[Cite as *Kenney v. Chesapeake*, 2015-Ohio-1278.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PATRICK R. KENNEY, et al. PLAINTIFFS-APPELLANTS VS. CHESAPEAKE APPALACHIA, L.L.C., et al. DEFENDANTS-APPELLEES	)	CASE NO. 14 CO 24 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Columbiana County, OH Case No. 13CV240

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants:

Atty. Sean R. Scullin
Atty. Timothy J. Cunning
Scullin & Cunning LLC
940 Windham Court, Suite 4
Boardman, Ohio 44512

For Defendants-Appellees:

Atty. Kevin Abbott
Atty. Michael R. Traven
Atty. Robert B. Graziano
Atty. Stacey Jarrell
Roetzel & Andress
155 E. Broad Street, 12th Floor
Columbus, Ohio 43215

Atty. Justin Werner
Reed Smith
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222

JUDGES:

Hon. Carol Ann Robb

Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 30, 2015

[Cite as *Kenney v. Chesapeake*, 2015-Ohio-1278.]
ROBB, J.

{¶1} Plaintiff-appellants Patrick Kenney et al. (collectively referred to as "Appellants") appeal the decision of the Columbiana County Common Pleas Court which granted summary judgment in favor of defendant-appellees Chesapeake Appalachia, L.L.C. ("Chesapeake Appalachia") and Statoil USA Onshore Properties, Inc. ("Statoil") (collectively referred to as "Appellees"). This appeal concerns the following language in paragraph 19 of various oil and gas leases: "Upon the expiration of this lease and within sixty (60) days thereinafter, Lessor grants Lessee an option to extend or renew under similar terms a like lease."

{¶2} Appellants argue that the clause did not create a legally binding offer as required for an option because there is no certainty as to the terms of an extension. They urge that "similar terms a like lease" applies to the word "extend" as well to the admittedly distinct word "renew" and dispute that the word "extend" by itself would necessarily mean on the exact same terms. We conclude that paragraph 19 plainly provides the lessee with the unilateral right to extend the contract on the same terms, including the durational term of five years.

{¶3} Appellants' second argument is that the trial court should have considered extrinsic evidence. They focus this argument on the allegation that industry custom was to obtain the lessor's signature on an extension. However, the evidence that the original lessee extended some leases by obtaining landowners' signatures did not establish that the language used in paragraph 19 had a special meaning or widespread use in the trade.

{¶4} Appellants' third argument is that the option was not actually exercised. In a letter and in a notice to be filed with the recorder's office, the lessee used the name "Chesapeake Exploration" instead of "Chesapeake Appalachia." The checks issued to Appellants were written on the account of Chesapeake Operating, Inc. As no specific method for accepting the option was provided in the contract, this argument is overruled.

{¶5} Appellants' fourth argument is that Appellees prematurely exercised the option before the lease expired and that is akin to untimely exercise of the option.

We conclude that the expiration of the lease was not a mandatory condition precedent to the ability to provide notice that an option is being exercised.

{¶6} For these and following reasons, Appellants' assignments of error are overruled, and the trial court's decision granting summary judgment in favor of Appellees is upheld.

STATEMENT OF THE CASE

{¶7} Appellants Patrick and Michelle Kenney, Joseph Calderone, and Roberta McClure, are landowners in Columbiana County. The Kenneys leased their minerals to Great Lakes Energy Partners, L.L.C. ("Great Lakes") on February 16, 2007. Mr. Calderone leased his minerals on April 14, 2007 to the same company. On January 4, 2008, Ms. McClure leased her minerals to Range Resources Appalachia, L.L.C. ("Range Resources"), who had acquired as a subsidiary the remaining one-half of Great Lakes that it did not already own.

{¶8} In December 2011, Range Resources assigned all of its Columbiana County leases to Appellees (divided 77.365% to Chesapeake Appalachia and 22.635% to Statoil). When the five-year primary terms were about to end, letters were sent to Appellants, stating that the option to extend the primary term of the lease by an additional five years was being exercised. Checks for the new delay rentals were enclosed.

{¶9} Appellants did not cash the checks and filed suit against Appellees in April 2013, seeking in pertinent part to have the extensions declared invalid and the leases declared expired. Competing summary judgment motions were filed. The issues presented in the motions that remain on appeal revolve around the second sentence of paragraph 19 in the leases, which paragraph provides:

> "19. In consideration of the acceptance of this lease by the Lessee, the Lessor agrees for himself and his heirs, successors and assigns, that no other lease for the minerals covered by this lease shall be granted by the Lessor during the term of this lease or any extension or renewal thereof granted to the Lessee herein. *Upon the expiration of this lease*

and within sixty (60) days thereinafter, Lessor grants Lessee an option to extend or renew under similar terms a like lease."

(Emphasis added).

{¶10} Appellants argued that the language "under similar terms a like lease" applied to "extend" as well as to "renew" and thus renegotiation (as opposed to unilateral exercise) was required. They stated the option was not a valid offer as it was too uncertain. They also claimed that the option was exercised prematurely and by the wrong Chesapeake entity. Finally, Appellants stated that the original lessees' practice was to renegotiate extensions. They provided various examples of extensions signed by Columbiana County lessors in favor of Great Lakes or Range Resources.

{¶11} On April 3, 2014, the trial court granted summary judgment in favor of Appellees. The trial court agreed with a federal district court that considered this same clause and concluded that it unambiguously provided an option to extend the lease on the same terms without renegotiating (or an option to renew under similar terms a like lease). *Citing Eastham v. Chesapeake Appalachia LLC*, S.D. Ohio 2:12-CV-0615 (Sep. 18, 2013). The trial court also agreed with the federal court's statement that the language does not create a condition precedent requiring the lessee to wait until the lease expired before announcing the exercise of the option. As the trial court found no ambiguity, the court refused to consider extrinsic evidence.

