[Cite as *Toronto City Schools Bd. of Edn. v. Am. Energy Utica, L.L.C.*, 2020-Ohio-586.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

BOARD OF EDUCATION
TORONTO CITY SCHOOLS et al.,

Plaintiffs-Appellees,

v.

AMERICAN ENERGY UTICA, LLC, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0025

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 15 CV 245

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

JUDGMENT:
Affirmed in part; Reversed and Remanded in part.

Atty. Andrew Douglas, Mazanec, Raskin & Ryder Co., 175 South Third Street, Suite 1000, Columbus, Ohio 43215; *Atty. Lee E. Plakas, Atty. Gary A. Corroto, Atty. Joshua E. O'Farrell, Atty. Lauren A. Gribble,* 220 Market Avenue South 8th Floor, Canton, Ohio 44702 for Plaintiffs-Appellees and

Atty. Kevin L. Colosimo, *Atty. Daniel P. Craig,* Frost Brown Todd, LLC, Union Trust Building, 501 Grant Street, Suite 800, Pittsburgh, Pennsylvania 15219; *Atty. Scott Beckmen,* CKR Law, P.O. Box 271064, Flower Mound, Texas 75027 for Defendants-Appellants.

Dated: February 3, 2020

Robb, J.

{¶1} Defendant-Appellant Ascent Resources Utica LLC (and related entities) appeal the decision of the Jefferson County Common Pleas Court granting summary judgment in favor of Plaintiff-Appellees Board of Education Toronto City Schools and other landowners on their contractual claims based on oil and gas leases in which the lessee was Great River Energy LLC, a land broker hired by Appellant to enter into leases in the area. First, Appellant argues it was not a party to the leases and the principles of agency law did not bind it to any contractual obligations on title work or signing bonuses, stating a disclosed principal is not bound where the other party chose to enter a contract in the agent's name. This argument is overruled as the trial court correctly held that Appellant was the principal who became a party to the contract when its authorized agent entered the contract on its behalf.

{¶2} Second, Appellant contests the trial court's conclusion that because notice of a title defect was not provided by the contractual deadline, the landowners were entitled to the signing bonus on all acres listed in the lease even if a landowner did not own the minerals or was unable to lease them due to a pre-existing lease. We reverse the summary judgment on this ground and conclude the plain language of the order of payment attached to the lease did not automatically require payment for all listed acreage upon a missed deadline. Rather, a breach of the title review clause requires a showing of damages. As the case did not reach that stage due to the trial court's summary judgment on contract interpretation, we hereby remand.

{¶3} Finally, we conclude certain rulings (such as deeming a matter admitted or denying leave to amend an answer) were not erroneous, and we conclude other rulings (finding non-movant's evidence on affirmative defenses did not create a genuine issue for trial) are moot due to our reversal of the underlying summary judgment. For the following reasons, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Statement of the Case

{¶4} In 2015, a group of landowners sued Ascent Resources Utica LLC (fka American Energy Utica LLC) and American Energy Partners LP (collectively "Appellant") and Great River Energy LLC ("GRE") asserting various claims including breach of contract. GRE was retained by Appellant as its land services agent and was named as the lessee in the 2013 oil and gas leases. When the leases were executed, the landowners were all represented by the same law firm who negotiated on their behalf as a group (which included other lessors who are not part of this suit).

{¶5} The complaint alleged the order of payment incorporated into each lease provided 120 days from receipt of the signed lease documents for GRE to tender the signing bonus for all acreage encompassed in the lease (even if there was no title or there was an existing lease) or to *timely* identify a title defect (and surrender the lease if the defect was not timely cured by the landowner within 90 days). The complaint said the landowners were not provided with notice of a title defect within 120 days, they gave notice of non-payment (which provided the lessee 30 days to tender payment), and they did not receive payment. The plaintiffs allegedly fell into three groups: (1) group one never received a notice of a title defect; (2) group two received untimely notice of a title defect and then allegedly cured the defect within the 90-day period; and (3) group three received untimely notice of a title defect.

{¶6} Appellant was said to be liable because GRE procured the leases as Appellant's agent at the direction and for the benefit of Appellant under an agreement whereby GRE would tender the signing bonus and legal fees payable under each lease after receiving the money from Appellant and GRE would subsequently assign the lease to Appellant. Both the bonus and the legal fees were calculated based on the acreage listed in each lease. (The lease terms are set forth in part two under the first assignment of error.)

{¶7} Appellant filed a motion to dismiss asserting it was not obligated under the lease because it was a disclosed principal and the lease named only the agent as the lessee meaning the landowners chose to contract with the agent alone. On December 12, 2016, the trial court denied Appellant's motion to dismiss.

{¶8} In the meantime, the landowners filed a motion for summary judgment (on August 29, 2016). They urged Appellant was bound by the lease with GRE under agency law and the duty to tender the full signing bonus became absolute if the title work was not

completed within 120 days. Affidavits from the landowners attested they did not receive notice of a title defect within the 120-day period and they were not paid for all acreage listed in the lease.

{¶9} Appellant's response in opposition to summary judgment reiterated the agency argument, claiming it was not bound by GRE's lease. Appellant also asserted the signing bonus was not automatic upon expiration of the title deadline because: the lease allowed the lessee to reduce the consideration paid based on the true net interest owned by the lessor; the lease conditioned payment upon title being confirmed satisfactorily to GRE in its sole discretion; a lack of ownership is more than a title defect; a lease is unenforceable without consideration, which was not excused by a clause stating there is no warranty of title; the lease did not take effect until payment of the bonus; the title review process in the order of payment was akin to an option contract which was never accepted by payment of the full signing bonus; and after the 120-day period expired without payment or notice of a title defect, the lease lapsed and the landowners were free to lease to another.

{¶10} Appellant filed a list of affirmative defenses, pointing out that it had not yet filed an answer due to its pending motion to dismiss. After the motion to dismiss was overruled, Appellant's answer (filed in January 2017) explained Appellant would tender the bonus payment to GRE for payment of the signing bonus to a landowner to the extent the landowner had good title to the oil and gas interests listed in the order of payment. The answer reviewed issues with certain interests attempted to be leased, such as lack of ownership and pre-existing leases. It said the tendered payments corresponded to the unencumbered acreage owned and pointed to "corrective" documents signed by some landowners.

{¶11} On March 23, 2017, the trial court granted the landowners' motion for summary judgment as to Appellant's contractual obligations. On the issue of agency, the court applied law stating the principal itself becomes a party to a contract made on its behalf by its authorized agent. The court pointed to the Master Land Services Contract with GRE's parent company (Orange Energy Consultants LLP), which stated the services to be provided to Appellant included: "negotiating for the acquisition of mineral rights, negotiating agreements that provide for the exploration and for production of minerals, conducting lease availability checks, title research, mineral take-offs, acquisition due diligence, lease and/or pipeline right-of-way negotiations, title curative and representation

at State and/or Federal Lease sales." The court referred to correspondence showing Appellant instructed Orange Energy to take the leases under the GRE name in order to portray local connections, and the court cited an advertisement approved by Appellant which instructed landowners interested in leasing with American Energy Partners to contact GRE with whom it was acting in partnership. The court concluded Appellant was bound under agency principles.

