[Cite as *Sims v. Anderson*, 2015-Ohio-2727.]

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

Erik Sims, et al.,	:	Case No. 14CA31
Plaintiffs-Appellants,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Allen Anderson,	:	
	:	
Defendant-Appellee.	:	**RELEASED: 6/30/2015**

APPEARANCES:

Molly Johnson Phillips, Canfield, Ohio, for Appellants.

Rustin J. Funk, Marietta, Ohio, for Appellee.

Harsha, J.

{¶1} In this action to declare forfeiture of an oil and gas lease, Erik and Michelle Sims sought summary judgment on their claims for breach of contract, declaratory judgment and slander of title. Instead of ruling in their favor, the court granted summary judgment to Allen Anderson on his cross motion for summary judgment to declare the lease to remain in full force and effect. The issue before the trial court was whether the oil and gas lease terminated due to failure to make minimum royalty payments. The Simses contend that the trial court erred because it failed to enforce the termination provision contained in the lease. They argue that the trial court incorrectly applied equitable principles to the contract in spite of the explicit agreement of the parties. Anderson contends he substantially complied with the terms of the lease and forfeiture is not equitable.

{¶2} The lease expressly states that it terminates unless Anderson produces oil or gas in paying quantities of a minimum of $400 in royalties per year. And the evidence is clear that in 2012, Anderson did not make the minimum $400 in royalty payments. Therefore, the trial court erred in granting summary judgment to Anderson because the lease expressly terminated in 2012 by its own terms when Anderson admittedly did not make the minimum royalty payment. Thus, the trial court was not free to use equity to rewrite the terms of the contract. Moreover, the Simses were not estopped from enforcing the termination by either a delay in seeking the forfeiture or by accepting royalty checks through March 2013. They took steps in early 2013 to notify Anderson of their position concerning the forfeiture. And as owners of the property, the Simses are entitled to all proceeds from oil and gas production after the termination of the lease. Thus, we reverse the trial court's judgment.

I. FACTS

{¶3} The Simses own approximately 30 acres of land in Barlow Township, Washington County, Ohio. They leased the oil and gas rights to part of their property to Allen Anderson on November 20, 1976. The lease provides for a primary term of one-half of a year and if the drilling of a well for oil and gas was not completed by July 1, 1977, the lease would terminate. The lease, which also contained a secondary term of indefinite duration, specified:

> 4. The rentals as provided hereunder shall keep this lease in full force and effect until July 1, 1977. On that date the lease shall terminate unless the Lessee is then producing oil or gas or their constituents in paying quantities.
>
> 5. It is mutually agreed by the Lessors and the Lessee that the term "paying quantities" as used in this lease shall mean production sufficient to net the Lessors a minimum of $400 royalty per year for oil or gas marketed and the value

> of any gas used by the Lessors for domestic purposes shall not be considered in determining the amount of annual royalty received by them.

One well, the Yost #1, produced "oil, gas or their constituents" on or before July 1, 1977 and Anderson made annual royalty payments of at least $400 up until 2012.

{¶4} The parties agree that Anderson failed to make the $400 minimum royalty payment in 2012, but they disagree on how to interpret the "per year" term. The Simses argue that there are three different ways to interpret "per year": (1) a calendar year, (2) 12 continuous months commencing from when production first occurred, which they contend was May 1978, or (3) 12 continuous months commencing from the date the lease was executed, which was November 20, 1977. They argue that the calendar year is the most reasonable interpretation of the "per year" term. In the 2012 calendar year, Anderson paid only $280.03 in royalties. Anderson argues that the 12-month period should run annually from July 1 to June 30, based upon the expiration of the primary term of July 1, 1977. Using the July to June interpretation of "per year," Anderson concedes he paid only $391.45 in royalty payments from July 1, 2011 to June 30, 2012. Because under any of the proposed interpretations it is undisputed that Anderson failed to pay the minimum $400 royalty payment for 2012, we need not determine which of the parties' interpretations of "per year" is correct.

