[Cite as *Casto v. Positron Energy Resources, Inc.*, 2016-Ohio-285.]

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

LARRY D. CASTO,	:	
Plaintiff-Appellee,	:	Case No. 14CA39
vs.	:	
POSITRON ENERGY RESOURCES, INC., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.[1]	:	

APPEARANCES:

John E. Triplett, Jr., and Theisen Brock, L.P.A., Marietta, Ohio for appellant.

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

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 1-7-16
PER CURIAM.

{¶ 1} Positron Energy Resources, Inc. (Positron) appeals from a Washington County Court of Common Pleas judgment that (1) granted Larry D. Casto's motion for summary judgment, and (2) ordered an oil and gas lease forfeited and declared void as to Casto's real property. The trial court concluded that although Positron's predecessor-in-interest had drilled a well on Casto's property, the well had not produced oil or gas in paying quantities for more than

[1]Counsel for appellant, Positron Energy Resources, Inc., claims that it also represents Stonebridge Operating Co., LLC in this appeal. However, Stonebridge did not intervene in these proceedings nor seek leave to intervene in this appeal. Therefore, insofar as Stonebridge claims it is an additional appellant in a case that it was never a party and never sought to be a party, we do not treat it as a party to this appeal.

seven years prior to the filing of the case and that the lease had expired by its own terms.

{¶ 2} In its first and second assignments of error, Positron asserts that the trial court erred by granting summary judgment to Casto because his own actions in seeking delay rental payments from Positron to cure its breach of the lease established that the lease is still valid, or that Casto is estopped from asserting that it is not valid. We, however, reject Positron's assertion because the lease expired by its own terms when no oil or gas was produced on Casto's property for seven years before he filed his complaint. The parties' lease did not permit Positron to extend the lease by paying a delay rental fee, and Positron did not change its position in reasonable reliance on Casto's actions.

{¶ 3} In its third assignment of error, Positron claims that the trial court erred by granting summary judgment to Casto without addressing the equitable issues in the case. Insofar as Positron claims that Casto's action is barred by laches, it waived the defense because it did not raise that issue as an affirmative defense in its answer. Moreover, no affirmative action on Casto's part, including notice, is required to formally terminate the lease; rather, the lease expired on its own terms.

{¶ 4} Therefore, we overrule Positron's assignments of error and affirm the trial court's judgment.

I. FACTS

{¶ 5} Larry Casto owns approximately 67.28 acres of land in Lawrence Township, Washington County, Ohio that was transferred to him from his mother in April 2011. The property is subject to an oil and gas lease executed in August 1972 that covered 173 acres, including Casto's property. In 1998, Positron was assigned the lessee's rights to the lease.

{¶ 6} The lease granted the lessee the exclusive right to "all of the oil and gas" on the property. The lease contained a habendum clause that provided a primary term of ten years and a secondary term of indefinite duration as long as oil or gas were produced on the property in paying quantities. The lease also contained a delay rental provision, which provided that the lease would terminate unless the lessee paid the lessor $173 each year if a well was not commenced on the property within three months from the date the lease was executed.

{¶ 7} Positron owns Glen A. Biehl Well No. 1, which was drilled on the property in 1980. That well is the only well that has not been plugged that is on Casto's property. The pump jack for the well has been removed, and the pipe sticking out of the ground from the bore hole has not been connected to a gas pipeline for more than seven years before December 2013. No oil or gas production or exploration has occurred on Casto's property for this seven-year period.

{¶ 8} In March 2013, an attorney mailed a letter to Positron on behalf of Casto notifying Positron that it "is in default of provisions of the lease which require delay payments and/or royalty payments on a producing well" and threatened a lawsuit seeking the forfeiture of the lease "[i]f this default is not cured within ten days." Shortly thereafter, Positron, through Stonebridge Operating Co., LLC, sent Casto a check for $346, claiming to represent the delay rental payments for 2011 and 2012. Casto did not cash the check because the well was not working. Casto did receive a 1099 federal tax form for 2013 that purported to indicate receipts on payments for the well, but he did not receive or cash checks that represented payments in that amount. Casto's mother did receive small checks many years ago. In December 2013, Casto filed a complaint for a declaratory judgment that the oil and gas lese had terminated. Casto named Positron, Indgo

