

[Cite as *Hoop v. Kimble*, 2015-Ohio-2110.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

KARL P. HOOP, et al.,

PLAINTIFFS-APPELLANTS/
CROSS-APPELLEES,

V.

DORIS J. KIMBLE, et al.,

DEFENDANTS-APPELLEES/
CROSS-APPELLANTS.

CHARACTER OF PROCEEDINGS:

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CASE NO. 14 HA 9

OPINION

Civil Appeal from Court of Common
Pleas of Harrison County, Ohio
Case No. CVH2012-0016

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiffs-Appellants

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 28, 2015

[Cite as *Hoop v. Kimble*, 2015-Ohio-2110.]
DONOFRIO, P.J.

{¶1} Plaintiffs-appellants/cross-appellees Karl P. Hoop, Karl E. Hoop, and Jennifer Kirkbride-Hoop (the Hoops) and defendants-appellees/cross-appellants Doris J. Kimble and RHDK Oil & Gas, LLC appeal separate decisions of the Harrison County Common Pleas Court adjudicating the parties respective rights to oil and gas leases on the Hoops' property.

{¶2} The Hoops own approximately 260 acres of property subject to two oil and gas leases. In 1984, Philip and Hanna Hoop executed an oil and gas lease with Floyd Kimble d.b.a. Red Hill Development (the 1984 Lease). The habendum clause of the 1984 Lease contained a primary term of one year and a secondary term for so long as "oil and gas or the constituents shall be found on the premises in paying quantities in the judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil and gas." It also stated, "One well will be drilled each year for a period of three years. If not drilled, acreage in excess of eighty acres per spacing will be released." The 1984 Lease also contained a typewritten amendment containing a trade-sale clause which stated, "This lease shall not be traded or sold without the written permission of the Lessor."

{¶3} After execution of the 1984 Lease, Red Hill Development drilled the first well in 1984 and the second well in 1985 but was unable to get the third well drilled in 1986. Consequently, Philip and Hanna Hoop executed a new lease in 1987 with Floyd Kimble covering 127 of the 260 acres covered by the original 1984 Lease. Thus, the remaining acreage was still subject to the 1984 Lease. However, unlike the 1984 Lease, the 1987 Lease did not contain a trade-sale clause. Red Hill Development proceeded to drill the third well in 1988.

{¶4} Floyd Kimble died in 1998 and his entire estate, including the family business known as Red Hill Development, was left to his wife, defendant-appellee/cross-appellant Doris J. Kimble. However, it was not until ten years later in 2008 that Doris, as executor of Floyd's estate, assigned all of the estate's leasehold interests, including the 1984 Lease and the 1987 Lease on the Hoops' property, to herself doing business as Red Hill Development. In 2009, she gave legal formation to the family business as defendant-appellee/cross-appellant RHDK Oil & Gas, LLC

(RHDK) and assigned her interest in the leases to it while at the time maintaining 100% ownership of the company.

{¶15} Concerning ownership of the Hoops' property, in 1999, Philip Hoop quitclaimed his interest in all but five acres of the property to his son plaintiff-appellant/cross-appellee Karl P. Hoop and his grandson plaintiff-appellant/cross-appellee Karl E. Hoop. In 2003, five acres were transferred to plaintiff-appellant/cross-appellee Karl E. Hoop and his wife, plaintiff-appellant/cross-appellee Jennifer Kirkbride-Hoop, upon which they built a home.

{¶16} On August 22, 2013, the Hoops filed an amended complaint for declaratory and injunctive relief against Doris Kimble and RHDK challenging the validity of the 1984 Lease and the 1987 Lease. Pointing to the trade-sale clause of the 1984 Lease, the Hoops sought cancellation and termination of the 1984 Lease based on Doris Kimble's assignment of that lease in 2008 from her late husband's estate to herself doing business as Red Hill Development and her subsequent 2009 assignment of that lease from herself to RHDK. The Hoops also sought termination of both the 1984 Lease and the 1987 Lease alleging that Doris Kimble and RHDK had failed to fully develop the oil and gas interests on their property. In sum, they sought a declaration that they are the lawful owners of the oil and gas rights attendant to the two leases and to the exclusion of Doris Kimble and RHDK and all others, and ordering that title to the subject property be quieted in their names through cancellation of the leases and corresponding easements.

{¶17} Doris Kimble and RHDK filed a joint answer setting forth counterclaims of declaratory judgment, breach of the leases, breach of warranties under the leases, an action to quiet title in the leases, promissory estoppel, unjust enrichment/quantum merit, and seeking injunctive relief. The crux of their pleading was to establish the continued validity of the leases.

{¶18} On January 10, 2014, Doris Kimble and RHDK filed a motion for summary judgment directed to all of the claims set forth in the Hoops' amended complaint. They argued that the transfers made by Doris Kimble in 2008 and 2009 were assignments authorized under the leases and did not constitute a breach of the

trade-sale clause in the 1984 Lease. Additionally, they argued that the Hoops waived any claim that the leases were no longer valid by accepting the benefits of the lease for years following Floyd Kimble's death. RHDK filed a separate but contemporaneous partial motion for summary judgment seeking a determination that the leases are valid.