{¶5} In early March 2013 the Simses informed Anderson in writing that the lease had terminated because Anderson had failed to make the $400 minimum royalty payment and that they intended to file an affidavit of forfeiture if Anderson did not formally release his leasehold. The Simses filed an affidavit of forfeiture with the Washington County Recorder in April 2013 and Anderson filed an affidavit of non-forfeiture the next day. The Simses filed a complaint alleging that Anderson had

breached the minimum royalty payment provision in paragraph five of the lease. They sought a judgment declaring that the lease terminated because Anderson failed to make the $400 minimum royalty payment in 2012, and damages for slander of title.

{¶6} The parties each filed motions for summary judgment. The Simses argued that Anderson failed to make the minimum royalty payment and therefore, the lease terminated by its own terms. Anderson conceded he failed to make the minimum royalty payment for the time period July 1, 2011 to June 30, 2012, but that the Simses continued to cash his royalty checks up through March 2013 and gave no notice that they claimed the lease was forfeited until the end of February 2013. He argued it would be inequitable to forfeit his interest in the lease for his inadvertent, insubstantial failure to pay $8.55. The trial court granted Anderson summary judgment on the grounds that forfeiture is an equitable remedy within the discretion of the court and an extreme measure that is granted only when legal remedies are inadequate. The Simses appealed.

II. ASSIGNMENT OF ERROR

{¶7} The Simses designate one assignment of error for review:

> I. The trial court failed to correctly apply the law related to the pleadings and summary judgment motions filed in this case.

III. STANDARD OF REVIEW

{¶8} 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. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against

whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶9} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence 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); *Chase Home Finance* at ¶ 27. 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 remaining for trial. *Dresher* at 293.

{¶10} 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.3d 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.,* 53 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.).

{¶11} 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; *Bohlen v. Anadarko E & P Onshore, LLC*, 4th Dist. Washington App. No. 14CA13, 2014-Ohio-5819.

IV. LAW AND ANALYSIS

{¶12} The Simses assert that the trial court erred in granting summary judgment in favor of Anderson because the lease terminated by its own terms, i.e. by operation of law.

{¶13} The oil and gas lease contains a habendum clause with a primary and secondary term. The secondary term expressly states that the lease terminates unless the lessee is producing oil, gas, or their constituents in paying quantities. The lease then defines "paying quantities" as "production sufficient to net the Lessors a minimum of $400 royalty per year * * *." Because the lease contains an express forfeiture clause, we must enforce the terms of the lease, absent some viable affirmative defense by Anderson.

A. Express Forfeiture Clauses

{¶14} When an oil and gas lease contains a forfeiture clause for the breach of an express contractual duty, upon a breach the lease terminates by operation of law under its own terms. In that situation it is the court's duty to give effect to the parties' intentions

as reflected by their express agreement. *See generally, Black Diamond Coal Co. v. Buckeye Petroleum Co., Inc.,* 4th Dist. Athens App. No. CA-1271, 1986 WL 12952 (Nov. 17, 1986). When the breach results from a failure to satisfy an implied covenant and the lease is silent regarding the appropriate remedy, a court may invoke equity to fashion an appropriate remedy. *Id*.

{¶15} The fact that the lease contains an express forfeiture clause distinguishes this case from those relied upon by the trial court. In *Beer v. Griffith*, 6 Ohio St.2d 119, 399 N.E.2d 1227 (1980), the lease's habendum clause did not contain an express forfeiture provision and the parties to the lease had not violated any of the express terms of the lease. Instead, the Court's analysis was based on a breach of an implied covenant to develop the land. Therefore, equitable considerations were properly factored into the Court's analysis. *See also*, *Coleman v. One Livingston Ent., II*, 4th Dist. Meigs App. No. 364, 1986 WL 5367,*3 (May 7, 1986) ("The remedy for a breach of an implied covenant is damages and not termination of the lease subject only to the exception that only where legal remedies are inadequate will termination of the lease by forfeiture be an appropriate remedy."). We explained the distinction between leases with forfeiture clauses and those without in *Black Diamond Coal* at *3 (emphasis added):

