[Cite as *Cox v. Kimble,* 2015-Ohio-2470.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GARY A. COX, et al.

Plaintiffs-Appellees

-vs-

DORIS J. KIMBLE, dba RED HILL DEVELOPMENT, et al.

Defendants-Appellants

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 13 CA 32

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 12 OG 301
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 17, 2015

APPEARANCES:

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Wise, J.

{¶1} Defendants-Appellants Doris J. Kimble, dba Red Hill Development and RHDK Oil and Gas, LLC appeal the decision of the Guernsey County Court of Common Pleas which granted summary judgment in favor of Plaintiffs-Appellees Gary and Cecily Cox.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts and procedural history are as follows:

{¶3} On March 24, 1980, Appellee, Gary Cox, entered into an oil and gas lease with Floyd Kimble ("Lease"). The Lease covers 100 acres of real property, owned by Appellees, located in Section 24 of Londonderry Township, Guernsey County, Ohio. ("Real Estate").

{¶4} The Lease presented by Floyd Kimble was a "form" lease. Prior to his execution of the Lease, Gary Cox, who was approximately 30 years old at the time, relied primarily on his father, Paul Cox, for negotiation of the terms of the lease with Floyd Kimble. (T. at 92-93). Paul Cox and Floyd Kimble are now deceased. (August 6, 2013 Judgment Entry, Findings of Fact 1-2).

{¶5} There were four handwritten changes made to the Lease by the parties. The first and most notable is a handwritten provision at the end of the Lease which reads as follows:

> If a second well is not drilled within one year after the first well, the acreage not included in the first well tract will be released.

> Any well to be drilled will not be shut in and will be put into production as soon as possible. Reclamation on the well site will be completed within nine months after drilling.
>
> Floyd E. Kimble

{¶6} There were also three other handwritten changes to the Lease. First, the Primary Term of the Lease was changed from ten (10) years to two (2) years. Next, struck from the Lease in paragraph 3 was any ability to hold the Lease as long as the premises were merely "operated" by the lessee, instead requiring the premises to produce oil and gas. Finally, paragraph 11, involving unitization, was struck in its entirety.

{¶7} Paragraph three of the Lease contains a habendum clause, which provides as follows:

> This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of two years and so much longer thereafter as oil or gas or their constituents shall be found on the premises in paying quantities in the judgment of the Lessee.

{¶8} On May 31, 1981, the Gary Cox No. 1 oil and gas well was drilled pursuant to the Lease ("Well"). The Ohio Department of Natural Resources ("ODNR") approved the Well with a drilling tract comprised of all 100 acres of the Real Estate. This No. 1 Well was the only oil and gas well drilled pursuant to the Lease.

{¶9} On January 17, 1984, Paul Cox sent a letter to Floyd Kimble, on behalf of his son, requesting that Mr. Kimble release any portion of the Real Estate not contained in the first Well's tract.

{¶10} Since the drilling of the Well, no portion of the Lease has been released. The Well's plat map, made available to the public by ODNR, has remained unchanged since 1981.

{¶11} Since 1981, the Well has continuously produced oil or gas in paying quantities. (T. at 277). Since 1981, all royalties owed to Appellees have been paid in full. (T. at 290).

{¶12} In 2011, Gary Cox was approached regarding leasing his acreage. He was being offered $5,000.00 per acre by a company interested in engaging in horizontal drilling into the Utica Shale. (T. at 21).

{¶13} Appellee Gary Cox claims that it was at this time that he first learned that Appellants were claiming to hold all 100 acres of his property, and that Appellants were taking the position that they were never required to drill a second well.

{¶14} On June 14, 2012, Plaintiffs-Appellees, Gary Cox and Cecily Cox ("Appellees"), filed a Complaint with the Guernsey County Court of Common Pleas against Defendant-Appellant, Doris J. Kimble dba Red Hill Development, in Guernsey County Case No. 12-0&G-301. Appellees' Complaint sets forth causes of action for declaratory judgment and breach of contract. Thereafter, Appellees filed an Amended Complaint that included Defendant-Appellant, RHDK Oil & Gas, LLC, as an additional party.

{¶15} On February 7, 2013, Defendants-Appellants, Doris J. Kimble and RHDK Oil & Gas, LLC ("Appellants"), filed their Answer to the Amended Complaint and a Counterclaim. That Counterclaim set forth causes of action for declaratory judgment, quiet title, and slander of title.

{¶16} On April 30, 2013, Appellants filed a Motion for Summary Judgment on all claims set forth in this case.

{¶17} On July 9, 2013, the trial court denied Appellants' Motion for Summary Judgment.

