IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

ENERPLUS RESOURCES (USA) CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	Case No. 1:16-cv-00103-DLH-CSM
vs.	)	
WILBUR D. WILKINSON, et al.,	)	
Defendants.	)	

PLAINTIFF ENERPLUS'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

Plaintiff Enerplus Resources (USA) Corporation ("Plaintiff" or "Enerplus") moves for summary judgment against Defendants Wilbur D. Wilkinson ("Wilkinson"), Reed A. Soderstrom ("Soderstrom") and Ervin J. Lee ("Lee") for the reasons set forth below.

I. INTRODUCTION

Enerplus seeks to recover $2,961,511.15 in erroneous overpayments to Wilkinson, Soderstrom and Lee on an overriding royalty interest ("ORRI") in connection with a settlement of litigation between, among others, Wilkinson and Peak North Dakota, LLC ("Peak North") ("the Overpayments").

After the settlement, Enerplus merged with Peak North with Enerplus as the surviving entity.

Enerplus made the Overpayments to Wilkinson's attorney, Soderstrom, in trust for Wilkinson and Lee, in 14 checks issued monthly from September 30, 2014 through October 30, 2015.

When Enerplus discovered the Overpayments, it notified Soderstrom and requested that they be returned. Soderstrom refused. Enerplus filed this action and obtained a preliminary injunction, among other things, ordering Soderstrom to deposit the Overpayments into this Court's Registry, which Soderstrom has done.

For the reasons set forth below, Enerplus is entitled to summary judgment ordering a return of the Overpayments totaling $2,961,511.15 to Enerplus.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed:

1. Wilkinson and Peak North entered a Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue (the "Settlement Agreement") on October 4, 2010. Brief of Appellants, Wilbur D. Wilkinson and Reed A. Soderstrom, U. S. Court of Appeals for the Eighth Circuit, Nov. 18, 2016 ("Wilkinson Appellate Brief"), p. 3, attached as Exhibit A to Declaration of Neal S. Cohen ("Cohen Decl.") filed with this motion. The Settlement Agreement is attached to the Cohen Decl. as Exhibit A-1.

2. Under the terms of the Settlement Agreement, Peak North was required to assign to Wilkinson a 0.5% of 8/8ths overriding royalty interest in certain oil and gas leases covering lands located within the exterior boundaries of the Fort Berthold Indian Reservation ("FBIR") in North Dakota, with 10% of Wilkinson's overriding royalty interest assigned to Lee, Wilkinson's attorney at the time. Cohen Decl., Ex. A at 3.

3. Pursuant to the Settlement Agreement, Peak North, Wilkinson and Lee executed an assignment to Wilkinson of a 0.45% of 8/8ths overriding royalty interest and to Lee of a 0.05% of

8/8ths overriding royalty interest ("ORRI Assignment"), also dated October 4, 2010, in certain oil and gas leasescovering lands located within the exterior boundaries of the FBIR. The ORRI Assignment is attached to the Cohen Decl. as Exhibit A-2.

4. Lee and Wilkinson executed Division Orders, also dated October 4, 2010, in conjunction with the Settlement Agreement and the ORRI Assignment ("Division Orders"). The Division Orders are attached to the Cohen Decl. as Exhibit A-3.

5. In December of 2010, Peak North and Enerplus merged with Enerplus remaining the surviving entity. Cohen Decl., Ex. A, p. 4.

6. Also in December of 2010, Wilkinson filed suit against Lee for attorney misconduct and breach of the Settlement Agreement in the Three Affiliated Tribes Fort Berthold Reservation District Court ("Tribal Court"). The Tribal Court denied Lee's Motion to Dismiss for lack of jurisdiction and ordered that all future payments due from Peak North to Wilkinson and Lee be deposited into the trust account of Wilkinson's attorney at that time, Soderstrom. The MHA Nation Supreme Appeals Court affirmed the Tribal Court's jurisdiction ruling on August 31, 2015, and reaffirmed its ruling on November 30, 2015. *Id.*

7. Between September 30, 2014 and October 30, 2015, Enerplus made fourteen monthly payments to Soderstrom's trust account for the benefit of Wilkinson and Lee in connection with the Rain, Snow, Sun and Wind Wells totaling $2,991,425.25. However, the amount Enerplus should have paid into the trust account was $29,914.10. As a result of an error in the placement of the decimal point, Enerplus overpaid those fourteen payments by a total of $2,961,511.15. Declaration of Carla Konopka ("Konopka Decl."), ¶ 7.