> A principle argument advanced by appellants in asserting summary judgment was improper is that the failure to pay royalties, ***absent a forfeiture clause in the lease so providing***, gives rise only to an action for damages and not cancellation. This, indeed, is the general rule. The following is stated by the Supreme Court of Arkansas in *Schaffer v. Tenneco Oil Company* (1983), 278 Ark. 511, 647 S.W.2d 446 at 447:
>
> "The appellants concede that Louisiana is the only jurisdiction that has consistently been willing to decree cancellation for a lessee's unexcused failure to pay pursuant to an oil and gas lease. The majority view was expressed by the Supreme Court of Oklahoma in *Wagoner Oil & Gas Co. v. Marlow,* 137 Okl. 116, 278 P. 294 (1929): "Failure to pay royalty or for injury to the land as provided by

> the lease will not give the lessors sufficient grounds to declare a forfeiture, ***unless by the express terms of the lease they are given that right and power.***" To the same effect is *Cannon v. Cassidy,* 542 P.2d 514 (Okl.1975). Summers, The Law of Oil and Gas, Vol. 3A (1958), § 616.

{¶16} Here, the trial court should not have weighed equitable considerations to determine if forfeiture is the appropriate remedy because under the express terms of the lease the parties contractually agreed that it is. If Anderson fails to make $400 minimum royalty payments per year, the lease terminates. Thus, the trial court erred in deciding that it, rather than the parties through their freedom to contract, could decide whether equitable considerations justified forfeiture in this instance. *See Bohlen v. Anadarko E & P Onshore, LLC,* 4th Dist. Washington App. No. 14CA13, 2014-Ohio-5819 (In analyzing the rights and remedies of parties to an oil or gas lease we acknowledged, "The freedom to contract is a deep-seated right that is given deference by the courts.").

{¶17} Anderson concedes that he failed to make the minimum $400 royalty in 2012, but he argues that it would be inequitable to forfeit his interest in the lease. He argues that Ohio courts retain an inherent power to employ equitable considerations in determining the rights or status of parties to a contract. He asserts that his royalty payments were close enough to the $400 minimum to constitute substantial compliance with that term of the lease. Substantial compliance is a concept that allows a party to enforce a contract where the party seeking enforcement has substantially complied with its terms. A nominal or trifling breach is excused. However, where the performance of a term is essential to the purpose of the contract, a default of that term is not excusable no matter how trifling. Here the parties defined the minimum payment as so essential that the failure to make it terminated the lease. *See Harris v. Univ. Hosps. of Cleveland*, 8th Dist. Cuyahoga App. Nos. 76724, 76785, 2002-Ohio-983 (concept of substantial

compliance did not provide a defense to a claim for breach of a non-compete agreement with a five-mile geographical limitation where defendant was .2 miles inside the limitation).

{¶18} Anderson also cites our decision in *Burlington Resources Oil & Gas Co. v. Cox*, 133 Ohio App.3d 543, 729 N.E.2d 398 (4th Dist. 1999) to support his position that his deficiency of $8.55 in the minimum royalty payment should be excused as a nominal, trifling breach. Anderson mischaracterizes *Burlington* because we did not use equitable considerations to excuse a breach. Instead, we found that no breach had occurred. The lessee, Burlington, was required to mail an annual royalty payment to the lessor by April of each year. The lessor sold the property and assigned the lease, but neither the prior lessor nor the new lessor informed Burlington of the assignment. Burlington mailed the royalty check in a timely manner to the prior lessor, but it was returned. Burlington investigated the matter and discovered the identity of the new lessors and forwarded the check to them. The new lessors claimed that Burlington breached the term concerning timely royalty payments and sought forfeiture of the lease pursuant to the forfeiture clause. We held that Burlington had not breached the contract. While the lease allowed for an assignment, it was silent as to who had the obligation to inform the lessee of the new lessor's identity. We held that the parties to a contract are required to use good faith to fill gaps of silence in a contract and that Burlington's actions constituted good faith. Thus, Burlington had not breached the contract. Here, the contract is not silent about the minimum amount of royalty payment that must be made each year – it is $400. Anderson concedes he paid less than the minimum. Thus, Anderson breached the minimum royalty payment provision and the lease terminated