{¶12} On the issue of contract interpretation and Appellant's duties under the lease, the court found the order of payment clearly and unambiguously: required payment or notice of a title defect within 120 days; provided an opportunity to cure a defect within 90 days of the notice; allowed surrender only if there was timely notice of a title defect plus an inability to cure within the cure period; and required full payment within 30 days of the lessor's notice of non-payment or to surrender by the due date. The court concluded the obligation to pay the full signing bonus became absolute once GRE failed to provide written notice of a title defect within 120 days and the obligation to pay was not dependent on a landowner's title.

{¶13} The court left the matter of breach and damages for subsequent summary judgment proceedings or trial. Notwithstanding the trial court's decision in favor of the landowners, Appellant filed a motion for summary judgment as to one landowner, arguing he did not own the minerals and suffered no injury. In response, the landowners pointed out that the trial court already rejected this argument in the March 23, 2017 decision, which found a landowner was entitled to full payment under the terms of the lease if the title review period expired without notice of a title defect. On June 2, 2017, the court denied Appellant's motion for summary judgment.

{¶14} Based on a disclosure at the motion hearing, Appellant filed a motion for recusal on June 7, 2017. The court recused itself in September 2017. A visiting judge was assigned in February 2018.

{¶15} In the interim, the landowners filed a motion for summary judgment on issues remaining after the March 23, 2017 summary judgment, such as the timing of the notice of a title defect, the full signing bonus relevant to each landowner, and how much each was paid if any. The landowners pointed to admissions by GRE that notice of a title defect was not given within the 120-day title review period and provided information on the signing bonus received by each landowner versus the amount listed in each order of payment.

{¶16} Appellant's August 2017 response reiterated prior arguments on agency, contract duties, and the effect of a landowner's inability to lease the minerals. Appellant also alleged discovery documents suggested later dates for GRE's receipt of the executed leases (the trigger of the 120-day title review period), citing the Craig Affidavit (Appellant's attorney). As to three landowners, Appellant alternatively argued the acceptance of payment for less than the entire acreage was an accord and satisfaction. It was also alleged that one landowner relinquished the right to payment by acknowledging title was defective and asking for a release, citing the Beckmen Affidavit (of GRE). On July 20, 2018, Appellant supplemented its response and filed another Beckmen Affidavit, which said the landowners' law firm provided some incorrect legal descriptions and claimed the 120-day period should not start until the description was corrected.

{¶17} In March 2018 (after the new judge was assigned), Appellant asked the court to reconsider the prior judge's March 23, 2017 summary judgment on contract interpretation. Appellant argued the landowners were misinterpreting the title review language and were not automatically entitled to the signing bonus.

{¶18} Upon noticing the landowners' assertion that Appellant waived the defense of accord and satisfaction since it was not raised in the answer, Appellant (on August 17, 2018) sought leave to amend the answer to add this defense. On November 18, 2018, the trial court denied this request finding undue delay.

{¶19} On November 20, 2018, the court granted summary judgment in favor of the landowners on the contract claims. First, the court agreed to reconsider the March 23, 2017 decision defining Appellant's legal duties, which was issued by the prior trial judge before recusal. However, the court agreed with that decision finding: Appellant was bound under agency law; the landowners were not provided with notice of a title defect before the expiration of their respective 120-day title review periods; the landowners provided notice of default after that period expired; they were not paid the full signing bonus as required by the lease; and the obligation to pay the full signing bonus became absolute after the 120-day title review period expired without notice of a title defect.

{¶20} The court found Appellant's evidence in opposition to summary judgment did not raise a genuine issue of material fact on its claims of waiver, estoppel, or accord and satisfaction (which was not properly raised). The court found admissions established

that the landowners were not provided with timely notice of a title defect, and the court struck the Craig Affidavit for lack of personal knowledge and hearsay. The court concluded Appellant and GRE were jointly and severally liable for the full signing bonus listed in each order of payment (which included the full amount of legal fees set forth in each order of payment).[1]

{¶21} The court described its judgment as a final appealable order and found there was "no just reason for delay" under Civ.R. 54(B).[2] Appellant filed a timely notice of appeal. Appellant sets forth three assignments of error, each generally corresponding to a different judgment: (1) the March 23, 2017 summary judgment (upheld in the November 20, 2018 judgment) ruling on (a) agency and (b) contract formation and interpretation; (2) the November 16, 2018 judgment denying leave to amend the answer to add accord and satisfaction; and (3) the November 20, 2018 confirmation of summary judgment and damage award. We address the two unrelated sections of the first assignment of error separately.

Agency

{¶22} The first part of the first assignment of error challenges the decision finding Appellant a party to the lease under agency law, alleging:

"The trial court erred as a matter of law * * * by ruling that Ascent was bound by GRE's Lease Documents where Ascent was a disclosed principal of GRE and Group Members nevertheless elected to contract with GRE in its name alone."

{¶23} Appellant urges: the face of the contract unambiguously shows the landowners leased with GRE, not with Appellant; the contract contained an integration clause (stating the lease with the exhibit and the order of payment constituted the entire agreement and no representations were made or relied upon by either party as an inducement to or modification of the lease); and parol evidence cannot change the party named in the contract where the principal was disclosed prior to contracting.

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[1] According to the bond filings, the judgment totaled $12,713,382 plus interest. Although the Village of Richmond was included in the judgment, a settlement was reached before the trial court entered its order (and the prior settlement was thereafter filed in the record).

[2] Under Civ.R. 41(A)(2), the trial court granted the landowners' request to voluntarily dismiss claims against Appellant which were unaddressed by the summary judgment motion. Other landowners who did not participate in the summary judgment motion (and were not included in the judgment) dismissed their claims. The court separately granted summary judgment for two defendants added in the second amended complaint (for acceptance of the leases as collateral).

{¶24} The landowners claim the relevant inquiry is not whether Appellant is named in the lease as a contracting party but is (1) whether an agency relationship existed between Appellant and GRE and (2) whether GRE's procurement of the leases was authorized under the agency relationship. Appellant does not dispute that parol evidence can be used to answer these two questions and says the questions on agency are not disputed, thereby admitting there was an agency relationship and Appellant authorized the procurement of the leases in GRE's name.

{¶25} The parol evidence rule generally prohibits the contradiction or supplementation of final written integrated agreements by evidence of prior or contemporaneous oral agreements or prior written agreements. *See Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000) (but parol evidence can be used to show fraud, mistake, or other invalidating cause). Notably, Appellant emphasizes its status as a disclosed principal in seeking to apply a rule where only the agent's name is in the contract. Where the principal's name is not in the contract, the very claim by the principal that it was a disclosed principal would be established by parol evidence.

{¶26} The landowners emphasize the general principle: "the acts of an agent within the scope of what he is employed to do and with reference to a matter over which his authority extends are binding on his principal." *Saunders v. Allstate Ins. Co.*, 168 Ohio St. 55, 58-59, 151 N.E.2d 1 (1958) (dealing with an agent soliciting insurance applications for an insurer). "[O]ne of the most important features of the agency relationship is that *the principal itself becomes a party* to contracts that are made on its behalf by the agent." (Emphasis original.) *Cincinnati Golf Mgt. Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶ 23, citing, *e.g.*, Restatement of the Law 3d, Agency, Section 6.01 (2006).

{¶27} The landowners contend the use of parol evidence is contemplated by these agency rules. They urge that just as parol evidence can be used in an undisclosed principal case to establish a contract made in the agent's name was actually made on a principal's behalf, it can be used where the principal was disclosed. *See, e.g., Bowden v. Meade*, 1 Ohio Law Abs. 596 (9th Dist.1923) (agency may be established by parol testimony in undisclosed principal case). A cited United States Supreme Court case involved whether an undisclosed principal could sue on the contract made in the agent's name, but the Court made broad various statements:

> It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.
>
> *The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction*. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, *while the same evidence will be admitted to charge the principal*.

