[Cite as *Bohlen v. Anadarko E & P Onshore, L.L.C.*, 2014-Ohio-5819.]

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

RONALD AND BARBARA BOHLEN,

:

Plaintiffs-Appellees, Case No. 14CA13

:

vs.

:

DECISION AND JUDGMENT ENTRY

ANADARKO E&P ONSHORE, LLC, ET AL., :

:

Defendants-Appellants.

APPEARANCES:

COUNSEL FOR APPELLANTS: John P. Brody, Kevin L. Sykes, and Margeaux Kimbrough, Kegler, Brown, Hill & Ritter Co., L.P.A., 65 East State St., Suite 1800, Columbus, Ohio 43215

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-22-14

ABELE, P.J.

{¶ 1} This is an appeal by Anadarko E&P Onshore, LLC (Anadarko) and Alliance Petroleum Corporation (Alliance), defendants-appellants, from a Washington County Common Pleas Court judgment that (1) granted the motion for summary judgment of Ronald and Barbara Bohlen, plaintiffs-appellees, (2) denied appellants' motion for summary judgment, and (3) declared that an oil and gas lease between the parties was void ab initio. The trial court concluded that the lease is a no-term, perpetual lease that violates public policy and the lease had terminated under its own terms because, for several years, appellants had not paid the full annual rental payment due under the lease and had failed to produce sufficient oil or gas from wells. Consequently, the trial court ordered the forfeiture of the lease.

{¶ 2} Appellants assign the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE OIL AND GAS LEASE IS A PERPETUAL, NO-TERM LEASE WHICH SERIOUSLY OFFENDS PUBLIC POLICY, AND THEREFORE, IS VOID *ab initio*."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE OIL AND GAS LEASE TERMINATED BY IT OWN TERMS AS A RESULT OF DEFENDANT'S FAILURE TO MAKE ANNUAL RENTAL PAYMENTS."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE COMMON PLEAS COURT ERRED IN RULING THAT PRODUCTION ON THE PREMISES WAS NOT IN PAYING QUANTITIES; THUS, THE OIL AND GAS LEASE EXPIRED BY ITS OWN TERMS."

FOURTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN RULING THAT FORFEITURE OF THE OIL AND GAS LEASE WAS AN APPROPRIATE REMEDY IN THIS CASE."

FIFTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE DISCLAIMER OF COVENANTS CONTAINED IN THE OIL AND GAS LEASE DID NOT EXPRESSLY DISCLAIM THE IMPLIED COVENANT TO REASONABLY DEVELOP THE LAND."

SIXTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE DOCTRINES OF ESTOPPEL AND WAIVER ARE INAPPLICABLE AND DO NOT PREVENT PLAINTIFFS FROM DENYING THE VALIDITY OF THE OIL AND GAS LEASE."

SEVENTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT PLAINTIFF'S CLAIMS WERE BARRED AS A RESULT OF THEIR FAILURE TO PROVIDE NOTICE OF BREACH UNDER THE OIL AND GAS LEASE."

FACTS

{¶ 3} The Bohlens own approximately 500 acres of land and includes six, noncontiguous tracts. On February 15, 2006, the Bohlens and Alliance executed an oil and gas lease. The Bohlens granted Alliance the exclusive right to the property "for the purpose of exploring, drilling, operating for, producing and removing oil and gas and all the constituents thereof." The lease contained a habendum clause that provides a primary term of one year, and a secondary term of indefinite duration that follows the expiration of the primary term:

This Lease shall continue in force and the rights granted hereunder be quietly

> enjoyed by the Lessee for a term of One (1) years and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.

(*Id.*)

{¶ 4} The lease also contained a delay rental provision, which provided that the lease would terminate unless Alliance paid the Bohlens $5,500 each year to defer commencement of a well on the leased premises:

> This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate, * * * unless the lessee shall thereafter pay a delay rental of $5,500.00 Dollars each year, payments to be made yearly, but in no event not less than yearly, for the privilege of deferring the commencement of a well. A well shall be deemed commenced *when drilling operations have commenced on leased premises*.

(Emphasis sic.) (*Id.*)

In sections 9 and 19 of the lease, the parties disclaimed implied covenants, including those related to production of oil and gas:

> * * * The parties hereto hereby expressly disclaim any and all implied covenants, whether at law or at equity, regarding production, continuing production or future production.
>
> * * * It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them.