pursuant to its own terms. In instances where the plain language of the contract defines the breaching minimum payment term and the remedy, a court does not use equitable principles to fashion different terms. *See M & C Oil, Inc. v. Geffert*, 21 Kan. App.2d 267, 271, 897 P.2d 191 (1995), where the court noted in dicta that when the lease contains a forfeiture provision such as, "In any year when lessees fail to pay the above minimum, this lease shall thereupon cease to be of any force or effect between the parties," there is no ambiguity, no equitable considerations needed, and no need to write a contract for the parties different from the one they entered into. The court's duty is to enforce the forfeiture provision. It was improper to apply equity to this contract.

B. Affirmative Defenses in Equity

{¶19} Although in deciding whether a breach occurred we do not use equity to alter the contract terms we may consider an affirmative defense, i.e. one in which "a defendant's assertion raising new facts and arguments that, if found to be true, will defeat the plaintiff's or prosecutor's claim, even if all the allegations in the complaint are true." *See Black's Law Dictionary* 430 (7th Ed. 1999). A defendant may raise affirmative defenses of waiver, estoppel, and laches where the defendant admits a breach has occurred, but claims equitable considerations excuse it. Substantial compliance is not an affirmative defense, so it has no application here. Thus, we now turn to Anderson's affirmative equitable defenses of laches and estoppel, for which he carries the burden of proof. *See* Civ. R. 8(c) and *McFadden v. Elmer C. Breuer Transp. Co.*, 156 Ohio St. 430, 103 N.E.2d 385 (1952) (a party asserting an issue has the burden of proving it); *See also Asset Acceptance Corp. v. Proctor*, 156 Ohio App.3d 60, 2004-Ohio-623, 804 N.E.2d 975, ¶ 15 (4th Dist.).

1. Laches

{¶20} Ohio law recognizes the defense of laches in a breach of contract action. Laches is an equitable doctrine that has been defined as "an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Connin v. Bailey*, 15 Ohio St.3d 34, 35, 472 N.E.2d 328 (1984) quoting *Smith v. Smith*, 107 Ohio App. 440, 443, 146 N.E.2d 454 (1957), affirmed, 168 Ohio St. 447, 156 N.E.2d 113 (1959). To successfully invoke the doctrine the party invoking it must establish by a preponderance of the evidence the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *State ex rel. Meyers v. Columbus*, 71 Ohio St.3d 603, 605, 646 N.E.2d 173 (1995). Delay in asserting a right does not, without more, establish laches. Rather, the person invoking the doctrine must show that the delay caused material prejudice. *Connin,* 15 Ohio St.3d at 35-36, 472 N.E.2d 328; *Smith,* paragraph three of the syllabus. *See also Black Diamond Coal Co.* at *3 (finding no material prejudice existed to warrant the defense of laches to claims for royalty payments in oil and gas lease).

{¶21} Here, there was no unreasonable delay by the Simses in asserting the forfeiture term of the lease. Under the Simses' interpretation of the lease term, "per year" meaning calendar year, the lease did not terminate until December 31, 2012. Within two months, they had retained counsel and sent written notice to Anderson, dated March 4, 2013, informing him of the forfeiture. Under Anderson's interpretation of the lease term, "per year" meaning July 1 to June 30, the lease terminated on July 1,

2012 and there was an eight-month delay. Even if we assume both that the eight-month delay was unreasonable and that the delay was unexcused by Simses' own good faith interpretation of the "per year" term, there is no evidence in the record that Anderson was materially prejudiced in any way by this delay. Thus, the Simses are not barred by the doctrine of laches from asserting the forfeiture provision.