{¶9} The Hoops filed a combined response in opposition to the summary judgment motion arguing that: (1) the habendum clauses of the 1984 and 1987 leases are perpetual in term and, therefore, invalid; (2) the plain language of the 1984 lease prohibited the leases from being "sold or transferred" without their consent; and (3) any ambiguity in the leases creates a genuine issue of material fact preventing the grant of both summary judgment and partial summary judgment.

{¶10} On February 7, 2014, the trial court granted Doris Kimble's and RHDK's summary judgment motions in part. The court found that the habendum clause in both leases was valid and enforceable, and not void as a no-term perpetual lease as asserted by the Hoops. However, the court did find that Doris Kimble's 2009 transfer of her interest in the 1984 Lease to RHDK did violate the trade-sale clause. The court stated that a hearing was necessary to decide the remaining issues of estoppel, damages, and forfeiture.

{¶11} The trial court conducted a hearing on February 19, 2014, and the parties submitted briefs addressing the remaining issues. In a judgment entry filed on April 3, 2014, the trial court found that forfeiture was not an appropriate remedy for Doris Kimble's breach of the trade-sale clause. The court concluded that the appropriate remedy was invalidation of the unauthorized transfer. The court reasoned that its resolution of the issue of the appropriate remedy rendered the issues of waiver and estoppel not ripe for review. This appeal followed.

The Hoops' Appeal

{¶12} The Hoops' sole assignment of error states:

IN A DECLARATORY JUDGMENT ACTION, A TRIAL COURT
COMMITTED PREJUDICIAL ERROR AS A MATTER OF LAW AFTER
IT FINDS A MATERIAL BREACH OF CONTRACT BUT FAILS TO

DETERMINE THE APPROPRIATE REMEDY[.]

{¶13} The Hoops' principally argue that they were entitled to forfeiture of the 1984 Lease rather than an invalidation of the transfer. In addition, they argue that the trial court erred in not conducting an evidentiary hearing to give them the opportunity to argue for and present evidence concerning damages and in support of forfeiture. In response, Doris Kimble and RHDK contend that the Hoops received the only remedy they sought below – invalidation of the assignment. They argue that the Hoops cannot now argue on appeal that they were entitled to forfeiture or rescission.

{¶14} “The rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such 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). See also *Swallie v. Rousenberg*, 190 Ohio App. 3d 473, 2010-Ohio-4573, 942 N.E.2d 1109, ¶ 61 (7th Dist.).

{¶15} The remedy of forfeiture or cancellation of an oil and gas lease is an equitable one that rests within the discretion of the trial court. *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶ 23. Ohio courts have recognized forfeiture as an appropriate remedy only in certain, limited circumstances: (1) when the lease specifically and expressly provides for such a remedy; (2) when legal damages resulting from a contractual breach are inadequate; (3) upon a breach of implied covenants; (4) upon a claim of abandonment; or (5) when necessary to do justice. *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 134-135, 443 N.E.2d 504, 508 (1983); *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980); *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897).

{¶16} In this case, the 1984 Lease did not contain any language providing for forfeiture, there has been no claim of abandonment, and the breach concerned the trade-sale clause and not an implied covenant. The Hoops' argument could be construed as suggesting that legal damages resulting from breach of the trade-sale clause are inadequate or that forfeiture was somehow necessary to do justice, but

they fail to point to any evidence in support of those notions. Moreover, Ohio courts have recently and uniformly held that the appropriate remedy for the breach of a clause similar to the trade-sale clause herein where consent of the lessor is required is voiding of the improper assignment and not forfeiture or cancellation of the underlying lease. *Bass-Fineberg Leasing, Inc. v. Modern Auto Sales, Inc.*, 9th Dist. No. 13CA0098-M, 2015-Ohio-46, ¶¶ 15-16; *Cleveland Clinic Found. v. Internatl. Portfolio, Inc.*, 8th Dist. Nos. 99898, 99988, 2014-Ohio-700, ¶¶ 24-25; *Harding v. Viking Internatl. Res. Co.*, 4th Dist. No. 13CA13, 2013-Ohio-5236. Therefore, the trial court properly concluded forfeiture was not an appropriate remedy for breach of the trade-sale clause.

{¶17} Accordingly, the Hoops' sole assignment of error is without merit.

Doris Kimble's & RHDK's Cross-Appeal

{¶18} Doris Kimble's and RHDK's sole cross-assignment of error states:

THE TRIAL COURT IMPROPERLY GRANTED PARTIAL
SUMMARY JUDGMENT AGAINST DEFENDANTS.

{¶19} The trial court found that the 2008 transfer of the lease from Floyd Kimble's estate to Doris Kimble did not violate the trade-sale clause of the 1984 Lease.¹ However, as to the 2009 transfer from Doris Kimble to RHDK, the court found that it did violate the trade-sale clause. In their appeal, Doris Kimble and RHDK argue that the 2009 transfer merely utilized a formulaic recitation of legal language to achieve a gratuitous family transaction and no consideration was exchanged. Alternatively, they argue that the trade-clause was ambiguous and, as such, unenforceable.