The lease also included a notice requirement as a condition precedent for a party to file an action based on a breach by the lessee:

> In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, Lessor shall notify Lessee in writing setting out specifically

> in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be a condition precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of said notice on Lessee. * * *

(*Id.*)

An addendum to the lease included an annual payment to the Bohlens of $5,500 if total royalties paid is less than that amount:

> In the event that during any calendar year the total royalties paid from production of the leased premises, shall be less than the annual rental of $5,500.00, Lessee shall tender to Lessor such sum that will equal to the $5,500.00 annual rental payment.

(*Id.*)

{¶ 5} In September 2006, during the primary term of the lease, Alliance drilled and completed Well Nos. 1CM and 2CM on two of the parcels. Well No. 1CM produced 76 MCFs of gas in 2007, but produced no gas after that year. Well No. 1CM never produced any oil, and the well is on a plug list. Well No. 2CM has produced over 4,000 MCF of gas from 2007 through 2012, with the total production declining to 582 MCF by 2011. Alliance continues to operate Well No. 2CM, which has yielded gas production sufficient to yield profits on an annual basis since it began production, and has tendered royalty payments to the Bohlens each year. Well No. 2CM has not produced any oil. No oil or gas has been produced from the remaining, undrilled portion of the leased premises.

{¶ 6} After the lease date, Alliance issued to the Bohlens royalties in the following amounts on the specified dates: $5,500 (March 2007); $4,284.83 (January 2008); $4,172.47 (January 2009); $4,757.22 (January 2010); $5,448.51 (January 2011); $5,141.84 (January 2012);

$5,245.90 (January 2013); and $5,500 (December 2013). The Bohlens cashed all of the royalty payment checks, except for the last two payments. Alliance failed to make the $5,500 annual payments specified in the lease addendum, instead coming up short by $3,949.23 by not making up the difference between the annual royalties and the specified annual payments. In September 2011, Alliance assigned a partial interest in the lease to Anadarko.

{¶ 7} In May 2013, the Bohlens filed a complaint against Alliance and Anadarko. The Bohlens sought a declaratory judgment that the oil and gas lease had expired under its own terms, and requested an order for the forfeiture of the lease. Appellants answered, and, following discovery, the Bohlens filed a motion for summary judgment. In their motion, the Bohlens claimed that: (1) the lease is void as a matter of public policy; (2) the lease had terminated because Alliance had failed to pay the annual delay rental payment; and (3) the lease was forfeited for the entire property due to the lack of oil and gas production, or, in the alternative, forfeited for the portion of the property that did not produce oil or gas.

{¶ 8} Alliance and Anadarko filed a joint motion for summary judgment and claimed that: (1) all the leased property is held by the production of gas in Well No. 2CM; (2) the Bohlens waived the right to deny the lease's validity because they continued to accept and cash the royalty checks; (3) forfeiture of the lease is not an appropriate remedy; and (4) the Bohlens failed to comply with the lease's notice requirement.

{¶ 9} In April 2014, the trial court granted the Bohlens' motion for summary judgment and denied appellants' motion for summary judgment. The trial court declared that the oil and gas lease was void ab initio because it constituted a no-term, perpetual lease that is against public policy. The trial court further declared that the lease had terminated by its own terms because

(1) Alliance had failed to pay the annual rental of $5,500 when its royalty payments did not completely offset that amount, and (2) Alliance and Anadarko had violated the express and implied terms of the lease by failing to produce sufficient oil or gas from the wells. Thus, the trial court ordered the forfeiture of the lease. This appeal followed.

STANDARD OF REVIEW

{¶ 10} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014-Ohio-335, ¶ 20.

{¶ 11} The moving party has the initial burden, by pointing to summary judgment evidence, of informing the trial court of the basis for the motion and identifying the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. *Id.*; *Chase Home Finance* at ¶ 27.

