[Cite as *Pottmeyer v. E. Ohio Gas Co.*, 2016-Ohio-1294.]

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

CHARLES POTTMEYER, et al.,	:	
		Case No. 15CA14
Plaintiffs-Appellees,	:	
v.	:	
THE EAST OHIO GAS COMPANY, et al.,	:	
Defendants-Appellants,	:	
v.	:	
ROBERT H. POTTMEYER	:	
Third Party Defendant-Appellee.	:	

CAROL A. SCIANCE, et al.,	:	
		Case No. 15CA29
Plaintiffs-Appellees,	:	
v.	:	
THE EAST OHIO GAS COMPANY, et al.,	:	
Defendants-Appellants.	:	

CONSOLIDATED DECISION AND JUDGMENT ENTRY (RELEASED 03/18/2016)

APPEARANCES:

James S. Huggins and Daniel P. Corcoran, Theisen Brock LPA, Marietta, Ohio, for defendants-appellants Heinrich Production LLC, Utica Assets, LLC, and Deep Rock Investments, LLC.

Thomas P. Webster and Andrew S. Webster, McCauley, Webster & Emrick, Belpre, Ohio, for plaintiffs-appellees.

Hoover, J.

{¶ 1} This consolidated appeal is comprised of two similar lawsuits filed in the Washington County Common Pleas Court. In both lawsuits, the trial court granted summary judgment in favor of the successors in interest to the lessors of oil and gas leases and ordered that the leases be forfeited and declared void. Specifically, the trial court determined that the secondary terms of the habendum clauses of the leases had expired. Heinrich Production LLC, Utica Assets, LLC, and Deep Rock Investments, LLC ("appellants"), who held an interest in the deep rights of the leases, appealed.

{¶ 2} Appellants claim that the trial court erred in granting summary judgment in favor of the successors in interest to the lessors; and, instead, argue that summary judgment should have been granted in their favor. However, for the reasons set forth below, we affirm the judgments of the trial court.

I. Facts

A. Case No. 15CA14 - Pottmeyer

{¶ 3} Charles Pottmeyer, Marilyn Pottmeyer, Christopher Pottmeyer, Kenneth Pottmeyer, Cindy Pottmeyer, Eric Pottmeyer, Erin Pottmeyer, Sherri Pottmeyer, Tedman Miller, and Trina Miller ("landowners") together own approximately 101 acres of real property located in Watertown Township in Washington County. In 1974, the predecessors in interest to the landowners, Robert H. Pottmeyer and Elizabeth C. Pottmeyer (husband and wife), leased the oil and gas rights in the property to the East Ohio Gas Company ("EOGC") for the term of five years and as much longer as "oil or gas or their constituents shall be found on the premises in

paying quantities in the judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil or gas * * *."

{¶ 4} In 1976, the EOGC entered into a Farmout Agreement with S.W. Farrell as operator. The Farmout Agreement concerned many properties, including the property at issue, and provided that the operator drill at least four wells on the properties subject to the agreement. The Farmout Agreement also provided for the assignment of the EOGC's interest in the oil and gas lease to the operator down to, but not below the base of the Berea Sand or to a depth of 2200', whichever is lesser, and was subject to the terms and conditions of said leases. Section Six of the Farmout Agreement also included a provision prohibiting the operator from allowing the leases to lapse or to cancel or surrender the rights under the leases, without first offering the EOGC, in writing, the opportunity to re-acquire such rights for the consideration of $1.00.

{¶ 5} Only one well was ever drilled on the landowners' property. The well was completed in 1977 and the parties agreed that Robert H. Pottmeyer[1] was the current operator of the well. Robert H. Pottmeyer purchased the rights to the well in an assignment of the lease in 1991 that included "[o]nly the most easterly 40 acres, more or less, down to but not below the base of the Berea Sand" and subject to all terms and conditions of the lease and of the Farmout Agreement. The well has produced gas for household and personal use since September 24, 1991– with gas produced from the well used to heat two homes on the property. In an affidavit, Eric A. Pottmeyer stated that at one time the landowners and Robert H. Pottmeyer did sell the gas produced by the well, but it became economically unreasonable to do so. Eric Pottmeyer further stated that the River Gas Company stopped purchasing gas from the well in the early

[1] In their appellate briefs, however, the parties acknowledge that Robert H. Pottmeyer passed away in May 2015. The parties also acknowledge that Robert H. Pottmeyer was closely related to the landowners.

