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Supreme Court of Texas.  
In re Applied Chemical Magnesias Corporation, Relator.  
No. 04-1119.

January 24, 2006.

Appearances:

David R. Pierce, The Law Office of David Pierce, El Paso, for relator.

Samuel Downing McDaniel, Law Office of Samuel D. McDaniel, Austin, Texas, real party in interest.

Before:

Chief Justice, Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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JUDGE: Thank you. Be seated, please. The Court is ready to hear argument in 04-1119 In re Applied Chemical Magnesias Corporation.

ORAL ARGUMENT OF DAVID R. PIERCE ON BEHALF OF THE PETITIONER

MR. PIERCE: May it please the Court. Mr. David Pierce to present argument for the Relator. [inaudible]. May it please the Court. There are at least four reasons why this contract in issue in this case is subject to the mandatory venue provision under 15.011 of the civil practice and under this code. The first is that, it in self is an agreement with and by one it. It-- the document itself states that after a six month feasibility period, my client ACM has the option to give notice pay a \$5,000 fee and have leases conveyed covering the minimal rights on the property in question.

JUDGE: But so was the agreement it inspect, wasn't it?

MR. PIERCE: Well, your Honor, except all of these auctions, all of the conditions predicate were performed and so this an auction is an interesting land and so properly construed this document unlikely document in Smith would be considered an auction agreement rather than simply an unperformed contractors specific performance or an ex-- an executory contract. Further, your Honor, the reason this document by itself is a conveyance of real state subject to the mandatory venue provisions is it contains in paragraph 8, "Current production will-- it obligates the thing of royalties which it always been considered to be

a conveyance of lands so that if instead of column this a suit to construe the obligation of the party but it were a suit of breach of contract for payment of production royalties, there would be no question but that it was a suit subject to mandatory venue. So that up- merely reading this contract by itself proves that it subject to mandatory venue provision. There's also a significant land of cases which we decided which state that it declaratory judgment action which is in reality and effort to cly a title is a subject to mandatory venue provisions even a non recorded documents such as the contract can constitute a cloud on title. My client has filed the least defendants in this case, claiming that this document was his activity which all describe give it title to the service in Mineral rights and more opinion of this account.

JUDGE: What supposedly is the-- your counter planning just a souse damages for breach and I know you say can't judge the petition by counter planning and I take your point on that. But it looks like at this were really about land in this reliance.

MR. PIERCE: Well, your Honor. That is one of several deficiencies in the record as it exist today which you could point out which some accuracy of the hearing at the motion to transfer, transfer to reveals that true zone errors between an attorney that was substituting out myself that counsel for the real party of interest. They didn't proceed the second amended motion to transfer until two days before the-- which is a violation of the statute and rather continue the hearing. They file their replied brief one day before which also was not permitted but given the circumstance we agree so there are a number of deficiencies in the record that had this been properly pleaded and deliver probably would have been cured of the, the issue that really before how-- that was not really graced by the real party interest. At least the document form until the day before and so there was no, no way to really squarely present the issues and the pleading before the Court.

JUDGE: Well, I mean I ask you this. If all anybody want of was this, would it fall under the mandatory provision?

MR. PIERCE: Depends on what form? If that was damages -

JUDGE: Of this agreement and both side like to breach any check line damages.

MR. PIERCE: - If the damages is in the form of payment for Royalties then yes, it clearly-- every agreement or obligation in this document is about you listening. Well, if you has been describe in is a declaratory judgment action to construed the rights and obligation of the party. Every right and obligation in the name of this document concerned either the conveyance of Mineral leases, the payment of the royalty, the construction of a mill on a property to be conveyed, understand there copy of the letters that is to distributed to the Court but what is not a types of that letter but this of types of the original agreement or the property descriptions of the land and covers in counting that's is the subject to disagreement. This is Real state document there will be a really no dispute of the, the third theory that supports the application of 1520011 is equitable time which-- under which even a contract to convey Real state can confer equitable title if the guarantee performs of the editions president. The record will flex that there were three things to be perform by my client as a predicate to consider before Mineral leases, one was a feasibility study, second was notice. Real party is existent to continue forward with the construction of a mill and the third is the payment of \$5 000 and was negotiate by the Real party of interest at that point in the

sequence of events identified in this document, they were only the language shout cause before the leases of Minerals Circuit Rights in the subject demands appropriate to the project contemplated here and to be delivered to ACMC. So we claim that equitable title has then created by our performance of all editions President. The Court and perhaps most compelling bases for distinguishing the line of cases -

JUDGE: Just to, just to ask you on a last one but I take it the in a lip the agreement ideals with interesting rule, rules state where in the meaning of mandatory venue provision. You'd still have make some claim involving that interest before the venue provision problem.

