[Cite as *Shutway v. Chesapeake Exploration, L.L.C.*, 2019-Ohio-1233.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

SAMUEL SHUTWAY et al.,

Plaintiffs-Appellants,

v.

CHESAPEAKE EXPLORATION, LLC,
AS SUCCESSOR IN INTEREST TO
MASON DIXON ENERGY, INC. et al.

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0030

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 15 CV 162

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Todd J. Abbott, Yoss Law Office, LLC, 122 North Main Street, Woodsfield, Ohio 43793 for Plaintiffs-Appellants and

Atty. Justin H. Werner, and *Atty. Kevin C. Abbott,* Reed Smith LLP, 225 Fifth Avenue, Pittsburgh, Pennsylvania 15222 and *Atty. Thomas A Hill, and Atty.* Richard F. Protiva, 6075 Silica Road, Suite A., Austintown, Ohio 44515 for Defendants-Appellees.

Dated: March 27, 2019

Robb, J.

{¶1} Plaintiff-Appellants Samuel and Karen Shutway appeal the decision of the Belmont County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Chesapeake Exploration, LLC et al. Appellants argue the trial court erred in finding Chesapeake was engaged in "drilling operations" at the expiration of the primary term so as to maintain its rights under the oil and gas lease. Appellants claim Chesapeake failed to obtain their consent to the well pad location and they did not unreasonably withhold consent. We also address the trial court's tolling order. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On May 3, 2005, Appellants executed an oil and gas lease with Mason Dixon Energy, Inc. concerning approximately 668 acres in Belmont County. Pursuant to the habendum clause in ¶ 2 of the lease, the initial primary term was for 5 years with an optional extension of 5 years under the same lease terms. Eric Petroleum Corporation (EPC), a successor lessee, exercised the extension before the primary term ended in 2010. Soon thereafter, EPC assigned an overriding royalty interest to Bruce E. Brocker, Trustee of the Brocker Realty Trust, and EPC assigned the deep rights to another company (who merged with Chesapeake in 2011). A related company, CHK Utica, LLC also acquired an interest in the lease.

{¶3} Under the delay rental clause in ¶ 4 of the lease, annual payments could delay the commencement of "operations for drilling" during the primary term. The following definition is provided in ¶ 4: "Drilling operations shall be deemed to commence when the first material is placed on the leased premises or when the first work, other than surveying or staking the location, is done thereon which is necessary for such operation." An addendum at ¶ 1 stated: "Lessee and Lessor to mutually agree on all drill sites and access road locations, not to be unreasonably withheld by Lessor."

{¶4} As for the secondary term, the habendum clause in ¶ 2 provided the lease would remain in force at the end of the primary term "as long thereafter as oil or gas * * * is produced from said land by the Lessee, its successors and assigns." However, the operations clause in ¶ 6 contained the following savings provision:

> **If at the expiration of the primary term of this lease, oil or gas is not being produced on the leased premises** or acreage pooled therewith, **but lessee is engaged in drilling**, deepening, plugging back, or reworking **operations thereon** or shall have completed a dry hole within ninety (90) days prior to the end of the primary term **this lease shall remain in force** so long as operations on said well or drilling, deepening, plugging back, or reworking of any additional well are prosecuted with no cessation of more than ninety (90) consecutive days and if they result in the production of oil and gas, so long thereafter as oil and gas is produced from the leased premises, or upon acreage pooled therewith."

(Emphasis added.)

{¶5} The parties agree there was no production which would extend the lease into the secondary term under the habendum clause. They also agree the primary term of the lease was extended by five years for a total primary term of ten years and delay rentals were paid so that the primary term would have expired on May 3, 2015 without the application of the above-quoted savings clause. The parties agree the dry hole clause (involving a dry hole completed within 90-days before the end of the primary term) was not at issue in this case.[1] Moreover, this case does not involve deepening, plugging back, or reworking. Regarding the clause requiring the drilling operations to be "prosecuted with no cessation" (of more than 90 consecutive days), there was no chance for cessation due to the lawsuit being filed very soon after the alleged drilling operations.[2] The dispute

[1] The second "issue presented" which Appellants' place under their sole assignment of error briefly observes that if Chesapeake had no production and was not engaged in drilling operations before the end of the primary term, then Chesapeake would have needed to rely on the dry hole clause with its unmet time constraints. (Apt.Br. 20-21). This clause was not used to extend the lease. Appellees agree this clause was not applicable to extend the lease in this case. The second "issue presented" is therefore merely an observation as it presents nothing for our review.

[2] Excavation work occurred at the end of April 2015; the primary term ended on May 3, 2015; Appellants filed a complaint three days later; they requested an injunction to prohibit drilling operations; and the parties entered an agreement on the request for an injunction on or before May 18, 2015.

concerned: (1) whether the conduct surrounding a planned well was sufficient for Chesapeake to be considered as "engaged in drilling operations" before the end of the primary term to avoid lease termination; and (2) the effect of certain actions or inaction in the last nine months of the primary term.

{¶6} Chesapeake first contacted Appellants in August 2014 about conducting a field review in order to choose the location for a well pad. In an August 26, 2014 letter, Appellants' attorney stated the field review could only be performed by walking and using no equipment other than survey equipment as the property was being farmed. The letter warned that the grant of permission to enter was not ratification of lease and referred to Appellants' prior disclosure of their opinion that the lease was no longer valid. In September 2014, Chesapeake conducted a field review with Karen Shutway, and a general location was discussed.

{¶7} At this same time, Appellants were attempting to negotiate an amendment of the lease with Chesapeake to obtain more favorable terms. Appellants' attorney reiterated the claim of lease invalidity in a November 4, 2014 letter, mentioning the law firm's settlement of many cases involving the same lease and making note of favorable federal decisions.[3] After the Sixth Circuit reversed these cases,[4] Chesapeake contacted Appellants' attorney on January 8, 2015, citing the decision and reasserting Chesapeake's intent to preserve its rights under the lease during the primary term.

{¶8} In mid-January 2015, Chesapeake provided a surface use agreement addressing the well pad location and damages. Appellants continued to negotiate a lease amendment. On January 22, 2015, Appellants' attorney asked to view the well permit application, and Chesapeake pointed out they were attempting to work with Appellants on the well pad location before applying for the permit. Chesapeake provided the plat of the proposed location, noting it was the same location as previously provided.