{¶12} Appellants filed the within appeal. They assert four assignments of error, all involving paragraph 19 of the lease. Before delving into these assignments, we set forth general, introductory law pertinent to the case.

GENERAL LAW

{¶13} We review the propriety of granting summary judgment de novo. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment can be rendered if, after construing the evidence in a light most favorable to the non-movant, it appears that reasonable minds can only come to one conclusion which is adverse to the non-movant. Civ.R. 56(C). Therefore, legal issues, such as the plain language of a contract, are properly addressed by way of

summary judgment practice. *See Peters v. Tipton*, 7th Dist. No. 07HA3, 2008-Ohio-1524, ¶ 9-10.

{¶14} When interpreting a contract, the court must give effect to the intent of the parties to the agreement which is presumed to be mirrored in the language used therein. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 ¶ 11. Words and phrases are given their common and ordinary meanings unless another definition is clearly evident in the contract itself or there would be manifest absurdity. *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield*, 100 Ohio St.3d 216 at ¶ 11.

{¶15} If the court cannot decipher the plain language of the contract, then the fact-finder can consider extrinsic evidence to resolve the ambiguity and ascertain the parties' intent. *Id.* at ¶ 11-13. And, where the written contract is standardized and between parties of unequal bargaining power, any ambiguities are strictly construed against the drafter and in favor of the non-drafting party. *Id.* at ¶ 13.

{¶16} It has been stated that an option contract involves an offer to perform an act and a binding agreement to leave the offer open for a particular period, which does not become a contract until accepted. *See, e.g., Plinkerd v. Mongeluzzo*, 73 Ohio App.3d 115, 122, 596 N.E.2d 601 (3d Dist.1992). The option itself is said to be unilateral. It binds one side without binding the other. The potential accepting party can withdraw any time prior to his acceptance, but the offering party cannot withdraw from the option. *Id.*

{¶17} Appellants note that an offer to enter a contract should be definite and certain, citing *Mr. Mark Corp. v. Rush, Inc.*, 11 Ohio App.3d 167, 169, 464 N.E.2d 586 (11th Dist.1983). Appellants then conclude that the elements of the offer in an option must be definite. In general, an offer cannot be accepted to form a contract unless the terms of the contract are reasonably certain. *Id.*, citing Restatement of the Law 2d, Contracts (1981) 92, Section 33. The terms are reasonably certain if they provide a basis for determining a breach and for remedying the breach. *Id.* The fact

that one or more terms of a proposal are left open or uncertain may show that the item is not intended to be understood as an offer. *Id.*

{¶18} "The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable." *Id.* (quoting comment f). However, in many cases, an option is merely a collateral offer to keep open for a specified period the main offer, whose terms are already detailed in the contract. *Howick v. Lakewood Village Ltd. Partnership*, 3d Dist. No. 10-08-20, 2009-Ohio-1921, ¶ 38, citing *Ritchie v. Cordray*, 10 Ohio App.3d 213, 215, 461 N.E.2d 325 (10th Dist.1983) (noting that the two offers are sometimes confused by the parties).

{¶19} Both sides cited a case where a lease contained "the right and option to renew and extend for a further period of three (3) years" and further stated that the rental for the new period was "to be subject to agreement between the parties at that time." The Ohio Supreme Court found that this was not a mere renewal clause but an extension at a rental to be determined later, meaning that "the identical lease was thereby extended for three years at a reasonable rental." *Moss v. Olson*, 148 Ohio St. 625, 629, 76 N.E.2d 875 (1947). The Court concluded that since all other terms of the lease were fixed, the rental was a matter of form not substance and did not make the option to extend too indefinite to be valid because a court can supply the reasonable rental if the parties do not agree. *Id.* at 630. *See also Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 556 N.E.2d 515 (1990) (agreement to agree, such as on price, is enforceable when the parties have manifested an intention to be bound by their terms and when these intentions are sufficiently definite to be specifically enforced).

{¶20} The Supreme Court has further clarified that a contract containing an option to "extend" for a given term is distinct from a contract containing an option to "renew" for a given term. *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 457, 166 N.E.2d 365 (1960). A contract containing an option to extend an agreement constitutes a present grant which, if the option is exercised, operates to extend the term of the original agreement. *Id.* at 457-458. At that time, the contract "becomes

one for both the original and the extended term." *Id.* On the other hand, a contract containing an option to renew grants the right to execute a new contract upon exercise of the option; the present grant is only for the original term after which the parties must execute a new contract. *Id.* at 457.

{¶21} Therefore, an option to extend for an additional term results in the original contract applying, except with regards to the specific features mentioned in the option. By definition, an extension operates to extend the original agreement, which remains as the governing instrument.

ASSIGNMENT OF ERROR NUMBER ONE

{¶22} Appellants' first assignment of error provides:

"The trial court erred in finding that the option in Paragraph 19 contains a legally binding offer."

{¶23} Appellants agree that pursuant to the Ohio Supreme Court's *Ferguson* case, "extend" and "renew" are distinct terms and that paragraph 19 contains two choices. However, they urge that both choices are modified by the words, "under similar terms a like lease." Appellants then argue that a unilateral option to extend was not created because that language is too indefinite to constitute an offer. They urge that there could be no meeting of the minds as to the meaning of the phrase "under similar terms a like lease." Rather, they say renegotiation was required for extension (as well as for renewal) and thus the option granted in paragraph 19 is akin to a right of first refusal.

