[Cite as *Eric Petroleum Corp. v. Ascent Resources-Utica, L.L.C.*, 2022-Ohio-3619.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

ERIC PETROLEUM CORPORATION, et al.

Plaintiffs-Appellants,

v.

ASCENT RESOURCES-UTICA, LLC, et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0036

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CV 536

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Dismissed in part.
Reversed and Remanded in part.

Atty. Randolph L. Snow and *Atty. James M. Wherley, Jr.*, Black, McCuskey, Souers & Arbaugh, 220 Market Ave. South, Suite 1000, Canton, Ohio 44702, for Plaintiffs-Appellants Eric Petroleum Corporation and Eric Petroleum Utica, LLC

Atty. Justin H. Werner, Reed Smith LLP, 225 Fifth Avenue, Suite 1200, Pittsburgh, Pennsylvania 15222, for Defendant-Appellee Chesapeake Exploration, L.L.C.

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John and Sharon Meyer, 8173 Germano Road SE, Amsterdam, Ohio 43903, Defendants

Kenneth and Linda McConnell, 2189 State Route 43, Richmond, Ohio 43944, Defendants.

Dated: September 28, 2022

WAITE, J.

{¶1} Appellants Eric Petroleum Corporation and Eric Petroleum Utica LLC ("Appellants") appeal an October 22, 2021 decision of the Columbiana County Court of Common Pleas denying their motion for a preliminary injunction and granting Appellees' Chesapeake Exploration LLC, EAP Ohio LLC, and Ascent Resources-Utica LLC motion to compel arbitration and stay the matter pending arbitration. For the reasons provided, Appellants' arguments pertaining to the preliminary injunction do not involve a final appealable order. As to their arguments regarding arbitration, the trial court improperly denied Appellants' request for a hearing pursuant to R.C. 2711.03. The matter is reversed on this basis and remanded for purposes of holding a hearing.

Factual and Procedural History

{¶2} This appeal concerns an arbitration provision within an agreement called the Asset Sale Agreement ("ASA"). However, the matter as a whole involves the drilling rights pertaining to approximately 50,000 acres of land subject to oil and gas leases in

Belmont, Carroll, Columbiana, Harrison, and Jefferson Counties. Appellants own an interest in the shallow drilling rights, which are not at issue, here. Appellants initially assigned the deep-drilling rights to Ohio Buckeye Energy, LLC. Buckeye Energy is the predecessor to Chesapeake, which later obtained these interests.

{¶3} In 2018, Chesapeake explored the idea of disposing of their Ohio oil and gas interests. In August of 2018, Chesapeake entered into an agreement with Appellee EAP Ohio accomplishing that goal. However, Section 14.10 of the ASA prohibited either party from assigning their interests without the written consent of the other party. In accordance with the ASA, Chesapeake sought permission to assign its interest to EAP Ohio from Appellants. However, Appellants had concerns about the assignment and declined to provide written consent. Despite this denial, Chesapeake assigned its deep-drilling rights to EAP Ohio, which in turn assigned some of the interests to Appellee Ascent.

{¶4} The exact timeframe is not specified within the record, however, deep drilling commenced apparently sometime in 2018. It is equally unclear if Chesapeake or EAP Ohio/Ascent first commenced drilling. Regardless, it appears that deep-drilling efforts had begun on at least 370 wells by late 2019. An unknown number of permits had been issued to commence deep-drilling on additional properties. EAP Ohio/Ascent sent Appellants millions of dollars in profit, however, it appears that Appellants did not deposit these checks.

{¶5} Instead, Appellants protested the assignments. Given that the remedy for unauthorized assignments is invalidation of those assignments, Appellants filed a complaint against Chesapeake, EAP Ohio, and Ascent on November 4, 2019. While

other defendants were named to the complaint, those defendants are not involved in this appeal.

{¶6} Counts one through three of the complaint sought a declaration of judgment invalidating the assignments due to a violation of the assignment clause. Count four involves a clause of the ASA which addresses participation rights pertaining to certain wells. Counts five through seven assert breach of contract claims. Count eight sought quiet title due to the allegedly invalid assignments. Counts nine and ten sought injunctive relief against EAP Ohio and Ascent during the pendency of litigation.