1990s and removed their sales meter due to low production. Additionally, Eric Pottmeyer averred that there is often insufficient gas produced by the well to heat the homes during the winter, and that the landowners must use alternative sources of fuel to heat their homes. The landowners or Robert H. Pottmeyer have also sold oil on approximately three occasions. According to Eric Pottmeyer, the oil is accumulated in the tanks as a by-product of gas production.

{¶ 6} In 1989, the EOGC assigned to Carl Heinrich "all rights of East Ohio below the Berea formation only" in the oil and gas lease at issue. Carl Heinrich subsequently assigned his deep rights interest in the oil and gas lease to Heinrich Production, LLC in an assignment dated December 30, 2008. Heinrich Production, LLC next assigned partial interests in the lease to Utica Assets, LLC and Deep Rock Investments, LLC in assignments dated December 23, 2011.

{¶ 7} In March 2014, the landowners filed a complaint in the trial court against the EOGC and the appellants. In count one of their complaint, the landowners alleged that the well had not produced oil or gas in paying quantities in the judgment of the lessee, resulting in its expiration under its own terms. The landowners requested a judgment declaring the oil and gas lease forfeited and void arguing that it expired when there was insufficient production of oil or gas. In count two, the landowners claimed that the defendants had breached various implied covenants, thus voiding the lease. The appellants filed a joint answer, counterclaim, and third party complaint (against Robert H. Pottmeyer), and later a first amended joint answer, counterclaim, cross-claim (against the EOGC), and third party complaint (against Robert H. Pottmeyer). In their counterclaim, appellants alleged that the well has continued to produce oil and gas sufficient to maintain the lease, and asked the trial court to declare the lease valid and in full force and effect. In their third party complaint, the appellants alleged that Robert H.

Pottmeyer breached the lease and Farmout Agreement; and asked that the court reassign the well to them under the terms of the Farmout Agreement, or alternatively enter judgment in their favor and against Robert H. Pottmeyer in excess of $25,000.

{¶ 8} While the lawsuit was pending, the EOGC released any and all interest in the lease. As a result, the landowners dismissed their claims against the EOGC without prejudice. Likewise, the appellants dismissed their cross-claim against the EOGC without prejudice, and no claims, by any party, remained pending against the EOGC.

{¶ 9} The landowners and Robert H. Pottmeyer subsequently filed a joint motion for summary judgment. That same day, the appellants filed three partial motions for summary judgment (one against landowners' claim one and in favor of their counterclaim, one against landowners' claim two, and one in favor of their third party complaint). Attached to the landowners' and Robert H. Pottmeyer's joint motion for summary judgment was the affidavit of Eric A. Pottmeyer. Through the affidavit, Eric A. Pottmeyer averred that it was no longer economically reasonable to commercially sell gas from the well; although some gas produced from the well is used for personal, household use. Eric A. Pottmeyer also averred that oil is produced as a by-product of the gas production, but that oil has only been sold on three occasions.

{¶ 10} Appellants filed an affidavit from Carl Heinrich[2] and other materials obtained through discovery in support of their partial motions for summary judgment. For instance, the appellants produced documents that indicate that 54.80 barrels of oil were sold in 2006 at $69.75 per barrel; 30.82 barrels of oil were sold in 2007 at $68.25 per barrel; and 73.45 barrels in 2011 at $96.89 per barrel. Appellants also pointed towards the landowners' discovery response that

[2] Heinrich is a member of each of the appellant companies.

indicated while oil was only sold on those three occasions, "[o]il may have been produced" in 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2007, 2008, 2009, 2010, 2012, 2013, and 2014. The appellants also pointed to the lease itself, which only allows the lessor to "take gas produced from said well for domestic use in one dwelling house on the lease premises * * *." Appellants argued that the gas supplied to the second house constituted non-domestic production that maintains the lease. Heinrich, in his affidavit, estimated that the total value of the gas provided to the second dwelling house from 1991 to 2013 was worth approximately $13,811.34.

{¶ 11} In March 2015, the trial court issued decisions on the pending motions. The trial court found, inter alia, that oil or gas had not been produced in paying quantities, that the lease expressly disclaimed all implied covenants, and that appellants did not have any rights under the Farmout Agreement. In a subsequent entry, the trial court granted landowners' and Robert H. Pottmeyer's joint motion for summary judgment on count one of the complaint and declared the lease void; granted appellants' second motion for partial summary judgment on count two of the complaint; denied appellants' first and third motions for partial summary judgment; and dismissed appellants' third party complaint.

