

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

Mountain Valley Pipeline, LLC,

Plaintiff

vs.

Action No. CC-32-2018-C-2

Appalachians Against Pipelines, et al.

Respondents

ORDER DENYING PRELIMINARY INJUNCTION

On March 13, 2018, and again on March 20, 2018, this Court held evidentiary hearings on Plaintiff, Mountain Valley Pipeline, LLC's ("MVP's") Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"). MVP appeared by counsel Scott Long and Nicolle Bagnell. Luca Connolly appeared by counsel, William DePaulo. The Court, after considering the Motion, the testimony and evidence at the hearings, and arguments of counsel, has determined that Plaintiff has failed to sustain its burden of proof, to support issuance of a Preliminary Injunction and hereby denies Plaintiff's request for injunctive relief.

PROCEDURAL HISTORY AND DISCUSSION

This case has arisen out of the issuance of a Certificate of Public Convenience and Necessity (the "Certificate"), by the Federal Energy Regulatory Commission ("FERC") to MVP on October 13, 2017, authorizing it to construct and operate the Mountain Valley Pipeline Project (the "MVP Project"), which includes approximately 303 miles of new 42-inch-diameter natural gas pipeline, from Wetzel County, West Virginia, to Pittsylvania County, Virginia.

In its Motion, MVP alleges that named and unnamed defendants have occupied trees in the path of its proposed pipeline at locations in the Jefferson National Forest (the “Forest”), and thereby blocked and/or delayed construction of the pipeline and the clearing of trees in preparation for that construction.

At the request of the Plaintiff, the Court reviewed the filings, and it appearing that the Plaintiff had the necessary documentation to support the request for temporary relief, granted the request for a temporary restraining order on March 7, 2018, and set the matter for a preliminary injunction hearing on March 13, 2018.

At this hearing, MVP offered the testimony of Joseph Cooper, project manager for MVP, and Ralph Wright, Security Director. Among other things, these witnesses testified about the project, and the location of the “tree sits” in reference to the project. Their testimony was based on other documents not offered as exhibits, and hearsay testimony as to the location of various points. The testimony was conclusory, and not persuasive on the issue of the location of the tree sits relative to the permitted area.

Mr. Cooper further testified that MVP was a partnership to construct a 42 inch natural gas pipeline, for a distance of 303 miles, for a construction cost of 3.3 billion dollars, that MVP would generate 450 to 600 million dollars in annual revenue upon completion, and that his company would suffer irreparable harm without a preliminary injunction. He surmised that if the trees were not cut by March 31, 2018, MVP would have to wait until November 2018, to commence work on the portion affected by the Respondents activities, which is approximately 500 feet in length. Although he conceded that FERC had granted a petition to rehear the matter, he asserted this would not delay the project.

This Court notes that the Respondents have offered evidence, to the effect that

FERC has agreed to grant a rehearing on the certificate. According to recent news media accounts, there are various state and federal challenges to this project, which will probably cause delay to Plaintiff's construction schedule. Needless to say, the possibility of economic harm to Plaintiff, should this request for preliminary injunctive relief be denied, is speculative, at best. Also, due the scope and complexity of the project, this Court is dubious that it will be completed and operational, within the time frame contemplated by the Plaintiff.

At the hearing on March 13, 2018, MVP introduced documentation from various governmental agencies, granting a right to proceed with the MVP project, including a FERC authorization to proceed in Virginia from mile post 196.4 and further southeast into Virginia. This Court sua sponte raised the issue that no FERC Notice to Proceed was offered, in connection with the portion of the project located in West Virginia.

Feeling that this was a jurisdictional issue, this Court declined to grant any relief at that time, in the absence of such documentation. Plaintiff's counsel indicated this very essential document was not supplied as an exhibit to its complaint though inadvertence or oversight, that a copy could not be produced at the hearing, and requested leave to supplement the record. Over the object of Respondent's counsel, this Court granted Plaintiff permission to supplement the record with this jurisdictional document.

The Respondents also objected that Plaintiff had not clearly proven that the area in question was within the permitted area, and that Plaintiff had not shown that Plaintiff would be irreparably harmed if the preliminary injunction was not granted. The Court overruled these objections, and indicated that it would be inclined to grant a preliminary injunction if the additional documentation was filed.

On March 14, 2018, MVP filed an additional FERC Notice to Proceed, covering

the portion of the project from mile post 65.5 in the northern part of West Virginia, to mile post 196.3, just short of the intersection of the proposed pipeline with the Appalachian National Scenic Trail (ANST).