{¶24} Appellants assert that paragraph 19's purpose in giving a choice of extension or renewal is because different law would apply to the instrument depending upon whether the lessee chooses an extension or a renewal, noting that an extension allows the law at the time of the original contract to apply while a renewal would not. *See Xenia v. State*, 140 Ohio App.3d 65, 73-74, 746 N.E.2d 666 (10th Dist.2000) (only ordinances existing at time of original contract applied where extensions, as opposed to renewals, occurred). *See also Barry v. The Cincinnati Ins. Cos.*, 10th Dist. No. 01AP-1437, 2002-Ohio-4898, ¶ 22 (new law applies to a renewal because a renewal results in a new contract, whereas an extension does not result in

a new contact), citing *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 695 N.E.2d 732 (1998).

{¶25} Appellants' argument revolves around their position that use of the word "extend" does not mean that an extension is on the exact same conditions for all of the exact same terms. They argue that the trial court improperly added language to the contract so that it provided an option to extend "for another five-year primary term on the exact same terms and conditions."

{¶26} Appellees respond that the phrase "under similar terms a like lease" modifies only the word "renew." Any alleged uncertainty in that phrase is therefore said to be irrelevant because they did not exercise the renewal option. Appellees explain that the very reason the law at the time of the contract applies where there is an extension is because *the exercise of an extension continues the same contract*. They urge that since an option to extend continues the same instrument, the original lease provides all the necessary terms for the lease as extended. Appellees also point out that no language indicates that the clause was merely a right of first refusal.

{¶27} Appellants note in reply that they do not argue, as the Jefferson County landowner in *Eastham* did, that "extend" and "renew" were used synonymously in paragraph 19. Still, Appellants employ the landowners' argument in *Eastham* that Chesapeake did not have a unilateral option to extend but was required to negotiate any extension or renewal and was merely granted a preferential right of first refusal to acquire an extension or renewal on the same terms the lessor is willing to accept from a third party. An issue in that case was also whether the "like lease" with "similar terms" had to be renegotiated for an extension. The *Eastham* landowners alleged that the option language was invalid as well. *See Eastham v. Chesapeake Appalachia, L.L.C.*, S.D. Ohio 2:12-CV-0615 (Sep. 18, 2013).

{¶28} That federal district court found the words "extend" and "renew" had distinct meanings and also rejected the argument that "under similar terms a like lease" applied to the extension, concluding that paragraph 19 unambiguously granted Chesapeake the option to extend on the same terms without renegotiation. *Id. See also Benzel v. Chesapeake Exploration*, S.D. Ohio 2:13-CV-280 (Sep. 30, 2014)

(where another federal judge applied *Eastham* to give effect to the entire unambiguous clause of paragraph 19 so that the defendant could bind the plaintiff to a new agreement under similar terms *or to an extension of the original agreement*).

{¶29} The United States Court of Appeals for the Sixth Circuit affirmed, agreeing that paragraph 19 was not ambiguous under Ohio law. *See Eastham v. Chesapeake Appalachia L.L.C.,* 754 F.3d 356, 361 (6th Cir.2014). The Sixth Circuit concluded that paragraph 19 cannot reasonably be construed to provide an option "to extend under similar terms a like lease or to renew under similar terms a like lease" as the concluding phrase does not modify "extend." *Id.* The Ohio Supreme Court's *Ferguson* case was cited to point out that extend and renew had distinct definitions in Ohio and that the landowner's interpretation would make "renew" superfluous and redundant. *Id.* at 361-363.

{¶30} The Sixth Circuit noted and distinguished an older Ohio Supreme Court case. *Id.* at fn.1, citing *Corvington v. Heppert*, 156 Ohio St. 411, 103 N.E.2d 558 (1952). That holding was limited to cases where the lease option contained no explanation of the word renew; the option in that case did not state extend or renew or even use the word extend. The contract specifically stated that any renewal would be on the same terms. *See id.* The option to renew for a specific duration on the same terms was construed as a right to an extension requiring no new contract. *Corvington*, 156 Ohio St. 411 at ¶ 1 of syllabus.

{¶31} The Sixth Circuit ruled that the only reasonable construction of paragraph 19 is that it grants the lessee two options: (1) to extend the lease on the same terms as the existing leases, or (2) to renegotiate for a renewed "like lease" on similar terms. *See Eastham,* 754 F.3d at 361. The Court explained that "when Chesapeake exercised its option to extend the lease, it bound the Easthams to the same agreement to which they were previously bound, but for a new period of years." *Id.* at 362. That new period of years was the original primary term contained in the original lease.

{¶32} A landowner made these same arguments about paragraph 19 to a federal district court in West Virginia, including the argument that paragraph 19 was

insufficient to convey an option and was vague. The court concluded that the use of the word "extend" necessarily implied that the existing terms and conditions of the existing lease would continue due to the very definition of a contract extension, explaining:

> In other words, the inclusion of an explanatory direct object is not necessary for the term "extend," as it necessarily means that the existing lease continues. The term "renew" however, while obviously implying the creation of a new lease, could be interpreted as allowing the Lessor to demand an entirely differing lease under very different terms. In order to limit the meaning of "renew," the contract thus must include the explanatory direct object of "like lease" and "similar terms."

See Brown v. Chesapeake Appalachia LLC, N.D. W.Va. No. 5:12-CV-71, p. 14 (Aug. 21, 2013) (paragraph 19 thus provides two options: extend the existing lease or renew a like lease under similar terms). *See also Bissett v. Chesapeake Appalachia L.L.C.*, N.D. W.Va. 5:13-CV-20, p. 4-5 (Apr. 29, 2014) (where another federal judge adopted the *Brown* position and found that paragraph 19 provided a unilateral right to extend and prolong the current lease and that "extend" was not modified by the same clause that modified "renew").