MR. PIERCE: Well, actually no. That's not correct, your Honor. In fact the Court will look has the plaintiffs pleadings to the real nature of the controversy in particularly here were the contract itself is a catch to the plaintiff original petition. Which Court is obliged to review both the petition and the terms of the contract to determine whether the pleading does or must indicate an interesting last subject to 15.011. Beyond that in-- while the language of the counter planning admittedly only larger damages of all the state and all conditions predicate to be conveyance of lease and then perform and the evidence attach to the second amended motion to transfer there's an affidavit in which describes a jack in the sequence of the events resulting into refusal to convey the Mineral leases. So we believed that all the documents reviewed together by the Trial Court to the motion to transfer would have revealed an interesting Land Circuit to the mandatory venue provision.

JUDGE: Well, I, I guess that's my problem if I'm-- I can read this agreement and see that surely equitable title could be involved but if nobody resends at is then how can be under the mandatory venue.

MR. PIERCE: Well, your Honor, the fault from the judging again admittedly there are deficiencies in the record and in the pleadings but the Court at trial hearing furnished the issue as well. I think the issue boils down to whether the controversies about ownership either legal or equitable title or about breach of contract is again ownership interest. So while the pleadings may not have raise the issue as actually as they should have. The Court recognized the issue presented in the motion to transfer venue but the strongest basis for the application for moving venue statute is really the performance that the record demonstrates by the parties under this agreement not only has the feasibility study been performed and the results shared as required. The notice to proceed the delivered the \$5 000 been paid and negotiated and reportable deeds been demanded and refuse but a my no sideways has been executed in relation to this agreement conveyed to my client a lease of a portion of the subject clients and then the record further reflects that my client has been mining on the subject plans since 1999 and so it would truly be pay an effort to ignore realty to suggest that apart from all that his actually occurred at Marbel Peng and covers in County and it is occurring today. Nevertheless, this pleading to construe this agreement does not affected interesting Land subject to commit mandatory winning venue provision. The fifth and final point I wish to make is on a broader basis the Court could consider whether an action for specific performance which is not been pleaded by any party but fits under the terms of 15.011. Almost all of the adjudication of the mandatory venue provision has occurred under the predecessor's statute. Article 15-- Article 14 of Section 1995, by the text as civil statute 15.011 actually broadens by its language the application of the early statute. It, it actually affects not only the recovery of Land but it, it extents it two an interest or state in that

and it raises the question, what did the legislator mean when they extended 15.011 to cover an interest store state in line? It's always been the law of this state that any interest in Land whether be a Royalty interest and easement a lease even an option has been an interest in Land and if were settle law, why would the legislator expends statute to not only specific recover-- the recovery of Land or nature's in land and one possible interpretation is really what they were trying to do, was to and this schism were a party could attempt to artfully plead around the mandatory venue by calling - instead of calling - at the trespass to trial tar, they called it the declaratory judgment or instead calling at a suit to clientele by calling a declaratory judgment or a plaintiff might inadvertently call it a suit for specific performance rather than a suit to enforce an option in land or another type of suit which does implicate a, a constructive trust. I mean the-- the bull's eye of the declaratory judgment that this-- the real party in interest this attempting the head is getting smaller and smaller because whether be there constructive trust or through the equitable title. This different theories are crowding in on this schism that existed going back into the nineteen century between the specific performance. One of case is which your not cover by mandatory venue and all of the other types of Real State suits that are coverage that it seems reasonable but it would really enhance the efficiency of the Court and of the legic-- and of the jurisdiction of the state if the Court where really say that the 15.011 no longer a recognize is that distinction. Whatever policy analysis there is that requires that suits on Real state be heard in the County where the real state applies certainly, applies equally to suit for specific performances to easement and optional rode. To the extent there is any on sight requirement it would apply.

