[Cite as *Lauer v. Positron Energy Resources, Inc.*, 2014-Ohio-4850.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

DALE GLEN LAUER,	:	
Plaintiff-Appellee,	:	Case No. 13CA39
v.	:	DECISION AND
POSITRON ENERGY RESOURCES, INC., et al.,	:	JUDGMENT ENTRY
Defendants-Appellants.	:	RELEASED 10/27/2014

APPEARANCES:

John E. Triplett, Jr., Theisen Brock, L.P.A., Marietta, Ohio, for defendants-appellants.

James R. Addison, James R. Addison Co., L.P.A., Marietta, Ohio, for plaintiff-appellee.

Hoover, J.

{¶ 1} This is an appeal from a judgment of the Washington County Common Pleas Court that granted default judgment in favor of plaintiff-appellee, Dale Glen Lauer ("appellee"), on his complaint, thereby terminating defendants-appellants, Positron Energy Resources, Inc., Bentre-Lavender Joint Venture, and Stonebridge Operating Co., LLC's ("appellants") interests in an oil and gas lease that encumbered appellee's property. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} In 1978, a lease concerning oil and gas rights was executed and recorded. The lease agreement covered 36 acres in Liberty Township, Washington County, Ohio; property which is currently owned by the appellee. One well was drilled on the property for oil and gas exploration. The appellants purportedly lay claim to an interest in the well and lease agreement.

{¶ 3} The habendum clause of the lease provides that the lease "shall remain in force for a primary term of two years * * * and as long thereafter as oil or gas or either of them is produced from said lands, or from lands with which said land is pooled therewith, by Lessee."[1]

{¶ 4} The lease also contains a notice provision, in paragraph 6 which states:

> * * * [N]o default shall be declared against the Lessee by the Lessor for failure of the Lessee to make any payment or perform any conditions provided for herein unless the Lessee shall refuse or neglect to pay or perform the same for ten days after having received written notice by registered mail from the Lessor of his intention to declare such default. * * *.

{¶ 5} On July 16, 2013, appellee filed a complaint alleging the lease had terminated because no oil or gas had been produced or marketed from the well for "more than two years". The complaint also alleged a breach of the implied covenants of "reasonable development" and "marketing of oil and gas" because appellants failed to explore and develop oil and gas formations. It further alleged that no drilling operations were presently being conducted on the leased premises. Appellee asked for forfeiture of the lease.

{¶ 6} Each of the appellants was served with the complaint by certified mail on July 17, 2013. None of the appellants, however, filed an answer or otherwise appeared in the action. On September 11, 2013, appellee filed a motion for default judgment. That same day the trial court granted appellee's motion for default judgment and ordered the lease forfeited. The trial court also ordered that the oil and gas well be plugged.

{¶ 7} Thereafter, the appellants filed a timely notice of appeal and set forth the following assignment of error:

First Assignment of Error:

[1] A copy of the lease agreement was attached as an exhibit to the complaint.

> The trial court erred in granting the Default Judgment based upon the record it had before it.[2]

{¶ 8} In support of their sole assignment of error, appellants' contend that the trial court erred in awarding appellee default judgment because: (1) the notice provision in paragraph 6 of the lease agreement required appellee to notify them of the alleged breach of the lease terms before declaring breach of the agreement; and (2) the trial court's order that the lease be forfeited was error, because adequate alternative remedies were available at law.

{¶ 9} We review a trial court's decision on a motion for default judgment under the abuse of discretion standard of review. *Cooke v. Bowen*, 4th Dist. Scioto No. 12CA3497, 2013-Ohio-4771, ¶ 19. Accordingly, we will uphold a trial court's decision so long as the trial court did not act unreasonably, unconscionably, or arbitrarily. *Id.* Moreover, in applying the abuse of discretion standard, we may not substitute our judgment for that of the trial court. *Id*.

{¶ 10} "Under Civ.R. 55, when a party defending a claim has 'failed to plead or otherwise defend,' the court may, upon motion, enter a default judgment on behalf of the party asserting the claim. If the defending party has failed to appear in the action, a default judgment may be entered without notice." (Citations omitted.) *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 120, 502 N.E.2d 599 (1986); *see also* Civ.R. 55. The Ohio Supreme Court explained further that:

> Default, under both pre-Civil Rule decisions and under Civ.R. 55(A), is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. As stated by the court in *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105, 443 N.E.2d 992 '[a]

[2] This assignment of error is taken from the appellants' brief. A more detailed assignment of error was separately filed with this Court, however, the appellants' brief does not offer argument in support of the separately filed assignment of error.

> default by a defendant * * * arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render default judgment against the defendant as liability has been admitted or "confessed" by the omission of statements refuting the plaintiff's claims. * * *' It is only when the party against whom a claim is sought fails to contest the opposing party's allegations by either pleading or 'otherwise defend[ing]' that a default arises. This rule * * * is logically consistent with the general rule of pleading contained in Civ.R. 8(D), which reads in part that '[a]verments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading.'

(Citation omitted) *Id*. at 121.