{¶33} The *Brown* court also disposed of a perpetuities argument by explaining the rule that, unless the lease expressly provides for perpetual renewal, an extension clause grants only a single right to extend as that clause of the original lease does not insert into the continued lease. *Id.* at 16-17. Ohio has a like position. *See Hallock v. Kintzler*, 142 Ohio St. 287, 289, 51 N.E.2d 905 (1943) (lease permits only single renewal unless clearly stated otherwise).

{¶34} In the *Moss* case mentioned in the introductory law section, the lease was for a two-year term and the option to extend provided for an additional term of three years at a rental rate subject to agreement of the parties. The Court framed the issue as whether the covenant to extend "for a specified term" (upon the giving of a certain notice) at a rental to be decreed was enforceable by specific performance and

not uncertain or indefinite. *Moss*, 148 Ohio St. at 628. The main issue was whether the option was too uncertain where rent was subject to future agreement. The Court adopted the minority position regarding a reasonable rental and then concluded that the exercised option bound the parties: "to all the conditions of the original lease save the duration and rental. The duration of the extended term was definitely fixed, the amount of rental was also fixed being a reasonable rental which the court could decree." *Id.* at 638.

{¶35} Appellants suggest that the mention of a definitely fixed duration in the option was meaningful to the Court's certainty analysis. However, the Court was emphasizing that only rent was left to be determined and not both rent and duration. Just because the option clause in that case provided a different duration for the extension does not mean that a term is missing when an option clause does not specifically list a duration. If, as acknowledged in *Moss*, an extension is "the identical lease," then the duration would be the same *unless stated otherwise*.

{¶36} Thus, *Moss* does not support Appellants' position that an option to extend without a specific statement as to duration is indefinite. Instead, it tends to support Appellees' position: that an extension necessarily entails an additional term for the same duration as the original term, and the contract is regarded as if it is beginning again. Appellants cite no law directly stating that the option to extend must contain the duration of the extension or it is invalid as an offer.

{¶37} The Supreme Court of West Virginia has stated that: "A general covenant to extend or renew implies an additional term equal to the first, upon the same terms, including that of rent, except the covenant to renew * * *." *Lawson v. West Virginia Newspaper Pub. Co.*, 126 W.Va. 470, 29 S.E.2d 3 (1944) (while explaining how the option to extend again is the only term that does not automatically carry to the extended contract). *See also* Annotation, 23 A.L.R.4th 908, Section 2 (1983) (in construing lease terms on renewal or extension, the option is construed to give the rights on the same conditions and for the same time as the original lease). Thus, a bare option to extend inherently provides the duration of the extension: the same time as the original lease. *See id.*

{¶38} Furthermore, the Supreme Court of Minnesota ruled on a case where the extension clause contained a blank for the length of the additional term, but the blank was not completed. *Hildebrandt v. Newell*, 199 Minn. 319, 272 N.W. 257 (1937). That court ruled, because the blank was not filled in, the contract was automatically extended for the same duration as the original term. *Id.* at 321. "The lease as extended is regarded as continuing from the very beginning of the original lease." *Id.*

{¶39} Although options for extensions often contain a specific duration for the extension, when no duration is specified, we conclude that the original contract terms merely take over to provide the duration. Contrary to Appellants' position, the contractual language was not required to state: "an option to extend *under identical terms the existing lease* or renew under similar terms a like lease." Instead, the granting of an option to extend (without stating the duration of the extension) necessarily meant for a term equivalent to the original contract's term.

{¶40} In sum, paragraph 19 is enforceable as a unilateral option to extend. The phrase "under similar terms a like lease" does not modify "extend." "Extend" and "renew" have different definitions under Ohio law. Those very definitions mean that the phrase only modifies renew. A contract containing an option to extend "constitutes a present grant which, upon exercise of the option, operates to extend the term of the original agreement and the contract then becomes one for both the original and the extended term." *Ferguson*, 170 Ohio St. at 459.

{¶41} The option to extend necessarily encompassed the terms of the original contract. The only exception is the extension clause itself, which can only be exercised once pursuant to Ohio law. *See Hallock v. Kintzler*, 142 Ohio St. 287, 289, 51 N.E.2d 905 (1943) (lease permits only single renewal unless clearly stated otherwise). Since the terms of the original contract applied to the extension, any essential durational term for a binding offer was present in the original contract itself and the option to extend was a complete offer. Appellants' first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶42} Appellants' second assignment of error contends:

"The trial court erred by failing to consider evidence of industry custom when interpreting the language of the option in Paragraph 19."

{¶43} After insisting that the plain language of paragraph 19 does not provide for an extension of the lease under the exact same terms for another five years, Appellants alternatively state that "the circumstances surrounding the lease invest the language of Paragraph 19 with a special meaning." They urge that their evidence of industry custom favors their interpretation of paragraph 19. Specifically, they argue that the original lessees, Great Lakes and Range Resources, approached certain Columbiana County landowners prior to lease expiration and obtained signed extensions rather than unilaterally announcing an extension under paragraph 19. *See* Plaintiffs' Motion for Summary Judgment at 3, 7-8, 17-18, 39-40, Exhibits B-G (examples of six leases with same paragraph and subsequent extensions signed by landowner); Plaintiffs' Response to Defendants' Motion for Summary Judgment at 1-2, 4, 14, 17, Exhibits A-B (nine leases with extensions signed by landowners, and five that were extended twice in this manner). [1]

{¶44} The parties' intent is presumed to reside in the language they chose to use in the contract. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987). "Courts resort to extrinsic evidence of the parties' intent 'only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning'." *See State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 2004-Ohio-7120, 820 N.E.2d 910, ¶ 23, quoting *Kelly*, 31 Ohio St.3d at 132. There are thus two uses of extrinsic evidence set forth in the above test.

