC 23.

3 A copy of the 1995 Lease appears as Exhibit G-5 in the Record for this matter.
4 A copy of the 1997 Lease Amendment appears as Exhibit G-6 in the Record for this matter.

In 2006 the Girard Estate found another operator to mine its properties, Keystone Anthracite ("Keystone"), whose principal, Robert Burns, Sr. ("Burns, Sr."), had been the Girard Estate's mining manager from 1996 to 2006. The agreement executed on August 16, 2006 gave Keystone the exclusive right to mine on Girard Estate's property, including the Packer 2-4 sites on which PAC 23 had ongoing operations at the time.[5] The Keystone Agreement provided for royalties to be paid by Keystone to the Girard Estate which were higher than the royalities PAC 23 had previously paid and, additionally, placed the burden of reclamation of all areas in the lease on Keystone. In the 1 year period between September 2006 and November 2007, Keystone generated $3,200,000 in royalties; whereas, in the 5 year period between August 2002 and 2007, PAC 23 paid the Girard Estate $670,000 in royalties.

PAC 23 continued to mine the Packer Sites through 2007, while Keystone applied to the Department of Environmental Protection ("DEP") for a Surface Mining Permit ("SMP") to begin mining and, in the meantime, commenced reclamation activities per its agreement with the Girard Estate.[6] On July 19, 2007 the Girard Estate returned PAC 23's royalty payment for June 2007 with instructions that any further royalty payments were to be remitted directly and exclusively to Keystone. As of that notification, PAC 23 had accumulated monthly minimum royalty payments with the Girard Estate in excess of what it owed that had not been recouped. If a mining company pays over what it expected in royalties it may continue to mine without remitting further royalties until its balance is once again even.

The Girard Estate allowed PAC 23 to continue its mining operations in order to enable PAC 23 to recoup the excess monthly minimum royalty payments that it had accumulated while Keystone prepared to take over mining operations on the sites. The Girard Estate informed PAC

5 A copy of the 2006 Keystone Anthracite Lease appears as Exhibit G-10 in the Record for this matter.

6 Keystone could not begin mining operations immediately at the Packer sites until they retained the requisite SMPs, a process which takes approximately one year.

23 on January 8, 2008, by letter, that it should immediately cease all mining activities and remove its equipment. The Girard Estate refunded the remainder of PAC 23's minimum royalties of $3,724.23 by check at that time. The Girard Estate forwarded the termination letter to the DEP with the request that it revoke PAC 23's license for failure to have a written lease agreement and to ensure that PAC 23 completed the required reclamation activities at the sites it had mined.

In November 2007, PAC 23 submitted copies of the 1989, 1995, and 1997 agreements to the DEP, at its request, in an attempt to maintain its mining rights. The DEP rejected these documents on the basis that any alleged verbal agreements between the parties were inadequate and revoked PAC 23's mining permits for its failure to provide a valid, written mining lease agreement. On May 5, 2008 the DEP sent PAC 23 a compliance order demanding that they immediately cease all mining and begin reclamation activities on the sites where they were still active in order to meet the DEP's standards and applicable laws.

On October 8, 2008 the DEP and N&L Coal Company entered into a Consent Order and Agreement for N&L's failure to heed the requirements of the May of 2008 compliance order in which N&L agreed to pay $15,728.00 in civil penalties in order to avoid further litigation. Overall, between March 3, 1992 and May 8, 2008, the DEP assessed civil penalties against N&L and PAC 23 a total of 66 different times for, amongst other infractions, mining within 300 feet of an occupied dwelling, failure to employ adequate air pollution controls, failure to properly bond mining areas, failure to dispose of hazardous materials, failure to properly dispose of solid waste, unlawful conduct, failure to reclaim permanently ceased operations areas, and failure to maintain liability insurance.[7]

In response to the termination letter from the Girard Estate sent on January 1, 2008, PAC 23 initiated an action for declaratory judgment against the City of Philadelphia as trustee under

7 A copy of the DEP Report appears as Exhibit G-19 in the Record for this matter.

the Girard Will and Keystone.[8] In its claim against the City of Philadelphia, PAC 23 sought a declaration that a lease existed between the Girard Estate and PAC 23 as a result of an "oral clarification," and that the lease extended until August 31, 2012. PAC 23 alleged that the terms of the revised oral agreement were such to make the 1995 lease subject to a "rolling term" of 5 years similar to that of the 1989 Lease. PAC 23 further alleges that the agreement could only be terminated in writing and that the Girard Estate had never issued such notice. PAC 23 alleged that per the terms of its 1995 agreement with the Girard Estate, the lease agreement between the Girard Estate and Keystone is subject to the agreements executed prior to Keystone's 2006 lease, specifically the alleged agreement between PAC 23 and the Girard Estate.