{¶18} On July 17-18, 2013, the case proceeded to a two-day bench trial. At the conclusion of Appellees' case-in-chief, Appellants moved the trial court for a directed verdict. (T. at 154). The trial court denied Appellants' request. (T. at 166).

{¶19} On August 6, 2013, the trial court rendered its decision and memorialized that decision in a judgment entry that contained findings of facts and conclusions of law. The trial court dismissed Appellees' Amended Complaint, in total, and granted Appellants relief on Count One of their Counterclaim, which sought declaratory judgment relief. The trial court denied relief on Counts Two and Three of Appellants' Counterclaim, which sought quiet title relief and slander of title, respectively. In ruling in favor of Appellants and against Appellees, the trial court held that Appellees' claims were barred by the statute of limitations period applicable to breach of contract actions. The trial court also ruled that Appellees' forfeiture claim under R.C. 5301.332 failed as matter of law.

{¶20} On August 21, 2013, Appellees filed a motion seeking an amendment of the trial court's findings of fact and conclusions of law or, in the alternative, a new trial, pursuant to Civil Rule 59(A), which provides.

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> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional

testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

{¶21} The scope of the motion was limited to the issue of when Appellees' declaratory judgment claim accrued.

{¶22} On September 27, 2013, Appellants filed a response to that motion.

{¶23} On November 19, 2013, the trial court granted the motion, reversed its prior holding, and ordered Appellants to release a portion of the oil and gas lease at issue.

{¶24} Appellants now appeal, assigning the following sole error for review:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLEES' CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

{¶26} "II. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE LEASE CONTAINS A MAXIMUM DRILLING UNIT SIZE OF 40 ACRES.

{¶27} "III. THE TRIAL COURT ERRED IN ITS USE OF EXTRINSIC EVIDENCE TO DETERMINE THAT THE LEASE PERMITTED A MAXIMUM DRILLING UNIT SIZE OF 40 ACRES.

{¶28} "IV. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE HANDWRITTEN PROVISION MODIFIED THE LEASE'S HABENDUM CLAUSE BY REQUIRING LESSEE TO DRILL A SECOND WELL.

{¶29} "V. THE TRIAL COURT'S DECISION DENYING APPELLANTS' CLAIM FOR ADVERSE POSSESSION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶30} For ease of discussion, we shall address Appellants' assignments of error out of order.

II., III., IV.

{¶31} In their Second, Third and Fourth Assignments of Error, Appellants argue that the trial court erred in determining that in order to encumber the entire 100 acres of Appellees' property, the lease required the drilling of a second well and further that the lease permitted a maximum drilling unit size of forty (40) acres. We disagree.

{¶32} The construction of a written contract is a matter of law for the trial court to determine. *Alexander v. Buckeye Pipe Line Co.,* 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. Because the interpretation of written contracts, including any assessment as to whether a contract is ambiguous, is a question of law, we review such issues de novo on appeal. *Sauer v. Crews,* 10th Dist. No. 12AP–320, 2012–Ohio–6257, ¶11. Our judicial examination of the contract begins with the fundamental objective of ascertaining and giving effect to the intent of the parties at the time they executed the agreement. *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.,* 10th Dist. No. 12AP–589 (Apr. 25, 2013); *Aultman Hosp. Assn. v. Community Mut. Ins. Co.,* 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.,* 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus.

{¶33} If a contract is not ambiguous, it must be enforced as written. *Key Bank Natl. Assn. v. Columbus Campus, LLC,* 10th Dist. No. 11AP–920, 2013–Ohio–1243, ¶ 27, 988 N.E.2d 32. "Ambiguity exists only when a provision at issue is susceptible of

more than one reasonable interpretation." *Lager v. Miller–Gonzales,* 120 Ohio St.3d 47, 896 N.E.2d 666, 2008–Ohio–4838, ¶ 16.

{¶34} In the instant case, the trial court found that the Lease agreement required that a second well be drilled to extend the primary term under the habendum clause to the remaining 60 acres.

{¶35} Appellants argue that the plain language of the lease allowed for all 100 acres be placed in well tract.

{¶36} Upon review of the Oil and Gas Lease agreement, we find that the parties to the Lease did not intend for the entire 100 acres of Appellees' property to be included in just one well tract. If that was the intention of the parties, the handwritten provision requiring release of the remainder of the acreage "not included in the *first well tract*" "[i]f a *second* well is not drilled within one year after the *first* well" would not make sense. By using the term "first" it is clear that the parties contemplated the drilling of an additional well. Additionally, by providing for the release of the remaining acreage if a second well is not drilled, it is clear that the parties did not intend to place the entire 100 acres in this "first" drilling unit.