{¶45} Appellees' response focuses on the first portion of the *R.J. Reynolds* case's use of extrinsic evidence. Likewise, the trial court here and various federal

[1]Appellees state that Appellants' brief fails to cite the part of the record supporting this argument. Although they fail to do so under the assignment of error, their statement of facts points to a pertinent portion of the record below. Appellants' Brief at 3, citing Plaintiffs' Response to Defendants' Motion for Summary Judgment, Exhibits A-B.

courts examining the issue found that paragraph 19 involved unambiguous, plain language as explained above and refused to address the landowners' extrinsic evidence of the parties' intent. *See Eastham v. Chesapeake Appalachia, L.L.C.,* 754 F.3d 356, 364 (6th Cir.2014) ("Having concluded that the lease is unambiguous, we decline to address the Easthams' extrinsic evidence of the parties' intent."); *Eastham v. Chesapeake Appalachia, L.L.C.*, S.D. Ohio 2:12-CV-0615 (Sep. 18, 2013). *See also Benzel v. Chesapeake Exploration, L.L.C.*, S.D. Ohio 2:13-CV-280 (Sep. 30, 2014) ("Because the contract language at issue is unambiguous, the Court need not review extrinsic evidence, including the fact that third-party contract drafter Range indicated that it did not adopt a formal position regarding the meaning of Paragraph 19."); *Brown v. Chesapeake Appalachia, L.L.C.*, N.D. W.Va. No. 5:12-CV-71 (Aug. 21, 2013), fn.2 (parol evidence that Chesapeake offered to negotiate an extension in another paragraph 19 lease was irrelevant as the court found paragraph 19 unambiguous). Due to the resolution of the first assignment of error finding plain language, we overrule any general argument that extrinsic evidence should be viewed to resolve an ambiguity.

{¶46} However, Appellants' alternative argument focuses on the second half of the extrinsic evidence rule. Appellants propose that industry custom of the original lessees in Columbiana County provides the option language with special meaning. On this topic, the Supreme Court has further stated:

> "It is well-settled that although extrinsic evidence of a general custom or trade usage cannot vary the terms of an express contract, such evidence is permissible to show that the parties to a written agreement employed terms having a special meaning within a certain geographic location or a particular trade or industry, not reflected on the face of the agreement."

Alexander v. Buckeye Pipe Line Co., 53 Ohio St.2d 241, 248, 374 N.E.2d 146 (1978).

{¶47} In *Alexander*, the Court found that an affidavit from one driller was insufficient to raise a genuine issue of material fact for summary judgment purposes

on the meaning of the terms "oil" and "gas" where the issue was whether those contractual terms would include both the natural and the refined forms of the substances. The Court concluded that the affidavit did not "evince a custom or usage so widespread in the oil and gas industries as to support a valid presumption that the parties having knowledge of the special usage, must have intended limited meanings when they employed the terms" in the agreement. *Id.* at 248.

{¶48} It does not appear that the courts in *Eastham* and *Brown* considered this use of extrinsic evidence. The *Benzel* court doubted extrinsic evidence could be considered due to the unambiguous language but added that the parol evidence in that case would not change the outcome as it did not show special meaning was attached. *See Benzel*, S.D. Ohio 2:13-CV-280. The *Bissett* court considered whether the *Eastham* interpretation of paragraph 19 would change based upon added allegations that a deposed expert testified that the terms "extend" and "renew" have distinct meaning but are often used interchangeably in the oil and gas industry and that Range Resources expressed that it had no opinion as to the meanings of the terms. *See Bissett v. Chesapeake Appalachia, L.L.C.*, N.D. W.Va. 5:13-CV-20, p. 6-7 (Aug. 29, 2014). The *Bissett* court rejected the claim that the definitions would change with this additional evidence. *Id.*

{¶49} We conclude that the court was not required to consider extrinsic evidence of an alleged special meaning distinct from that of Ohio law on the terms used. There was nothing to explain why the two related companies obtained signatures on some extensions. It was merely speculated that Great Lakes and Range Resources did not believe they entered a contract providing a unilateral right to extend for another five-year term.

{¶50} The matter before us does not involve a certain geographic location. There is nothing to indicate the language "option to extend or renew under similar terms a like lease" varies from place to place or involves geographic features of a particular location. Additionally, no affidavit or testimony was presented on special meanings or usage within the industry. The extensions signed by other landowners

did not provide direct evidence that a special meaning was attached to the words in paragraph 19 so as not to employ the meanings of terms provided by Ohio law.

{¶51} The examples of signed extensions did not establish a widespread usage in the oil and gas industry. In other words, the documents did not "evince a custom or usage so widespread in the oil and gas industries as to support a valid presumption that the parties having knowledge of the special usage, must have intended limited meanings when they employed the terms." *See Alexander*, 53 Ohio St.2d at 248. *See also Chuparkoff v. Farmers Ins. of Columbus*, 9th Dist. No. 22712, 2006-Ohio-3281, ¶ 18 (no genuine issue of material fact even though there was testimony from other insurance agents who interpreted the disputed term the same as the plaintiff-agent because such testimony did not show widespread use in industry or that unique meaning was attributed to the word in the industry).

{¶52} We conclude that the extensions signed by other landowners did not provide direct evidence that the terms of the option were imbued with a special meaning distinct from Ohio law governing those terms. In accordance, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

{¶53} Appellants' third assignment of error contends:

"The trial court erred in finding that Chesapeake Exploration, L.L.C. had the ability to exercise the purported option in Paragraph 19."