{¶7} We note that although EAP Ohio and Ascent have the same general defense as Chesapeake, EAP Ohio and Ascent's arguments differed from Chesapeake's in one regard. Chesapeake asserted that the ASA did not require written consent in this instance. EAP Ohio and Ascent argue that the ASA does not apply to them, as they did not receive any assignment pursuant to that agreement.

{¶8} On December 4, 2019, Appellees filed a motion for a preliminary injunction and the trial court scheduled a hearing for January 8, 2020. The hearing was continued. On January 9, and January 13, 2020, Appellees filed a motion to compel arbitration and a motion to stay the proceedings pending arbitration. The timeline of the motions is relevant to this appeal. Ascent filed a motion to stay the proceedings pending arbitration on January 9, 2020. Ascent did not file a motion to compel arbitration. Then, on January 13, 2020, Chesapeake filed both a motion to compel arbitration and a motion to stay the proceedings pending appeal. On January 21, 2020, EAP Ohio filed a motion to join the motions filed by Ascent and Chesapeake.

{¶9} The court rescheduled the preliminary injunction hearing and scheduled a hearing on March 22, 2020 to include the arbitration motions. The hearing was again continued and rescheduled for August 19, 2020. However, on July 6, 2020, Chesapeake filed for bankruptcy and the case was subsequently stayed.

{¶10} The bankruptcy stay was terminated on August 19, 2021. Thereafter, the court asked the parties to brief the issue of whether the previously scheduled hearings were required to be rescheduled. On October 22, 2021, the court deemed any hearing unnecessary, as the parties had been adequately heard through their motions. The court denied the preliminary injunction, granted Appellees' motion to compel arbitration, and stayed the matter pending arbitration. The court determined that the quiet title action was exempt from arbitration but stayed that claim pending arbitration. It is from this entry that Appellants timely appeal.

ASSIGNMENT OF ERROR NO. 1

> The trial court erred in denying the motion for preliminary injunctive relief of EPC.

{¶11} Appellants present two arguments within this assignment of error: the trial court's analysis of the preliminary injunction elements was erroneous both legally and factually, and that the court improperly decided the matter without holding the previously scheduled hearing.

{¶12} A trial court's judgment regarding whether to grant an injunction is reviewed under an abuse of discretion standard. *Gionino's Pizzeria Inc. v. Reynolds*, 7th Dist. Carroll No. 20 CA 0940, 2021-Ohio-1289, ¶ 26, citing *Danis Clarkco Landfill Co. v. Clark*

Cty. Solid Waste Mgt. Dist., 73 Ohio St.3d 590, 653 N.E.2d 646 (1995), paragraph three of the syllabus. An abuse of discretion is more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Yashphalt Seal Coating, LLC v. Giura*, 7th Dist. Mahoning No. 18 MA 0107, 2019-Ohio-4231, ¶ 14, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶13} The purpose of a preliminary injunction is to preserve the status quo among the parties during legal proceedings. The party seeking a preliminary injunction must show: "(1) there is a substantial likelihood the party will prevail on the merits; (2) the party will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction." *Gionino's Pizzeria* at ¶ 26, citing *Chapin v. Nameth*, 7th Dist. Mahoning No. 08 MA 18, 2009-Ohio-1025. Each element must be established by clear and convincing evidence. *Chapin v. Nameth*, 7th Dist. Mahoning No. 08 MA 18, 2009-Ohio-1025, ¶ 19, citing *S. Ohio Bank v. S. Ohio Savings Assn*., 51 Ohio App.2d 67, 366 N.E.2d 296 (1st Dist.1976).

{¶14} No one factor is dispositive, as the court must balance all factors and weigh the equities. *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649 (7th Dist.), ¶ 19, citing *King's Welding & Fabricating, Inc. v. King*, 7th Dist. No. 05-CA-828, 2006-Ohio-5231. "An injunction is an equitable remedy that should be used only when an adequate remedy at law is not available." *Chapin* at ¶ 17, citing *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988).