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[3] *See Griffith v. Hess Corp.*, S.D.Ohio No. 2:14-CV-00337 (Apr. 11, 2014) (finding the lessee had one year to commence drilling activity upon extension of five-year primary term as the delay rental clause did not apply to the extension); *Kelich v. Hess*, S.D. Ohio 2:13-CV-140 (Jan. 2, 2014) (finding the lease terminated because a delay rental payment would have been due in addition to the tendered extension payment; also opining it was reasonable to conclude the extension was not part of the primary term).

[4] *Kelich v. Hess Corp.*, 6th Cir. Nos. 14-3411, 14-3431 (Dec. 23, 2014) (consolidated appeal finding the lease created two successive five-year terms and specifically provided any error in paying rental shall not constitute a ground for forfeiture and notice is required before non-payment is considered a default).

{¶9} On January 27, 2015, Appellants' attorney suggested Chesapeake run a title search to ensure Appellants were the owners. This prompted Chesapeake to ask for Appellants' answer on the amendment offer "and regardless, their agreement to the proposed surface location by tomorrow. We're prepared to move forward with the proposed location with or without the extension/amendment." In another communication, Chesapeake reiterated the need for independent responses on the issue of location and the issue of amendment, noting Appellants "cannot unreasonably withhold consent to the proposed location based on ongoing lease amendment/extension negotiations."

{¶10} Appellants' attorney opined on January 27, 2015, "I believe we would have to agree to the amendment/extension before we discuss the proposed location." Chesapeake explained it was "proposing the location whether or not we can come to terms on the proposed extension/amendment. The extension/amendment proposal terminates tomorrow. Your clients cannot reasonably condition their consent to the location based on whether or not we agree to extend the lease."

{¶11} On January 28, 2015, Appellants' attorney opined the failure to respond to the well location proposal was not unreasonable "as the lease is set to expire in May, and the well will not be completed by that time." Nevertheless, she added, "I will let you know as soon as I get an answer from them on the well location." The next day, she reiterated the belief the lease would expire at the end of the primary term and provided an interpretation of certain clauses in the lease. Chesapeake directed Appellants' attention to the drilling operations clause and said a survey crew would be present the next day (January 30) as it intended to commence drilling operations within the primary term. In response to a question on the location, Chesapeake replied it was the same site as proposed earlier. No objections to the site were presented to Chesapeake.

{¶12} In February 2015, a plan for erosion and sediment control and a report on natural resources were prepared. On March 4, 2015, the sites for the well and the access road were staked, and Chesapeake filed an application for a permit to "Drill Vertical Well" checking the box for the type of well called "Stratigraphic Test." An inspection by the Ohio Department of Natural Resources (ODNR) occurred on March 5, 2015. In response to questions from Appellants' attorney, Chesapeake provided a copy of the permit application and explained it was common to apply for the stratigraphic well permit before

applying for the horizontal well permit, which they predicted would be filed in the next week. The vertical well permit was granted on March 24, 2015.

{¶13} In mid-March, Chesapeake asked for Appellants' signature to obtain a permit from the Ohio Department of Transportation (ODOT) for accessing a state route, noting it was the means of access identified by Karen Shutway as the preferred location. When Appellants finally agreed to consent to the road access permit, a meeting was arranged for April 18, 2015 to obtain their signatures; at the meeting, they refused to sign the application. Chesapeake advised it could use an alternate road for access which would not require a permit from ODOT. Appellants did not prefer that route as it involved the use of their driveway. Appellants thereafter signed the road access permit application on April 20, 2015, and it was approved by ODOT on April 23, 2015 after an expedited review. Appellants' affidavit states they informed Chesapeake (at the time they executed the road permit application) that they wanted the well pad location moved 500 feet.

{¶14} On April 22, 2015, Chesapeake filed an application to "reissue" a permit to "drill horizontally" for an oil and gas well; this permit was granted on April 30, 2015. In an April 23, 2015 letter, Chesapeake expressed a belief the location was mutually agreed upon (due to Appellants' lack of objections after the location was specified in January) and asked Appellants to voice in writing any objections to the well pad location within 24 hours. Appellants did not do so. In late April, Chesapeake moved contractors and heavy equipment onto the property and began clearing and leveling the well pad site.

{¶15} Karen Shutway acknowledged she observed Chesapeake digging on a ridge with construction equipment three days prior to the May 3, 2015 expiration of the primary term; they also installed a culvert for the road. (K.S. Dep. 14). She testified at deposition that Chesapeake assured her during the initial field review (in September 2014) that the well pad site would be on the other side of a pipeline right-of-way. (K.S. Dep. 12). She believed the well would be less visible from her house if so located. Samuel Shutway acknowledged at deposition that Chesapeake used heavy equipment on his property, leveled and bermed 5 acres for a well pad, extended a dirt access road by 300-500 feet, and stabilized the site with seed and mulch; he also noticed concrete trucks on the property (but his lawsuit was filed before concrete was poured). (S.S. Dep. 38-39).

{¶16} On May 6, 2015, Appellants filed suit against the Chesapeake defendants, EPC, and the Brocker trustee, setting forth claims for: declaratory judgment on lease termination by expiration (due to lack of production or drilling operations in the primary term); breach of contract (for failing to obtain consent to the well location); slander of title (for failing to file a release of the lease); breach of implied covenant to reasonably develop; and ejectment.

{¶17} Chesapeake filed a counterclaim seeking a declaratory judgment that drilling operations were commenced prior to the expiration of the primary term. Chesapeake also sought a declaratory judgment that interference during the primary term resulted in equitable tolling or extension of the lease (which should continue throughout all court proceedings). Chesapeake claimed Appellants' withholding of consent to the location of the well site and access road was unreasonable and eliminated the obligation to obtain consent, asserting claims for breach of contract and breach of an implied duty of good faith and fair dealing. EPC and the Brocker trustee filed a similar counterclaim for declaratory judgment and breach of contract. On the issue of tolling, they also pointed to Appellants' execution of a new lease with Rice Drilling recorded on October 8, 2014, which specifically purported to cover two of the parcels in the subject lease.

{¶18} Appellants filed a motion for "partial" summary judgment on their declaratory judgment claim, stating it would make the other claims moot. Appellants argued the "engaged in" phrase in the drilling operations clause essentially required the well pad to be completed with a rig actively engaged in drilling on May 3, 2015, the day the primary term ended. They placed emphasis on the phrase "said well" in the drilling operations clause, concluding there could be no drilling operations if there was no well. Contending Chesapeake lacked intent to timely complete a well, they pointed to evidence showing Chesapeake anticipated the "spud date" (date the drill bit penetrates the surface) would not be until May 20, 2015. Over Chesapeake's objection, they also cited a 2016 article reporting Chesapeake operated two rigs in Ohio in the last three months of 2015 before winding down to zero rigs.