{¶ 12} In addition, this case involves the interpretation of a written contract, which is a matter of law that we review de novo. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14, quoting *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ (" '[t]he construction of a written contract is a matter of law that we review de novo' "). "Our role is to ascertain and give effect to the intent of the parties, which is presumed to lie in the contract language." *Boone Coleman Constr., Inc. v. Piketon*, 2014-Ohio-2377, 13 N.E.2d 1190, ¶ 18 (4th Dist.), citing *Arnott* at ¶ 14. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 54 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus, superseded by statute on other grounds; *Harding v. Viking Internatl. Resources Co., Inc.*, 2013-Ohio-5236, 1 N.E.3d 872, ¶ 12 (4th Dist.).

{¶ 13} More specifically, "[t]he rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument" and "[s]uch leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897); *Harding* at ¶ 11.

NO-TERM, PERPETUAL LEASE

{¶ 14} In their first assignment of error, appellants assert that the trial court erred by holding that the parties' oil and gas lease is a no-term, perpetual lease that offends public policy and is void ab initio.

{¶ 15} "The freedom to contract is a deep-seated right that is given deference by the

courts." *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 15. However, this deference is not absolute; rather, it is subject to a public-policy exception. *Id.* Under this exception, contracts that bring about results that the law seeks to prevent are unenforceable as being against public policy. *Id.* at ¶ 17. This exception must be narrowly construed because the General Assembly is the ultimate arbiter of public policy. *Id.* citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21.

{¶ 16} "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat to the health, safety and welfare of the citizens of Ohio." *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Bldg. Co. v. Sharon Twp. Bd. of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist.1996). In *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), at paragraph one of the syllabus, the Supreme Court held that "[a]n annual advance payment which is credited against future royalties under the terms of a mineral lease does not relieve the lessee of his obligation to reasonably develop the land." In so holding, the court observed that long-term leases under which there is no development are contrary to public policy:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties are entirely separate matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the

mining of mineral lands and are against public policy.

Id. at 134.

{¶ 17} In the case sub judice, the trial court determined that the parties' lease is a no-term, perpetual lease because (1) its habendum clause gave Alliance the unilateral right to extend the term of the lease by merely exercising its judgment about whether the premises can produce oil and gas without any time restriction on actually developing the land, (2) it authorized Alliance to pay the annual delay rental indefinitely in order to hold the lease without ever developing the land, and (3) it gave Alliance the unfettered right to terminate the lease by surrender.

{¶ 18} We, however, believe that the trial court erred for the following reasons. First, although the law disfavors perpetual leases, courts have not found them to be per se illegal or void ab initio. *See Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, __ N.E.3d __, ¶ 82 (7th Dist.), citing *Myers v. East Ohio Gas*, 51 Ohio St.2d 121, 364 N.E.2d 1369 (1977), *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943), and *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N.E. 281 (1904); *see also Regency Plaza, L.L.C. v. Morantz*, 10th Dist. Franklin No. 06AP-837, ¶ 24, citing *President & Trustees of Ohio Univ. v. The Athens Livestock Sales, Inc.*, 115 Ohio App. 21, 179 N.E. 382 (4th Dist.1961) ("although perpetual leases are not favored, the Supreme Court recognized in *Hallock* that a clear intention to create a perpetuity is enforceable").

{¶ 19} Second, the parties' oil and gas lease in the case at bar is not a no-term lease. The habendum clause of the lease contains a primary term of one year and a secondary term of indefinite duration as long as "oil or gas * * * are produced or are capable of being produced on

the premises in paying quantities, in the sole judgment of the Lessee * * *." *Hupp* at ¶ 86-90; *see also* Kuehnle and Levey, *Ohio Real Estate Law*, Section 47:6 (2013) (the duration of an oil and gas lease is determined by the habendum clause, which includes a primary term of definite duration and a secondary term of indefinite duration). The presence of a primary term distinguishes the lease in this case from the no-term *Ionno* lease that included no primary term during which major actions, like the commencement of a well, were required. *Hupp* at ¶ 115.

{¶ 20} Third, notwithstanding the trial court's contrary conclusion, the parties' lease did not permit Alliance to extend the lease in perpetuity by paying a delay rental fee. "Under established case law, once the primary term of the Lease expires, the delay rental provision is no longer applicable." *Hupp* at ¶ 99; *see also Northwestern Ohio Natural Gas Co. v. Tiffin*, 59 Ohio St. 420, 54 N.E. 77 (1899); *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902); *Ohio Real Estate Law* at Section 47:9 ("Traditional oil and gas leases in Ohio contain a 'drill or pay clause," which is also known as a delay rental provision. This provision allows the lessee to defer drilling a well during the primary term of an oil and gas lease by compensating the lessor for the delay").