{¶54} As aforementioned, the leases at issue were assigned by Range Resources to Chesapeake Appalachia and Statoil in December 2011. As each lease approached the end of the five-year primary term, Appellants were contacted regarding the exercise of an extension for an additional five-year primary term. Although they do not do so under this assignment of error, in their statement of facts, Appellants point to Exhibits S and T to the Amended Complaint and Exhibit K to their Motion for Summary Judgment.

{¶55} Exhibit S to the Amended Complaint is a letter to Landowner McClure dated January 3, 2013, stating that "Chesapeake Exploration, L.L.C." is successor to Range Resources, that "Chesapeake" is now the owner of the January 4, 2008 lease,

and that "Chesapeake" has elected to extend the January 4, 2008 lease under paragraph 19 for an additional five-year primary term. It was written on a "Chesapeake Energy" letterhead with a "Land Department" subtitle and with "Chesapeake Energy Corporation" contact information at the base of the page. It was signed, "Chesapeake Exploration, L.L.C." by Jeffrey R. Pinter, who is elsewhere said to be the Operations Land Manager-Utica Shale for Chesapeake Energy Corporation.

{¶56} The attached check was written on the account of "Chesapeake Operating, Inc. Delay Rental Account" and was connected to the bottom of a deposit receipt of said company for purposes of a five-year extension. A notice of extension was also attached for future recording, stating that Chesapeake Exploration, L.L.C. as successor by assignment tendered payment in order to extend the lease for an additional five-year primary term. The notice of extension was signed in the same manner as the letter.

{¶57} Exhibit T to the Amended Complaint is a similar letter also on Chesapeake Energy letterhead to Landowner Calderone dated March 14, 2012, extending his April 14, 2007 lease. It contained the same statements regarding Chesapeake Exploration. Attached was a similar deposit receipt and check involving Chesapeake Operating, Inc. A notice of extension involving Chesapeake Exploration, L.L.C. was attached as well. Exhibit K to the Plaintiffs' Motion for Summary Judgment provided similar documents concerning the Kenney lease.

{¶58} On this topic, the Complaint stated that Chesapeake Exploration rather than Chesapeake Appalachia filed the notice of extension, and the plaintiffs sought a finding that the defendant did not file the notice of extension. It was stated that Chesapeake Exploration was an Oklahoma limited liability company whose members were Chesapeake Appalachia, L.L.C., Chesapeake Operating, Inc., and Chesapeake E&P Holding, Inc. *See* Answer at ¶ 41. The record shows that Chesapeake Energy Corporation, Chesapeake Exploration, L.L.C., and Chesapeake Appalachia, L.L.C. all have the same mailing address at 6100 N. Western Avenue in Oklahoma City.

{¶59} In seeking summary judgment, Appellants changed the focus of their argument. They argued that acceptance of the offer was by a Chesapeake entity with no power to accept as the lessee was Chesapeake Appalachia. The emphasis was not only on the language of the notice filed with the recorder but also on the check being tendered by Chesapeake Exploration (via the letter) but written on a Chesapeake Operating, Inc. account. Appellants suggested that proof of an agency relationship could have resolved the problem but urged that the defendants did not set forth evidence of such.

{¶60} As to the specific claim in Appellants' complaint, Appellees insisted that the language of the option did not specify the method of extension or require that it be accomplished by a filing. They thus urged that the proper entity's alleged failure to "file" an extension would not eliminate the fact that the option to extend was exercised. Appellees added that as the option had no particular method for acceptance, there was no contractual mandate regarding the name on the checking account on which the check was drawn. Appellees also urged that the naming issue in the letter and notice was at most a scrivener's error.

{¶61} Appellants' assignment of error focuses on the following statement of the trial court (made after concluding that paragraph 19 provided an option to extend without renegotiation): "As the successor in interest to Great Lakes and as the owner of each lease, Chesapeake Exploration validly exercised the option within the time period prescribed by each Lease." As can be seen from the above recitation of facts pertinent to the Chesapeake Exploration issue, both sides proceeded under the premise that Chesapeake Appalachia was the owner of the leases at the time of the extension.

{¶62} Appellants reiterate their argument that the entity who tried to exercise the extension option did not have the power to accept the offer as only Chesapeake Appalachia had that power. In urging that the option could only be exercised by the party to whom it was granted, Appellants cite cases dealing with a non-party to an offer or option attempting to exercise the option and seeking a court order to compel acceptance.

{¶63} In one case, a plaintiff contemplated purchasing a house but his mother was named as the purchaser instead. The purchase agreement provided the mother with a two-year option to buy an undeveloped neighboring lot. When the plaintiff attempted to exercise that option, the sellers refused to convey the property. The court held that the plaintiff had no interest in the purchase agreement containing the option and his subjective interest in the property did not give rise to his legal authority to exercise the option granted to someone else. *Croucher v. Schwing*, 12th Dist. CA85-03-017 (May 19, 1986). As the plaintiff never demonstrated that he held a recognizable interest in the home or the option for the other lot and no form of agency existed, the *Croucher* court reversed the trial court's order of specific performance of the option. *Id.*

{¶64} In another case, involving an offer to purchase securities made in a letter solely to a realty company, the court held that the plaintiff-bank who held the securities as collateral could not accept the offer. *Engineers' Natl. Bank v. Harris*, 32 Ohio Law Rep. 576 (8th Dist.1930). The court stated that the "relationship was too distant to create such a legal connection as is necessary to impose an obligation" on the part of the offeror to the plaintiff-bank, who was said to be a "stranger to the controversy" and "alien to any obligation" imposed on the offeror. *Id.*

{¶65} "[T]he lack of this legal nexus with respect to the obligation between plaintiff and defendant" imposes no obligation on the offeror regarding his offer. *Id.* (noting that there is no indication that the offeror used the party to whom he sent the offer as an agent to communicate the offer to the bank). "This is a substantial and not a technical proposition, because one cannot be bound to everybody under a specific obligation made to a definite and distinct entity, unless the obligation is transferred by way of agency or otherwise * * *." *Id.* It was also stated that the bank did not own the securities but merely held them under a pledge and may not have been able to complete a private sale. *Id.*

{¶66} As Appellees point out, the present case does not involve a non-party to the contract interjecting itself into an offer on its own behalf and then asking the court to bind the offeror to the non-party. That is, Chesapeake Exploration is not

asking the court to declare it the new lessee under the option. Nor is that company asking the court to enforce the extension as that company is not a party herein. The landowners sued Chesapeake Appalachia, who was the lessee. Chesapeake Appalachia filed a counterclaim seeking to declare its rights regarding the extension, which it claimed that it properly exercised. It was undisputed that said entity had the right to invoke whatever right paragraph 19 granted.