JUDGE: Any further questions. Thank you, Counsel. The Court is ready to here argument from the Real Party.

JUDGE: May it please the Court. Mr. Samuel McDaniel represent argument for Real Party that use.

ORAL ARGUMENT OF SAMUEL DOWNING MCDANIEL ON BEHALF OF THE RESPONDENT

MR. MCDANIEL: May it please the Court. The negotiation of the Relator to me at least it base of assumptions. They assumed that the letter agreement is a lease and it they know what terms of that lease are or perhaps that the term of the lease are not essential. I don't know either one of those things and one reason that I have had the-- a copy of the letter place on the bench in front of you. It's because I'm thought it might be helpful both from the stamp of review of the letter but also from the stand pull up of tracing the sequence of events here. The letter starts out saying this proposal when accepted by you and a matter of provided below 4,000 for the letter of agreement. Well, what is that mean? They apparently takes the position that they may grab one provision and I have it down there when they get to it and say that it means what we paid the \$5,000.00. You have accepted it and your sup-- and, and take the \$5 000.00 in the fund. You accepted it and your obligated to my beliefs still on part was in the term the leases to that point. To may the furnishing of the leases himself negotiating out terms of the lease would be the more probable acceptance and the letter is said out sold that it says upon receive of such recordable

documents, ACMC so have six months within which the construct the facility that's all shall we referred to in the letter conveying the \$10,000.00, I mean the fact that are browse, I'm sorry. The problem in this case is they would it came down to ten to negotiate the terms of the lease. The party were unable to negotiate term of the lease and this letter does not tell us when the lease starts or what it in or very much about it at all. It doesn't even tell us what the leases suppose to cover neither true that there is attach to a letter. The description of 554 acres of land. The only lease that they ever agreed on which was in the mill side is a lease that cover 28 out of that.

JUDGE: So you think if the terms where more definite, it would come on in mandatory venue provision?

MR. MCDANIEL: No, I don't think it would but accordingly it didn't bring a suit for that but I, I wanted to address the deficiency -

JUDGE: What you think, what you -

MR. MCDANIEL: -and here in this as, as, as and of inch of them -

JUDGE: What did you want to have it as result to a suit?

MR. MCDANIEL: I wanted the Court to tell us what this letter does and whether or not it is an agreement that's create enforceable rights, I don't think it does so that's my opinion.

JUDGE: If you don't it does then infect you, you want them awfully.

MR. MCDANIEL: No, I have my ask form to get also Land. They taken the position, this is a lease.

JUDGE: Right.

MR. MCDANIEL: We, got right and I say, where are they?

JUDGE: - But normally you know, there's, there's two queries filed lawsuits. One is 20,000 who say going to claim in the defendants got to tell them, where the hell you want to apply? The other claim is of yes, the plaintiff first just like started the thing. What is it you want? And it is extraordinarily vague to say, "I wan't you to tell me what I've got if anything." Now, the problem is of course if there going to file mandatory venue and then you objects the motion to transfer. They got to do and start and so they certainly we don't want a lot of this such situation where people do artfully plead things cause I don't really want to try case whether the Land is you'd agree much with of things. We don't want people making deliberately vague initial petitions and then it turns out in the Seventh of it of the petition they won't tackle the lane but it's not of-

MR. MCDANIEL: I know-- you know that's the law as you understand. I don't have a particular desire one way or another and I think I'm being accused with considerably more gall than I posses ...

JUDGE: So what-- that maybe but, but we're trying, were, were asking you now, what we assuming for and your telling me I'm assuming for whatever I, I have a right to but ...

MR. MCDANIEL: Well, let me--

JUDGE: Do you know file a suit just a cause your curious.

MR. MCDANIEL: Let they out ...

JUDGE: They files as in because they think they ain't get in a some but I want to know what -

MR. MCDANIEL: That's not entirely true and that's not true in this case and that's not what to declaratory judgment not act contemplate. This is a-- to me classic suit for the declaratory judge. When it go on through the letter for amended and show you some thanks here. Some other will take evidence.