{¶ 21} Fourth, the trial court found that the addition of the language "in the sole judgment of the Lessee" in the secondary term of the habendum clause gave Alliance the unilateral right to extend the term of lease by merely exercising its judgment, whether the premises was capable of production without actually developing the land. However, as the Seventh District Court of Appeals held:

> [T]he trial court incorrectly reasoned that the addition of the language "in the judgment of Lessee" to the secondary term of the habendum clause, permits the Lease to continue in perpetuity at Beck's sole discretion. The full portion of the

> habendum clause reads: "are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee." The Landowners and the trial court over-parsed the phrase. The phrase does leave it to the judgment of the Lessee to determine whether a well is in fact or capable of *producing in paying quantities.* It would be contrary to the joint economic interest of both a landowner and the lessee to continue drilling if it was no longer financially feasible. Under these conditions, the lease would end and the lessee's interest in the mineral rights would expire; it would not continue in perpetuity. Further, clauses dealing with paying quantities have not been invalidated or read as making an entire lease void ab initio. They do not necessarily allow the lessee to arbitrarily determine whether a well is capable of production.
>
> Rather, courts generally impose a good faith standard on the paying quantities requirement, with or without this lease language. *See, e.g., T.W. Phillips Gas and Oil Co. v. Jedlicka,* 615 Pa. 199, 216–224, 42 A.3d 261, fn. 15 (2012); *Cotton v. Upham Gas Co.,* 5th Dist. No. 86CA20, 1987 WL 8741, *1 (Mar. 6, 1987) ("As between lessor and lessee, the construction of the phrase 'paying quantities' must be from the standpoint of the lessee and his 'good faith judgment' that production is in paying quantities must prevail."); *Weisant v. Follett*, 17 Ohio App. 371 (7th Dist.1922) (reviewing cases in various states for propositions such as: "The lessee, acting in good faith and upon his honest judgment, not an arbitrary judgment * * * "; "His judgment, when bona fide, is entitled to great weight in determining whether the gas is in fact produced in paying quantities"; "the lessee is the sole judge on this question, and as long as he can make a profit therefrom, he will be permitted to do so"; and "largely left to his good judgment").

Hupp, 2014-Ohio-4255, __N.E.2d_, ¶ 102-103 (emphasis sic).

Therefore, we conclude that the trial court erred by holding that the parties' oil and gas lease is a no-term, perpetual lease that is contrary to public policy and void ab initio. Accordingly, we hereby sustain appellants' first assignment of error.

TERMINATION OF LEASE BY ITS OWN TERMS
FOR FAILURE TO MAKE ANNUAL PAYMENTS

{¶ 22} In their second assignment of error, appellants assert that the trial court erred by holding that the oil and gas lease terminated by its own terms as a result of their failure to make annual rental payments. The trial court determined that the addendum to the lease "expands the

annual delay rental payment beyond the commencement of a well, but also to circumstances where insufficient production results in annual royalties below the annual delay rental of $5,500," which resulted in "automatic grounds for termination of the Lease" when Alliance was short on its annual payments by $3,949.23.

{¶ 23} We, however, believe that the lease's plain language does not make the addendum part of the delay rental provision. The delay rental provision specifies that the lease becomes "null and void" and the parties' rights thereunder "shall cease and terminate" unless the lessee pays a delay rental of $5,500 each year "for the privilege of deferring the commencement of a well." It further states that a well is deemed commenced, for purposes of the delay rental provision, "when drilling operations have commenced on the lease premises."

{¶ 24} By contrast, the addendum requires that if, during any year, the amount of total royalties paid from production of the leased premises is less than the annual rental amount of $5,500, Alliance would pay to the Bohlens the sum that would make up the deficit. The addendum does not provide that a failure to comply with the payment provision would result in the lease being void or terminated. To us, it appears that the trial court conflated these two provisions when neither the lease language nor the summary-judgment evidence supported that interpretation. As we noted previously, our construction of the lease is consistent with established precedent that generally limits the application of the delay rental provision to the primary term of the lease. *See Hupp*, 2014-Ohio-4255, __ N.E.3d __, ¶ 99; *Ohio Real Estate Law* at Section 47:9.