(Emphasis added.) *Ford v. Williams*, 62 U.S. 287, 289, 16 L.Ed. 36 (1858).

{¶28} This use of parol evidence does not deny the contract binds those named on its face but shows the contract also binds another under the principle that the act of the agent is the act of the principal. *Id.* It has been observed that whether the principal is disclosed or undisclosed, the court is answering the same question of whether the contract was made for and on behalf of the principal; the same rule allowing parol evidence applies in either case. *Moore v. Consol. Products Co*., 10 F.2d 319, 321 (8th Cir.1925) (the same parol evidence which shows the plaintiff's knowledge of the agency can show the principal essentially adopted the agent's name for the purpose of a given contract).[3]

[3] The landowners cite *Collins* for the premise that parol evidence can be used by a plaintiff to show the principal was the true contracting party in a contract with only the agent's name; however, the Court was merely reciting an argument, and the case dealt with *the agent's* liability on a note. *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 222 (1867).

{¶29} In addition to stating, "one of the most important features of the agency relationship is that *the principal itself becomes a party* to contracts that are made on its behalf by the agent," the Ohio Supreme Court also explained, "binding the principal to agent-made contracts typically requires that the agent make the contracts on the principal's behalf with actual authority to do so." (Emphasis original.) *Cincinnati Golf*, 132 Ohio St.3d 299 at ¶ 23-24. Appellant's argument presumes the contract was not "made on the principal's behalf by the agent" if the principal's name was not in the contract and the agent was named in the contract as a contracting party. It has been said: "An agent who acts for a disclosed principal and who acts within the scope of his authority *and in the name of the principal* is ordinarily not liable on the contracts he makes." (Emphasis added.) *See James G. Smith & Assocs. Inc. v. Everett*, 1 Ohio App.3d 118, 120 (3d Dist.1981). However, that case reviewed the law on the agent's liability, without discussing the principal's liability. And, the Supreme Court used the phrase "on the principal's behalf" rather than limiting the holding to contracts made "in the name of the principal."

{¶30} Appellant seeks to bar suit against the disclosed principal under the premise: "where a party contracts with an agent, knowing at the time of the making of the contract that he is dealing with the agent of another party but notwithstanding that fact contracts with the agent alone, he cannot thereafter maintain an action on said contract against such agent's principal." *Depositors S. & L. Co. v. Gross*, 6 Ohio Law Abs. 606 (8th Dist.1928) (contractor could not sue building owner known at the time of contracting since he contracted only with the agent). The *Gross* case cited *Post & Co.* wherein a panel in the Cincinnati Superior Court ruled: if the name of the principal does not appear in an unambiguous instrument which asserts a positive liability on the part of the person contracting, then parol evidence to bind the principal is not admissible. *Post & Co. v. Kinney*, 7 Ohio Dec. 439 (1878) (but also noting the principal was unaware of the contract and the agent's authority to enter the contract was doubtful).

{¶31} The rule in *Gross* was applied by the Sixth District in *Perrysburg Twp. v. Rossford* where the plaintiff entered a contract with the Rossford Arena Amphitheater Authority (an agency of the city formed as a non-profit corporation to own and operate a project). The Sixth District held that even if the RAAA and its president were agents of the city of Rossford, the plaintiff could not maintain an action on a contract against the city since the sole contracting party was RAAA (with its president signing as its agent)

because if the agent does not enter into the contract as agent, but as the sole contracting party, the disclosed principal is not bound. *Perrysburg Twp. v. Rossford*, 149 Ohio App.3d 645, 2002-Ohio-5498, 778 N.E.2d 619, ¶ 54-55 (6th Dist.) (*aff'd on other grounds*, as this issue was not accepted for appeal, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44), citing *Brown v. North American Energy Programs Inc.*, 8th Dist. Cuyahoga No. 46749 (Nov. 17, 1983). The landowners say the Sixth District case is distinguishable because the property was not to be assigned to the alleged principal as were the leases here and Perrysburg did not allege the agent entered the contract on the city's behalf and at the city's direction as was the case here.

{¶32} In the cited *Brown* case: the plaintiff contracted with a corporation to study some oil wells; the corporation was a general partner in a limited partnership which owned the wells; the contract stated the study was for the corporation who would provide the information to the partnership; the plaintiff sued the partnership to recover his fee under the contract; and the trial court dismissed the claim against the partnership. The Eighth District affirmed, noting the plaintiff entered into the contract with the corporation (not the partnership) and there was no indication on the face of the contract that the corporation was acting as agent for the limited partnership. *Brown*, 8th Dist. Cuyahoga No. 46749, citing *Gross,* 6 Ohio Law Abs. 606. The landowners point out that *Brown* is distinguishable as the contract expressly said the study was for the corporation and noted the partnership would be provided information, thereby distinguishing the agent as the contracting party. Additionally, the *Brown* court reviewed a statute providing that a partner is an agent of the partnership who can bind the partnership by acts such as "execution *in the partnership name* of any instrument." (Emphasis added.) *See* R.C. 1775.08(A).

{¶33} The landowners point to a federal case applying Ohio law to find parol evidence can be used to determine if the agent could bind the principal to a contract naming only the agent as the contracting party. *Versatile Helicopters Inc. v. City of Columbus*, 548 Fed.Appx. 337 (6th Cir.2013). In that case, a purchase agreement was made between the plaintiff and the city's agent (a broker who was to sell the city's helicopter for a commission and take title before transferring it to the buyer). The city made arguments similar to those presented by Appellant: the city was not liable to the plaintiff for breach of contract, as a matter of law, because it was not a party to the agreement; the inquiry can go no further than the four corners of the contract; and a disclosed principal will not be liable when the agent does not enter into the contract as an

agent and the third party elects to contract with the agent alone. The federal appellate court for the Sixth Circuit found "the question of whether [the agent] could bind the City to the contract with [the plaintiff] under agency principles was an entirely separate question that may be determined from evidence outside the contract." *Id.* at 340.

{¶34} Although the Sixth Circuit mentioned that the purchase agreement did not contain an integration clause and the contract here contained an integration clause, the court relied on a case which rejected the principal's argument that an integration clause barred parol evidence on whether an agent bound a disclosed principal to a contract. *Id.*, citing *MJR Internatl. Inc. v. American Arbitration Assn.*, S.D.Ohio No. 06–cv–0937 (2009), fn. 6. The cited case rejected an argument that the court could only consider the terms of the contract (which contained an integration clause and did not name the principal) to decide whether the principal could be bound under agency principles. *MJR,* S.D.Ohio No. 06–cv–0937, *aff'd*, 398 Fed.Appx. 115 (6th Cir.2010). This is supported by the observation: "The parol evidence rule applies, in the first instance, only to integrated writings, and an express stipulation to that effect adds nothing to the legal effect of the instrument." *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7, 734 N.E.2d 782 (2000) (allowing parol evidence of fraud in the inducement regardless of the integration clause).