{¶ 12} Appellants filed a timely notice of appeal. The landowners, however, did not file a cross-appeal of the trial court's decision granting appellants' second motion for partial summary judgment.

B. Case No. 15CA29 - Sciance

{¶ 13} Carol Sciance and Gregory Sciance ("landowners") together own approximately 84 acres of real property located in Warren and Watertown Townships in Washington County. In

1974, the predecessors in interest to the landowners, Denzil M. Robinson and Helen M. Robinson (husband and wife), leased the oil and gas rights in the property to the EOGC for the term of five years and as much longer as "oil or gas or their constituents shall be found on the premises in paying quantities in the judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil or gas * * *."

{¶ 14} In 1976, the EOGC entered into a Farmout Agreement with S.W. Farrell as operator. The Farmout Agreement concerned many properties, including the property at issue, and provided that the operator drill at least four wells on the properties subject to the agreement. The Farmout Agreement also provided for the assignment of the EOGC's interest in the oil and gas lease to the operator down to, but not below the base of the Berea Sand or to a depth of 2200', whichever is lesser, and was subject to the terms and conditions of said leases. Section Six of the Farmout Agreement also included a provision prohibiting the operator from allowing the leases to lapse or to cancel or surrender the rights under the leases, without first offering the EOGC, in writing, the opportunity to re-acquire such rights for the consideration of $1.00.

{¶ 15} Only one well was ever drilled on the landowners' property. The well was completed in 1977 and the parties agree that Carol Sciance is the current operator of the well. Carol Sciance's late husband, Glen Sciance, purchased the rights to the well in an assignment of the lease in 1995 that included "[o]nly the most easterly 40 acres, more or less, down to but not below the base of the Berea Sand" and subject to all terms and conditions of the lease and of the Farmout Agreement. The well has produced gas for household and personal use since September 8, 1995– with gas produced from the well used to heat two homes on the property. In an affidavit, Carol Sciance stated that at one time the landowners did sell the gas produced by the well, but it became economically unreasonable to do so. Carol Sciance further stated that the

River Gas Company stopped purchasing gas from the well in the mid 1990s and removed their sales meter due to low production. The landowners have also sold oil on four occasions. According to Carol Sciance, the oil is accumulated in the tanks as a by-product of gas production.

{¶ 16} In 1989, the EOGC assigned to Carl Heinrich "all rights of East Ohio below the Berea formation only" in the oil and gas lease at issue. Carl Heinrich subsequently assigned his deep rights interest in the oil and gas lease to Heinrich Production, LLC in an assignment dated December 30, 2008. Heinrich Production, LLC next assigned partial interests in the lease to Utica Assets, LLC and Deep Rock Investments, LLC in assignments dated December 23, 2011.

{¶ 17} In March 2014, the landowners filed a complaint in the trial court against the EOGC and the appellants. In count one of their complaint, the landowners alleged that the well had not produced oil or gas in paying quantities in the judgment of the lessee, resulting in its expiration under its own terms. The landowners requested a judgment declaring the oil and gas lease forfeited and void arguing that it expired when there was insufficient production of oil or gas. In count two, the landowners claimed that the defendants had breached various implied covenants, thus voiding the lease. The appellants filed a joint answer and counterclaim, and later a first amended joint answer, counterclaim, and cross-claim (against the EOGC). In their counterclaim, appellants alleged that the well has continued to produce oil and gas sufficient to maintain the lease, and asked the trial court to declare the lease valid and in full force and effect. Appellants also alleged that Carol Sciance breached the lease and Farmout Agreement; and asked that she be barred in equity from denying the validity of the lease, or alternatively enter judgment in their favor and against Carol Sciance in excess of $25,000.

{¶ 18} While the lawsuit was pending, the EOGC released any and all interest in the lease. As a result, the landowners dismissed their claims against the EOGC without prejudice. Likewise, the appellants' dismissed their cross-claim against EOGC without prejudice, and no claims, by any party, remained pending against the EOGC.