JUDGE: What to follow up on, on that question. When you say, "Judge, please tell us what this means", the Judges going to say what

do you think of things and then why are you go on a shopping?

MR. MCDANIEL: I'm going to say we going to put on expert witnesses to testify about what it means.

JUDGE: What in many years that?

MR. MCDANIEL: Well, you got the question first of all which are already address is what this acceptance as provided below. What is that records? What is it trick? Then you got a question, they have said that they build a separation billing facility. You have well, beneficiary that's in the second, the first number paragraph and there's an alley of the out of the word down there. After the sig there should be another act. The cause one of the things that cause the problem here is they want to head and jump the gun and built a mill after a year. Without having this leases and things and flakes we want to hear to two years stranded and negotiate the arrangement between the Court.

JUDGE: Well, but you watch the bill of this?

MR. MCDANIEL: Sure, sure we watch conveyance but the problem was they built some from this not what they represented that's what disturbed my client. What they built is not a separation facility it's not something that have been appreciate this a work and is not something that will produce a hard purity my knees in part had drags an account. All of those your docket, they would be proved out by the evidence.

JUDGE: So what you wanted to do is build a different kind of plaintiff.

MR. MCDANIEL: I don't want to do anything right now, I want to find out what rise they have under this documents -

JUDGE: But that's the point how that, if let assume they built a wrong kind of plaintiff. If you want them to build the right kind of plans then I would agree with you then look like a suit for title. If you want to kick them off because they build a wrong plan is to late to do something else then it does look title but only you can tell us and you won't, what will you do now -

MR. MCDANIEL: I do came, I don't know. Well, let me tell you where we are? Where we tell us here? The other side says, "I've got a right-- I've got a lease." Well, they don't have a lease as I read this document and they wrote negotiate its folder from that point. So at that point we need some definition. What right exist under this 1999 agreement that's what I want the Court to tell?

JUDGE: So then--, Okay. So if the question in the case is, do they have a lease or not? That would come under the mandatory venue.

MR. MCDANIEL: I don't think so.

JUDGE: Why not?

MR. MCDANIEL: Because I'm not trying to roll off, I'm not doing any of the file thing that it provide it in 15.011.

JUDGE: What take-- I mean if that had a lease or they don't have a lease your not trying to decide a title?

MR. MCDANIEL: If the Court says I going to leave sure your on a least on this terms. We probably execute the lease. I'd tried the problem, the problem in we don't know what to do. The statute it says actions for one recovery Real property were not trying to do that: Two for petition of real property were certain not trying to do that removal of in converses, they say were trying to do that but were lack.

JUDGE: So what's going to happen on that trab ? When you go up the Judge says, "call your first witness," and the end the Judge that-- agreement and say, "Judge tells what this mean." The Judge said again, "call your first witness." What, what case are you going to present of Judge? That's I'm confuse.

MR. MCDANIEL: Well, actually one thing I'm going to-- the thing that I'm back is a Judge about it whether or not this document specifies the terms that you need in a lease and whether or not it's enforceable from that's stand for. Fast that point and it is a two level thing. Fast that point, I intend the pull on expert testimony and then what they're doing out there is not beneficitation of this aware and it's not producing a half purity by means and I brought that powder and therefore, they're not doing what they agreed to do in the instrument. Now, there is not a self executing time. It's going to take the presentation of evidence and is going to take some decision of by fact finder is to watch go on out there. Because the outside probably will say, "yeah, there's evidence appreciation and where going to have to prove up." What years been appreciation in the middle of understood and what are they doing, and is this half purity with this qualify of half purity because what we got-- we got a product after year that my client uses for one the -

JUDGE: And if you win all of those, you win all everyday it's not beneficitation that is required beneficitation now, what happens?

MR. MCDANIEL: Then and only then after we know what this document tells us. We may or may not bring an action to try this possessum or premises. Let me give you an example -

JUDGE: So you have-- you have decided whether this is a subtitle or yeah.

MR. MCDANIEL: We have not pleaded as a suit for title were not -

JUDGE: I know, I know that -

MR. MCDANIEL: With we trying of found out in any -

JUDGE: More than an-- the reason you didn't pleaded is that, was not be clever. The reason is because you don't know.