2. Estoppel & Waiver

{¶22} Anderson also argues that the Simses waived their right to enforce the forfeiture provision because they continued to cash royalty checks up through March 2013. The Simses argue that Ohio courts do not apply the doctrine of waiver to a lessor who continues to cash royalty payments after forfeiture because such actions are not inconsistent with the termination of the lease. They cite *Bonner Farms, Ltd. v. Fritz*, 355 Fed Appx. 10 (6th Cir. 2009) (applying Ohio law in an oil and gas lease dispute originally filed in Portage County Court of Common Pleas and removed on the basis of diversity of citizenship).

{¶23} In *Bonner Farms* the lessors attempted to have the oil and gas lease forfeited because production had stopped. The lessee claimed that the lessors waived their right to assert the forfeiture by accepting royalty checks during the course of the dispute. The court held that under Ohio's doctrine of quasi-estoppel the lessors' acceptance of royalty payments for the oil and gas lease did not bar them from pursuing forfeiture. The court reached this conclusion because the act of accepting royalty payments for the production of oil and gas was not inconsistent with the termination of lease. We agree that the proper focus is on whether the party's behavior is *inconsistent* with their legal position:

> Ohio "[c]ourts have recognized that a party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by that same contract or transaction," *Dayton Securities Assoc. v. Avutu,* 105 Ohio App.3d 559, 563, 664 N.E.2d 954, 957 (1995), a species of estoppel described as "acceptance of benefits" or "quasi estoppel." *Id.* at 564, 664 N.E.2d at 957 (citing *Hampshire Cty. Trust Co. of N. Hampton, Mass. v. Stevenson,* 114 Ohio St. 1, 13–17, 150 N.E. 726, 729–731 (1926)). "[S]trict adherence to some of the elements of technical estoppel, such as knowledge and reliance, may not be required for the doctrine to be invoked." *Id.* For estoppel to apply, the conduct of the party to be estopped must be "inconsistent" with the termination of the contract. *Stevenson,* 114 Ohio St. at 19, 150 N.E. at 731 (holding that estoppel applies to prevent a person who induced reliance by another on his course of conduct from "assum[ing] a position or assert[ing] a title inconsistent with such course of conduct"); *Rayl v. East Ohio Gas Co.,* 46 Ohio App.2d 175, 179, 348 N.E.2d 390, 393 (1975) (noting that estoppel would apply if the landowner acted in a manner "inconsistent with the attempted termination of the agreement[ ]"); *cf. Greer–Burger v. Temesi,* 116 Ohio St.3d 324, 331, 879 N.E.2d 174, 183–84 (2007) (noting that judicial estoppel only applies to a situation where the litigant takes a position inconsistent with one he took previously).

Id. at *14.

{¶24} The court in *Bonner Farms* found that the lessor's acceptance of the lessee's payments was consistent with the termination of the lease because the lessor had a claim to payment for production of oil and gas in the absence of the lease. Because it owned the land, the lessor had not accepted a benefit that it could only receive under the lease, but rather a benefit that it was equally entitled to with or without the lease.

{¶25} The *Bonner Farms* court found the reasoning in *Stitzlein v. Willey,* 5th Dist. Holmes No. CA-318, 1979 WL 209691 (Dec.12, 1979) to be persuasive. There the court also rejected the argument that the landowners were estopped from arguing that the lease had expired because they had accepted royalty payments, noting that, "as owners of the land, [they] were entitled to at lease [sic] the royalties, no matter what the outcome in this case." *Id.* at *2. Before a party is estopped by the "receipt of benefits

from a transaction to deny the validity of the transaction it must initially appear that he is not otherwise entitled to those benefits." *Id.* The court found that this "comports with the longstanding rule from other jurisdictions that '[e]stoppel does not arise where the person accepting the benefits is entitled thereto, regardless of the questioned transaction.'" *Id*. at *16 quoting *Grand Trunk Western R. Co. v. H.W. Nelson Co.,* 116 F.2d 823, 836 (6th Cir.1941).