{¶35} The Sixth Circuit in *Versatile Helicopters* relied on the Ohio Supreme Court's holding in *Cincinnati Golf* and the following Restatement comment:

> If an agent makes a contract in the name of a principal or a description in the contract is sufficient to identify the principal, the principal is a disclosed principal and is a party to the contract. * * * Additionally, a principal may be disclosed even though the contract does not name or identify the principal; it is sufficient that the third party has notice of the principal's identity. * * * Unless the contract explicitly excludes the principal as a party, parol evidence is admissible to identify a principal and to subject the principal to liability on a contract made by an agent. The parol-evidence rule does not bar proof that an agent made a contract on behalf of a principal.

Restatement of the Law 3d, Agency, Section 6.01, Comment c (2006). The Ohio Supreme Court cited Section 6.01 when stating the principal is a party to the contract when an agent makes a contract on behalf of a disclosed principal. *Cincinnati Golf*, 132 Ohio St.3d 299 at ¶ 23.

{¶36} We agree with the position in the above-quoted comment. The fact that the principal's name is not in the instrument and there is no appearance of agency upon the writing does not mean a disclosed principal cannot be liable. Restatement of the Law 1st, Agency, Section 149 (1933) (unless the specific terms exclude the principal as a party). *Accord Rosenberg v. Heritage Renovations LLC*, 685 N.W.2d 320 (Minn.2004) (the disclosed principal is subject to liability for an authorized written contract even though it purports to be the contract of the agent, unless the principal is excluded as a party by the contract). "A principal has the right to do business in his own name or in the name of his agent, and parol evidence identifying him as the real party in interest violates to no greater extent the rule against varying contracts by extrinsic evidence than does subjecting to liability an unknown and unnamed principal by the same means." *Love v. Brown Dev. Co. of Michigan*, 131 So. 144, 146 (Fla.1930). *See also* 10 *Williston on Contracts*, Section 29:19 (4th Ed.) (a writing which identifies A as a party sufficiently designates B where parol evidence shows B is A's principal).

{¶37} The evidence demonstrated the agent's authorization to enter the contract in the agent's name but on the principal's behalf and at the principal's direction. As a disclosed principal can be liable where the agent is the only party named in the contract due to parol evidence showing the authorized agent entered the contract at the direction of and on behalf of the principal, Appellant's agency argument that it was not a contracting party is overruled.[4]

Contract Terms: Title Review Period & Consideration

{¶38} In the second section of the first assignment of error, Appellant addresses contract interpretation and formation, alleging:

[4] Therefore, we need not address the landowners' alternative theory that Appellant is liable as a third-party beneficiary. The precedential cases deal with *recovery* by a third-party beneficiary (who has no greater right than the signatory when seeking judicial interpretation of a contract) and hold: intent to benefit a third party must be expressed in the language of the agreement; extrinsic evidence cannot be considered absent an ambiguity (or circumstances invest the contract with special meaning); and an incidental beneficiary cannot recover. *See Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, ¶ 12; *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381, ¶ 18; *Hill v. Sonitrol of Southwestern Ohio Inc.*, 36 Ohio St.3d 36, 41, 521 N.E.2d 780 (1988). *See also Three-C Body Shops Inc. v. Nationwide Mut. Fire Ins. Co.*, 2017-Ohio-1462, 81 N.E.3d 499, ¶ 18-23 (10th Dist.) (third-party beneficiary's right to performance does not equate to liability for breach), citing Restatement of the Law 2d, Contracts, Section 302 at 439-440 (1981). In any event, this theory of liability was not raised in the motion below or addressed by the trial court.

"The trial court erred as a matter of law by ruling * * * that the Lease Documents were valid and enforceable contracts regardless of whether Group Members owned the oil and gas interests they purported to lease."

{¶39} The lease with its five-year primary term recites in the "Payments to Lessor" clause that the lessee paid a bonus for execution of the lease and no further delay rental payments would be due during the primary term of the "Paid-up Lease." The "Entire Contract" clause of the lease states: "The entire agreement between the Lessor and Lessee is embodied herein, and in Exhibit A attached hereto and incorporated herein and in the associated order of payment. No oral warranties, representations, or promises have been made or relied upon by either party as an inducement to or modification of this Lease." (Lease at 4). The "Surrender" clause allows the lessee to surrender and cancel at any time all or part of the leasehold by recording a surrender which shall cause all rights and obligations to terminate. (Lease at 4).

{¶40} The "Title" clause provides: "If Lessee receives evidence that Lessor does not have title to all or part of the rights herein leased, Lessee may immediately withhold payment that would be otherwise due and payable hereunder to Lessor until the adverse claim is fully resolved. Lessor represents and warrants that there is no existing oil and gas lease which is presently in effect covering the Leasehold." (Lease at 3). A "Title and Interests" clause warrants: "The Lessor hereby warrants generally and agrees to defend title to the Leasehold and covenants that Lessee shall have quiet enjoyment hereunder and shall have benefit of the doctrine of after acquired title." (Lease at 3).

{¶41} Attached to the lease is Exhibit A, which states it controls if there is a conflict with the form lease. (Lease at 6). The "No Warranty of Title" clause says the "Lease is made without warranty of title." (Lease at 8). The exhibit states in bold, "Lessor hereby warrants that Lessor is not currently receiving any bonus, rental, production royalty as the result of any prior oil and gas lease covering any or all of the subject premises, and that there are no commercially producing wells currently existing on the subject premises [or upon lands in the same drilling unit]." (Lease at 6). Emphasizing the lease did not take effect until the receipt of the bonus, Appellant focuses on the "Lessor's Representation Regarding Title to Leased Premises" clause in the exhibit which states:

> Upon this lease taking effect (thus upon Lessor's receipt of the bonus payment), Lessee's obligations under this Lease shall not be diminished or

> affected by any title encumbrance on the Leased Premises, including but not limited to any mortgage or mineral lease of record that existed as of the date this Lease became effective.
>
> (Lease at 8). Finally, the exhibit's "Release of Lease" clause requires the lessee to provide a release upon the lessor's written request and after termination, expiration, or surrender. (Lease at 9).

{¶42} Each lease and order of payment lists the parcel numbers in the leasehold, the acreage of each parcel, and the total acreage. The order of payment (incorporated by the integration clause) specifies the amount payable to the landowner as a signing bonus per acre and the total signing bonus, along with the amount payable to the law firm for legal fees per acre and the total legal fees under the particular lease. The disputed language of the order of payment states:

> [GRE] will tender payment of the initial consideration to the Lessor identified in the Paid Up Lease ("the Lease"), and the separate amount identified below as fees for Lessor's legal counsel, as indicated herein by checks within 120 days of its receipt of the original of this Order of Payment and the executed Lease. Payment is conditioned upon title to the property interests leased being confirmed satisfactorily to GRE, in its sole discretion. A prior unsubordinated mortgage shall constitute a title defect and is a basis to render title unacceptable. Upon notification by GRE of the title defect(s), Lessor shall have a period of ninety (90) days to cure any title defect ("cure period"). Should Lessor cure the title defect(s) within the 90 day cure period, Lessor shall be paid as set forth herein by GRE. * * * No default for non-payment may be claimed by Lessor during said 120-day period.
>
> If Lessor owns more or less than the net interest defined herein, GRE may, without immediate notice to Lessor, increase or reduce the consideration payable hereunder proportionate to the actual interest owned by Lessor.
>
> GRE may surrender the Lease associated with the Order of Payment only upon the existence of a title defect and Lessor's inability to cure such defect within the cure period. If the Lease is surrendered due to the presence of

> a title defect(s) and Lessor is unable to cure such title defect(s) within the cure period, the Lessor may retain any consideration paid at the time of signing the Lease but is not entitled to any additional amount. If the Lease has not been surrendered or payment made by the specified due date, then Lessor shall notify Lessee in writing and Lessee shall have 30 days from receipt of such written notice to make payment. * * *

(Lease, Order of Payment).