{¶ 19} The landowners subsequently filed a motion for summary judgment. That same day, the appellants filed three partial motions for summary judgment (one against landowners' claim one and in favor of their first counterclaim, one against landowners' claim two, and one in favor of their remaining counterclaims). Attached to the landowners' motion for summary judgment was the affidavit of Carol Sciance. Through the affidavit, Carol Sciance averred that it was no longer economically reasonable to commercially sell gas from the well; although some gas produced from the well is used for personal, household use. Carol Sciance also averred that oil is produced as a by-product of the gas production, but that oil has only been sold on four occasions.

{¶ 20} Appellants filed an affidavit from Carl Heinrich and other materials obtained through discovery in support of their partial motions for summary judgment. For instance, the appellants produced documents that indicate that 49.36 barrels of oil were sold in 1999 at $23.24 per barrel; 35.19 barrels of oil were sold in 2004 at $34.24 per barrel; 5.19 barrels of oil were sold in 2009 at $58.37 per barrel; and 58.59 barrels in 2013 at $103.40 per barrel. Appellants also pointed towards the landowners' discovery response that indicated that while oil was only sold on those four occasions, "[o]il may have been produced" in 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2010, 2011, 2012, and 2014. The appellants also pointed to the lease itself, which expressly allows the lessor to "take gas produced from said well for domestic use in one dwelling house on the lease premises * * *". Appellants argued that the

gas supplied to the second house constituted non-domestic production that maintains the lease. Heinrich, in his affidavit, estimated that the total value of the gas provided to the second dwelling house from 1995 to 2013 was worth approximately $12,703.44.

{¶ 21} In March 2015, the trial court issued its decisions on the pending summary judgment motions. The trial court found, inter alia, disputed issues of fact. Therefore, the trial court denied the pending motions and ordered that the matter "proceed to a trial to the Court". A short time thereafter, the trial court issued its first amended decision, which corrected a clerical error regarding the trial date.

{¶ 22} In May 2015, the landowners filed a motion asking the trial court to reconsider its decision regarding their motion for summary judgment based on the trial court's ruling on the similar issues in *Pottmeyer* above (15CA14). A couple of months later, the trial court issued an order granting landowners' motion to reconsider finding that "this Court is of the opinion that the decision[s] entered in [*Pottmeyer*] are the correct decisions". In a subsequent entry, the trial court granted the landowners' motion for summary judgment on count one of the complaint and declared the lease void; granted appellants' second motion for partial summary judgment on count two of the complaint; and denied appellants' first and third motions for partial summary judgment.

{¶ 23} Appellants filed a timely notice of appeal. The landowners, however, did not file a cross-appeal of the trial court's decision granting appellants' second motion for partial summary judgment.

C. The Consolidation of the Appeals

{¶ 24} The parties in the two underlying cases sought consolidation on appeal given the similarity of facts, issues, and counsel. By magistrate order, we granted the request to consolidate; thereby consolidating case numbers 15CA14 and 15CA29 for purposes of oral argument and decision.

II. Assignments of Error

{¶ 25} In Case No. 15CA14, appellants raise three assignments of error for our review.

First Assignment of Error:

> THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' AND THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Second Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT.

Third Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT.

{¶ 26} As for Case No. 15CA29, appellants raise three nearly identical assignments of error for our review.

First Assignment of Error:

> THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Second Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT.

Third Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT.

III. Law and Analysis

{¶ 27} Because appellants' assigned errors are interrelated, we address them jointly. In both cases, appellants argue that the trial court erred by granting the landowners' motion for summary judgment and in denying their cross motions for summary judgment. Essentially, appellants contend that the oil and gas leases have not expired under the terms of leases or by virtue of the Farmout Agreements.

A. Standard of Review

{¶ 28} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 29} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264

(1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293; Civ.R. 56(E).

{¶ 30} "In addition, this case involves the interpretation of a written contract, which is a matter of law that we review de novo." *Bohlen v. Anadarko E & P Onshore, LLC*, 2014-Ohio-5819, 26 N.E.3d 1176, ¶ 12 (4th Dist.), citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. "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.

{¶ 31} 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 v. Viking Internatl. Resources Co.*, 2013-Ohio-5236, 1 N.E.3d 872, ¶ 11 (4th Dist.).

B. Oil, Gas, or their Constituents Have Not Been Produced in Paying Quantities

{¶ 32} Appellants first argue that the trial court erred by ruling that the wells had not produced oil, gas, or their constituents in paying quantities as required to maintain the leases under the habendum clauses.