8. Upon discovery of the mistaken Overpayments, Enerplus, through counsel, made demand upon Wilkinson and Soderstrom on December 4, 2015 for their return. Konopka Decl., ¶ 8. Soderstrom and Wilkinson have refused to return the Overpayments. Konopka Decl., ¶ 9.

9. The Overpayments have since been transferred from Soderstrom's trust account into the United States District Court's Registry. (Dkt. # 55.)

10. Enerplus brought this action against Wilkinson, Soderstrom and Lee, among others, seeking, among other things, 1) a preliminary injunction prohibiting Wilkinson from prosecuting any lawsuits in Tribal Court arising from or related to the Settlement Agreement, the ORRI Assignment, and/or the Wilkinson Division Order; 2) a preliminary injunction prohibiting the Tribal Court from exercising jurisdiction over Enerplus in Wilkinson's Tribal Court case; and 3) an Order requiring the Overpayments be deposited into the Court. The Court granted that motion and entered a preliminary injunction dated August 31, 2016. (Dkt. #48.)

11. Wilkinson and Soderstrom filed a Notice of Appeal on September 16, 2016, and moved for a stay pending appeal of the Order to deposit the Overpayments in the Registry of the Court. (Dkt. #49.) On October 6, 2016, the United States District Court denied that request for a stay. (Dkt. #55.)

ARGUMENT

I. Standard of Review.

Summary judgment must enter where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of material fact is 'genuine' if it has a real basis in the record … [and] [a] genuine

issue of fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) and quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The basic inquiry for purposes of summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376 (8th Cir. 1996) (citation omitted).

Summary judgment procedure is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id.* at 396 (quoting with approval *Celotex Corp. v. Catrett*, 477 U.S. 322, 327 (1986)). Although the evidence is to be viewed in favor of the non-movant, if the movant demonstrates that there are no trial-worthy issues of material facts, the burden then shifts to the non-movant to "set forth specific facts sufficient to raise a genuine issue for trial." *Quinn v. St. Louis Cnty.*, 643 F.3d 745, 750 (8th Cir. 2011); *Wingate v. Gage Cnty. Sch. Dist., No. 34*, 528 F.3d 1074, 1078-79 (8th Cir. 2008).

II. Because its Overpayments Were Based on a Mistake of Fact, and Because Defendants did not Change Positions to their Detriment, Enerplus Is Entitled to Summary Judgment Ordering the Return of the Overpayments.

It is blackletter law in North Dakota, as well as in most other jurisdictions, "that a payment made under the influence of a mistake of fact may be recovered provided that the payment has not caused the payee to change his position to his detriment." *Rohrville Farmers Union Elevator Co. v. Frison*, 42 N.W.2d 354, 356 (N.D. 1950) (citation omitted). Indeed, the North Dakota Supreme Court has long held that, where a plaintiff "in good faith and by mistake of fact, parted with money

to which defendant was not entitled either legally or morally[,] … an implied promise on defendant's part to repay such money [arises] immediately upon the payment by plaintiff of the last check." *James River Nat. Bank of Jamestown v. Weber*, 124 N.W. 952, 954 (N.D. 1910) ("A proposition so elementary requires no citation of authorities, but see …") (citations omitted); *see also Jacobson v. Mohall Telephone Co.*, 157 N.W. 1033, 1036 (N.D. 1916) ("The law seems to be well settled that: 'A voluntary payment, with a full knowledge of all the facts, cannot be recovered back, although there was no debt; *but a payment under a mistake of fact may be.*'") (Goss, J., concurring) (emphasis in original) (quoting with approval *Simms v. Vick*, 65 S.E. 621, 621 (N.C. 1909)); *Chrysler Light & Power Co. v. City of Belfield*, 224 N.W. 871, 872 (N.D. 1929) ("A right of action at law to recover moneys paid under mistake does not arise out of contract of the parties, but out of an obligation imposed by law upon the recipient of the money to return the same to the rightful owner.").