The Girard Estate and PAC 23 entered into an agreement on October 22, 2008 wherein the Girard Estate agreed to withdraw its previously filed Emergency Petition for Special Injunction against PAC 23. The agreement allowed PAC 23 to remove coal that had been stockpiled at the Packer sites and to continue to mine on the pits most recently active, for the royalty of $6 per long ton, until the hearing scheduled for PAC 23's desired declarative relief. PAC 23 then resumed mining operations at the site.

PAC 23 principal, Kleeman, and representatives for Keystone, met on December 18, 2008 at which time Kleeman and Keystone provisionally agreed to the terms of a new agreement that would allow PAC 23 to mine at the Packer sites for an 18 month period. On January 7, 2009, the date set by the Girard Estate to either settle the matter or go to court, Kleeman again met with Keystone and a new 18 month lease agreement that had been circulated the previous day was executed.[9] The deadline for an agreement was 1:00 PM at, before which time the maps commissioned by Keystone would not be complete.

8 A copy of the Petition for Declaratory Judgment appears as Exhibit P-11in the Record for this matter.
9 A copy of the Mining Lease appears as Exhibit K-3 in the Record for this matter.

The Mining Lease gave PAC 23 and N&L the right to mine selected Packer sites on maps that both parties agreed would be attached at a later time. Emails between counsel stated that PAC 23 was aware that Keystone would subsequently attach maps it provided. The Lease also set a $10,000 a month minimum royalty to be paid by PAC 23, provided that neither PAC 23 nor N&L should affect any bank material on the site. Failure to abide by the terms of the lease or to provide royalty payments would result in the lessor having the power to terminate the agreement in writing.

Though the agreement had no attached maps describing restricted areas, Kleeman attached his own maps to his copy of the agreement. On January 8, 2009, Keystone submitted maps to the DEP that had been prepared by I&I Engineering, a firm employed independently by both PAC 23 and Keystone. On January 12, 2009, PAC 23 was notified by the DEP that the maps it had received from PAC 23 were different than the maps submitted by Keystone. Upon receiving the maps on January 15, 2009, the Girard Estate forwarded the maps to PAC 23 on the same date, the substance of which PAC 23 disputed.

After the dispute over which maps would be employed for the 18 month lease, PAC 23 did not resume any mining operations until April of 2009. Whether or not PAC 23 mined at all, the Lease signed by both parties stated that minimum monthly royalties of $10,000 were to be paid every month. Before and after the resumption of mining by PAC 23, it failed to remit any royalty payments pursuant to the Mining Lease it had signed in January of 2009. Based on the 6,452.43 tons of coal removed by PAC 23 after resumption of mining, PAC 23 is in default of $38,714.58. During the time of its 2009 mining, PAC 23 also moved bank material from one location to another in order to pursue its own mining activities.

Throughout this period, Keystone was contractually obligated to pay the Girard Estate

$10,000 for each of the 18 months of the PAC 23 lease, which they did despite the the lack of reciept of any royalty payments form PAC 23. During that time neither Keystone nor the Girard Estate attempted to remove or have the DEP remove PAC 23 from the Packer sites.

Petition To Enforce Lease Agreement (Control No. 090283)

PAC 23 initiated this action in order that maps, Exhibit P-5, which it claims to be the ones decided upon by it and Keystone prior to the signing of the January 7, 2009 Mining Lease, be attached to the Lease in lieu of those provided by Keystone. Additionally, PAC 23 seeks damages stemming from alleged violations of the Lease Agreement by Keystone, including lost profits, costs, and attorney's fees.

