[Cite as *Armstrong v. Chesapeake Exploration, L.L.C.*, 2015-Ohio-3310.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MYRON ARMSTRONG, et al.

Plaintiffs-Appellants

-vs-

CHESAPEAKE EXPLORATION, L.L.C., et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2014 AP 12 0056

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No 2014 CV 08 0472
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 14, 21015

APPEARANCES:

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Wise, J.

{¶1} Plaintiffs-Apellants Myron and Nikki Armstrong appeal the December 1, 2014, Judgment Entry entered by the Tuscarawas County Court of Common Pleas, granting the motion to dismiss filed by Appellees Chesapeake Exploration, LLC, EnerVest Operating, LLC and Belden & Blake Corporation.

STATEMENT OF THE CASE AND FACTS

{¶2} The relevant facts are as follows:

{¶3} On February 5, 2003, Plaintiffs-Appellants Myron and Nikki Armstrong became the owners of approximately 61 acres of real property located in Tuscarawas County, Ohio ("Property"). Complaint at ¶¶ 7-8, 20. When the Armstrongs acquired the Property, it was encumbered by an oil and gas lease ("Lease") entered into on July 11, 1972, by and between Delbert C. Edwards and Peggy Edwards as lessors and Stocker & Sitler Leasehold Corporation as lessee. *Id*. at ¶ 9.

{¶4} Under the terms of the Lease, the owner of the Armstrong Property was required to notify the lessor of any change in ownership of the property. *Id*. at ¶12. Additionally, among other things, the express terms of the Lease required that a 1/8 royalty be paid by the lessee for all oil and/or gas produced from the unitized property. *Id*. at ¶13.

{¶5} Following the execution of the Lease, the Armstrong Property was unitized with surrounding property to create a drilling unit. *Id*. at ¶ 14. An oil and/or gas well was drilled on one of the properties within the drilling unit; however, no oil and/or gas well has ever been drilled on the Armstrong Property. *Id*.

{¶6} Prior to Appellants obtaining ownership of the Armstrong Property, the Lease was assigned to Appellee Belden & Blake. *Id*. at ¶12.

{¶7} According to Appellants, upon purchase the Property, they promptly provided notice of the change in ownership as required under the terms of the Lease. *Id*. Appellants maintain that Appellees have failed to pay any of the required royalty payments due and owing to Appellants throughout their entire ownership of the Armstrong Property. *Id*. at ¶15.

{¶8} On August 4, 2014, Plaintiffs-Appellants, Myron Armstrong and Nikki Armstrong, filed an action seeking the cancellation of the oil and gas lease executed on July 11, 1972, for breach of its express terms.[1]

{¶9} On October 1, 2014, Defendants-Appellees, Chesapeake Exploration, LLC., EnerVest Operating, LLC. and Belden & Blake Corporation filed a Motion to Dismiss, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief could be granted.

{¶10} On December 1, 2014, the trial court granted Appellees' Motion to Dismiss.

{¶11} It is from this judgment entry Appellants appeal, raising the following assignment of error:

ASSIGNMENT OF ERROR

{¶12} "I. WHETHER THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS."

[1] Appellants' Complaint contains four separate causes of action: Count I: Breach of Express Terms, Count II: Quiet Title, Count III: Declaratory Judgment, Count IV: Slander of Title.

I.

{¶13} In their sole Assignment of Error, Appellants contend the trial court erred in granting Appellees' motion to dismiss. We disagree.

{¶14} In considering a motion to dismiss under Civ.R. 12(B)(6), a court must consider only the facts alleged in the complaint and any material incorporated into it. *State ex rel. Crabtree v. Franklin County Bd. of Health,* 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). For purposes of the Rule, the trial court must presume all facts alleged in the complaint are true and it must draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts warranting a recovery." *Id.* If there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant the motion to dismiss. *York v. Ohio State Highway Patrol,* 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). Dismissal is proper if the complaint fails to sufficiently allege an essential element of the cause of action. *State ex rel. Cincinnati Enquirer v. Ronan,* 124 Ohio St.3d 17, 2009–Ohio–5947, 918 N.E.2d 515, at ¶ 7–8. However, because of the notice pleading requirements of the Ohio Rules of Civil Procedure, "a plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until [he] is able to discover materials in the defendant's possession." *Id.*

{¶15} This Court reviews an order granting a Civil Rule 12(B)(6) motion to dismiss *de novo. Perrysburg Twp. v. City of Rossford,* 103 Ohio St.3d 79, 2004–Ohio–4362, 814 N.E.2d 44, at ¶ 5.

{¶16} In their Complaint, Appellants aver that Appellees' failure to pay royalty payments is a violation of the express terms of the Lease and that as a result of the period of non-payment "any extension of the primary term of the lease has lapsed as a matter of law and the Lease has terminated." Complaint at ¶ 16. A copy of the oil and gas lease was attached to Appellants' Complaint as Exhibit A.

{¶17} 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.).

{¶18} 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.

{¶19} The oil and gas lease in this case does not contain an express provision empowering the lessor or royalty owner to declare a forfeiture thereof for the nonpayment of oil and gas royalties from production.