{¶26} We recently discussed whether acceptance of royalty payments estopped a landowner from asserting a breach and noted that the cases turned on factually distinguishable considerations and principles. *See*, *Harding v. Viking Internatl. Resources Co., Inc*., 2013-Ohio-5236, 1 N.E.3d 872 (4th Dist) (while there are cases that stand for the proposition that acceptance of royalty payments may result in a landowner being estopped from asserting a breach, there are just as many that hold that the acceptance of a benefit such as royalty payments does not result in the landowner being estopped). The question turns on the facts of each case and whether the acceptance of the benefit is inconsistent with the landowner's legal position concerning the lease.

{¶27} For example, in *Litton v. Geisler*, 80 Ohio App. 491, 76 N.E.2d 741 (4th Dist. 1945), the oil and gas lease in dispute provided for an indefinite term so long as oil and gas were produced in paying quantities and, if a well stood without production the parties agreed to an annual rent of $300 and sufficient gas for the lessor's personal use. Thus, the parties had agreed on rent in lieu of actual production. The lessee paid rent on time and the lessor accepted it. The lessor later sued on the theory that the wells were not producing in paying quantities, even though he had been accepting the rent

checks in lieu of production. We held that the lessor's acceptance of the rental payments when the well was not productive was inconsistent with his claim that the lease should be terminated due to nonproduction. Because the lessor's behavior was inconsistent with the terms in the oil and gas lease, we found that "acceptance of rents or royalties is a waiver of forfeiture for breach of any covenant or condition for which such rents or royalties are paid." *Id.* at 494. The rent was being paid because the lessee was not honoring the covenant related to production. Because the rent had been agreed to by both parties and was paid on time, there was no cause of action to terminate the lease based on whether the wells were producing. *See also*, *Price v. K.A. Brown Oil & Gas LLC,* 7th Dist. Monroe App. No. 13MO13, 2014-Ohio-2298 (discussing *Litton,* distinguishing it from an oil and gas lease that terminated if a well was not placed in production by a certain date, and finding that the lessor was not estopped from asserting forfeiture when he cashed royalty checks).

{¶28} Here, as in *Stitzlein*, *supra*, the fact that the Simses accepted royalty payments after the lease terminated is not inconsistent with their legal position on the lease because as owners of the land, they were entitled to at least the royalties, no matter what the outcome in this case. "Before a party is estopped by the receipt of benefits from a transaction to deny the validity of the transaction it must initially appear that he is not otherwise entitled to those benefits." *Id.* at *2. Thus, the doctrine of quasi-estoppel does not prevent the Simses from asserting a forfeiture of the lease where they accepted royalty payments.

{¶29} Last, Anderson argues that paragraph seven of the lease allows him to tender the difference between the actual royalties and the minimum royalty of $400 to

keep the lease alive. Anderson did not make this argument to the trial court. In summary judgment appeals, even though this is a de novo review of a summary judgment decision, there is no second chance to raise arguments that should have been raised before the trial court. *Marietta College v. Valiante,* 4th Dist. Washington App. No. 13CA12, 2013-Ohio-5405. Additionally, we disagree with Anderson's characterization of paragraph seven of the lease. It provides for a payment of $400 each year as royalty "on each and every well where gas or oil is found and same is not used or sold * * * " Here, the well in question was in production and the oil or gas was used or sold. Thus, paragraph seven is not applicable.

{¶30} Accordingly, the Simses are entitled to summary judgment on their claim for forfeiture of the lease.

IV. CONCLUSION

{¶31} The trial court improperly entered summary judgment for Anderson. The lease contained an express forfeiture provision that was triggered when Anderson failed to make the minimum royalty payment in 2012. The lease terminated by operation of law and neither Simses' delay nor their acceptance of royalty payments after termination provides Anderson a viable affirmative defense against their claim for forfeiture. We reverse the judgment and remand the case to the trial court for further proceedings.

JUDGMENT REVERSED AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee 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. Exceptions.

Abele, J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.