{¶43} The landowners emphasize the lease clause stating the landowners will not provide a warranty of title. Nevertheless, payment was conditioned on the confirmation of a landowner's title to the leasehold, they warranted the leasehold was not encumbered by an active lease, and they agreed to "exclusively" lease "all the oil and natural gas * * * underlying the land herein" which was then described with the anticipated acreage listed. As Appellant points out, a clause disclaiming a warranty of title means the landowner will not compensate the lessee if there is a failure of title. *See People's Sav. Bank Co. v. Parisette*, 68 Ohio St. 450, 458, 67 N.E. 896 (1903) (covenant of warranty promises to make monetary compensation for a loss and eviction on the failure of the title which the deed purports to convey).

{¶44} The "No Warranty of Title" clause does not convert the lease into a quitclaim and involves a distinct covenant that is different from a disclaimer of the right to convey. *See* R.C. 5302.06 (listing the four covenants). *See also Chesapeake Exploration LLC v. Valence Operating Co.*, S.D. Texas No. H-07-2565 (Sept. 10, 2008) (the warranty of title is an agreement to pay damages and is a covenant separate from the grant; the mere exclusion of this warranty in the oil and gas lease does not result in a quitclaim); *Barron ex rel. Maness v. Purnell Morrow Co.*, Tex. App. 14th Dist. No. 05-98-01828-CV (June 11, 2001) (eliminating the warranty of title in a mineral lease will not negate the distinct covenant of ownership; the lessee was entitled to recover the bonus paid to lessor). The mere disclaimer of the warranty of title within the lease did not entitle a lessor without title to compel a signing bonus. We also note the November 20, 2018 judgment (which reconsidered the March 23, 2017 judgment) did not rely on the no warranty of title clause (and the March 23, 2017 judgment mentioned the clause but did not base the ruling on it).

{¶45} Appellant raises issues with consideration as to landowners who owned no interest in the minerals listed in their lease (because the minerals were owned by another or subject to an existing lease[5]). The landowners claim the consideration was their detriment of removing the minerals from the market by executing the lease or the benefit to Appellant from recording a memorandum of lease (which allowed Appellant to use the leases as collateral). Appellant points out a landowner cannot remove an interest from the market if he did not own it; also, a memorandum of lease was recorded because Ohio is a race to record state, and this procedure eliminates concerns that the minerals will be encumbered pending the title review. (The lease provided for the recording of a memorandum of lease, and the memorandum said it was not an amendment of the lease but was to provide third parties with notice.)

{¶46} In an attempt to avoid even reaching the language on the title review process, Appellant argues the contract was invalid and never formed. Consideration and contractual capacity are essential contractual elements. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. Consideration is the bargained for legal benefit and/or detriment. *Id.* There can be no contract without consideration. *Prendergast v. Snoeberger*, 154 Ohio App.3d 162, 2003-Ohio-4742, 796 N.E.2d 588, ¶ 29-33 (7th Dist.) (as the document expressed no consideration to support the alleged contract, the contract was invalid). Yet, there is a difference between failure of consideration and want of consideration. *See, e.g.,* Civ.R. 8(C) (defendant must affirmatively set forth in the answer the defense of failure of consideration or want of consideration but only as the latter applies to a negotiable instrument). Want of consideration is the total lack of valid consideration in the contract. *John P. Timmerman Co. v. Hare*, 3d Dist. Allen No. 1-03-14, 2003-Ohio-4622, ¶ 10. Failure of consideration is the refusal or failure to provide the consideration intended to pass under the contract. *Id.* "Failure of consideration exists when a promise has been made to support a contract,

[5] An "oil and gas lease has been construed as transferring to the lessee a fee simple determinable in the mineral estate with a reversionary interest." *Chesapeake Exploration LLC v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 61. "During the lease, the lessor effectively relinquishes his or her ownership interest in the oil and gas underlying the property in favor of the lessee's exclusive right to those resources." *Id.* at ¶ 62. The lease "ultimately, grants title in the oil and gas underlying the property to the lessee during the term of the lease. This effect on ownership, possession, and custody is an inherent attribute of an oil and gas lease." *Id.* at ¶ 64.

but that promise has not been performed." *Action Sanitation Inc. v. Keg & Quarter Inc*., 8th Dist. Cuyahoga No. 49463 (Oct. 3, 1985).

{¶47} In general, where title fails, the purchaser can recover the consideration paid. *See generally Oviatt v. Brown*, 14 Ohio 285, 294 (1846). This is based on a failure of consideration (rather than a want of consideration) where the face of the agreement recites the consideration. "It is well settled that property being sold as an entire thing, if title to a material portion fails, this is such a *failure of consideration* as entitles the purchaser to an election. He may rescind the sale, or he may complete it, upon abatement of price or other terms satisfactory to both parties." (Emphasis added.) *Hayes v. Skidmore*, 27 Ohio St. 331, 334 (1875). And here, the lease specifically provides the lessee can increase or reduce the consideration payable proportionate to the actual interest owned.

{¶48} Where the landowner signs an agreement to exclusively lease minerals but only owns or has the right to lease a portion of the minerals listed in the lease, there would be a failure of consideration as to that acreage. Yet, this does not mean the entire contract was a nullity. Likewise, if a landowner signs an agreement to exclusively lease all oil and gas under the leasehold therein described, but the anticipated title search subsequently shows that the landowner does not own any of the minerals listed in the leasehold (because someone else owns them or has a pre-existing lease over them), then the lease was initially supported by consideration on its face but the recited consideration thereafter failed.

{¶49} This failure of consideration can represent a reason for non-performance, but it would not be an invalidation of all parts of the contract so as to prohibit a court from applying the title review language in the order of payment. The Supreme Court of Pennsylvania stated: "if the consideration money has not been paid, the purchaser, *unless it plainly appear that he has agreed to run the risk of the title*, may defend himself in an action for the purchase money by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty, or of right to convey, or quiet enjoyment, by the vendor, or not; and whether the vendor has executed a deed of conveyance for the premises or not." (Emphasis added.) *Roland v. Miller*, 3 Watts & Serg. 390 (1842). And here, the order of payment contains contractual provisions that apply before the lease goes into effect so that whether the lease takes effect or not, these pre-lease provisions have some effect.

{¶50} It has been observed that a transaction affecting property which a person does not own is an impossibility or a nullity. *Chase Home Financial LLC v. Banker*, 182 Ohio App.3d 546, 2009-Ohio-2650, 913 N.E.2d 1016, ¶ 17-18 (when a mortgagor did not hold legal or equitable title to the subject property, the subsequent mortgage was a nullity and of no legal consequence), citing, *e.g.*, *Pennock v. Coe*, 64 U.S. 117, 128, 16 L.Ed. 436 (1859). If a party "undertakes, by deed or mortgage, to grant property, real or personal, in presenti, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity." *Pennock*, 64 U.S. at 128. Nevertheless, the United States Supreme Court explained that a contract can be *made with intent to affect an interest in property not yet owned*. *Id.* at 129-130 (a contract to mortgage after-acquired property is valid even if the property did not yet exist).