After review of the testimony and evidence presented during trial, this Court declines to find merit in either of the alleged complaints brought by Kleeman on behalf of PAC 23. From the evidence presented, there is nothing to support Kleeman's contention that the maps which he provided in response to the Lease Agreement had ever been approved or seen by Keystone prior to the execution of the January 7, 2009 Mining Lease. Furthermore, none of the evidence suggests that Kleeman had ever seen or agreed to the maps to be prepared by I&I before executing the January Lease. As neither party to the Lease was of the same mind as to what area was being leased by the Agreement, this court finds that no meeting of the minds existed between the party as of execution and, as such, no binding contract was formed. Even if a valid agreement did exist, it is clear that through PAC 23's admitted failure to remit royalties and its affecting of bank material that it would be in breach of said Mining Lease if valid.

Secondly, PAC 23 failed to produce any compelling evidence that it suffered any damages as a result of either Keystone or the Girard Estate's actions. To the contrary, based on the testimony of both sides it would appear that PAC 23 did, in fact, in 2009, reap financial benefits

from its mining operations on the Packer Sites in excess of what it normally could have expected stemming from its refusal to pay royalties. Additionally, PAC 23 had no written agreement with the Girard Estate after August 31, 2002 and, thus, received substantial benefits by its failure to cease its mining operations as demanded by the Girard Estate. Based on these facts, the court finds that PAC 23 is entitled to no relief from Keystone or the Girard Estate and is ordered to remit the unpaid royalties that it owes to the Girard Estate from its mining activities in 2009 and 2010.

The Validity of the January 7, 2009 Mining Lease Agreement

Mining leases in Pennsylvania are subject to the same rules that are generally applied when interpreting the meaning of a contract. *Hutchinson v. Sunbeam Coal Corp.*, 513 Pa. 192, 200 (1986). Under such interpretations, for a contract to be valid and enforceable there must exist a meeting of the minds between the parties as to the agreement and there must be mutual assent at the time of execution. *Mozena v. Thompson,* 353 Pa. 21, 21-22 (1945).Without such conditions, a contract entered into absent agreement on important provisions is not valid. *Id.* at 22. If there is an ambiguity in a lease the court may look at parol evidence to resolve the disputed provisions. *Hutchinson*, 513 Pa. at 200-01.

From the testimony presented at court, at the time of the execution of the Mining Lease between PAC 23 and Keystone, neither party was in agreement as to which maps would be attached to the the agreement. Kleeman's testimony states that he believed that the maps would show a much smaller restricted area of the Packer Sites than was included with the maps that were attached to the Mining Lease and sent to the DEP subsequent to the actual signing of the lease. N.T. 11/13/09, 61: 21-25. Kleeman stated that during the meeting between him and Keystone representatives on December 18, 2008, the parties agreed to the area that would be

covered by the January 7, 2009 Mining Lease. According to him, the restricted areas agreed to then were only “two and a half, three acres that [Keystone] wanted to keep restricted...[because] I believe he wanted to bring the contractor back.” N.T. 11/13/09, 9:22-25. Kleeman further suggested that the unnamed contractor mentioned was somehow employed by Keystone and that the restrictions were an attempt by Keystone to have one of its own employees mine the site. N.T. 10:1-3. Kleeman testified in court that he “only agreed to the area that was crosshatched on my map,” and not on the ones submitted into evidence by Keystone. N.T. 11/13/09, 67: 21-25.

Burns, Jr. for Keystone testified that different areas of the Packer Sites had been agreed upon in the December 18, 2008 meeting and that no maps had been prepared outlining the area to be mined in the new Lease at that time. On January 7, 2009, emails between counsel for PAC 23 and Keystone, Exhibit K-2, demonstrate that both sides knew that no maps would be available before the 1:00 PM signing deadline for the Mining Lease and that PAC 23 acknowledged and accepted this fact. N.T. 12/1/09, 205: 1-14, 206: 1-4.