{¶ 11} In the case sub judice, we disagree with the appellants' contention that the trial court's decision to enter a default judgment constituted an abuse of discretion. Appellants essentially argue that the trial court should not have awarded default judgment because appellee did not fulfill a "condition precedent" to filing suit, i.e., appellee did not give notice of breach under the notice clause in paragraph 6 of the lease agreement. Even if we were to assume, arguendo, that paragraph 6 of the lease agreement constitutes a condition precedent[3]; appellants waived such argument by failing to raise the issue in a responsive pleading. *See* Civ.R. 9(C) ("A denial of performance or occurrence [of a condition precedent] shall be made specifically and with particularity."); *see also Triangle Properties, Inc. v. Homewood Corp*., 2013-Ohio-3926, 3

[3] We have doubts that appellee was required to notify the appellants under paragraph 6 of the lease prior to filing his complaint because the issue presented in his first claim for relief was not one of breach of a condition or covenant, but rather, whether the lease had expired because of the failure to produce gas or oil for two years. *See Wagner v. Smith*, 8 Ohio App.3d 90, 92, 456 N.E.2d 523 (4th Dist.1982) ("Since the term of the lease, after its initial fixed term or terms, was dependent upon continued production of oil or gas in paying quantities, the issue is not one of forfeiture as upon a condition or covenant, but whether the lease expired by failure to produce gas or oil in paying quantities."). In any event, we need not reach the issue.

N.E.3d 241, ¶ 71 (10th Dist.) ("The effect of the failure to deny conditions precedent in the manner provided by Civ. R. 9(C) is that they are deemed admitted."). Moreover, having waived the condition precedent issue by not timely filing an answer, we will not now permit the appellants to make this argument on appeal. It is well-settled law in Ohio that appellate courts will not consider as error issues that are raised for the first time on appeal. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982); *see also Ohio Performance, Inc. v. Nelson*, 4th Dist. Scioto No. 94CA2226, 1995 WL 103634, *3 (Mar. 7, 1995) ("It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. * * * Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process."). Appellants should have raised their condition precedent argument in a responsive pleading or as a meritorious ground for relief under Civ.R. 60(B).

{¶ 12} We also disagree with the appellants' assertion that the trial court "established an extra-contractual" lease term by declaring the lease forfeited after two years of inactivity. This Court has previously noted that:

> Courts universally recognize the proposition that a mere temporary cessation in the production of a gas or oil well will not terminate the lease under a habendum clause of an oil and gas lease where the owner of the lease exercises reasonable diligence and good faith in attempting to resume production of the well. A critical factor in determining the reasonableness of the operator's conduct is the length of time the well is out of production. * * *
>
> A review of the reported cases reflects that while courts tend to hold the cessation of production temporary when the time periods are short, lessees have, for the

> most part, been held not to have proceeded diligently when the cessation from production exists for two years or more.

Wagner, supra, at 92-94. Thus, given the controlling precedent of this appellate district, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in declaring the lease forfeited after two years of well inactivity.

{¶ 13} Next, appellants contend that the trial court erred by ordering the lease forfeited, instead of ordering an alternative legal remedy to resolve the alleged inactivity and breach of the agreement.

{¶ 14} "[T]he remedy of forfeiture or cancellation of an oil and gas lease * * * is an equitable remedy that rests within the discretion of the trial court." *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶ 23. "Ohio courts have recognized that forfeiture is an appropriate remedy when legal damages resulting from a contractual breach are inadequate; upon a breach of implied covenants; upon a claim of abandonment; or when necessary to do justice." (Citations omitted.) *Id*.

{¶ 15} The *Moore* case is similar to the case at hand. In *Moore*, lessors filed suit alleging that an oil and gas lease encumbering their property had terminated under the habendum clause because the lessee had not maintained operations for nearly six years. *Id*. at ¶ 10. The complaint also alleged breach of implied covenants due to the lessee's failure to reasonably develop and market the gas operation. *Id*. The lessors in *Moore* requested that the lease be ordered forfeited. *Id*. After a bench trial, the trial court ordered the lease forfeited. *Id*. at ¶ 12. On appeal, the lessee argued that the trial court erred in declaring the lease forfeited because equity disfavors forfeiture. *Id*. at ¶ 42. The Fifth District Court of Appeals disagreed with the lessee, and upheld the trial court's forfeiture award. *Id*. at ¶ 51. In doing so, the appellate court acknowledged that

the failure to mine or drill on the leased premises within a reasonable amount of time could result in forfeiture. *Id*. at ¶ 45-48. The rationale for allowing forfeiture in lieu of damages is the fact that " 'the real consideration for the lease is the expected return derived from the actual mining of the land' not the rental income." *Id*. at ¶ 48, quoting *Barkacs v. Perkins*, 165 Ohio App.3d 576, 2006-Ohio-469, 847 N.E.2d 481, ¶ 14 (6th Dist.), in turn quoting *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 133, 443 N.E.2d 504 (1983).

{¶ 16} In the case sub judice, appellee, like the lessors in *Moore*, sought forfeiture of the lease and specifically pleaded that he did not have an adequate remedy at law. Moreover, by failing to answer the complaint or otherwise responding, appellants admitted the allegations that they failed to mine or drill the leased property for a period of two years, failed to fulfill the implied covenants under the agreement, and that legal damages were not adequate to remedy the breach and inactivity. *See* Civ.R. 8(D). Therefore, we cannot find that the trial court abused its discretion in ordering a forfeiture of the lease.

{¶ 17} With the foregoing in mind, we find that the trial court did not abuse its discretion in awarding default judgment and ordering the lease forfeited. Accordingly, appellants' sole assignment of error is overruled. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellants shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.