{¶ 33} Under the secondary terms of the habendum clauses of the leases, after the initial five-year terms, the leases continued as long as "oil or gas or their constituents shall be found on the premises in paying quantities in the judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil or gas * * *." "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, 43 A.L.R.3d 8, 25. 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." *Siley v. Remmele*, 4th Dist. Washington No. 86CA6, 1987 WL 7585, *3 (Mar. 6, 1987). As the leases emphasize, " '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.' " *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 103 (7th Dist.), quoting *Cotton v. Upham Gas Co.*, 5th Dist. Knox No. 86-CA-20, 1987 WL 8741, *1 (Mar. 6, 1987); *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").

{¶ 34} Appellants contend that the leases remain viable under the terms of the habendum clauses because the landowners' use of the wells to provide gas to multiple dwellings on the properties is equivalent to production in paying quantities.

{¶ 35} Similar arguments were made in *Gardner v. Oxford Oil Co.*, 2013-Ohio-5885, 7 N.E.3d 510 (7th Dist.). In *Gardner*, one shallow well was drilled on the entirety of the leased premises. *Id*. at ¶¶ 2, 4, 9. The rights to the shallow well were subsequently assigned to the landowner, while the oil and gas company retained the deep rights. *Id*. at ¶¶ 2, 6. The landowner used the well solely for domestic purposes – obtaining gas from the well for buildings on his property. *Id*. at ¶ 10. Eventually, the landowner filed an action to cancel the lease based on lack of production. *Id*. at ¶ 12. After the parties filed cross-motions for summary judgment, the trial court granted the landowner's motion. *Id*.

{¶ 36} The habendum clause at issue in *Gardner* provided that the oil and gas lease would remain valid beyond the primary term, which had undisputedly expired, as long as "oil, gas or their constituents are produced in paying quantities thereon, or operations are maintained on" the leased premises. *Id*. at ¶¶ 2,4. On appeal, the oil and gas company contended, *inter alia*, that the landowner's use of the well to provide gas to three separate buildings on his property constituted "production in paying quantities" or "operations" sufficient to preserve the validity of the lease. *Id*. at ¶¶ 18, 36. The Seventh District Court of Appeals disagreed with the oil and gas company's argument, holding that: the landowner's use of gas for domestic purposes did not constitute production in paying quantities or operations under the lease. *Id*. at ¶¶ 38-42, citing

Yoder v. Stocker & Sitler Oil Co., 5th Dist. Holmes No. CA-465, 1993 WL 95604 (Mar. 30, 1993), and *Tisdale v. Walla*, 11th Dist. Ashtabula No. 94-A-0008, 1994 WL 738744 (Dec. 23, 1994). Rather, the appellate court determined that the landowner's domestic use of the gas was incidental to the purpose of the lease and did not count towards the calculation of gas produced in paying quantities under the habendum clause. *Id*. at ¶ 41. Finally, the appellate court also noted that the landowner did not have a duty to continue production after taking ownership of the well so as to preserve the oil and gas company's leasehold interest. *Id*. at ¶ 46.

{¶ 37} Here, as in *Gardner*, one of the landowners, or a close family member of the landowners owns the wells on the respective properties. The landowners have only used the wells for the incidental purpose of obtaining gas for personal use; i.e., distribution of gas for domestic rather than commercial purposes. Adopting the persuasive analysis of our sister district in *Gardner*, we hold that the landowners' personal use of the gas does not count towards the calculation of gas produced in paying quantities. Rather, the landowners' use of the gas is incidental to the purpose of the leases.

{¶ 38} We also believe that the appellants' reliance on *Litton v. Geisler, supra*, for the assertion that "free gas provided to additional dwellings is sufficient consideration to maintain a lease", is misplaced. *Litton* involved circumstances that are not comparable to those at issue here. Specifically, the lessee in *Litton* maintained operation of the well. The well was not operated or owned by the landowner/successor lessor as in the present case. Moreover, unlike the present case, in *Litton* the parties agreed that the well was producing gas in paying quantities, but "due to a lack of market all parties were satisfied to let the well stand until such time as a market could be obtained, and during this interval the [lessors] were furnished, in lieu of the $300 per annum that they would have been entitled to had the gas been marketed, sufficient gas to heat and light

additional homes over and above the one residence provided for in the lease." *Litton* at 493. Given the distinct factual scenario, we conclude that the *Litton* holdings do not control the present appeal.