{¶51} The contractual title review process with notice of a title defect and the subsequent cure period evinces the intent to lease property even if the record shows a defect in title because the landowner may subsequently cure the defect (and has 90 days to do so after receiving notice of a title defect). As discussed further infra, a person may have equitable title even if they do not have legal title, and the title review of the record title was the intended means to flesh this out and provide an opportunity to preserve the lease.

{¶52} Appellant also seeks to avoid application of the title review clauses by asking this court to distinguish between a title failure and a title defect, claims a landowner's lack of mineral ownership (due to severance or an existing lease) is a title failure, not a title defect. The order of payment includes a prior unsubordinated mortgage as an example of a title defect. The exhibit to the lease describes a mortgage and a prior recorded mineral lease as examples of a "title encumbrance" and states the lessee's obligation shall not be diminished by any title encumbrance *once the signing bonus is paid*. The order of payment used the term "title defect" instead of "title encumbrance." The landowners cite a case suggesting the phrase "title defect" includes the situation where the landowner does not own all of the minerals described in the lease. *See Jimenez v. Chicago Title Ins. Co.*, 310 Ga.App. 9, 14, 712 S.E.2d 531 (2011) (where a portion of the property within those described boundaries in the deed was owned by someone other than the grantor, this amounts to a defect in title). Appellant cites no

support for the allegation that a title defect would not include a title failure or that a title failure cannot be cured.

{¶53} In fact, landowner's lack of record ownership of minerals (including due to an existing lease) may be cured. For instance, a landowner could: obtain a release of the old lease for undisputed lack of production; seek a quitclaim from a person (such as from a relative who agrees you have title to the minerals or from a person who admits Marketable Title Act extinguishment of their mineral interest); serve a Dormant Mineral Act notice and hope the mineral holder does not respond; record a deed that was executed but never recorded; or have a deed executed under a prior contract (such as in our *Shrock* case where the plaintiff had equitable title from a land purchase but not legal title). *See Shrock v. Mullet*, 7th Dist. Jefferson No. 18 JE 0018, 2019-Ohio-2707. Therefore, an analysis and application of the title review clauses and the contractual opportunity to cure title defects is warranted.

{¶54} Where the contractual language at issue is unambiguous, the plain language is applied without consideration of extrinsic evidence. *Shifrin v. Forest City Ent. Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). Words and phrases are given their common and ordinary meanings absent specific contractual definitions, unless manifest absurdity would result or an alternative meaning is clearly demonstrated in the contract. *Id.* "In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain." *Farmers' Natl. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337, 94 N.E. 834 (1911).

{¶55} When possible, a court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them. *Summitcrest Inc. v. Eric Petroleum Corp.*, 2016-Ohio-888, 60 N.E.3d 807, ¶ 35 (7th Dist.). The determination of whether a contract is unambiguous is a legal question. *Bond v. Halcon Energy Props. Inc.*, 7th Dist. Mahoning No. 15 MA 0178, 2017-Ohio-7754, ¶ 23. See also *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984) (an unambiguous contract has plain language that is applied as a matter of law with no issue of fact to be determined). The parties do not claim there is an ambiguity here.

{¶56} We note the order of payment has distinct language as compared with other cases with a clause providing payment was conditioned on title being confirmed satisfactorily to Ascent and a clause providing payment may be reduced proportionate to the actual interest owned. *Compare, e.g., Reynolds v. Ascent Resources-Marcellus LLC*, N.D. W.Va. Civ. No. 1:16CV777 (May 11, 2017). In that case, the order of payment said if the lease was not surrendered or payment made within the set title review period, then the lessor may make a demand, in which case Ascent had an additional 30 days to pay the signing bonus **or** *surrender the lease*. *Id.* Even under that language, the court found an issue remained as to whether title should have been confirmed satisfactorily by Ascent. *Id.*

{¶57} Here, the order of payment said the lessee can surrender "only upon the existence of a title defect and Lessor's inability to cure such defect within the cure period" and said if the lease was not surrendered or payment made within the set time period, then the lessor may make a demand, in which case the lessee had 30 days *to make payment*. Pointing to these clauses, the landowners cite two cases which they say are examples of courts enforcing a title review period so as to require payment even for defective titles. The cited Sixth Circuit case has distinct facts where a clause in a purchase agreement granted a right to arbitrate if the buyer found title defects and the seller disputed the buyer's estimate of the value of the defective properties plus a right to terminate the sale if the value was reduced by 30% at arbitration. *See Broad St. Energy Co. v. Endeavor Ohio LLC*, 806 F.3d 402 (6th Cir.2015) (finding the buyer liable for damages). There was no unilateral right for the buyer to declare a title defect in that contract. *Id.* at 407. In the other case, a district court found where the buyer missed the deadline to give notice of a title defect for certain leases in a lease portfolio (which would have prompted a mutual resolution procedure), the contract unambiguously required full payment by the buyer without reduction for defective leases in the sale. *Anadarko E & P Co. LP v. Northwood Energy Corp.*, 970 F.Supp.2d 764, 772 (S.D.Ohio 2013) (pointing out the buyer "bargained for the opportunity to avail itself of the title defect notice procedure, but did not exercise it"). Both cases involved a purchase sale agreement for an existing lease portfolio rather than the creation of a lease for all oil and gas. Also dissimilarly, the agreement here conditioned payment on title being to GRE's satisfaction and provided the right to decrease payment based upon acreage owned.

{¶58} The landowners insist the payment of the full signing bonus for all acres described in the lease was not dependent on the ownership of or ability to lease the minerals if the clause regarding the title review period was not timely followed. They consider the 120-day title review period to be a due diligence clause which unambiguously meant that if 120 days passed without the lessee providing notice of a title defect, then the lessee must still tender the signing bonus (including the legal fees) for all acreage in each lease even if the lease could not be maintained on the acreage or parts of the acreage listed.

{¶59} Appellant counters by arguing the title review deadline could only mean: if the lessee did not provide notice of a title defect or pay the bonus within 120 days, the lessor would be free from further obligation and could cancel the lease if payment was not made within 30 days after notice of default. Appellant construes the clause requiring payment within 30 days after the lessor's notice of default as a savings clause to protect the lessee by giving the lessee 30 more days to pay before the landowner could demand a release (and seek a lease with another company).

{¶60} We disagree with the trial court in that the lease did not entitle the landowners to automatic payment of the full signing bonus for breach of the title review clause. We do not, however, find the title review clause imposed no obligation on Appellant. "The meaning of the contract must come from the aggregate of each and every part, and each and every part of the contract must be given meaning if possible." *Bank of New York Mellon v. Rhiel*, 155 Ohio St.3d 558, 2018-Ohio-5087, 122 N.E.3d 1219, ¶ 22.

{¶61} The signing bonus covered the delayed rentals for the primary term over the acreage listed in the leasehold, and the lease says the lessee can withhold a payment that would otherwise be due and payable to the lessor if the lessee receives evidence the lessor does not have title to all or any part of the rights. The lease allowed the lessor to retain any bonus *paid* if a title encumbrance is discovered after the bonus was paid. The exhibit to the lease, which was incorporated into the lease and which takes priority over the lease if there is a conflict, states the lease takes effect "upon Lessor's receipt of the bonus payment." Although the order of payment provides a preliminary step by setting forth the title review process, it also specifically warns that "[p]ayment is conditioned upon

title to the property interests leased being confirmed satisfactorily to GRE, in its sole discretion."[6] It does not say the lessee waives its right to decrease the signing bonus after 120 days pass without notice of a title defect.