{¶19} Chesapeake filed a motion for summary judgment listing the following items as evidence supporting a declaration that they were engaged in drilling operations at the end of the primary term: permits were obtained for the drill site, the vertical and horizontal portions of the well, and the access road; the well pad site and road were surveyed and

staked; contractors were engaged; equipment and personnel were moved onto the property; significant earth-moving operations were performed, including clearing and leveling of the well pad site; and the access road was prepared.

{¶20} As to the issues of delay, tolling, and location, Chesapeake asserted Appellants' claim of lease invalidity in August 2014 and subsequent refusal to respond to the proposed well location thwarted their effort to develop the property. They alleged Appellants breached the clause which prohibited Appellants from unreasonably withholding consent to the location. It was noted Ohio law does not impose an implied covenant to reasonably develop where the lease contains the period for development via the habendum and other clauses.

{¶21} EPC and the Broker trustee filed a motion for summary judgment concurring with Chesapeake's motion. They added an expert's affidavit explaining a stratigraphic test well is capable of production as it allows the lessee to determine where to begin horizontal fracturing and could become the vertical portion of a horizontal well. In response to Samuel Shutway's statement at deposition that the Rice lease recorded in October 2014 mistakenly included two parcels covered by the subject lease (and discussing a March 2015 letter from Rice disclosing its inability to lease these parcels), EPC attached the affidavit of a land manager. He reported that no partial release of the recorded Rice lease was thereafter filed regarding the two parcels covered by the subject lease.

{¶22} In response to Appellant's interpretation of the "said well" language, EPC and the Broker trustee noted this merely referred to the well for which drilling operations were commenced. Noting this terminology would typically refer to a prior use of the word "well" in the lease, they pointed to the prior reference in ¶ 3 giving the right to drill wells. They asked the court to find there were eight months remaining in the primary term due to Appellants' conduct since repudiating the lease in August 2014. In addition to utilizing emails to show Appellants withheld consent as they believed it was too late for Chesapeake to begin drilling operations, EPC attached an April 24, 2015 letter (provided by Appellants in response to a request for production), wherein Appellants' counsel stated: "If your company would have been able to get a well capable of production drilled before the expiration of the lease my clients would not have objected to the general area indicated for the pad in your meeting last year."

{¶23} Appellants argued: they did not deny Chesapeake access to the property; Chesapeake waited until January to provide the location ascertained from the September field review; and it was reasonable to ask to view a permit application before responding to the location proposal. Appellants quoted the definition in ¶ 4 and argued no material was delivered and no work necessary to drilling operations was performed. While the defendants pointed out the excavation of the well pad site and access road constituted necessary work which must be conducted on the property before actual drilling could begin, Appellants claimed preparatory excavation did not constitute drilling operations as more significant physical activities were necessary.

{¶24} On April 26, 2018, the trial court granted summary judgment in favor of the defendants and against Appellants. Applying ¶ 4 and ¶ 6, the court found Chesapeake engaged in sufficient conduct to constitute the commencement of drilling operations so as to extend the primary term of the lease. It was observed that beyond the obtaining of permits, surveying, and staking, Chesapeake also engaged contractors who used heavy equipment to clear, level, and berm five acres and install a road. The court also ordered the lease to be equitably tolled effective September 1, 2014 through the resolution of the final appeal in the case. The court said no damages would be awarded to the defendants. Appellants filed a timely notice of appeal.

DRILLING OPERATIONS

{¶25} Appellants' sole assignment of error provides:

"The trial court erred in finding that Chesapeake commenced 'drilling operations' as defined by the subject oil and gas lease on the Property prior to May 3, 2015."

{¶26} We review the grant of summary judgment under a de novo standard of review governed by Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. A motion for summary judgment shall be granted if the court determines there are no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. Civ. R. 56(C). The court views the evidence in the light most favorable to the nonmovant and determines whether reasonable minds can only come to a conclusion adverse to that party. *Id.* The only factual disputes that can preclude summary judgment are those that might affect the outcome of the suit under the governing law. *Byrd v. Smith*, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶27} "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." *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 483, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist.), quoting *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897). "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

{¶28} If a disputed term is unambiguous, the issue is decided as a matter of law with no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning–Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984). 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). 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 within the four corners of the agreement. *Westfield*, 100 Ohio St.3d 216 at ¶ 11.

{¶29} In the first "issue presented" which is set forth under this assignment of error, Appellants ask whether Chesapeake's conduct constituted sufficient "drilling operations" to activate the savings provision in ¶ 6 of the lease. Appellants begin by observing that surveying, staking, and engaging contractors for excavation would not meet the definition of commencement of drilling operations provided in ¶ 4 of the lease, which states: "Drilling operations shall be deemed to commence when the first material is placed on the leased premises or when the first work, *other than surveying or staking the location*, is done thereon which is necessary for such operation." (Emphasis added). They argue the obtaining of permits is not work done on the leased premises and fits the definition even less than the acts of surveying or staking which are specifically excluded from the definition of commenced drilling operations.

{¶30} As for the additional conduct of bringing heavy equipment onto the property, extending the dirt access road, installing a culvert, and excavating the well pad site (by clearing, leveling, berming, and stabilizing), Appellants take the position of "too little, too

late." They place emphasis on the timing of this conduct, occurring less than a week before the end of the primary term, and urge that although it may constitute the commencement of drilling operations under ¶ 4, it should not be considered drilling operations under ¶ 6.

{¶31} As set forth above, ¶ 6 provides: "If at the expiration of the primary term of this lease, oil or gas is not being produced on the leased premises or acreage pooled therewith, but lessee is engaged in drilling, deepening, plugging back, or reworking, operations thereon * * * this lease shall remain in force so long as operations on said well or drilling, deepening, plugging back, or reworking of any additional well are prosecuted with no cessation of more than ninety (90) consecutive days and if they result in the production of oil and gas, so long thereafter as oil and gas is produced from the leased premises, or upon acreage pooled therewith."