In the case of a mistaken overpayment, the reasons for this well-settled principle are obvious:

> There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid out and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and probably on that of the receiver also; and it is plain that money thus got under a mistake, and for no consideration, cannot be kept ex æquo et bono.

Jacobson, 157 N.W. at 1036 (quoting with approval *Simms*, 65 S.E. at 621).

This common law rule is also codified in North Dakota. N.D. Cent. Code § 9-10-05 states, in relevant part, that "[o]ne who obtains a thing without the consent of its owner, or by a consent afterwards rescinded … **shall** restore it without demand to the person from whom it was obtained

except in [three inapplicable situations]." (emphasis added). Therefore, Defendants are obligated by statute to return the Overpayments.

North Dakota courts and courts across the country have also applied this rule in the specific context of overpayment of oil and gas royalties. *See Golden v. SM Energy Co.*, 826 N.W.2d 610, 620 (N.D. 2013) ("'The basis for recovery is unjust enrichment; the overpaid royalty owner is **not** entitled to the royalties ....'") (quoting *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 485 (N.D. 1991)) (emphasis added); Williams & Myers Oil and Gas Law, § 657, Vol. III (LexisNexis Matthew Bender 2016) ("Where as a result of a good-faith mistake royalty has been paid to a person not entitled to receive same or where excessive payments have been made in good faith, it is generally held that the lessee (or purchaser) who has made such payments may recover from the payee the payments to which he was not entitled.") (collecting cases).

The undisputed facts here are straightforward, and application of the foregoing law compels an obligation to return the Overpayments to Enerplus. By virtue of a good-faith mistake in the placement of the decimal point, Enerplus miscalculated the overriding royalty payments to Wilkinson and Lee. The mistake resulted in the Overpayments deposited in Soderstrom's trust account in the amount of $2,961,511.15. Enerplus had no intention of gifting the extra money to Wilkinson or Lee, and received no consideration from them for the mistaken Overpayments. It cannot be denied that the parties agreed that Wilkinson would only receive a 0.45% of 8/8ths overriding royalty interest, proportionately reduced, and Lee would only receive a 0.05% of 8/8ths overriding royalty interest, proportionately reduced, on production. Therefore, neither Wilkinson nor Lee can claim any legal (or moral) entitlement to money mistakenly paid in excess of those amounts. Upon discovery of its honest clerical mistake, Enerplus immediately notified Defendants and requested that the Overpayments be returned. Defendants refused.

Under the foregoing, well-settled North Dakota law, the Overpayments cannot be kept and must be returned to Enerplus. There are simply no trial-worthy issues of material fact that bear on this elementary legal question.

Moreover, Defendants Lee and Wilkinson cannot show that they were prejudiced by, or changed positions to their detriment based on the Overpayments under these undisputed facts. In North Dakota, the burden of showing that one has detrimentally changed positions, or has been prejudiced by the payor's mistake rests upon the payee as the party claiming the right to retain the money. *See First Nat. Bank v. Bank of Wyndmere*, 108 N.W. 546, 549 (N.D. 1906). Here, it is undisputed that Enerplus's Overpayments went directly to Soderstrom's trust account, where they stayed until this Court ordered that they be deposited into its registry. Lee and Wilkinson therefore had no opportunity to change positions, to their detriment or otherwise, as they never had possession or control of the funds. Accordingly, Enerplus is entitled to summary judgment as a matter of law.

CONCLUSION

WHEREOFRE, based on all of the foregoing reasons, Plaintiff, Enerplus Resources (USA) Corporation, respectfully requests that this Court enter an Order that the Overpayments held in the Court's Registry be paid to Enerplus.

Dated this 13th day of January, 2017.

FOX ROTHSCHILD, LLC. BY:

/s/ Neal S. Cohen

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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ATTORNEYS FOR DEFENDANTS
WILBUR D. WILKINSON AND
REED A. SODERSTROM, *PRO SE*

I further certify that a copy of the foregoing was sent to the following email address and deposited in the U.S. mail, postage prepaid, addressed as follows:

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/s/ Erica L. O'Neill