Corp., Anadarko E & P Company LP (Anadarko), Alliance Petroleum Corporation (Alliance), Ohio L & M Co., Inc., and David S. Towner Enterprises aka C.T. Production Company, as defendants who either had, or may claim, an interest in the oil and gas lease. Casto claimed that the lease had expired because: (1) no oil and gas production occurred on his property for more than seven years before he filed the complaint, including the well that Positron owned; (2) the defendants violated various implied covenants of the lease; and (3) the defendants abandoned their interests in the lease. Positron's answer raised various defenses, including that Casto may not have provided proper notice of any alleged breach and that by his actions he is estopped to assert forfeiture. Anadarko and Alliance disclaimed any interest in Casto's real property, and the remaining defendants failed to defend or otherwise appear in the action.

{¶ 9} Casto's motion for summary judgment and supporting affidavit established that Positron's well had not produced oil or gas for more than seven years before he filed his complaint. Casto also filed his deposition. Positron filed a memorandum in opposition to the motion. In November 2014, the trial court granted Casto's motion for summary judgment and declared the oil and lease gas forfeited and void as to Casto's real property. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶ 10} Positron assigns the following errors for our review:

> 1. "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE ON THE RECORD BEFORE THE COURT."
>
> 2. "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AFTER APPELLANT CURED THE ALLEGED BREACH OF THE LEASE AS DEMANDED BY THE

APPELLEE PRIOR TO THE SUIT BY MAILING THE DEMANDED PAYMENTS."

3. "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WITHOUT ADDRESSING THE EQUITABLE ISSUES IN THE CASE."

III. STANDARD OF REVIEW

{¶ 11} 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, 2014 WL 3940314, ¶ 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, 2014 WL 356626, ¶ 20.

{¶ 12} 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 satisfied this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts to show that a genuine issue exists for trial. *Id*.; *Chase Home Finance* at ¶ 27.

{¶ 13} Additionally, 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, ¶ 9 (" '[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.).

{¶ 14} 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.

IV. LAW AND ANALYSIS

A.

{¶ 15} In its first assignment of error, Positron asserts that the trial court erred by granting summary judgment to Casto. In particular, Positron claims that Casto's own actions by demanding delay rental payments to cure a default under the lease are inconsistent with his claim

that the lease should be forfeited because it had expired. In its second assignment of error, Positron contends that the trial court erred by granting summary judgment to Casto after Positron cured its alleged breach of the lease as demanded by Casto by mailing the requested delayed rental payment. Because these assignments of error raise similar legal questions, we consider them jointly.

{¶ 16} In the case sub judice, we do not believe that the trial court erred by declaring the oil and gas lease forfeited insofar as it applied to Casto's property.[2] An oil and gas lease that contains a habendum clause that states that the lease shall remain in effect as long as oil or gas are produced in paying quantities expires when no oil or gas is produced for two years or more:

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

Lauer v. Positron Energy Resources, Inc., 4th Dist. Wash. No. 13CA39, 2014-Ohio-4850, ¶ 12, quoting *Wagner v. Smith*, 8 Ohio App.3d 90, 92-94, 456 N.E.2d 523 (4 Dist.). Because the summary judgment evidence in the case sub judice established that no well on Casto's property (including the well owned by Positron) had produced oil or gas for more than seven years before

[2]Positron does not contend that oil or gas is being produced in paying quantities elsewhere on the original leasehold that would prevent the forfeiture of the lease for Casto's property, and the trial court did not consider this issue. Thus, we need not address this potential question.

Casto filed his complaint in the underlying action in December 2013, the lease expired by its own terms.

{¶ 17} Positron argues that, notwithstanding this uncontroverted evidence and the applicable law, Casto's demand for delay rental payments to cure its alleged breach of the lease established that the lease is valid, or at least estops Casto from asserting that the lease is invalid.