{¶32} Appellants contend the standard for drilling operations in ¶ 6 (to extend the lease past the expiration of the primary term) is more onerous than the definition in ¶ 4 (which follows the delay rentals clause requiring annual payments to delay the commencement of drilling operations). Appellants state ¶ 4 and ¶ 6 are in conflict but can be harmonized so as to give effect to both. *See Love v. Beck Energy Corp.*, 7th Dist. No. 14 NO 415, 2015-Ohio-1283, ¶ 22 ("a court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them"). By harmonizing, Appellants mean the definition in ¶ 4 should only be used if determining whether delay rentals were necessary in years during the primary term (a matter not at issue in this case) and should not be used if determining whether Chesapeake was engaged in drilling operations at the expiration of the primary term.

{¶33} As they emphasized below, Appellants maintain the case is ripe for summary judgment as the issue presents a matter of law. They acknowledge various courts have found the lease phrase "drilling operations" to be unambiguous and admit the phrase has been ruled to encompass less conduct than occurred in this case. *See Anderson v. Hess Corp.*, 649 F.3d 891, 897-899 (8th Cir.2011) (adopting the general rule that "actual drilling is unnecessary" when a court is considering what constitutes the commencement of a well or of drilling operations; affirming the decision that the lessee was engaged in drilling operations at the end of the primary term due to preparatory work); *Wold v. Zavanna LLC*, D. N.Dak. No. 4:12-CV-43 (Dec. 31, 2013) (finding sufficient drilling

operations to extend the lease beyond the primary term included obtaining the necessary permits and regulatory approvals for drilling and engaging in other development activity). In a case cited by Appellants, a trial court found: "Defendants could have been engaged in drilling operations long before a well bit was actually put in the ground, i.e., the spud date. For instance, there is no dispute that significant efforts were made to begin drilling, including leveling the location and preparation of the well pad and the access road. Further, equipment was on the site and drilling was ready to begin." *DeRosa v. Hess Ohio Res. LLC*, S.D. Ohio 2:13-CV-0472 (Aug. 27, 2014).

{¶34} In a case from Harrison County (a county within this appellate district), the state appellate court applied a "commence operations" clause and found the lessee complied *on the last day* by staking out the well, making the contract for the timber to be used to construct the rig, and cutting a portion of the timber. In so doing, the court held the commencement of operations under an oil and gas lease may "consist of a trivial and comparatively insignificant matter * * * Any act, the performance of which has a tendency to produce the desired result, is a commencement of operations." *Duffield v. Russell*, 10 Ohio C.D. 472, 474 (1899), summarily affirmed per curiam, 65 Ohio St. 605, 63 N.E. 1127 (1902). *See also Kaszar v. Meridian Oil & Gas Enterprise, Inc.*, 27 Ohio App.3d 6, 7, 499 N.E.2d 3 (11th Dist.1985) (finding the savings clause, "[i]f the Lessee shall begin operations for the commencement of a well during the term of this Lease," applied where the lessee surveyed the site, staked the well pad, cleared the site, and filed the necessary documents with a government agency).

{¶35} Notably, Appellants' trial court filings utilized and adopted the definition in ¶ 4, stating it worked in their favor as it specifically excluded surveying and staking as constituting the commencement of drilling operations. For instance, Appellants' February 10, 2017 response to the defendants' summary judgment motions stated: "While Ohio case law has defined 'drilling operations' in cases where such term is not defined within a lease, this Court need not speculate or look to outside sources to determine the intent of the parties. Paragraph 4 of the Shutway Lease very clearly defines drilling operations * * *." In addition, Appellants' February 17, 2017 reply, setting forth its final arguments to the trial court, specified: "In the instant case, one is not left to wonder what constitutes 'drilling operations' sufficient to trigger the 'leasehold savings provision' contained in paragraph 6, as the Shutway Lease very clearly and explicitly sets forth what is defined

as a drilling operation in paragraph 4." To support these statements, Appellants quoted the following law: "Where a contract gives precise meaning to a particular term, the term should be construed consistently as having that same meaning throughout the contract, absent some evidence of contrary intent." *Sherock v. Ohio Mun. League Joint Self-Insurance Pool*, 11th Dist. No. 2003-T-0022, 2004-Ohio-1515, ¶ 13. *See also Casto v. Sanders*, 11th Dist. No. 2004-P-0060, 2005-Ohio-6150, ¶ 33.

{¶36} As Appellees urge, Appellants cannot now argue the trial court erred in using the definition for the commencement of drilling operations provided in ¶ 4. Besides waiving any argument against employing the definition in ¶ 4, we note the lease definition requires more of the lessee than some of the case law reviewed by Appellants. This was why Appellants characterized the definition as favorable to their case below. In any event, there is no indication in the lease that the definition of commenced drilling operations in ¶ 4 would not apply when considering whether drilling operations commenced under other lease clauses.

{¶37} Nevertheless, as Appellants urge, the phrase must be read in the context of ¶ 6 of the lease. Appellants emphasize the requirement that the lessee be "engaged in" drilling operations. They also place import on the absence of the word "commence" in reference to drilling operations in ¶ 6 (whereas ¶ 4 defines the commencement of drilling operations). However, as the word "commence" means to begin, a lessee who "is engaged in drilling * * * operations" has necessarily commenced drilling operations, and a lessee who has commenced drilling operations is necessarily engaged in them.

{¶38} Relying on the phrase "said well" in the continuing operations portion of the drilling operations clause, Appellants next contend Chesapeake "was required to have a well pad completed, and a rig actively engaged in the process of drilling, deepening, plugging back, or reworking a well on the date the primary term expired * * *." Appellants refer to documents showing Chesapeake's anticipated "spud date" was May 20, 2015 (after the primary term ended). They suggest Chesapeake could not have been engaged in drilling operations at the end of the primary term if the drill bit was not predicted to penetrate the surface until after the primary term expired, concluding Chesapeake thus lacked "said well" on which it could be said they "prosecuted" operations. Appellants contrast the lease language with similar leases which use "said land" instead of "said well" in the drilling operations savings clause. *See DeRosa*, S.D. Ohio 2:13-CV-0472.

{¶39} Notably, the subject lease does initially use terminology akin to "said land" when it states: "If at the expiration of the primary term of this lease, oil or gas is not being produced **on the leased premises** or acreage pooled therewith, but lessee is engaged in drilling, deepening, plugging back, or reworking, operations **thereon** * * *." The word "thereon" refers back to the leased premises (or acreage pooled therewith) and is the equivalent of using "said land" after operations; it informs the lessor there is a savings event if the lessee is engaged in drilling operations on the leased premises (or acreage pooled with the leased premises) at the expiration of the primary term.