{¶ 39} We are also not persuaded by the appellants' argument that the landowners' use of free gas beyond that explicitly permitted in the lease prejudiced their "intervening rights" by threatening the lapse of the lease. Even if we were to assume, *arguendo*, that appellants possess intervening rights, the landowners in this situation did not have a duty to continue production after taking ownership of the well so as to preserve the appellants' leasehold interest. *See Gardner, supra*, at ¶¶ 3, 29, 35, 46. Rather, appellants could have prevented the situation by drilling a deep well elsewhere on the property. *Id*.

{¶ 40} Finally, we disagree with appellants' contention that the sporadic sale of oil from the wells constitutes production in paying quantities. Here, the summary judgment evidence established that since 1991 the Pottmeyer Well has produced oil in paying quantities on only three occasions – with the last sale of oil taking place in 2011. Likewise, since 1995 the Sciance Well has produced oil in paying quantities on only four occasions – with the last sale of oil occurring in 2013. We do not believe that such sporadic and *de minimus* production constitutes production in paying quantities. *See Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955), paragraph two of the syllabus ("Allegations, that a small amount of oil was produced, that it was difficult to bring out to the road and that it did not warrant building a line, do not amount to allegations that oil, gas or their constituents were produced in paying quantities."); *Lauer v. Positron Energy Resources, Inc.*, 4th Dist. Washington No. 13CA39, 2014-Ohio-4850, ¶ 12 ("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."). Furthermore, Carol Sciance and Eric Pottmeyer averred that it was not economically reasonable to commercially operate the well and that the limited amount of oil found in the well was produced as a by-product of the domestic gas production. We find nothing in the record to indicate that these determinations were not made in good faith.

{¶ 41} Based on the foregoing, we conclude that the wells are not producing oil, gas, or their constituents in paying quantities in the judgment of the lessee as required to maintain the leases under the secondary terms of the habendum clauses.

C. The Leases Have Not Been Maintained by the Landowners' Operation of the Wells

{¶ 42} The appellants next contend that even if the production from the wells are not in paying quantities, the leases have been maintained by the landowners' operations. For the reasons stated below, we find this argument to be without merit.

{¶ 43} Here, the leases at issue also provide that the leases would continue past the primary term as long as "the premises shall be operated by the Lessee in the search for oil or gas * * *." In cases similar to the case at hand - i.e. where the lessee oil and gas company have retained only the deep rights and the landowner/shallow rights lessee have been assigned the only producing well and chose to take the well out of production and use it for domestic gas purposes only- courts have held that operations mean those conducted by the oil and gas company, not the landowner, even though the landowner had been assigned the rights to the well. *See Gardner, supra,* at ¶ 42, citing *Yoder, supra,* at *3. As the *Gardner* court explained: "Operations, just as production in paying quantities, are assessed from the perspective of the lessee oil and gas company; the party under the lease with the right and duty to drill for oil and

gas. The incidental use of gas by the property owner is insufficient to constitute operations." *Gardner* at ¶ 42.

{¶ 44} Again, we are persuaded by the rationale of the *Gardner* court, and hold that the landowners' incidental use of domestic gas does not constitute operations under the terms of the lease. Furthermore, no summary judgment evidence has been presented that indicates that the appellants have engaged in any activities in the search for additional oil or gas in the formations below the Barea formation. Accordingly, because there was no production in paying quantities, and because lessees did not maintain operations on the properties, the leases have terminated pursuant to the terms of the habendum clauses.

D. The Farmout Agreements Do Not Protect The Appellants' Interests in the Leases

{¶ 45} As an alternative argument, appellants contend that the relief requested by the landowners violates the Farmout Agreements. Specifically, appellants argue that the landowners have breached Section Six of the Farmout Agreements by seeking to terminate the leases without first offering to reassign the well/shallow rights back to the EOGC. The pertinent language contained within Section Six of the Farmout Agreements states as follows:

> OPERATOR shall not surrender or cancel the rights acquired pursuant hereto in any of the leases or partial leases set forth in Exhibit A or allow such rights to lapse unless it first offers in writing to re-assign such rights to EAST OHIO for the consideration of One Dollar ($1.00) and EAST OHIO declines to accept such offer within thirty (30) days after receipt of same.