{¶67} In a recent case, a lessee assigned its interest in an Ohio oil and gas lease to another company. Three years later, the original lessee sent a letter and a check to the landowners to exercise an extension option and filed a notice of extension with the recorder's office. The court first found that the naming of the landowners on the checks individually instead of through their limited liability company and mistakenly mailing the check to the house next door was substantial performance under the terms for accepting the option where the lessor actually received the documents. *Baile-Bairead, L.L.C. v. Magnum Land Servs., L.L.C.*, 19 F.Supp.2d 760, 767-768 (S.D.Ohio 2014). In addition, the court rejected the argument that the current lessee did not act to preserve its interests because the original lessee, rather than the current lessee, issued the extension check and filed the affidavit of extension in the recorder's office. *Id.* at 768-769 ("That Magnum acted to extend the leases on Belmont's behalf does nothing to change Belmont's rights.") We recognize that the court supported its holding with considerations not at issue in the case before us, stating that an assignor can act on behalf of an assignee in exercising the extension option under Ohio law and the contract before that court.

{¶68} In any event, the provision of actual notice regarding the exercise of the option is generally valid unless violative of a contractual provision. "In an option contract, a party may exercise its option *only* in the manner provided in the contract." (Emphasis original). *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1983). Where the option is silent as to the manner of acceptance and merely provides for the time of acceptance, it is sufficient to give timely notice and then later tender performance within a reasonable time. *See, e.g., In re Estate of De Saint-Rat*, 12th Dist. No. CA2007-02-052, 2008-Ohio-2109, ¶ 15, citing *English v.*

English, 44 S.W.3d 102 (Tex.App.2001). Verbal or written acceptance is permissible where the option does not specify the manner of acceptance. *Bingham v. Shoup*, 2d Dist. No. 431 (June 12, 1936). *See also* R.C. 1302.09(A)(1) (an offer in the commercial context shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances).

{¶69} Here, there is no dispute that the performance under the extended contract (payment of delay rentals/paid-up lease payment) was tendered. The lease did not require the exercise of the option by a particular ritual. The lease did not require payment in a certain form, e.g. from a particular account or paid directly by the lessee. *See Bingham,* 2d Dist. No. 431. *See also Butler v. Howittz*, 74 U.S. 258, 260-261, 19 L.Ed. 149 (1868) (the tender of any lawful money satisfies contract in the absence of an express stipulation as to the form of payment).

{¶70} The account on which an extension payment is drawn does not govern whether an option was exercised by the lessee. Thus, the writing of the checks by Chesapeake Operating, Inc. (Chesapeake Appalachia's fellow member of Chesapeake Exploration) does not allow a landowner to claim in the summary judgment stage that the option was technically never exercised. In fact, the payment under the lease alone constituted the exercise of the option as the issue is essentially the notice provided to the landowners that the option was being invoked.

{¶71} The concern with the name on the letter containing the check is not dispositive. It constituted an innocuous misnomer under the facts of the case. The letter was written on the letterhead of the main company, Chesapeake Energy Corporation. The letter stated that Chesapeake Exploration, L.L.C. was the assignee of the lease who was exercising the option when the actual assignee of the lease was Chesapeake Appalachia, L.L.C. (a member of the limited liability company of Chesapeake Exploration). This is a name in a letter; it is not comparable to a legal issue of standing or service.

{¶72} Moreover, it appears that Appellants understood that its current lessee was exercising the option. One of the landowners was advised over the telephone, prior to the tendering of the check, that an extension was forthcoming from the

lessee. (Calderone Depo. at 49-50, 62). Another landowner specifically contacted their lessee to seek increased rentals per acre and received the letter and check for extension in response. (P. Kenney Depo. at 26, 34-35). And the third landowner called the lessee to complain after receiving the letter (and was offered increased rentals per acre due to her objections to the extension). (McClure Depo. at 33). Again, we have satisfaction of the overriding concern in the exercise of an oil and gas option that does not express any limitations in acceptance besides timeliness: notice to the landowner.

{¶73} Finally as aforementioned, Chesapeake Appalachia's failure to "file" a notice of extension *was the only claim made in the complaint as to the Chesapeake Exploration matter*, and the plaintiffs' sought a declaration that a notice of extension was not filed. The option clause did not require the notice to be filed in the recorder's office in order to timely exercise the option to extend. *Compare Sauder v. Frye*, 613 S.W.2d 63, 64 (Tex.App.1981) (where lease stated that execution in writing and recording was required to preserve the interest of pooled unit past expiration). Even an unrecorded original lease, which must be recorded by statute, is valid between the parties. *See* R.C. 5301.09. Thus, the misidentification of the assignee who exercised the option in the notice generated for filing in the recorder's office in order to put the public on notice does not govern whether the option was timely exercised. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶74} In their final assignment of error, Appellants assert:

"The trial court erred in finding that the purported option in Paragraph19 could be extended before the oil and gas leases expired."