{¶37} Further, evidence was presented to the trial court that a typical drilling unit for a Clinton well in the area required 40 acres. (T. at 93, 98, 177, 205-206). In support of this assertion, the trial court found that the well drilled in this case was placed exactly in the center of the forty acres for this drilling unit.

{¶38} With respect to factual determinations, the trial court is in the best position to "view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons*

Coal Co., Inc. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. We therefore indulge every reasonable presumption in favor of a trial court's judgment regarding its underlying findings of fact and if the evidence supports more than one interpretation, we shall give deference to the lower court's credibility determinations. *Id*. Accordingly, where a contract is ambiguous, we will not overturn the trial court's interpretation absent a showing of an abuse of discretion. *Ohio Historical Soc. v. Gen. Maintenance and Eng. Co.* (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340.

{¶39} Initially, we note that Appellants never objected to the introduction of extrinsic evidence at trial. It is well established that a party cannot raise any new issues or legal theories for the first time on appeal." *Dolan v. Dolan,* 11th Dist. Nos. 2000-T-0154 and 2001-T-0003, *2002-Ohio-2440,* at ¶ 7, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. "Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193, 2000 Ohio App. LEXIS 5615.

{¶40} Further, while the evidence considered by the trial court was outside the scope of the written contract, it does not contradict the substantive provisions of the written contract. The evidence submitted at trial supports the court's conclusion.

{¶41} Appellant also argues that the trial court improperly limited the introduction of their expert’s testimony as to the oil and gas drilling standards and practices in existence in the early 1980’s in Londonderry Township. (T. at 241-242).

{¶42} The trial court, in limiting Dr. Coogan’s testimony, found that his testimony would not benefit the court because “the kin of knowledge … to interpret the four

corners or the plain language of the oil and gas lease is not benefitted by expert testimony."

{¶43} As to the Oil and Gas Lease in this case, the trial court had before it the testimony of each of the parties. The trial court found that Dr. Coogan's testimony was not relevant to the intent of the parties in this particular contract.

{¶44} A trial court's determination concerning the admissibility of extrinsic evidence will not be overturned absent an abuse of discretion. *Atelier Dist., LLC v. Parking Co. of Am., Inc.,* 10th Dist. No. 07AP-87, 2007-Ohio-7138, at ¶ 17, citing *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.* (1989), 65 Ohio App.3d 139, 147, 583 N.E.2d 340, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578; *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 597 N.E.2d 499, at syllabus.

{¶45} Based on the foregoing, this Court finds Appellants' Second, Third and Fourth Assignments of Error not well-taken and overrules same.

V.

{¶46} In their Fifth Assignment of Error, Appellants argue that the trial court's decision denying their claim for adverse possession was against the manifest weight of the evidence. We disagree.

{¶47} "Adverse possession is a common law device by which one in unauthorized possession of real property acquires legal title to that property from the titled owner." *Hamons v. Caudill,* Huron App. No. H–07–020, 2008-Ohio-248, 2008 WL 204069, citing 1 Curry and Durham, Ohio Real Property and Practice (5th Ed. 1996) 276.

{¶48} Adverse possession focuses on the acts of the one claiming prescriptive ownership and requires proof of exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus; *see also Pennsylvania RR*. *Co. v. Donovan* (1924), 111 Ohio St. 341, 349–350, 145 N.E. 479, 482. *See also State ex rel. A.A.A. Invest. v. Columbus* (1985), 17 Ohio St.3d 151, 153, 478 N.E.2d 773, 776; *Gill v. Fletcher* (1906), 74 Ohio St. 295, 78 N.E. 433, paragraph three of the syllabus; *Dietrick v. Noel* (1884), 42 Ohio St. 18, 21.

{¶49} To prevail on a claim for adverse possession, a claimant must establish these factors by clear and convincing evidence. *Grace v. Koch* at 580, 692 N.E.2d 1009. A party who fails to prove any of the elements fails to acquire title through adverse possession. *Grace v. Koch* at 579, 692 N.E.2d 1009; *Pennsylvania RR. Co. v. Donovan*; *Houck v. Huron Cty. Bd. of Park Commrs.,* 6th Dist. No. H–05–018, 2006-Ohio-2488, 2006 WL 1363833, ¶ 12, affirmed 116 Ohio St.3d 148, 2007-Ohio-5586, 876 N.E.2d 1210.

{¶50} When the original entry onto another's property is permissive or conferred by grant, then any use reasonably consistent with such a grant or permission is not adverse. *Heggy v. Lake Cable Recreation Assn.* (Dec. 15, 1977), Stark App. No. CA 4704, 1977 WL 201024*; see also Kelley v. Armstrong* (1921), 102 Ohio St. 478, 132 N.E. 15. “If a claimant's use of the disputed property is either by permission or accommodation for the owner, then it is not ‘adverse,’ for purposes of establishing adverse possession.” *Coleman v. Penndel Co.* (1997), 123 Ohio App.3d 125, 703 N.E.2d 821, paragraph three of the syllabus.