{¶ 46} "A farm-out agreement is not an assignment, sublease, or transfer of lease rights. Rather, a farm-out agreement is an executory contract by which a lessee * * * promises to

transfer rights in the lease upon the completion of certain obligations." *Sandstone Corp. v. Columbia Gas Transm. Corp.*, 10th Dist. Franklin No. 88AP-292, 1989 WL 43201, *2 (Apr. 25, 1989). " 'A farm-out agreement is a contract to assign oil and gas lease rights in certain acreage upon the completion of drilling obligations and the performance of any other covenants and conditions therein contained. It is an executory contract. * * * ' " *Id*., quoting 2 Williams and Myers, Oil and Gas Law (1985), Section 432. Because the Farmout Agreements are contracts exclusive of the leases at issue, only a party to the agreements or an intended third-party beneficiary of the agreements may claim rights under the agreements. *See CitiMortgage, Inc. v. Carpenter*, 2d Dist. Montgomery No. 24741, 2012-Ohio-1428, ¶¶ 14-15, citing *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (1991).

{¶ 47} Here, the appellants were not parties to the Farmout Agreements. Rather, those agreements were entered between the EOGC and S.W. Farrell as operator. Nonetheless, appellants contend that their predecessor in interest, Carl Heinrich, was assigned the EOGC's rights under the Farmout Agreements by virtue of his acquisition of the deep rights interests under the leases. We disagree.

{¶ 48} The assignments at issue took place in 1989. The assignments were prepared by the EOGC and provided that Carl Heinrich would receive "all rights of East Ohio below the Berea formation only *in the oil and gas leases* shown on Exhibit A." (Emphasis added). By the plain language of the assignments it is clear that only the EOGC's reserved deep rights interests under the oil and gas leases were assigned to Heinrich. There is no indication that the EOGC's rights under the Farmout Agreements were incorporated into the assignments. In other words, the assignments to the appellants' predecessor in interest transferred only the EOGC's rights under the oil and gas leases and were unequivocally silent as to the rights existing under the Farmout

Agreements. While the EOGC did assign any rights it held in the oil and gas leases to the appellants' predecessor in interest, it did not assign any rights it retained under the Farmout Agreements. Accordingly, appellants' theory that they are successors in interest to the EOGC's rights under the Farmout Agreements is misplaced.

{¶ 49} Appellants also contend that they are third-party beneficiaries of the Farmout Agreements, and thus, are entitled to enforce the re-assignment provisions.

{¶ 50} This Court has described a third-party beneficiary as:

> [O]ne for whose benefit a promise has been made in a contract but who is not a party to the contract. The third party need not be named in the contract, as long as she is contemplated by the parties to the contract and is sufficiently identified. Moreover, it must be shown that the contract was made and entered into with the intent to benefit the third person. A mere incidental or indirect benefit is not sufficient to create enforceable third-party rights under the contract.

Peters v. Malone, 4th Dist. Jackson No. 03CA23, 2004-Ohio-3327, ¶ 10.

{¶ 51} Here, while the EOGC may have contemplated that one day they, as reserved deep rights holders, or S.W. Farrell, as shallow rights holders, would assign their respective interests in the oil and gas leases, it does not appear that they intended the Farmout Agreements to benefit their successors or assigns. Notably, the Farmout Agreements identifies the parties as the EOGC and S.W. Farrell. The words "successors and assigns" or similar terminology appear nowhere in the introductory provisions of the agreements or in the re-assignment provisions of the agreements. Moreover, the very nature of farm-out agreements, as executory contracts meant to pass leasehold rights upon the completion of a well or similar conditions, suggests a lack of

intent to benefit third parties. Given these circumstances, it is unlikely that either the EOGC or S.W. Farrell contemplated the existence of appellants or their predecessors in interest at the time of entering into the Farmout Agreements, or that the Farmout Agreements were made or entered into with the intent to benefit appellants or their predecessors. Accordingly, appellants are not third-party beneficiaries of the Farmout Agreements.

{¶ 52} Because the appellants are not parties to the Farmout Agreements, and because they are not third-party beneficiaries under the agreements; they are not entitled to any of the rights or remedies afforded by the agreements.

IV. Conclusion

{¶ 53} With respect to the arguments, briefs, and records in this consolidated appeal, we find no error prejudicial to appellants. All of appellants' assignments of error are therefore overruled. The judgments of the Washington County Common Pleas Court are affirmed.

JUDGMENTS AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS ARE 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 execute this consolidated decision and judgment.

Any stays previously granted by this Court are 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.

Abele, J: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

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.