{¶20} Absent specific language in the lease, nonpayment of royalties is not grounds for cancellation of an oil and gas lease. *Blausey v. Stein*, 6th Dis. Ottawa No. OT-78-3, 1978 WL 214959, (Dec. 8, 1978), aff'd, 61 Ohio St.2d 264 (1980); *Cannon v. Cassidy* (Okla. 1975), 542 P. 2d 514; *Kelly v. Ivyton Oil and Gas Co*. (1924), 204 Ky. 804, 265 S.W. 309; (An oil and gas lease binding the lessee to drill a well on the leased premises within a certain period or in lieu thereof make periodical payments of rental or delay money, and containing no clause of forfeiture, is not forfeited merely by nonpayment of the rental. It can be terminated only by surrender, abandonment, or expiration of the term.) *Pure Oil Co. v. Sturm*, 43 Ohio App. 105, (5th Dist. 1930) citing *Reserve Gas Co. v. Carbon Black Mfg. Co*., 72 W. Va. 757, 79 S. E. 1002. Other authorities, holding that a failure to pay deferred rentals on the stipulated date, where there is no forfeiture clause in the lease, will not work a forfeiture thereof, are cited as follows: Thornton, Oil and Gas, vol. 1, 881 § 180; *Smith v. People's Natural Gas Co*., 257 Pa. 396, 101 A. 739; *Jackson v. Twin State Oil Co*., 95 Okl. 96, 218 P. 324; *Harris v. Ohio Oil Co.,* 57 Ohio St. 118, 48 N. E. 502; *Wilson v. Pernell*, 199 Ky. 218, 250 S. W. 850; *Kies v. Williams*, 190 Ky. 596, 228 S. W. 40; Pryor Mountain Oil & Gas Co. v. Cross, 31 Wyo. 9, 222 P. 570; *Decker v. Kirlicks*, 110 Tex. 90, 216 S. W. 385; *McCallister v. Texas Co*. (Tex. Civ. App.) 223 S. W. 859; *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1095, 30 L. R. A. (N. S.) 176; *Castle Brook Carbon Black Co. v. Ferrell*, 76 W. Va. 300, 85 S. E. 544; *Davis v. Chautauqua Oil & Gas Co*., 78 Kan. 97, 96 P. 47;

Barnhart v. Lockwood, 152 Pa. 82, 25 A. 237; *Chandler v. Hart*, 161 Cal. 405, 119 P. 516; Ann. Cas. 1913B, 1094.

{¶21} In a recent case involving the issue of forfeiture of an oil and gas lease for failure to pay minimum royalty payments, the Fourth District Court of Appeals in *Sims v. Anderson*, Washington No. 14CA31, 2015-Ohio-2727,[2] stated:

> 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***

[2] In *Sims v. Anderson*, the lease contained an express forfeiture clause distinguishing it from this case and from those cases cited above.

> ***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.

{¶22} Appellants do not dispute the general rule as set forth above, but instead argue that the trial court should have applied the exception set forth in the case of *Black Diamond Coal Co. v. Buckeye Petroleum Co*., 4th Dist. CA-1271.

{¶23} Upon review, we find Appellants' reliance on *Black Diamond Coal* is misplaced. *Black Diamond* involved a case where the lessor had previously obtained a monetary judgment against the lessee which remained unpaid. Under this limited set of circumstances, the court held that such failure to satisfy the monetary judgment warranted cancellation of the lease because legal remedies had proven to be inadequate.

{¶24} Specifically, the court in *Black Diamond* held:

{¶25} "Where legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant."

{¶26} In the case *sub judice*, Appellants have never brought an action seeking a monetary judgment for the unpaid royalties. Appellants would then need so show that such judgment cannot or will not be satisfied by Appellees.

{¶27} Appellants, on appeal, also argue that violations of the implied covenants of good faith and fair dealing allow for the forfeiture of the Lease. However, upon review we find that Appellants did not assert this claim in their Complaint or raise this argument before trial court. 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.

{¶28} Appellants also argue for the first time that legal remedies would be inadequate in this case. Again, Appellants did not include such claim in their Complaint and we will not consider said argument for the first time on appeal.

{¶29} Based on the foregoing, we find no error in the trial court's dismissal of Appellants' Complaint pursuant Civ.R. 12(B)(6).

{¶30} Appellants' sole Assignment of Error is overruled.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., concurs.

Farmer, J., concurs in part and dissents in part.

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Farmer, J., concurs in part and dissents in part

{¶32} I respectfully dissent from the majority's opinion that Count I, Breach of Express Terms, does not survive a Civ.R 12(B)(6) motion. Count 1 claims failure to pay any royalties as required by the lease, and requests that because of the breach, the lease should be terminated.

{¶33} Appellees and the majority argue this is a claim for forfeiture. In *Black Diamond, supra,* the Supreme Court of Ohio acknowledged that forfeiture, although not contained in the lease itself, may be a remedy if no other remedy exists.

{¶34} From a reading of the four corners of the complaint and the lease, I would find that a Civ.R. 12(B)(6) dismissal is inappropriate and the claim should proceed.

{¶35} I concur that Count IV, Slander of Title, should be dismissed under Civ.R.12(B)(6) because of the statute of limitations.