{¶51} The party claiming title by adverse possession must establish a prima facie case of adverse use before the alleged owner is required to rebut the claim. *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 84, 448 N.E.2d 1380. However, if the owner of the property in question claims that the use was permissive, the owner has the burden of proving it. *Pavey v. Vance* (1897), 56 Ohio St. 162, 46 N.E. 898.

{¶52} Each case of adverse possession rests on its own peculiar facts. *Bullion v. Gahm*, 164 Ohio App.3d 344, 349, 2005-Ohio-5966, 842 N.E.2d 540, citing *Oeltjen v. Akron Associated Invest. Co.* (1958), 106 Ohio App. 128, 130, 153 N.E.2d 715. *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 241-242, 897 N.E.2d 680, 689 - 690 (Ohio App. 5 Dist., 2008)

{¶53} In the case *sub judice*, Appellants original entry onto Appellees' property was conferred through rights granted them under the Oil and Gas Lease. Appellants' actions and use of the property since that time have been consistent with such grant and/or permission and is therefore not adverse.

{¶54} We find no error in the trial court's denial of Appellants' claim for adverse possession.

{¶55} Appellants' Fifth Assignment of Error is overruled.

I.

{¶56} In their First Assignment of Error, Appellants argue that the trial court erred in finding that Appellees' claims were not barred by the statute of limitations. We disagree.

{¶57} In their Complaint for declaratory judgment filed in this case, Appellees brought their claims under a theory of quiet title. Appellants argue that Appellees' claims in this case are in effect breach of contract claims and pursuant to R.C. §2305.06, a 15 year statute of limitations bars such claims.

{¶58} The trial court found Appellees claims were not barred by such statute of limitations because the "breach" in this case did not accrue until 2011 when Appellees first requested that Appellants release the acreage, Appellants refused and Appellees suffered damages by their inability to lease the 60 acres for the development of oil and gas.

{¶59} The trial court further found that Appellees were not barred by the 21-year statute of limitations for quiet title action under R.C. §2305.04 because Appellants never engaged in any overt acts which would outwardly demonstrate occupation and ownership of the property until 2011 when they refused to release the remaining acreage.

{¶60} Upon review, we find that under R.C. §2305.04, the twenty-one year statute of limitations does not begin to run until a plaintiff's cause of action accrues. The cause of action does not accrue until the defendant takes possession of the disputed property. See *Webster v. Pittsburgh, Cleveland and Toledo Ry.* (1908), 78 Ohio St. 87, paragraph one of the syllabus. Therefore, the determination of the issue of whether a quiet title action is barred by R.C. §2305.04 necessarily turns upon a factual question of when the Appellants took possession, if at all, of the record owner's property.

{¶61} In this case, Appellants did not engage in any overt acts of possession of Appellees' property. The only act performed by Appellants, other than the drilling of the

first well tract and the ongoing operation pursuant to same, was the filing of the plat map which indicated that all 100 acres were included in the first well tract.

{¶62} This Court does not find the filing of the plat to be "open and notorious" for purposes of putting Appellees' on notice of an adverse claim. To begin, Appellees were never notified that the plat, as filed, indicated that all 100 acres were included. Further, the filing of a plat indicating what land is encumbered by the oil and gas lease is not outside of the permissive rights granted under the lease. Therefore, it is not adverse.

{¶63} Finally, under the handwritten provisions in this Oil and Gas Lease, once the conditions of the "secondary term" were not met, the lease terminated by operation of law as to that acreage, which was not included in the "first well tract".

{¶64} "If after the expiration of the primary term [of an oil and gas lease] 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." *American Energy Services, Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 212, citing, *Gisinger v. Hart* (1961), 115 Ohio App. 115, 184 N.E.2d 240; *Moore v. Adams*, Tusc. County, 5th Dist. App. 2007AP090066, 2008-Ohio-5953.

{¶65} In this case, the secondary term of the lease was dependent upon the drilling of a second well within one year after the drilling of the first well. When Appellees failed to drill the second well, they failed to meet the express terms of the habendum clause of the oil and gas lease; therefore, the secondary term of the lease terminated by its own terms and 60 acres not included in the first well tract reverted to Appellants automatically.

{¶66} Based on the foregoing, we find that Appellees' claims were not barred by any statute of limitations.

{¶67} Appellants' First Assignment of Error is overruled.

{¶68} Accordingly, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Gwin, J., concur.

JWW/d 0126