MR. MCDANIEL: That is correct-- that is absolutely correct. And they're argument and well, like then they're producing and not like the difference. I've use this exam unless suppose that I have a plan a place like I use to leave on them by the river. It have a bunch of grab along and somebody comes to me and said, "I don't make a deal with you and to produce like gravel down there and I here when on around it." and I say, "okay, well lets try to work out a lease and we got a hang up a word that going to lease" and he said, "well, I want to tell down there and produce gravel. Let me put a plant down there and I play it so much where we turn gravel and that take out of there." And I say, "fine, there's nothing wrong we that deal. There's nothing wrong with this doing that until we work out along term lease if we work out long term lease." That's exactly what we got here this to me is a letter of intent and the payment of the \$5,000 will separate a payment-- equivalent to Arnish money to say, "okay, it's now time to go to the next step." Let's go in here and let seat down unless really get in the serious negotiation and serious negotiations or what powerful here because this is not an all alone in engagely , so next month to say at all engagely and necessary a simple document. You going to have term in them -

JUDGE: But -

MR. MCDANIEL: But this a Mining lease where they usually stroast then working on the ground out there and there's two of the men, men there and if they're, they're there big issue is for is control of the man and the mining plan and shooting explosive of grenade and things like that. You've got to be address.

JUDGE: Mr. McDaniel, I see him obviously thinks that he own something cause rather doing this, right? And they think this agreement provides end with something. A right possession of the property produce

were there produce, right or wrong?

MR. MCDANIEL: Yes, I think they do likes a -

JUDGE: And, and it your declaratory judgment action attempts to throw some doubt as to they're right to the whether than what you say?

MR. MCDANIEL: My declaratory judge of an action attempts to find out a whether this is what a complete enough document to be an enforceable contract and be what the terms have it all.

JUDGE: I know you said but I'm, I'm asking you doesn't your deck action throws some doubt-- attempts the throw some doubt over their right to do what they're doing?

MR. MCDANIEL: I don't think so. I don't think so cause if it does then that would seeing to be -

JUDGE: Well, they taken a position that this is a lease and were entitled to go a land. All I'm saying is I don't think it's a lease I question whether it is an enforceable ans-- enforceable contract but what ever it is let's define, let's define it so we know what we dealing with and that's what I understand the declaratory judge what action is for. The mere fact that has something to do with the Real state -

MR. MCDANIEL: So, so -

JUDGE: Does it like in a mandatory venue case -

MR. MCDANIEL: - So that the, the final result on the declaratory judgment action even could or could not ultimate decide the underline dispute.

JUDGE: It might provide a basis for deve-- at deciding the underline dispute. Let me, let me illustrate what I'm talking about Justice during they argue-- this is on page 12 of their petition given the ACMC curling had position of the Mineral and a portion of the Circuit and its made and prove into Circuit. Let me say that I do not have exclusive possession of Mineral as one of the things here supposedly letter recognize its Jo Uprise, for both of from the man after. Any declaration of the rights that is legal relations under the 300 requested by TAA necessarily will determine whether the TAA has the right to exclude ACMC for possession of the land and question. Maybe that sought but this is not a suit to exclude as ACMC it is not a suit to recover the possession of the land. It's to find out what kind of be this people made between themselves and so for is let me define it. It's no different at least in my judgment that a contract to convey land you can have a question as to whether a not this contract to convey Land is an enforceable contract but that is not make this-- does not make a suit to recover Land then in fact in that case you can get the contract define and you would have to bring a suit for specific performance to try the enforce and that clearly under the case law of Rule of hundred of years in Texas does not come under mandatory venue provisions. So -

JUDGE: Yes -

MR. MCDANIEL: - were walking some talk-- some, some close Land to I recognize that -

JUDGE: But they done that of course a difficult thing in venue is must it start of with cases not about Land but in so of about Land. Those up on appeal, that's automatically for reversable but it also-- we don't consider what the Judge do with start. We consider the whole record and it subs fully develops. So in terms into a Land case later we've wasted all of our time. So shouldn't that suggest at the start if it-- if that's what it might be than in telephoning the problem of wasting and entire drawl in appeal. We dim it to believe or at least for to close a question.