{¶20} As indicated, the 1984 Lease contained a typewritten amendment containing a trade-sale clause which stated, "This lease shall not be traded or sold without the written permission of the Lessor." Sale is defined as the transfer of

1. Doris Kimble and RDHK incorrectly state that the trial court found that the 2008 transfer from the estate of Floyd Kimble to Doris Kimble violated the trade-sale clause. While the court did find that the transfer constituted a sale, it concluded that the transfer/sale did not violate the trade-sale clause because Doris Kimble was the sole beneficiary of Floyd Kimble's will and was thus "seized in Floyd Kimble's property at the time of his death pursuant to his will regardless of the transfer."

property or title for a price or the agreement by which such a transfer takes place. R.C. 1302.01(A)(11); *Black's Law Dictionary* (10th Ed.2014). The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised. *Black's Law Dictionary* (10th Ed.2014).

{¶21} Here, the trial court properly found that the 2009 transfer constituted a sale and, thus, a breach of the trade-sale clause of the 1984 Lease. The parties were competent to contract. Doris Kimble as an individual who has not been adjudicated as mentally incompetent in a court of law is presumed to be in fact competent. *Buzzard v. Pub. Emp. Ret. Sys. of Ohio*, 139 Ohio App. 3d 632, 637, 745 N.E.2d 442 (10th Dist.2000). Also, RHDK, as a limited liability company, is authorized to make contracts. R.C. 1705.03(C)(2).

{¶22} Next, Doris Kimble and RHDK have not pointed to anything which would rebut the presumption of mutual assent. *Cent. Trust Co. v. Murphy*, 1st Dist. No. C-790615, 1980 WL 353052, at *2 (Oct. 29, 1980). There have been no allegations of fraud or mutual mistake. An oil and gas lease is considered a "lease of any interest in real property" and, thus, can be conveyed and transferred subject to the provisions of R.C. Chapter 5301.01. *Carruthers v. Johnston Petroleum Corp.*, 5th Dist. No. CA 1399, 1980 WL 354011, at *3 (June 5, 1980)

{¶23} Lastly, the assignment and bill of sale explicitly states a consideration of one dollar. Therefore, all four elements were present to qualify the 2009 transfer as a sale.

{¶24} Moreover and in addition to meeting the four elements of a sale, an examination of the document representing the 2009 transfer clearly reflects that it was a sale. It is expressly titled as an "ASSIGNMENT AND BILL OF SALE" which provides in relevant part:

KNOW ALL MEN BY THESE PRESENTS, that **DORIS J. KIMBLE**, single, of 3596 SR 39 NW, Dover, Ohio 44622 (hereinafter referred to as the "Assignor"), for and in consideration of the sum of One Dollar (\$1.00) and other valuable consideration, the receipt of

which is hereby acknowledged, does hereby assign, transfer, sell and convey unto **RHDK OIL & GAS, LLC**, an Ohio limited liability company (hereinafter "Assignee"), all of Assignor's right, title and interest in and to the oil and gas wells, leasehold interests and related facilities listed on Exhibit A, which is attached hereto and made a part hereof, together with all tangible real and personal property relating to, or used in connection with, the leases and wells.

{¶25} Doris Kimble's and RHDK's last argument under their assignment of error is a procedural one. They argue that the trial court erred in granting partial summary judgment against them concerning breach of the trade-sale clause even though the Hoops had not filed a summary judgment motion.

{¶26} As a general rule, Civ.R. 56 does not authorize a trial court to enter summary judgment in favor of a non-moving party. *Marshall v. Aaron*, 15 Ohio St.3d 48, 15 OBR 145, 472 N.E.2d 335 (1984), syllabus. However, in *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 17, the Ohio Supreme Court recognized an exception to the general rule when the trial court has before it all the relevant evidence:

When a party moves for summary judgment, the nonmovant has an opportunity to respond, and the court has considered all the relevant evidence, the court may enter summary judgment against the moving party, despite the nonmoving party's failure to file its own motion for summary judgment. The reason for this exception is that the parties have had an opportunity to submit all evidence to the court, and the parties have notice that the court is considering summary judgment. As a result, neither party's due process rights are violated.

{¶27} In this case, Doris Kimble, RHDK, and the Hoops had an opportunity to submit evidence to the trial court. All parties had legal notice of the moving party's summary judgment motion. The Hoops had the opportunity in their response to the

summary judgment motions filed by Doris Kimble and RHDK to submit evidence showing a genuine issue of material fact. Moreover, the trial court had before it all the relevant evidence – the leases and the assignments – all of which were clear and unambiguous on their face.

{¶28} Accordingly, Doris Kimble's and RHDK's sole assignment of error is without merit.

{¶29} In sum, as there remained no genuine issue of material fact, the trial court properly entered summary judgment. Doris Kimble clearly violated the trade-sale clause by transferring her interest in the 1984 Lease to RHDK. The court appropriately determined that a striking of the 2009 transfer was the appropriate remedy and that forfeiture or rescission of the lease was not the appropriate remedy for that breach.

{¶30} The judgment of the trial court is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.