In response to MVP's March 14, 2018 submission, Defendant Connolly submitted a memorandum pointing out that Plaintiff's Exhibit 4 created a so-called "no cut zone" between mile posts 196.29 to 196.39, and asserted that Plaintiff needed to establish that the defendants were located at some point, other than inside the no cut zone, in order to carry its burden of proof for the assertion that defendants were obstructing MVP's right to proceed.

After reviewing these documents and reflecting over the issues, this Court deemed it necessary to require an additional hearing to address issues not given adequate consideration at the hearing on March 13, 2018, and scheduled an additional hearing on March 20, 2018 to consider the issue of the location of the "tree sits," relative to the no cut zone.

The March 20, 2018 hearing focused primarily on the location of the defendants' purported "tree-sit" in relation to the no cut zone. At that hearing MVP introduced exhibits and testimony from Marshall Wayne Robinson, a licensed West Virginia surveyor. His testimony was offered to demonstrate that the Respondents were "sitting" in trees seven feet to the west of mile post 196.29 and, therefore obstructing the ability of MVP to clear trees up to that point, and not within the no cut zone.

In the course of cross examination, it became apparent that the witness was testifying that the location of the tree sits, the mileposts in question, and other relevant matters, was based in whole or in part, on the work of other surveyors. His testimony was not clearly tied to the location of monuments, control stations, or some other fixed

means of determining location of important points. Much of his testimony as to the location of important points as depicted by his trial exhibit, was by referring to or measuring from the Appalachian National Scenic Trail. He also utilized “limit of disturbance” stakes, or temporary wooden stakes placed in the area where construction is considered, by other surveyors.

This Court would simply observe that ANST is not a fixed point, it is not paved or fenced, and that it is simply a footpath, at the top of a steep, wild, rugged and inaccessible mountain, existing within a fixed corridor. The location of ANST changes according to the whims and footsteps of its users, and it should never be used as a fixed monument or reference for surveying purposes, as used by Plaintiff’s expert and as depicted by the document marked as Plaintiff’s exhibit 13.

This map that was produced as an exhibit was inherently confusing, and appeared to be internally inconsistent and inaccurate. In particular, the critical mile post markings were located on MVP’s exhibit, by use of a “rounding” technique, which inherently includes a range of potential error. In an inquiry where the distance between mile posts was as small as 1/100th of a mile (which the witness acknowledged was 52.8 feet), and MVP contended that the location of the defendants’ alleged obstruction was only seven feet away from the no cut zone, the use of “rounding” is inadequate.

The use of “rounding,” perhaps tolerable in other contexts, is not acceptable here for the simple reason that the range of error inherent in “rounding” has the potential to subsume within it the precise distance which it purports to measure. Such a range of error eliminates any probative value of the proffered exhibit.

The concern for accuracy in this instance is heightened in this instance because MVP exhibit 13 at the March 20, 2018 hearing, recited the distance between two mile

posts - acknowledged to be only .01 miles apart - as being 25.4 feet distant from each other, notwithstanding MVP's surveyor's concession that the distance of 1/100 of a mile (.01), is 52.8 feet, a misstatement of distance in excess of 100%. Additionally, the MVP exhibit -- while purporting to be drawn at a scale of 1" = 100' -- clearly was not drawn to scale, as evidenced by the fact that the exhibit depicted the .05 mile distance between mile posts 196.3 and 196.35, by a line substantially different in length from the .05 mile distance between mile posts 196.35 and 196.4, otherwise equal distances.

The Court also notes that the testimony of Plaintiff's witness, as a person who appears to derive his livelihood in large part from the MVP, has to be considered in light of the fact that he has worked for MVP as a subcontractor since 2014, and appears to obtain much, if not all of his livelihood from this project. While this does not disqualify him as a witness, and indeed, he has appropriate qualifications to testify as an expert witness, his testimony has to be considered as that of a person who has a significant financial stake in the outcome of this litigation and a significant interest in its outcome.

The cumulative effect of these errors render the testimony of MVP exhibit 13 inherently unreliable for the purpose of locating the Plaintiff's right of way, and, thereby, support Respondent's claim that the Plaintiff has not shown that it is likely to succeed on the merits.

The issue of a financial interest in the outcome, also applies to the testimony of the other witnesses for MVP, Mr. Cooper and Mr. Wright. Each witness has an enormous financial stake in the outcome of the MVP, and the Court has to consider this financial interest, in assessing credibility, and finds much of their testimony to be self-serving. Because this is only a preliminary injunction hearing, the Court has not had the opportunity to allow the parties to fully develop these issues, as it would do, if the case

were to proceed to trial.