MR. MCDANIEL: Judge Brister, our greatest respect I do not agree with your premise. The reason I don't agree with your premise is we suppose to be able to look at this thing on the basis of the pleadings at the beginning and determine the venue issues -

JUDGE BRISTER: But not -

MR. MCDANIEL: - what it might become on down the lake.

JUDGE BRISTER: But on appeal that's not what we look at, at the end of the trial. If you win on what we got on the pleadings it's not for Land we go to trial but it try you as to the Land back to kick them off and 15064 says on appeal, if venue wasn't improper it shall no event be harms as ever in determining whether been you was, was not proper the appelland Court shall consider the entire record in pleading the trial on the merits.

MR. MCDANIEL: Well, all I can say about that is that's not the lawsuit we brought contrary to one of the statements from the bent while ago a present lawsuit is not even ask for damages to the Real state all we ask for is to know what we're dealing with.

JUDGE BRISTER: Let me ask a question, on the matter of just would play. Paragraph ten it says, "such agreement shall be performable in covers account." What was, what was the purpose of that?

MR. MCDANIEL: I don't know, let me say that neither, I nor opposing counsel had anything to do with this document.

JUDGE: I, I take it that you don't think that it has an effect on the venues.

MR. MCDANIEL: I don't think so I don't think so. Let me-- here's one of the things we got, we got a fill a little bit in the progression that was going to have but it says this agreement shall not be assignable . However, the matter of lease is contemplated here and their maybe as I'am. That's in the eleventh probation. My time is up, thank you very much.

JUDGE BRISTER: Thank you.

REBUTTAL ARGUMENT OF DAVID R. PIERCE ON BEHALF OF PETITIONER

MR. PIERCE: Your Honor. I just want to point a couple of claimants. This letter was accepted in the manner provided below because the manner provided below is found on the last page about the signatures where it's state that if foregoing properly and accurately your such your understanding of the agreement. Please indicate approval in acceptance by executing it's space provided below. It didn't depend on any other action or in any other payment in the body of the agreement once the party signed as they did signed the note that they initially to page is this typical with what the parties consider about the contract and in fact they agreed that was a bind of contract in paragraph 11 just before resigning the clientage that you were just referred to it states this a binding document. It done-- it is not simply an invitation with negotiate as paragraph 4 stage once my client they notice of his intent to construct the separation note. Willing facility from that day 12 months from that dated it encore the obligation and pay \$200 000.00 in works. That is not implies some effort to open a negotiation that's a firm fix obligation in real state for the payment of route.

JUDGE: So flip side of the question I was asking opposing counsel. If we grant Mandamous transferred coblished in County . They trial

Judge determines declares that the their portion that understand the contract is right and simply orders your client to bill the different kind of plant. Where there were this turns out that point they want. Then ark we again going to reverse cause of the whole, you the record when if when you transfer was improper-- its improper forever it's automatic reversal declare and turns out this was not really a case about Probley Olay.

MR. PIERCE: If that were the facts none of those fact were reflected in the record their petition doesn't say they don't belong to kind of facility and so as to whether that's-- what is reflected by the record is their statement that ACMC, which is the one moderately concrete statement in the petition ACMC contents that TAA is obligated but the April 1999 letter to do certain things in TAA does not agree and then in our second amended motion to transfer. We state TAA has failed and refuse to the law of the lea-- leases contemplated by the letter of agreement. So the one specific event or none event that is raised by the pleadings is the none conveyance of leases. If they felt that we built the wrong facility or that we didn't have right to be on the Land there is a much more simple and direct enforceable entry entertainer suit or but this type of document certainly does not arise from the disagreement is to whether the building the right type facility on the Land file four and a half years after the execution of this document and the initiation of the mining of minerals on the land. The one point I do wish to make about if this document would in the vacuum it does not contains certain terms that will show brief release but force and the statute to frauds partly performance can constitute an exception of custom and the industry possibly and so herein six years later into the parties have had some commercial relationship certainly jury could supply if they were missing terms base on the practice of the parts. Done.

JUDGE: Thank you, that's all for judgment includes all the arguments for today in Marshall and now adjourn the Court.

JUDGE: All right.

JUDGE: Oyez, Oyez, Oyez the Honorable, the Supreme Court test is not half and in to year.

2006 WL 6047192 (Tex.)