Additionally, Burns, Jr.'s testimony regarding which areas were to be restricted and why are in complete opposition to that of Kleeman and the maps he presented as evidence. Burns, Jr. testified that the meeting on December 18, 2008, regarding the maps the parties had discussed, included restricted areas that would cover the land leased to Hynoski, areas within 300 feet of any dwelling as per Pennsylvania state statutes, and all areas which contained bank material that PAC 23 was prohibited from affecting pursuant to the Mining Lease. N.T. 211: 9-12. When Burns, Jr. received the map prepared by Kleeman, Exhibit K-1, he stated that he had completely disregarded it as the email in Exhibit K-2 had expressed PAC 23's understanding that Keystone would be providing the maps to be used. N.T. 210: 23-24.

Besides being in contradiction to the testimony of Burns, Jr., Kleemans's testimony

regarding the maps is further contradicted by the testimony of the other 50% owner of PAC 23, Vincent Guarna. In his testimony, Guarna stated that he was of the understanding that the maps prepared and submitted by Keystone, Exhibits K-8, were consistent with what the Mining Lease signed by Kleeman. Guarna explained that the restricted areas in K-8 were unavailable for PAC 23 to mine as:

> "it was where Hynoskis mined before, and on the front page, it's a restricted area, where the homes are, which naturally you can't strip there, and where most of the bank is on top of the ground, which was a restricted area, so I assume it covered everything.
> Q[Gutshall]: So, basically, you believed K-8 reflected the three restricted area that you understood were to be a part of the mining lease?
> A: Yes. N.T. 12/1/09, 105: 11-22

Guarna's testimony, in conjunction with that of Burns, Jr.'s, indicates that, at the very least, the signatories to the lease were not of one mind on an important term of the lease. As such, it would appear that the two major parties to the Lease were not in actual agreement.

If Kleeman, in fact, believed his maps reflected the restricted area, then it is abundantly clear that there was a major discrepancy as to what each party thought it was agreeing. Because there was no meeting of the minds the court rules that no contract ever existed between PAC 23 and Keystone and, as such, there would be no legal effect in attaching the maps prepared by Kleeman to the Mining Lease. On that basis, this Court rejects PAC 23's petition to place the maps labeled as Exhibit P-5 into the Lease Agreement because the Agreement was never valid.

Even if a valid Lease Agreement had existed, however, this Court would still decline to incorporate the Exhibit P-5 maps into the Lease Agreement. Given the testimony presented by both sides and the fact that Kleeman's own business partner testified that the maps provided by Keystone were in keeping with the discussed terms, this Court would have no choice but to determine that Keystone's maps were the correct ones to have been attached to the Lease

Agreement. This is especially true given the evidence presented that counsel for PAC 23 had expressly agreed to this via email before the signing of the Lease Agreement.[10] Other than Kleeman's testimony as to what he construed the December 18, 2008 meeting to have agreed upon and the maps that he apparently created himself, no credible evidence in the record suggests that Keystone ever had any intention of allowing PAC 23 to mine the Packer Sites to the extent Kleeman claims. Indeed, all evidence and testimony suggests Keystone planned to lease the smallest area it could in order to begin mining the site itself.

Furthermore, if the Court were to declare the Lease Agreement valid, no matter which maps were used, Kleeman and PAC 23 would clearly be in violation of the terms of the Agreement. Section 1(a) of the Mining Lease, Exhibit K-1, clearly states that PAC 23 "shall refrain from mining or otherwise affecting the bank material on the above referenced SMPs, including restricted areas." Testimony delivered by Guarna and Burns, Jr. at the trial stated that it was understood that "affecting" meant moving the bank material. N.T. 12/1/09, 100:3-18, 101: 6-18, 103: 12-15, 201: 1-22; 12/7/09, 29:20-25. Guarna and Kleeman, himself, also testified that after the signing of the lease by PAC 23, Kleeman did in fact move bank and back-fill certain areas with the bank material. N.T. 11/13/09, 48: 5-22; 12/1/09, 108: 16-19, 109: 12-22. The moving of bank material was further corroborated by Hynoski. As the Lease, without ambiguity, states that this is a violation, whether in a restricted area or not, PAC 23 has clearly breached § 1(a) that it expressly agreed to when it signed the Lease.