{¶ 25} We also believe that the Bohlens' reliance on *Price v. K.A. Brown Oil and Gas, LLC*, 7th Dist. Monroe No. 13 MO 13, 2014-Ohio-2298, and *Beaverkettle Farms, Ltd. v.*

Chesapeake Appalachia, LLC, N.D. Ohio No. 4:11CV02631, 2013 WL 4679950, to assert that the addendum provision extended the delay rental provision beyond the primary term of the lease, is misplaced. These cases involved lease termination provisions that are not comparable to those at issue here. *Price* involved an oil and gas lease that provided that the lease terminated if two existing wells were not put into production by a specified date. *Beaverkettle* involved an oil and gas lease that required the lessee to pay delay rentals for undrilled acreages without limitation. Neither of these holdings controls the lease here.

{¶ 26} Instead, we believe that in the case at bar the delay-rental provision was limited by the unambiguous terms of the lease until drilling operations had commenced on the premises. Because Alliance began drilling its wells in 2007, the termination provision never became effective. Nothing in the addendum altered the limited impact of this provision. Therefore, we conclude that the trial court erred by holding that the parties' oil and gas lease terminated under its own terms when Alliance failed to pay the full $5,500 annual amount due under the addendum to the lease. Accordingly, we hereby sustain appellants' second assignment of error.

EXPIRATION OF LEASE ON ITS OWN TERMS
FOR FAILURE TO PRODUCE OIL OR GAS IN PAYING QUANTITIES
AND FAILURE TO REASONABLY DEVELOP THE PROPERTY

{¶ 27} In their third assignment of error, appellants argue that the trial court erred by ruling that the production was not in paying quantities. In their fifth assignment of error, appellants contend that the trial court erred by holding that the lease provisions that disclaimed implied covenants did not disclaim the implied covenant to reasonably develop the land.

{¶ 28} The trial court concluded that (1) the oil and gas lease expired by its own terms because appellants failed to produce sufficient quantities of oil or gas during the secondary term

of the lease, and (2) appellants had breached the implied covenant of reasonable development. Under the secondary term of the habendum clause of the lease, after the first one-year term, the lease continued as long "as oil or gas * * * are produced or are capable of being produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee." "The term 'paying quantities,' when used in the habendum clause of an oil and gas lease, has been construed by the weight of authority to mean 'quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss.' " *Blausey v. Stein*, 61 Ohio St.2d 264, 265-266, 400 N.E.2d 408 (1980), quoting Annotation; *Gardner v. Oxford Oil*, 2013-Ohio-5885, 7 N.E.3d 510, ¶ 37 (7th Dist.). We have previously held that "[s]uch language indicates it is for lessee to determine if a profit is being generated above the amount of operating expenses. The amount of royalties paid has no relevancy as to whether a well is actually 'producing in a paying quantity.' " *Siley v. Remmele*, 4th Dist. Washington No. 86 CA 6, 1987 WL 7585, *3. As the parties' lease emphasizes, " 'the construction of the phrase 'paying quantities' must be from the standpoint of the lessee and [its] 'good faith judgment' that production is in paying quantities must prevail.' " *Hupp*, 2014-Ohio-4255, at ¶ 103, quoting *Cotton*, 1987 WL 8741, at *1; *see also Litton v. Geisler*, 80 Ohio App. 491, 496, 76 N.E.2d 741 (4th Dist.1945) ("The prevailing rule seems to be that the phrase 'paying quantities' is to be construed from the standpoint of the lessee, and by his judgment if exercised in good faith").

{¶ 29} Here, the summary judgment evidence established that Well No. 2CM has continued, during the secondary term of the lease, to produce gas in paying quantities that have

yielded profits to Alliance and resulted in royalty payments to the Bohlens. Further, we find nothing to indicate that appellants' determination that the lease premises continues to produce gas in paying quantities was not made in good faith.

{¶ 30} The trial court relied on *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, and *Tedrow v. Shaffer*, 23 Ohio App. 343, 155 N.E. 510 (4th Dist.1926), to reach a contrary conclusion. In *Moore*, there had been no production of gas for over six years. In *Tedrow*, the day that the lease expired a few gallons of oil were produced for the first time in over seven years. Here, however, appellants produced gas in paying quantities every year that the lease has been in effect.