The evidence produced by the Plaintiff is mostly relevant to the issue of irreparable harm to the Plaintiff, and the likelihood of Plaintiff's success at trial. Here, there has been no showing of irreparable harm, as the only claimed harm is economic loss to the partners in MVP. The only evidence in support of likelihood to prevail at trial, as noted above, is self-serving, and not based on reliable monuments and control points, and credible witnesses on the survey issues.

The only testimony of irreparable harm, is of the project manager, Mr. Cooper, of the private economic loss of Plaintiff, if the project is delayed solely because of the actions of Respondents, without any evidence the project will be completed within the anticipated timeline. There is no showing that there is a national shortage of natural gas, an emergency requiring immediate need of delivery of gas to the ultimate delivery point, or some other factor causing irreparable harm, if completion of this pipeline is delayed due to the Respondent's actions, pending trial.

Another factor to be considered in deciding to grant or deny a preliminary injunction, is the likelihood of harm to the defendants. No evidence has been produced by either party on this issue. Here, the Respondents are obviously trying to protect the trees in which they are sitting, and to delay this project. If this Court were to grant the request and the Respondents were removed, the project could proceed at this location, the trees would be cut, and MVP would proceed to bore through Peters Mountain, causing great harm to Respondent, should they ultimately prevail at trial.

Finally, the fourth factor to be considered, is the public interest. The Respondents generally represent the interest of the public and the environment, such as the interest in protecting the waters underlying Peters Mountain, its flora and fauna, its view shed,

the ANST, and similar interests that will or may be destroyed, if this request for a preliminary injunction is granted, and the project proceeds before the public interest is considered at a trial on the merits. These interests may suffer irreparable harm if the preliminary injunction is granted.

Taking these four factors into account, and the evidence offered in connection therewith, this Court does not see any valid reason to rush to judgement, and to grant Plaintiff's motion for a preliminary injunction. This Court believes the case should proceed to trial, so that these four factors can be decided by trial, as required by the overwhelming authority in this matter, as the only effect of denial, is to delay construction of 500 feet of pipeline until later this year.

This case is controlled by some fairly simple points of law. For many decades, West Virginia courts have applied the following guide when granting or refusing an injunction:

The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.⁹

The central core of this decades-old analysis is the "comparative hardship" of the parties. The federal courts have evolved a detailed methodology to guide courts in balancing the hardship of the parties. West Virginia trial courts apply this same four-factor methodology when weighing the granting or refusal of a preliminary injunction:

Under the balance of hardship test the district court must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) *the plaintiff's likelihood of success on the merits*; and (4) the public interest.

Morrisey v. W. Virginia AFL-CIO, 239 W. Va. 633, 804 S.E.2d 883, 888 (2017)

Unless an absolute right to injunctive relief is conferred by statute, the power to grant or refuse or to modify, continue, or dissolve a temporary or a

permanent injunction, whether preventive or mandatory in character, ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion.” Syl. pt. 11, *Stuart v. Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

Weatherholt v. Weatherholt, 234 W. Va. 722, 769 S.E.2d 872, 873 (2015)

It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. As this court has noted:

The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d at 925. Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business. See *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C.Cir.1977).

Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985)

FINDING OF FACT

1. MVP has failed to meet its burden to prove that the area within which it is seeking a preliminary injunction, falls within the permitted area, in which it has permission to cut trees.
2. The only harm MVP will suffer if a preliminary injunction is not granted, is economic harm to MVP, and its partners, which is speculative, at best.

CONCLUSIONS OF LAW

1. MVP is not entitled to a preliminary injunction, enjoining the Respondents from “sitting” in the trees at the location in question, and proceeding with construction at this location. The question of MVP’s right to injunctive relief should proceed to a full and fair trial on the merits.

2. The Respondents will suffer irreparable harm if the preliminary injunction is granted.

NOW THEREFORE, it is hereby **ORDERED, ADJUDGED AND DECREED** that the motion for a preliminary injunction be, and hereby is, **DENIED**. Counsel shall confer with one another in order to resolve the undisputed issues by agreed order, and shall confer as to the time to complete discovery, and other necessary pretrial matters and after doing so, shall request a scheduling conference in, order to schedule a trial and the other necessary deadlines, in order to resolve the matters in dispute. This matter is continued accordingly.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the surety bond of \$10,000, previously posted on March 8, 2018, be released, as the preliminary injunction was denied. If an injunction is granted after trial, this Court will reconsider the matter of the bond.

The Circuit Clerk shall provide a copy of this order to any party or counsel not registered for electronic notification.

ENTERED: March 27, 2018.

/s/ Robert A. Irons

Robert A. Irons Circuit Judge