As demonstrated by Burns, Jr. and Kleeman's own testimony, PAC 23 has failed to remit a single royalty payment during the entire period it mined after the signing the Lease. N.T. 11/30/09, 101: 5-20, 102 21-25; 12/7/09, 12: 4-10. Failure to remit timely royalty payments

10 Exhibit K-2 (On 1/7/09 at 12:27:33 PM Charles Haws, counsel for PAC 23, acknowledged in email that, "Agreed, the maps will be reviewed and attached to the Lease Agreement, after Mr. Beedle [head of I&I Engineering] prepares them."

expressly required by a Lease Agreement constitutes a complete breach of a mining agreement rendering the contract null and void. *Russell v. Stewart*, 204 Pa. 211, 212 (1902). Under such circumstances, a lessor has the right to immediately cancel any agreement and enter judgment under and ejectment clause contained in the lease. *Beedle et al. v. Hilldale Min. Co.*, 204 Pa. 184, 185 (1902). Section 3(a) of the Mining Lease states PAC 23's "obligation to make royalty payments under this lease commence upon January 7, 2009." The Lease, in § 4(a), also states:

> "[I]t is expressly understood and agreed upon that the Minimum Monthly Payments required... shall be made by the Lessee notwithstanding whether or not Lessee shall have conducted any operation on the Property and/or mined/or removed any Coal from the property during any calender month, for any reason whatsoever, except as expressly provided herein."

The only reason PAC 23 would not have to pay at least the minimum monthly at any given point is, according to §4(b), of the signed Lease:

> "If for any calender month during each year of the Term, the Monthly Royalty Payment calculated and paid in accordance with Section 3(c) above is less than the Minimum Monthly Payment required to be paid pursuant to Section 4(a), the Lessee shall have the right ...after the prior payment in full of the Minimum Annual Payment for such year, to mine, remove, and carry away sufficient Coal, without payment of the royalty required pursuant to Section 3 above to make up the deficiency."

As Kleeman did not start mining, by his own admission, until April of 2009 and during that time never paid a single required minimum monthly royalty payment, the exception described clearly does not apply to PAC 23's activities.

Since PAC 23 did not make the requisite payments of royalties at any time after January 7, 2009, if the Mining Lease were enforceable, PAC 23 has violated its terms by failing to remit a royalty payment on the first due date. The Lease states that Keystone has the right to terminate the Lease if PAC 23 "(a) fails to make any royalty payment required by this lease; (b) fails to comply with this lease." Giving the words of the Lease their plain meaning, it is abundantly clear

that Keystone would have the right to terminate the Lease at any time as PAC 23, by its own admission, has clearly violated term (a) by non-payment of any royalties. Likewise, given the credible testimony presented in relation to PAC 23's affecting of bank material, it also clearly violated (b). Kleeman admitted to violating both the schedule of payments and the moving of bank material. N.T. 11/30/09, 168:5-11, 169: 10-15. As such, no matter which maps might have been attached to the Lease, if it were valid PAC 23 has violated its terms and Keystone has the right to unilaterally terminate it in writing.

The Validity of the Oral Lease Between PAC 23 and the Girard Estate

The evidence presented does not sustain PAC 23's contention that any sort of oral agreement existed between it and the Girard Estate. The last written agreement between PAC 23 and the Girard Estate terminated on August 31, 2002. After that time PAC 23 had only a month-to-month lease with Girard Estate that could be terminated at will by either of the parties. On April 30, 2003, the Girard Estate clearly terminated that agreement in writing when it demanded, in no uncertain terms, that "all operations must cease immediately and your firm must vacate the Premises promptly." G-7. Other than Kleeman's own testimony, nothing supports the existence of an oral agreement. Given the testimony of Burcik, past lease agreements, and past litigation, all evidence points to the inescapable conclusion that the Girard Estate would not have entered into any long term agreement with PAC 23. This Court finds that no "oral clarification" existed between the PAC 23 and the Girard Estate regarding the 1995 Lease nor the 1997 Amendment, and that any mining done after August 31, 2002 was based upon a default month-to-month lease. Even if an oral agreement to mine existed, it is void under the statute of frauds.