{¶ 31} The trial court next held that, assuming that appellants complied with the express terms of the habendum clause by producing gas, they breached the implied covenant to reasonably develop the property by not producing sufficient amounts of oil or gas. Under an oil and gas lease that is silent about the number of wells to be drilled, an implied covenant exists that the lessee shall reasonably develop the land by drilling and operating the number of wells as would ordinarily be required for the production of oil or gas. *Harris*, 57 Ohio St. at 127, 48 N.E. 502; *Ohio Real Estate Law* at Section 47:18.

{¶ 32} Nevertheless, " '[w]hile gas and oil leases contain an implied covenant requiring the lessee to reasonably develop the leased property, Ohio courts have consistently enforced express provisions in such leases that disclaim the implied covenant.' " *Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 2013-Ohio-2487, 993 N.E.2d 795, ¶ 18, quoting *Bushman v. MFC Drilling Inc.*, 9th Dist. Medina No. 2403-M, 1995 WL 434409, *2; *see also Taylor v. MFC Drilling, Inc.*, 4th Dist. Hocking No. 94CA14, 1995 WL 89710. "[A]n implied covenant can only be construed in

a lease if there are no express provisions to the contrary, " and "[w]here the lease specifies that no implied covenant shall be read into the agreement, an implied covenant to develop * * * cannot be imposed." *See Hupp*, 2014-Ohio-4255, at ¶ 115, and cases cited therein. Thus, even a general provision disclaiming implied covenants is sufficient to disclaim an implied covenant to develop the property.

{¶ 33} Here, the lease contained both a general provision that disclaimed all implied covenants as well as a more specific provision that disclaimed all implied covenants relating to production. Thus, based on the applicable precedent, the parties disclaimed the implied covenant to reasonably develop the land. *Hupp* at ¶ 122; *Bilbaran Farm* at ¶ 21; *Bushman* at *2.

{¶ 34} Moreover, the Bohlens' alternative argument that the production of paying quantities of gas from Well No. 2CM is insufficient to preclude the forfeiture of the remaining, undeveloped 413 acres of leased property also lacks merit. This argument is based on the erroneous claim that appellants breached the implied covenant to reasonably develop the property. *See Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph four of the syllabus ("Where remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant"). Additionally, this case does not involve a violation of an express lease term to drill "a sufficient number of wells to fully develop" the land. *See Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488, 67 N.E. 1069 (1903). Here, the parties' lease did not require that Alliance drill on each noncontiguous tract of land. Consequently, we believe that the Bohlens' citation of these cases to support their claim for partial forfeiture is misplaced.

{¶ 35} Therefore, we conclude that the trial court erred by holding that the parties' oil

and gas lease expired because of appellants' failure to produce oil or gas in paying quantities or to reasonably develop property. Accordingly, we hereby sustain appellants' third and fifth assignments of error.

FORFEITURE AND FAILURE TO PROVIDE NOTICE OF BREATH

{¶ 36} In their fourth assignment of error, appellants assert that the trial court erred by ruling that forfeiture of the lease is an appropriate remedy. In their seventh assignment of error, the appellants argue that the trial court erred by holding that the Bohlens' claims are barred as a result of their failure to provide notice of breach.

{¶ 37} Because the trial court's decisions on these matters were premised on its rationale that the lease is void and had either terminated or expired under its own terms, we hereby sustain these assignments of error for the reasons previously discussed.

REMAINING CLAIM

{¶ 38} In their sixth assignment of error, appellants assert that the trial court erred by holding that the doctrines of estoppel and waiver are inapplicable and did not prevent the Bohlens from denying the validity of the lease.

{¶ 39} Because we have held that the trial court's summary judgment in favor of the Bohlens' declaratory judgment action and request for forfeiture of the lease is erroneous, we need not address this issue because it has been rendered moot. See App.R. 12(A)(1)(c).

CONCLUSION

{¶ 40} Therefore, having sustained appellants' first, second, third, fourth, fifth, and seventh assignments of error, we hereby reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. Appellees shall pay the costs.

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 Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

FOR THE COURT

BY:_____
Peter B. Abele
Presiding 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.