{¶75} Appellants insist that any attempt to exercise the option to extend prior to the expiration of the lease violates the following timing requirements of paragraph 19: "Upon the expiration of this lease and within sixty (60) days thereinafter, Lessor grants Lessee an option to extend * * *." Appellants believe that the expiration of the lease was a condition precedent to the existence of the option and thus premature exercise was invalid.

{¶76} As to the particular landowners, Appellants complain that the check was mailed and the notice of extension was signed thirty days before expiration of the April 14, 2007 Calderone lease. (The notice was recorded prior to expiration as well.) They state that the Kenneys' check was mailed and the notice of extension signed eight days before that February 16, 2007 lease was set to expire. (This notice was not filed in the recorder's officer until after expiration.) The check to Ms. McClure was mailed and the notice of extension signed only one day before the January 4, 2008 lease was set to expire. As there is no indication she received the letter and check in Columbiana County, Ohio on the same day that it was signed in Oklahoma (and recording of the notice did not occur until a week later), the arguments here would not apply to her situation.

{¶77} Appellees urge that the documents referring to the extension make clear that the extended leases do not take effect until the expiration of the prior term of the lease as they refer to an extension for an "additional" five-year primary term. They conclude that the effective date of the extension, not the date of notice, is important. Appellees cite federal cases disagreeing with the landowners' arguments about premature exercise of the option in paragraph 19. They state that paragraph 19 merely provides a deadline for the option, not a preclusive start date. They point out that a court is to avoid interpreting a contract to impose a condition precedent unless the intent is plain as the law generally disfavors a condition precedent. *Citing Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007, ¶ 14-15 ("absent an explicit intent to establish a condition precedent, courts will not interpret a contractual provision in that manner, particularly when a forfeiture will result.").

{¶78} Appellants cite cases which they believe support the proposition that the day on which the option comes into existence is just as important as the date on which it expires. However, those cases did not address an issue of early exercise but dealt with tender of performance after exercise of the option. For instance, the contract in *Stockmaster* stated that the party could exercise an option within thirty days after the appraisal was approved by the probate court with payment made and

closing had within sixty days of the election. *In re Estate of Stockmaster*, 3d Dist. No. 13-10-33, 2011-Ohio-3006, ¶ 15. That case was about the failure to close within sixty days of the exercise of the option and did not deal with early exercise. *Id.* ¶ 18.

{¶79} In discussing paragraph 19, the Sixth Circuit disclosed that it was unable to locate any case where the option failed because it was exercised too early. *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 364 (6th Cir.2014). The court in *Benzel* similarly stated that it uncovered no case supporting the landowners' position on the early exercise of an option. *See Benzel v. Chesapeake Exploration*, S.D. Ohio 2:13-CV-280 (Sep. 30, 2014).

{¶80} The Sixth Circuit then ruled that the language of paragraph 19 does not provide a condition precedent of lease expiration before the option can be exercised, rejecting the argument that premature exercise of the option was invalid. *Eastham*, 754 F.3d at 364. The court alternatively concluded that "the early filing of the extension was nonmaterial * * *." *Id.* (stating that the general rules on nonoccurrence of a condition precedent do not bar performance if the condition is of minor importance and a mere technicality).

{¶81} The affirmed *Eastham* district court, in rejecting the landowners' argument on premature exercise of the option concluded that paragraph 19's "phraseology simply describes the time when the option expires and is not designed to define a condition precedent at all." *Eastham v. Chesapeake Appalachia, L.L.C.*, S.D. Ohio No. 2:12-CV-0615 (Sept. 18, 2013), citing *Goodyear Tire and Rubber Co. v. Kin Properties, Inc.*, 276 N.J.Super. 96, 647 A.2d 478, 481 (1994) (an option can be validly exercised even if exercised early). Another federal district court found that any failure of the condition precedent in paragraph 19 was not material, disclosing: "Of the few courts to address this issue, all have ruled that a lessee's premature notice of the exercise of an option to renew or extend a lease is nevertheless timely." *Bissett v. Chesapeake Appalachia, L.L.C.*, N.D. W.Va. 5:13-CV-20, p. 8-9 (Aug. 29, 2014), quoting 63 Am. Jur. Proof of Facts 3d 423 (2001).

{¶82} A party may exercise an option *only* in the manner provided in the contract. *Lake Ridge Academy,* 66 Ohio St.3d at 380. "If a time limit is given for

exercising an option, the option may not be exercised *after* that time has passed." (Emphasis added). *Id.* "In order 'for an exercise of an option to be binding on the optionor, it must be exercised in the manner provided for in the instrument creating the option *on or before* the time specified' * * *." (Emphasis added). *In re Estate of Stevens*, 2d Dist. No. 2011CA26, 2012-Ohio-1860, quoting *Gehret v. Rismiller*, 2d Dist. No. 06CA1705, 2007-Ohio-1893, ¶ 13, quoting *Mother Ruckers, Inc. v. Viking Acceptance, Inc.*, 2d Dist. No. 7890 (Jan. 13, 1983). *See also Urology Serv., Inc. v. Greene*, 8th Dist. No. 50205 (Mar. 6, 1986). In the case at bar, the option was not exercised after the time limit passed but rather was exercised on or before the time specified.

{¶83} There is thus authority in favor of early exercise of a lease extension option, including authority directly involving paragraph 19. No authority has been provided supporting Appellants' position that early announcement that an option will be exercised is insufficient to exercise the option. This assignment of error is overruled.

{¶84} For all of the foregoing reasons, Appellant's four assignments of error are overruled, and the trial court's judgment in favor of lease extension is hereby upheld.

Waite, J., Concurs.

DeGenaro, J., Concurs.