{¶40} As to the subsequent use of the phrase "said well," Appellees point to the prior reference to a well in ¶ 3 where the lessee is given the right to drill wells (where the reference to wells is obviously wells intended to be drilled in the future). Appellees urge the lease's use of the phrase "said well" in ¶ 6 (after the lease asks if the lessee is engaged in drilling operations on the leased premises at the expiration of the primary term) is merely a reference to the intended well for which the drilling operations were commenced.

{¶41} In other words, when the clause allows the lease to continue "so long as operations **on said well** [or certain work on an additional well] are prosecuted with no cessation of more than ninety (90) consecutive days," it is referring to the well in the process of being developed by the lessee via the drilling operations the lessee is engaged in at the expiration of the primary term. The phrase merely reinforces that the drilling operations are being engaged in with intent for these operations to culminate in a well (which is needed for production). *See generally Johnson v. Yates Petroleum Corp.*, 127 N.M. 355, 981 P.2d 288, ¶ 5-7, 11-12 (1999) (finding the lessee was sufficiently engaged in drilling operations in a lease containing this "said well" language where: the well site was surveyed and staked; a well permit was sought and granted with approximately two weeks remaining in the primary term; a contractor hauled a bull dozer to the site with two days remaining in the primary term; and the contractor began clearing brush and leveling the site with one day left in the primary term).

{¶42} Appellants cite a definition of drilling operations as "any work or actual operations undertaken or commenced in good faith for the purpose of carrying out any of the rights, privileges or duties of the lessee under a lease, followed diligently and in due course by the construction of a derrick and other necessary structures for the drilling of

an oil and gas well, and by the actual operation of drilling in the ground." Williams & Meyers, *Oil & Gas Law*, 618.1 (2012). Similarly, the appellate court presiding over the Harrison County case found the lessee sufficiently commenced operations on the last day by staking the well, making the contract for the timber for the rig, and cutting some timber where he in good faith intended to continue the work and perform the contract with reasonable diligence. *Duffield*, 10 Ohio C.D. 472 (commencement of operations may "consist of a trivial and comparatively insignificant matter * * * Any act, the performance of which has a tendency to produce the desired result, is a commencement of operations"), summarily affirmed per curiam, 65 Ohio St. 605. *See also Sheffield v. Exxon Corp.*, 424 So.2d 1297, 1302 (Ala.1982) (although the court required on-site physical efforts in the absence of a different lease definition, it opined that work preparing a well pad site for the drilling of the well was part of the drilling operations if performed with intent to proceed with diligence toward the completion of a well).

{¶43} As for Appellants' reference to a news article in 2016 reporting Chesapeake's disclosure that it operated two rigs in Ohio during the last three months of 2015 (and subsequently wound down its Ohio operations to zero rigs), Chesapeake objected to the trial court's consideration of this hearsay. Furthermore, the article does not relate to the time period relevant to this case. Contrary to Appellants' contention, this was a statement about the past, not what the past may have looked like if Appellants had not enjoined their operations on the well for which permits were granted in this case. The reference to having an intent to sell Ohio assets does not equate to a lack of intent to preserve rights under this lease in 2015, and the lease allows the lessee to assign its rights.

{¶44} Appellants also seem to suggest any drilling operations at the end of the primary term must continue for 90 consecutive days and result in production within 90 days. However, the actual language provides the drilling operations must be "prosecuted **with no cessation of more than ninety (90) consecutive days** and if they result in the production of oil and gas, so long thereafter as oil and gas is produced from the leased premises * * *." (Emphasis added). This clause could not be evaluated or found to have stopped the effect of the drilling operations clause in this case due to the filing of the lawsuit on May 6, 2015, three days after the primary term ended, and the parties then negotiated Appellants' request for an injunction pending the suit.

{¶45} Likewise, whether Chesapeake "diligently" engaged in further operations on the property after the excavation work was not an issue as Appellants filed suit within days of excavation causing work to stop on the property. In any event, the lease defined the parameters of the lessee's conduct where the lessee was engaged in drilling operations at the expiration of the primary term, e.g., prosecution of the operations without cessation of more than 90 consecutive days.

{¶46} Additionally, even though surveying and staking are not sufficient to constitute drilling operations under the express terms of the lease, those acts along with the various permits obtained demonstrate the intent behind the excavation. We recap various relevant items: the field review for locating a well site; the continual attempts to negotiate the location for the well pad and road; surveying and staking; engaging in the two-part permitting process (by obtaining a permit for a vertical stratigraphic well and then obtaining a permit for a horizontal well); the obtaining of an access road permit which required the landowners' signature to comply with the landowners' preferred route; the hiring of contractors; the moving of heavy equipment onto the property; the placing of a culvert; the extension of an access road; and the ultimate excavation of the well pad site (involving the clearing, leveling, berming, and seeding of five acres).

{¶47} There is no indication these acts were engaged in with any intent other than carrying out the rights of the lessee under the lease; the mere fact the intent to carry out the lease means there is an intent to utilize the drilling operations clause to extend the lease (even without actual production at the end of the primary term) does not corrupt the intent. Whether Chesapeake "scrambled" because the lease was about to expire in order to try to extend the lease past the primary term and whether Chesapeake intended to have a completed well capable of production before the end of the primary term are not pertinent to whether the drilling operations clause operated to save the lease. *See Duffield*, 10 Ohio C.D. 472 (reasons lessee waited until last day were irrelevant as he was only bound to commence operations before expiration).

{¶48} Appellants also cite law stating a lessee who waits to begin development until immediately before the end of the primary term is not entitled to an extension in the absence of paying quantities, lessor interference, or an agreement to extend. *Gisinger v. Hart*, 115 Ohio App. 115, 116-117, 184 N.E.2d 240 (4th Dist. 1961), citing *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955). They quote: "It is a case of 'too little too late'

on the part of the plaintiffs." *Gisinger*, 115 Ohio App. at 116. Appellees reply by pointing out that savings provisions, such as the one being applied in the case at bar, were incorporated into leases to address the harsh consequences involved where operations have commenced, citing, e.g., Williams & Meyers, *Oil and Gas Law,* Scope (2015) (the drilling operations clause is a savings clause which operates to keep the lease alive after the expiration of the primary term despite the failure to obtain production).

{¶49} As pointed out by Appellees, the *Gisinger* and *Hanna* holdings involved the application of only a habendum clause requiring paying quantities. Those cases did not involve a savings clause such as the drilling operations clause at issue here. In the case at bar, there was an agreement to extend the lease even without production in paying quantities; this agreement was within the lease itself in the form of the drilling operations clause. In summary, we conclude the trial court did not err in finding Chesapeake engaged in drilling operations before the expiration of the primary term.