{¶62} The lease's order of payment explicitly advises: "If Lessor owns more or less than the net interest defined herein, GRE may, without immediate notice to Lessor, increase or reduce the consideration payable hereunder proportionate to the actual interest owned by Lessor." Plus, in setting forth the anticipated acres and the amount per acre, the order of payment *shows the bonus is based upon a listed amount of acres*. Therefore, if the lease can only validly cover X amount of acres, then the signing bonus would only cover X amount of acres. The contractual language in its entirety anticipates that the failure of consideration can excuse performance; the language does not express a right to future and full payment after a failure in consideration and/or provide punishment for the failure to meet a deadline. Accordingly, we conclude that automatic entitlement to the full signing bonus was not the contractual remedy for untimely notice of a title defect. (Untimeliness is discussed in the third assignment of error in discussing the affidavits submitted in opposition to summary judgment.)

{¶63} Although we reverse the entry of summary judgment which found the obligation to pay the entire bonus became absolute upon untimely notice, the landowners are not prohibited from showing actual damages for breach of the title review clause. In other words, a faulty title review process may be a breach, but the remedy is not necessarily a full signing bonus to each landowner regardless of their ability to show damages. This incorporates an argument from Appellant's third assignment of error at part C on whether an injury resulted from the breach. Damages are not awarded for mere breach of contract but for injury sustained as a result of that breach. Damages should only place the injured party in as good a position as he would have occupied absent the

[6] We note the exercise of sole discretion would still be subject to the standard of good faith. *See Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 103 (7th Dist.) (good faith standard imposed on lease language "in the judgment of the lessee" even though the lessee is the "sole judge"), *aff'd, 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. "To the extent that the 'sole discretion' language may suggest otherwise, Ohio law imposes an implied duty on parties to a contract to act in good faith in its performance." *Bruzzese v. Chesapeake Exploration LLC*, 998 F.Supp.2d 663, 672 (S.D.Ohio 2014). Thus, if the lessee declined the lease based on a determination made in bad faith as to marketable title, the landowner would have a cause of action for breach of the lease. *Id.*

breach. *See F. Ents. Inc. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 159, 351 N.E.2d 121 (1976).

{¶64} The trial court awarded damages to landowners without any showing that they were able to lease the mineral interests they purported to lease or that they were damaged by the breach such as by showing there was no title defect or they did or could have cured. In the case of partial ownership or partial ability to cure, the recoverable signing bonus must be proportional to the actual ownership or ability to cure. We cannot presume a lack of ownership or inability to cure. Due to the legal decision that Appellant was liable for the full signing bonus for every lease with an untimely notice of a title defect (regardless of the ability to lease the minerals), the case never reached the evidentiary stage where certain issues were ripe (such as ownership, title defect, complete or partial cure, ability to cure, or extent of actual damages).[7] We therefore must remand for further proceedings.

{¶65} For these reasons, we sustain Appellant's argument on lease interpretation in part, affirm the decision finding breach of the title review clause, reverse the decision finding automatic entitlement to damages in the amount of the full signing bonus, and remand for further proceedings where a showing of damages would be required by each landowner.

Motion to Amend: Accord & Satisfaction

{¶66} Appellant's second assignment of error contends:

"The trial court abused its discretion in its November 16, 2018 order denying Ascent's motion to Amend Affirmative Defenses to add the defense of accord and satisfaction."

{¶67} An accord is a contract between a debtor and a creditor to settle the creditor's claim in exchange for a sum of money other than that which is allegedly due, while satisfaction is the performance of that contract. *Allen v. R.G. Indus. Supply*, 66

[7] For instance, the landowners sought summary judgment on whether the lease required the full signing bonus for untimely notice of a title defect (and then whether the notice was untimely and the amount of each bonus). (Their motion did not rely on the alleged cure by group two but relied on the preliminary allegation that landowners were automatically entitled to the full signing bonus.) Appellant's motion to dismiss based on the face of the complaint was confined to whether it was a party to the contract under agency law (only mentioning GRE did not breach when addressing a tortious interference claim which is no longer at issue). Appellant's motion for summary judgment on ownership only applied to one landowner (Meyer) and was filed after the trial court had already ruled that ownership was irrelevant (at a time when the topic was essentially moot); it was essentially a reconsideration motion. And, we are herein ruling that mere lack of title ownership may not preclude recovery (due to possible lost opportunity to cure).

Ohio St.3d 229, 231, 611 N.E.2d 794 (1993). The defense of accord and satisfaction requires proof on three elements: (1) the plaintiff accepted the defendant's offer to resolve the plaintiff's claim; (2) the defendant satisfied its undertaking to the plaintiff; and (3) the offer and acceptance were supported by consideration. *Id.* at 231-232 (the first two elements "merge when the creditor manifests acceptance of the offer by negotiating a check sent by the debtor with the offer"). However, acceptance of a partial payment alone does not raise a genuine issue as to accord and satisfaction. The debtor must send the check "with the offer." *Id.* There must be a bona fide dispute over a claim, and the debtor must tender the check upon the *express* condition that it shall be in full satisfaction of the disputed claim. *Id.* at 231.

{¶68} Accord and satisfaction is an affirmative defense that must be raised in the answer Civ.R. 8(C). An affirmative defense is waived if it is not timely raised. *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 97 706 N.E.2d 1261 (1999). Pursuant to Civ.R. 15(A), when a party requests leave to amend a pleading, the trial court "shall freely give leave when justice so requires." The trial court has discretion in determining whether to grant leave to amend the answer. *Turner*, 85 Ohio St.3d at 99. "While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Id.*

{¶69} As for the timeline in this case, the complaint was filed in June of 2015 and amended in January of 2016. Appellant filed a motion to dismiss before filing an answer, and the landowners filed a motion for summary judgment before Appellant's dismissal motion was ruled upon. Noting its answer was not yet due, Appellant filed a list of affirmative defenses on October 24, 2016 (when its response to the initial summary judgment motion was filed). After its dismissal motion was overruled, Appellant filed an answer on January 24, 2017. Accord and satisfaction was not set forth in the list of affirmative defenses or in the answer.

{¶70} Appellant's August 1, 2017 response to the second stage of summary judgment referred to accord and satisfaction when discussing three landowners who accepted payment for less than all acreage. Appellant's July 20, 2018 supplement reiterated this defense as to one landowner and mentioned the defense as to another landowner (also saying his lease was released). Although the landowners' August 10, 2017 reply in support of summary judgment pointed out the defense was waived due to

the failure to properly raise it, it was not until August 17, 2018 (a year later) that Appellant sought leave to amend the answer to add the affirmative defense of accord and satisfaction. The landowners objected, and the trial court denied Appellant's request. Appellant argues this was an abuse of discretion.

{¶71} As the trial court observed, any suggestion that discovery had to be completed before they could ascertain the applicability of the defense was not credible. In fact, GRE asserted the defense in its answer long before Appellant filed an answer. Also, Appellant's July 2018 supplement did not refer to new information under the label of accord and satisfaction compared to what was in its August 1, 2017 response to summary judgment. If the defense was added, the landowners may have sought additional leave to file submissions regarding the elements of the defense, further delaying the proceedings. In *Turner*, the Court found the trial court abused its discretion by granting leave to amend where the defendant asked to amend the answer to add immunity after: the trial date was set, a summary judgment motion had been ruled upon (appealed), and the litigation had been pending for nearly three years. *Turner*, 85 Ohio St.3d 95.