In the 1989 Lease, Exhibit G-1, PAC 23 clearly had a provision put in by the General Manager of the Girard Estate at that time, so that PAC 23 could have a "rolling term" where

there would always be at least five years on the lease upon notice of its termination. This was done in violation of the Girard Will and in violation of Pennsylvania state law and was not approved by the Orphans' Court. The testimony presented at trial evidences that upon becoming General Manager Burcik discovered and was concerned about this potential violation and took steps to end it by terminating the agreement between the parties. N.T. 12/1/09, 10: 16-25, 13: 15-21. Despite Kleeman's testimony to the contrary, this was done solely because the Lease terms were most likely invalid and because of Burcik's review of the extremely poor quality of PAC 23's operations. N.T. 14: 3-18.

Following the Girard Estate's termination letter, PAC 23 initiated a suit to declare the 1989 lease valid and eventually settled with a new Lease Agreement, Exhibit G-5, that gave it five more years on the Girard Estate's property and no more. The 1997 Amendment, Exhibit G-6, gave a further two years on a specific area with the rest of the 1995 lease expiring. Based on these irrefuted facts, the only logical conclusion is that there was no "oral clarification." In 1994 Burcik had terminated the 1989 Lease and litigated a settlement with PAC 23 to create a new lease that would specifically lack any sort of "rolling term" and turned down PAC 23 entreaties for a longer lease. N.T 26: 17-22, 29: 9-12, 36: 10-25. Burcik further emphasized multiple times in his testimony that he had no substantial contact with Kleeman after 1995 and, thus, there was no and could be no oral agreement between the two. N.T. 36: 9-10, 38: 9-16, 43: 17-21, 44: 2-8, 45: 22-25. It is incredible to suggest that Burcik would orally agree to new terms that would reinstate the very same troublesome and violating terms that he had sought to be rid of in terminating the 1989 Lease and that he had denied repeatedly only two years prior.

Even had PAC 23 managed to produce evidence that any sort of "oral clarification" actually existed, such an agreement would be void under the statute of frauds. Under the

Pennsylvania Statute of Frauds, any lease of more than 3 years must be in writing. 68 Pa.Cons.Stat.Ann. § 250.202; *2101 Allegheny Assoc. v. Cox Home Video, Inc.*, 1991 WL 225008 *6 (E.D.Pa. 1984). When the Statute of Frauds requires that a contract be in writing, its terms, generally, cannot be subsequently orally modified. *2101 Allegheny Assoc.*, 1991 WL 225008 *6. One exception to the Statute of Frauds is if the purchaser has actually taken possession of and made improvements upon the land, but courts have noted that this exception is inappropriate to apply to leases because improvements are generally considered to be consistent with the lessee's possessory interest under the lease. *U.S. v. 29.16 Acres, More or Less, Valley Forge Nationaly Historical Park*, 496 F.Supp. 924, 929 (E.D.Pa. 1980). For a subsequent oral modification to be valid, when allowed, the oral agreement must be based upon valid consideration and it must be proved by evidence which is clear, precise and convincing. *2101 Allegheny Assoc.* 1991 WL 225008 *5 (citing *Bonczek v. Pascoe Equipment Co.*, 450 A.2d 75, 77 (Pa.Super. 1982)).

To take a parol, oral agreement for conveyance of interest in land out of the operation of the Statute of Frauds, the agreement's terms must be shown by full, complete, satisfactory, and indubitable proof and must define the boundaries and indicate the exact quantity of land to be conveyed by the alleged oral agreement. *Manir Properties v. Resolution Trust Corp.*, 1993 WL 381445 * 7 (E.D.Pa. 1993). The Statute of Frauds does not completely outlaw oral contracts relating to land, for it has long been recognized that if the party entitled to the protection of the Statute of Frauds chooses to affirm the existence of the Agreement and acknowledge it has binding upon them. *Schuster v. Pennsylvania Turnpike Commission*, 395 Pa. 441, 452 (1959). Despite this basic concept, PAC 23 argues that, at a minimum, the oral agreement between it and the Girard Estate allows it mining rights until August 31, 2012. PAC 23's contention that it has any rights under any oral modification is incorrect and unsupported as it is in direct violation of

the Statute of Frauds and denied by the Girard Estate.