Well Pad Location

{¶50} Appellants' sole assignment of error alleged the court erred in finding Chesapeake commenced drilling operations, which corresponded to their first "issue presented." Within the same assignment of error, Appellants set forth another "issue presented" as follows:

"Appellant's consent to the well pad location was necessary and was not unreasonably withheld. Chesapeake breached the terms of the Shutway Lease by failing to obtain consent to the well pad location and by failing to act in good faith during negotiations/discussions regarding the pad location."

{¶51} The lease addendum at ¶ 1 stated: "Lessee and Lessor to mutually agree on all drill site and access road locations, not to be unreasonably withheld by Lessor." Appellants filed a breach of contract claim under this clause alleging a failure to obtain their consent on location. Chesapeake filed a counterclaim for breach of contract under this clause alleging Appellant unreasonably withheld consent to the proposed location. The trial court entered summary judgment against Appellants and for the defendants (but awarded no damages).

{¶52} Appellants acknowledge a lessee is excused from obtaining consent to the location if the lessor unreasonably withholds consent to the location. *See generally Love v. Beck Energy Corp.*, 7th Dist. No. 14 NO 415, 2015-Ohio-1283, ¶ 43 (attempt to obtain

consent to assignment can be considered futile if lessor unreasonably withholds consent where lease prohibits the unreasonable withholding of consent). Appellants do no contend there are factual issues; rather, they maintain their position that the facts contained in the evidence presented by the parties show consent was not unreasonably withheld and/or Chesapeake failed to negotiate the location in good faith.

{¶53} Appellees urge that Appellants were required to set forth a separate assignment of error in order to present an argument on whether they unreasonably withheld consent to the location as the issue arises from the breach of contract claims, rather than the declaratory judgment on lease expiration. *See Kennedy v. Sherwood*, 7th Dist. No. 00 CO 57, 2001-Ohio-3355 ("The arguments under each assignment of error must pertain to the concept outlined in the text of the assignment."), citing App.R. 12(A)(2); App.R. 16(A)(3) and (7). Appellees also point out forfeitures are generally abhorred in the law, especially under circumstances such as existed here. They cite Williams & Meyers, *Oil and Gas Law*, 673 (2017) for the premise that a breach of a restriction on surface use is not grounds for forfeiture. Along these lines, they note even if forfeiture was sought and could be chosen as a remedy for breach of a contract term on location, the aggrieved party must show why damages would be inadequate, but Appellants do/did not discuss this concept. *Citing Riggenbach v. Independent Machine Co., Inc.*, 7th Dist. No. 534, 1980 Ohio App. Lexis 11589 (disallowing forfeiture for breach of express lease clause that does not provide for this remedy). In any event, Appellants do not argue forfeiture; rather, they are arguing lease expiration.

{¶54} It seems Appellants set forth the argument on location consent under the sole assignment of error on drilling operations because they are now contending that any operations on a site which was not approved by the lessor cannot be used to satisfy the drilling operations clause. Appellants conclude that if we find they did not unreasonably withhold consent to the location, then the lease expired due to Chesapeake's failure to obtain their approval. Appellants cite no law in support of this premise. The express lease terms do not indicate the lease terminates or expires if its extension terms are satisfied but there was a breach of the clause on consent to location. We note the lease also contains a notice of breach or default clause stating the lessor shall notify the lessee in writing of the alleged breach which provides the lessor time to cure the breach before a suit can be commenced.

{¶55} Most notably, however, Appellants did not make the argument to the trial court (that the excavation work should be eliminated from consideration as drilling operations due to breach of the consent clause). Appellants' complaint suggested the breach of contract claim on the consent clause was set forth in the event the court ruled the lease extended past it primary term. Appellants' motion for (partial) summary judgment expressly did not discuss the breach of contract claim and asked for a declaratory judgment finding the lease expired due to the lack of drilling operations without raising this issue as a reason for lease expiration. For instance, the motion did not state the conduct alleged to constitute drilling operations cannot be considered if the lessee did not obtain the lessor's consent to the location.

{¶56} Subsequently, their response to Appellees' cross-motions for summary judgment did not set forth an argument on the lack of consent to the location under their argument about whether drilling operations commenced. They argued their consent was not unreasonably withheld only in response to Chesapeake's motion for summary judgment on Appellants' breach of contract claim or in response to the argument of landowner interference and the request for lease tolling. Appellants did not claim a breach of the consent clause would nullify any drilling operations and cause the lease to expire. Likewise, Appellants' final reply in the trial court did not raise the lack of consent on location as a reason for lease termination.

{¶57} As the filings below did not raise this claim, it is waived. *Covert v. Koontz*, 7th Dist. No. 13 MO 8, 2015-Ohio-228, ¶ 16 (failure to raise arguments during the summary judgment stage constitutes waiver of the issue on appeal). "Appellate courts review summary judgment decisions de novo but the parties are not given a second chance to raise arguments that they should have raised below." *Whitson v. One Stop Rental Tool & Party*, 2017-Ohio-418, 84 N.E.3d 84, ¶ 18 (12th Dist.).

{¶58} In any event, Appellants consented to the location by inaction, failed to engage in the process of mutual approval as required by the lease, or otherwise unreasonably withheld consent to the location. We refer back to our Statement of the Case for a more detailed review of the conversations relied upon in the summary judgment filings. Appellants emphasize that even though they told Chesapeake the lease already terminated before the initial field review, they did not prohibit entry onto the property. They complain Chesapeake did not provide the map of the proposed location

until January 2015, after performing the field review in September 2014. Nevertheless, the focus of our analysis for purposes of the location consent clause is on Appellants' conduct and inaction *after* the January 2015 proposed location was provided to them. Appellants' conduct prior to this date was mainly utilized for other purposes, such as to support the tolling request and show Appellants' lease repudiation (due to their claim of lease expiration before the primary term even ended).