{¶72} Here, the court denied a motion for leave to amend after the litigation had been pending for over three years. By the time Appellant sought leave to amend, the court had already denied Appellant's motion to dismiss and granted partial summary judgment for the landowners with the next stage of the landowner's request for summary judgment pending for over a year. The landowners complained about Appellant's waiver of the accord and satisfaction defense in their August 10, 2017 reply in support of summary judgment, and still Appellant waited over a year to seek to amend the answer. When Appellant finally sought leave to amend the affirmative defenses, it had been more than 1.5 years after the answer was filed and more than 2.5 years after the list of affirmative defenses was filed. Contrary to Appellant's contention, the trial court reasonably found this was undue delay under the circumstances of this case.

{¶73} Appellant states there was no evidence of bad faith or misrepresentation in failing to seek leave earlier and then claims there was no prejudice to the landowners. In arguing a lack of prejudice, Appellant uses the fact that GRE raised accord and satisfaction in its answer as an indication that the landowners were prepared for the affirmative defense. However, GRE did not then file any motions or respond to the

summary judgment motions so as to develop its contentions regarding the doctrine which was not raised in Appellant's answer.

{¶74} Assuming there was no prejudice, Appellant says delay is an insufficient reason to deny a motion for leave to amend, relying on a case which opined that prejudice is the most critical factor and delay alone should not bar an amendment. *See Triangle Properties Inc. v. Homewood Corp.*, 2013-Ohio-3926, 3 N.E.3d 241, ¶ 29 (10th Dist.). We note this appellate case said "delay alone" (should not bar amendment) but did not say "undue delay alone" (should not bar amendment). In any event, the Supreme Court's precedent states a motion to amend a pleading "should be refused if there is a showing of bad faith, undue delay, **or** undue prejudice to the opposing party." (Emphasis added.) *Turner*, 85 Ohio St.3d at 99. *See also State ex rel. Smith v. Adult Parole Auth.*, 61 Ohio St.3d 602, 603-604, 575 N.E.2d 840 (1991) (if there is no reason apparent to justify the delay for an untimely motion to amend, a trial court does not abuse its discretion in refusing to allow amendment); *Clay v. Shriver Allison Courtley Co.*, 2018-Ohio-3371, 118 N.E.3d 1027, ¶ 116 (7th Dist.) (the failure to timely file a motion to amend based on evidence in the movant's possession constitutes undue delay, and the court has discretion to deny amendment). In accordance, undue delay is a sufficient reason to deny leave.

{¶75} Considering the totality of the circumstances on undue delay, we cannot find the trial court abused its discretion in denying the motion for leave to amend the affirmative defenses to add accord and satisfaction. As we are remanding on a prior point, however, the trial court could use its discretion to allow amendment in the future. To the extent the issue is not moot, the second assignment of error is overruled.

Non-movant's Summary Judgment Evidence

{¶76} In the third assignment of error, Appellant sets forth various contentions related to the evidence it set forth in opposition to the landowners' summary judgment motion. Appellant argues it demonstrated a genuine issue of material fact on whether certain landowners may be barred by affirmative defenses such as waiver or estoppel (and accord and satisfaction). We find the issue of whether Appellant presented evidence demonstrating a trial issue on its affirmative defenses is moot. Appellant did not seek summary judgment on these affirmative defenses but raised them in opposition to summary judgment. Above, we reversed the summary judgment on contract interpretation and remanded for further proceedings on whether breach of the title review

clause caused injury. Whether the non-movant met the reciprocal burden by showing a genuine issue remained for trial is irrelevant where the summary judgment is reversed and the case is remanded. (Even if the non-movant did not set forth sufficient evidence on the defenses, the elimination of summary judgment on a preliminary matter would leave the raised affirmative defenses open on remand.)

{¶77} Appellant also complains the court failed to consider affidavits suggesting the due date for the notice of a title defect on some leases should be later than originally believed. One affidavit explained the law firm representing the landowners was responsible for supplying the legal descriptions on the leases but some legal descriptions were insufficient and had to be corrected. The affidavit of Appellant's attorney incorporated records provided by the landowners in discovery showing there were corrections after some leases were received by GRE.

{¶78} Notably, Appellant's evidence suggested some legal descriptions were resolved by GRE's addition of an exhibit without requiring the re-signing of the lease; even where the lease was re-signed due to the location of the signature, Appellant does not argue novation or say the date on the lease was altered. We also note the order of payment states the title review period begins on "the receipt of the original of this Order of Payment and the executed Lease." Furthermore, an insufficient legal description (for purposes of recording) or a lack of recording does not affect the enforcement of a contract between the parties. *See Kenney v. Chesapeake*, 2015-Ohio-1278, 31 N.E.3d 136, ¶ 73 (7th Dist.) (a lease which must be recorded by statute is valid between the parties even if unrecorded), citing R.C. 5301.09; *Bank One, N.A. v. Dillon*, 9th Dist. Lorain No. 04CA008571, 2005-Ohio-1950, ¶ 9 ("failure or success of recording an instrument has no effect on its validity as between the parties to that instrument"); *Young v. Hodapp*, 12th Dist. Butler No. CA85-08-094 (Dec. 29, 1986) (inability to record due to insufficient legal description is not fatal to contract formation between the parties).

{¶79} Regardless, as urged by the landowners, the contention on a later start date for the title review period was viewed as an improper attempt to vary matters that were already deemed admitted. A matter deemed admitted is conclusively established as stated by Civ.R. 36(B). *Cleveland Tr. Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985). *See also JPMorgan Chase & Co. v. Indus. Power Generation, Ltd.*, 11th Dist. Trumbull No. 2007-T-0026, 2007-Ohio-6008, ¶ 37 (a party cannot challenge matters it conclusively admitted by submitting a contradictory affidavit). The answer to a request

for an admission "shall specifically deny the matter or *set forth in detail the reasons why* the answering party cannot truthfully admit or deny the matter." (Emphasis added.) Civ.R. 36(B).

{¶80} Moreover, "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." Civ.R. 36(B). "If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served." Civ.R. 36(C). *See also Equitable Life Assur. Soc. of U.S. v. Kuss Corp.*, 17 Ohio App.3d 136, 139, 477 N.E.2d 1193 (3d Dist.1984) (implied written admission where the party fails to provide the reason why it cannot admit or deny or claims a lack of information without stating the reasonable inquiry).

{¶81} In discovery responses, GRE (Appellant's agent) admitted the landowners did not receive timely notice of a title defect, and Appellant responded that it had no independent knowledge of this information and could not admit or deny the request for admission. No detailed reasons were set forth on why it could not answer the request, and there was no indication that a reasonable inquiry was made or that the information was not readily obtainable from its agent. Although a court may allow amendment or withdrawal of the deemed admission under Civ.R. 36(B), Appellant's brief does not rely on this provision or address the contention regarding the admissions. As Appellant did not satisfy the rule's requirement on specificity and reasonable inquiry, the court did not err in deeming admitted that the landowners did not receive timely notice of a title defect.

{¶82} For the foregoing reasons, the trial court's judgment is reversed on the issue of contract interpretation as Appellant is not automatically liable for the full signing bonus merely because notice of a title defect was not timely provided to the landowner, and the case is remanded for further proceedings under the principles set forth herein.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, we affirm the trial court's decision on agency and breach of the title review clause and reverse the decision finding automatic entitlement to damages in the amount of the full signing bonus. We hereby remand this matter to the trial court for further proceedings under the principles set forth herein and according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

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.