{¶ 18} We, however, disagree with Positron's argument. Here, the lease expired by its own terms when no oil or gas was produced on Casto's property for more than seven years before he filed his complaint. The parties' lease did not permit Positron to extend the secondary term of lease indefinitely by paying a delay rental fee of $173 a year. Moreover, " '[u]nder established case law, once the primary term of the Lease expires, the delay rental provision is no longer applicable.' " *Bohlen v. Anadarko E & P Onshore*, 2014-Ohio-5819, 26 N.E.3d 1176, ¶ 20 (4th Dist.), quoting *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 82 (7th Dist.); *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); Kuehnle and Levey, *Ohio Real Estate Law*, Section 47:9 (2014) ("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").

{¶ 19} Finally, if we assume for purposes of argument that equitable estoppel is an appropriate defense to a forfeiture claim based on an oil and gas lease that has expired on its own terms, it was not established here. " 'Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable

reliance on those facts to his detriment.' " *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, 880 N.E.2d 892, ¶ 7, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 34, 641 N.E.2d 188 (1994). Although Casto demanded delay rental payments from Positron to cure the alleged breach of the lease and Positron submitted a check in response, it ultimately did not change its position because Casto did not negotiate the check. In addition, Positron's reliance on Casto's demand to believe that the lease is still valid would not have been reasonable in view of the unambiguous language of the lease that indicates that it had already expired based on the lengthy period of nonproduction of oil and gas on Casto's property. Furthermore, "[e]quitable estoppel usually requires actual or constructive fraud," and there was no evidence or argument that Casto was guilty of fraud. *See State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, 909 N.E.2d 610, ¶ 28. We overrule Casto's first and second assignments of error.

B.

{¶ 20} In its third assignment of error, Positron contends that the trial court's failure to address the equitable issues in the case constitutes reversible error. Positron first argues that Casto's delay in instituting its forfeiture action barred his claim. In essence, Positron argues that Casto's action was barred by laches. If, however, the affirmative defense of laches is not raised in a pleading or in an amended pleading, it is waived. *See Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506 (1998); *see generally* Klein, Darling, and Terez, *Baldwin's Ohio Civil Practice*, Section 8:14 ("Affirmative defenses that are not presented in a responsive pleading pursuant to Civ.R. 8(C), not presented by motion before pleading [pursuant to Civ.R. 12(B)], or not presented by an amended pleading pursuant to Civ.R. 15 are

waived"); *Poling v. Poling*, 4th Dist. Hocking No. 03CA3, 2003-Ohio-5601, ¶ 22. Because Positron did not raise laches in its answer or an amended answer, it waived the affirmative defense.

{¶ 21} Additionally, because the lease expired by its own terms when Positron failed to produce oil or gas in paying quantities for more than seven years before Casto filed his forfeiture action, "no affirmative action" on his part is "required to formally terminate the lease." *Tisdale v. Walla*, 11th Dist. Ashtabula No. 94-A-0008, 1994 WL 738744, *4 (Dec. 23, 1994); *Am. Energy Servs. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist. 1992) ("If after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law and revests the leased estate in the lessor"); *see also* 3-6 Williams & Meyers, *Oil and Gas Law*, Section 604.7 (2014) (footnotes omitted) ("No cases have been found in which the court has found that the doctrine of laches is a defense to the lessor's claim that a lease has terminated pursuant to the special limitation in the habendum clause").

{¶ 22} Because the lease required no affirmative action on Casto's part, the notice provision permitting an opportunity to cure a default is inapplicable. *See Tisdale* at *4, quoting 4 Williams & Meyers, at Section 682.2 ("It has long been understood that a leasehold created by an ['and as long thereafter as'] lease terminates automatically without any requirement of notice or judicial ascertainment in the event of failure of production at or after the end of the primary term"). Thus, we hereby overrule Positron's third assignment of error.

V. CONCLUSION

{¶ 23} After our review, we conclude that the trial court did not err by granting summary

judgment in favor of Casto, and declaring the oil and gas lease forfeited insofar as it applied to his property, because the lease expired by its own terms after the lengthy period of nonproduction of oil and gas. Having overruled Positron's assignments of error, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant 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.

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

For the Court

_____
Marie Hoover
Presiding Judge

_____
Peter B. Abele, Judge

_____
Matthew W. McFarland
Administrative 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.