{¶59} Appellants admit that after providing the location proposal in January, Chesapeake "repeatedly attempted to gain location approval for the site." Appellants argue it was reasonable to withhold their approval of the location because they "felt that additional information, such as copies as the permits for wells, were relevant in reviewing location proposal." First, we note it seemed Appellants asked for a copy of the permit application in January in the context of their attempt to renegotiate the entire lease; there was no indication the request was related to the desire for more information on the location. Furthermore, Chesapeake responded by informing Appellants the permit application had not been filed because the location was not yet approved by Appellants, and still, Appellants provided no enlightenment as to any issue with the proposed location. We also note the permit inspection, which occurred contemporaneously with the permit application, required the GPS coordinates for the well stake. And, Chesapeake provided Appellants with the permit application after it was filed in March 2015, but this prompted no response from Appellants as to any issue with location.

{¶60} Appellants next note the site was not staked until March 4, 2015, claiming they did not wish to approve the site upon merely viewing a map with GPS coordinates for the well head as it did not provide a first-hand visual representation as would the staking of the site. Appellees urge that staking occurs *after* a site is approved; otherwise, it would have to be re-conducted if the landowner reasonably withheld consent. Moreover, besides failing to advise Chesapeake they had an issue with the location, *Appellants did not indicate the location was unascertainable from the map* provided by Chesapeake. Rather, they indicated multiple times that they did not believe they should approve the location as they hoped the lease would expire.

{¶61} Appellants note they were negotiating surface damages (in addition to negotiating a lease amendment) during the relevant time period. Appellees point out the lease already required the lessee to pay a reasonable rate for surface damages, and this

was not connected to the location clause in a manner that would allow the withholding of consent. The permit filings and communications indicated no disturbance to timber or growing crops was anticipated. Additionally, Appellants did not indicate at any point that the rate for disruption to the surface should be different based on the precise well location. Even when Chesapeake explained that the answer on location was distinct from lease amendment, no explanation was provided for the refusal to approve the proposed location (other than hopes of lease expiration for failure to produce in paying quantities or failure to commence operations). The well location was provided in January, and Appellants failed to voice any issue with the location or the depiction of it in January, February, March, and half of April.

{¶62} Appellants point to Karen Shutway's statement that she informed Chesapeake during the September 2014 field review (before a specific site was proposed) that she would prefer the well to be located on the opposite side of a pipeline right-of-way, but then the subsequent proposal did not place the well back far enough. However, upon receiving the January proposed location, Appellants did not inform Chesapeake they objected to the location or that this was the reason why. They claim they were never asked after the March 4, 2015 staking whether the location was acceptable. Yet, they were asked to provide consent to the location many times before this, and they were provided with the permit application after this.

{¶63} According to their affidavit, Appellants did not object until they signed the road permit application (which was executed April 20, 2015). A letter thereafter advised Appellants: they failed to object to the well pad location after the January proposal; they admitted they were withholding their approval because they were hoping the lease would expire before sufficient operations could be commenced; they encouraged Chesapeake to apply for the well permit; and Chesapeake reasonably believed there was a mutual agreement as to the location. This letter provided one last time to give a reasonable objection to the well pad site, but Appellants did not respond.

{¶64} In summary, Appellants failed to respond to the repeated requests for feedback on the proposed well pad site. They voiced no timely objection to the specified location, initially or after Chesapeake indicated it was proceeding on the same site as originally proposed. A failure to object to a proposed location can be considered the provision of approval by inaction. *See, e.g., Meeko v. Southwestern Energy Prod. Co.*,

M.D. Pa. No. 3:CV-11-1409 (Dec. 27, 2012) (granting summary judgment on landowner's breach of contract claim where the lessor asked the landowner to voice any objections to the proposed well location within five days). Regardless, Appellants' failure to engage in the process of mutual approval of a location or object to the location or the sufficiency of the description of the location in the proposal constitutes the unreasonable withholding of consent. As a matter of law, even a lessor who has a perfectly understandable and valid reason for withholding consent to a location must express that reason to the lessee so the parties can mutually approve a location, which is required under the first part of the clause: "Lessee and Lessor to mutually agree on all drill site and access road locations, not to be unreasonably withheld by Lessor."

{¶65} For the reasons explained above, we conclude Appellants breached this clause, and Chesapeake did not. The entry of summary judgment against appellants on their claim related to this topic and in favor of Chesapeake on their counterclaim related to this topic was therefore not in error.

Lease Tolling

{¶66} This leaves the issue of the tolling order. The trial court found Chesapeake engaged in sufficient conduct to constitute drilling operations and to thus extend the primary term past the May 3, 2015 expiration date. In the same judgment, the trial court further found Chesapeake was entitled to equitable tolling of the lease and ordered the lease tolled from September 1, 2014 through resolution of the final appeal.

{¶67} "Equitable tolling of the terms of oil and gas leases may be employed by courts to preserve the status quo where the validity of those leases is challenged." *Summitcrest, Inc. v. Eric Petroleum Corp.*, 7th Dist. No. 12 CO 0055, 2016-Ohio-888, 60 N.E.3d 807, ¶ 44. *See also Hupp v. Beck Energy Corp.*, 7th Dist. No. 12 MO 6, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 26 (issuing a tolling order for time between the filing of the motion to toll in the trial court through appeal process), affirmed in part and reviewed via mandamus in part in *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836. The general rule has been expressed as: "When a lessor actively asserts to a lessee that his lease is terminated or subject to cancellation, the obligations of the lessee to lessor are suspended during the time such claims of forfeiture are being asserted." *Yoskey v. Eric Petroleum Corp.*, 7th Dist. No. 13 CO 42, 2014-Ohio-3790, ¶ 46, quoting *Jicarilla Apache Tribe v. Andrus*, 687

F.2d 1324 (10th Cir.1982) (and the purpose is not to punish the landowner for asserting lease invalidity but to suspend obligations in the fact of a clear repudiation), citing *Morrison Oil and Gas Co. v. Burger*, 423 F.2d 1178, 1182-83 (5th Cir.1970) and 2 E. Kuntz, *Oil and Gas* 324–27 (1964).

{¶68} On the matter of pre-litigation tolling due to interference by the landowner, this court granted a motion for tolling upon finding it was reasonable and equitable to toll the primary term of the lease beginning at the point the landowner refused to permit access to the property. *See Oxford Oil Co. v. West*, 7th Dist. No. 13 BE 0031, 2016-Ohio-5684, 62 N.E.3d 195, ¶ 35, citing *Feisley Farms Family, L.P. v. Hess Ohio Resources*, S.D. Ohio No. 2:14-CV-146 (Sept. 30, 2015) (tolling the primary term from the date the lessee received a letter from the lessor's attorney declaring the lease "forfeited"). This case did not suggest that refusing access to the property is the only means of interference. We note that this use of tolling is akin to an extension.