The Statute of Frauds is intended to protect against perjury. The doctrine of partial performance, while intended to provide an exception to the strict requirements of the Statute of Frauds, was not intended to defeat or undermine it. *Paul v. Kauffman*, 60 Pa.D.&C. 65, 73 (Phila. 1947). PAC 23's claim that it has overcome the statute of frauds due to its partial performance on the site is unavailing. Based upon the testimony of various parties and Kleeman, himself, PAC 23 invested a minimum amount of money in the Packer Sites both before and after the expiration of the 1997 Amendment. Burcik testified the PAC 23 equipment was junk when he first became General Manager and junk years later as well. N.T. 69: 4-21, 49: 5-7. Guarna also testified that most of the equipment was poor quality and not adequate for mining the site. N.T. 111: 2-18. From Kleeman's own testimony, most of the equipment owned and used by PAC 23 and N&L is either not working and has not worked for years, or in such poor repair as to be near junk status. N.T. 11/30/09, 48: 1-8, 11-13, 24-25; 49: 1-7; 153: 9-18; 172: 3-22. 173: 4-8; 174: 1-9. Based on these facts, it is clear that PAC 23 has failed to demonstrate that its expenditures on the Packer Sites and its operations rise to the level of partial performance that would overcome the bar set by the Statute of Frauds. As such, though there was no oral agreement and, had there been one, it would be void under the statute of frauds and is not overcome by any partial performance on PAC 23's part.

Based upon the above conclusions, PAC 23 has no legal right to continue to mine any property owned by the Girard Estate. They have no valid agreement with the Girard Estate, the last one having ended on August 31, 2002, with the Girard Estate subsequently notifying PAC 23 multiple times to cease all operations. Likewise, PAC 23's agreement with Keystone is invalid due to the ambiguity of Lease terms. As such, PA C 23 has no right to mine based upon any

agreement with Keystone. PAC 23 must cease all mining operations immediately and complete all reclamation activities necessary in the leased areas that it had previously mined.

PAC 23's Claim of Damages Against Keystone

PAC 23 also claims an unspecified amount of damages resulting from Keystone's alleged breach of the January 7, 2009 Mining Lease. The Court finds that this claim is rejected on the grounds that no Lease was ever formed as a result of unresolved material terms of the Lease. The Court further rejects the claim as PAC 23 at trial was unable to provide any compelling evidence that even had a lease existed that PAC 23 suffered any damages as a result. The applicable law in Pennsylvania provides clear guidelines regarding the damages one can recover as a result of the other party's breach of a valid oral contract subject to the statute of frauds: reliance damages, only. *Stalnaker v. Lustik*, 1999 Pa.Super. 346 (1999) (citing *Linsker v. Savings of America*, 710 F.Supp. 598 (E.D.Pa. 1989) ("reliance damages are the only measure of recovery for an action for breach of an oral contract subject to the statute of frauds; a Plaintiff cannot be compensated for loss of its bargain pursuant to such a contract")). With regard to the amount recoverable in the form of reliance damages, a Plaintiff may only recover the reasonable value of any services actually performed and expenses actually incurred. *Stalnaker*, 1999 Pa.Super 346.

Based upon both testimony and photographic evidence submitted at trial, PAC 23 does not have the requisite equipment to mine coal in quantities anywhere near the level that they claim they have been deprived of. Furthermore, as had been amply noted before, PAC 23 failed to pay any royalties to either the Girard Estate or Keystone and, likewise, failed to prove that they in fact have any right to mine on the Girard Estate lands at all. Even if PAC 23 could prove the existence of a contractual right to mine on the Girard Estate lands, there are no services rendered for which PAC 23 is entitled to relief. Additionally, PAC 23 has averred no expenses

that it incurred in carrying out its duties under the alleged oral agreement. PAC 23 has no legal right to compensation for the loss of its bargain pursuant to the alleged oral agreement. *See Linsker*, 710 F.Supp. 598. Absent proof of any actual reliance damages on the alleged oral agreement, PAC 23's claim for damages has no merit. *See generally Stalnaker*, 1999 Pa.Super 346. Under such circumstances, PAC 23 is entitled to no damages from Keystone nor to have Keystone pay its attorney's fees.