{¶69} As reviewed above, where a lessee claims the lease extended beyond the primary term in a case with no drilling operations savings clause, the lease is extended if the lessee shows there was: production in paying quantities, an agreement for the extension, or interference by the lessor. *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955), paragraph one of the syllabus. In a case with a drilling operations savings clause, the same principle would apply to interference with attempts to engage in drilling operations. Repudiation is a type of interference. The repudiation doctrine can apply to extend a lease when a lessor asserts a clear, unequivocal challenge to the lessee's right in the lease. *See, e.g., Yoskey*, 7th Dist. No. 13 CO 42 at ¶ fn. 3 (citing cases).

{¶70} EPC and the Broker trustee argue the entire appeal is moot due to Appellants' failure to specifically contest the tolling order, which was an alternative holding. They urge the issue of whether drilling operations commenced before May 3, 2015 is moot if the lessee's obligations under the lease were tolled since September 1, 2014.

{¶71} As mentioned in the section addressing whether Appellants withholding of consent, Chesapeake's brief protested Appellants' placement of the consent issue under the drilling operations assignment of error instead of separately assigning as error the consent issue. Chesapeake did not construe the situation as a failure to address the tolling order or as a mooting of the entire appeal. Instead, Chesapeake construed

Appellants' arguments on whether they unreasonably withheld consent as arguments relating to the tolling order.

{¶72} In their reply brief, Appellants urge that a request to set aside the tolling order is inherent in their brief. They point to various arguments in their brief, including their contentions that they did not unreasonably withhold consent, Chesapeake engaged in unreasonable delay, and each side's culpability should be considered.[5] The actions relating to the withholding of consent to the well pad location are relevant to the issue of tolling, but other circumstances are pertinent as well and there were various items used by Appellees to support their tolling request which called for individual analysis.

{¶73} Appellants' initial brief addressed some concepts relevant to the issue of whether the lease should have been tolled or extended for a period of time prior to the filing of the lawsuit.[6] Appellants' arguments on whether they unreasonably withheld consent to the proposed location would be relevant to the issue of tolling between January and May 2015. These arguments were disposed of supra.

{¶74} As to the September 1, 2014 effective date ordered by the trial court and the January 2015 location proposal, Appellants' brief does argue the trial court should not have attributed to them any delay between August 2014 and January 2015. They note they did not refuse entry to Chesapeake when they prohibited heavy equipment from entering the property while crops were growing, and they complain Chesapeake conducted the field review in mid-September 2014 but did not provide the proposed location until mid-January 2015.

{¶75} During the time period of August 2014 to January 2015, Appellants were protesting the validity of Chesapeake proceeding under the lease. This is evidenced by:

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[5] The reply brief also suggests our finding that a certain tolling order was moot in *Yoskey* supports their failure to specifically argue the tolling order was improper, why, and to what extent. *Yoskey* involved a request to toll a lease that was still in its primary term when the landowner filed suit seeking lease rescission for fraud, and the lessee only sought to toll the lease during the lawsuit. *See Yoskey v. Eric Petroleum Corp.*, 7th Dist. No. 13 CO 42, 2014-Ohio-3790. There was no pre-litigation tolling ordered in the alternative as a dispositive reason for lease validity. As we were remanding on a threshold issue leaving no prevailing party, we merely refused to review the merits of the tolling issue raised; it was not ripe as the trial court expressly based its tolling decision on the fact that the plaintiff did not prevail. *Id* at ¶ 51. We did not relieve a party from raising a dispositive tolling issue.

[6] There is no indication that an issue is taken with the portion of the tolling period applicable to the time *after* the suit was filed. Again, Appellants' suit was filed three days after the primary term would have expired if not for drilling operations, and an agreement was entered with regards to a their request for a preliminary injunction to stop operations pending the lawsuit.

Appellants' declaration in an August 26, 2014 letter that the lease was no longer valid; the reference in this letter to Appellants' prior disclosure of their position disclaiming the effectiveness of the lease; and Appellants' statements in a November 4, 2014 letter reiterating this claim and noting their reliance on federal case law. Appellants continued to protest lease validity even after the Sixth Circuit's decision, by changing to another theory. Yet, these theories were not then relied upon in their lawsuit, and Appellees point to multiple letters suggesting the theories were used as excuses for delaying Chesapeake on the location proposal.

{¶76} Appellees reviewed the totality of the circumstances in their request for a tolling of the lease, including the unreasonable withholding of consent to the proposed location and lease repudiation as Appellants challenged the validity of Chesapeake proceeding under the lease. Notably, Appellants never argued they did not repudiate the lease by telling Chesapeake the lease was no longer valid. Instead, they suggested to the trial court that the repudiation was proper. As stated above, tolling can be ordered not merely for punishment but also for equity.

{¶77} On appeal, Appellants' brief does not address the parameters of the doctrine of interference or repudiation as justification for tolling or extending the lease. The statement of facts in Appellants' brief mentions their initial reliance on a federal district court case, but this was not thereafter connected to an argument in the brief. Their reply brief on appeal argues their claim of lease termination based on a federal district court precedent was not "improper" or "nefarious" just because it turned out to be incorrect. Still, they cite no law supporting their suggestion that extension or tolling of a lease due to repudiation cannot be implemented upon a repudiation that was based on a merely incorrect belief that the lease terminated. In any event, a reply brief is not the proper place for raising original, substantive arguments not raised in the appellant's brief. *Paulus v. Beck Energy Corp.*, 7th Dist. No. 16 MO 0008, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 36.

{¶78} Finally, we note there was an additional interference argument presented below about the Rice lease recorded on October 8, 2014, which clouded the title to the subject lease by specifically claiming it covered two of the parcels that were already contained in the subject lease (and which also contained catch-all language that it covered all oil and gas interests owned by the lessor). This lease was entered after Appellants told Chesapeake the lease was no longer valid. Appellees submitted an

affidavit to the trial court showing no release (or partial release) was filed regarding the Rice lease, even after Appellants were informed by Rice (nearly six months after the recording) that certain parcels could not be leased. This was not discussed in Appellants' initial brief. In the reply brief, Appellants cite to their deposition testimony stating this was a mistake, suggesting a mistake cannot constitute interference. However, this would not eliminate its consideration as a factor on the issue of interference as a whole.

{¶79} To the extent the arguments in Appellants' brief can be construed as contesting the tolling order, they are overruled. The trial court's tolling order was reasonable and equitable.

{¶80} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J.,concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.