{¶15} At oral argument, we *sua sponte* raised the question of whether the trial court's order pertaining to the preliminary injunction constituted a final appealable order.

Appellants urge that the entire judgment entry is final and appealable because they assert they are unable to obtain relief if they are unable to appeal every aspect of the court's decision. Appellants contend that as the drilling efforts advance, it will be nearly impossible to recoup any losses suffered.

{¶16} In its current version, R.C. 2502.02 provides that:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶17} The crux of both the preliminary injunction request and the arbitration issue is whether Chesapeake's assignment to EAP Ohio and subsequent assignment to Ascent is permissible without the written consent of Appellants. Because this issue remains active in the arbitration process, denial of the preliminary injunction does not prevent a

judgment in favor of Appellants. Appellants still have a meaningful remedy available by way of arbitration.

{¶18} While Appellants argue that relief becomes increasingly difficult to obtain as drilling and production advance, we note that deep drilling had already begun on at least 370 wells associated with the properties at issue prior to the filing of the complaint. Additionally, permits had been issued for a number of other wells located on the properties. By this point in the process, it is extremely likely that additional drilling has commenced at these sites. Thus, any relief that Appellants may gain from a preliminary injunction is highly speculative, given the amount of drilling and production that has already commenced.

{¶19} We note that Appellants specifically agreed to allow drilling and production to the extent that it is necessary to fulfill the affected leases. Thus, Appellants already must allow some level of drilling and production. We emphasize that Appellants themselves admit that the sole remedy sought is to rescind the assignments. This remedy would certainly still be available regardless whether Appellees are permitted to continue their operations.

{¶20} Further, the underlying dispute regarding the assignment clause is properly pursued, jurisdictionally, only in arbitration. Under the facts of this case, any decision to grant a preliminary injunction appears to require the trial court to determine an issue that only the arbitrator is authorized to decide. This is evident from the court's struggle analyzing the elements of a preliminary injunction within its entry.

{¶21} Even if the court's entry were construed as a final appealable order, Appellants are unable to show irreparable harm, because the drilling operations they seek

to halt have been ongoing for what appears to have been several years. Appellants contend that they are not required to show irreparable harm pursuant to *DeRosa v. Parker*, 7th Dist. No. 10 MA 84, 197 Ohio App.3d 332, 2011-Ohio-6024, 967 N.E.2d 767. However, the holding in *DeRosa* was narrowly limited to matters involving deed restrictions. Thus, its holding and rationale are inapplicable to these facts.

{¶22} Because a significant amount of drilling has already occurred and Appellants concede that they are required to allow at least some drilling to continue to honor various oil and gas leases, and because the request deals with decisions left solely to the purview of the arbitrator, the court's decision does not constitute a final appealable order. As Appellants' first assignment of error does not involve a final appealable order it is dismissed.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred in staying this matter pending arbitration and compelling arbitration in this matter.

{¶23} Procedurally, Appellants argue that the trial court improperly denied its request for a hearing based on the R.C. 2711.03 motion to compel. Appellants also contend that Appellees lost their right to enforce the clause by assigning their interests. Appellants also argue that EAP Ohio and Ascent could not enforce the arbitration clause, because they have claimed that they are not bound by that document. As to the merit of the court's decision, Appellants first argue that while the court correctly exempted the quiet title claim from arbitration, it should have also exempted the declaratory judgment claims, because those claims are essentially identical. Appellants also argue that the

Federal Arbitration Act ("FAA") and the Ohio Arbitration Act ("OAA") cannot simultaneously apply. Since the court applied the OAA to the quiet title claim, it should also apply the OAA to the declaratory judgment claims. Appellants contend that the OAA should apply due to a choice of law provision within the ASA, which asserts that it is governed by Ohio law.

{¶24} Appellees contend that EAP Ohio and Ascent are entitled to participate in the arbitration process even though their assignments occurred outside the purview of the ASA. Appellees' arguments as to the merits largely center on their belief that the FAA, and not the OAA applies. As to the necessity of a hearing, Appellees assert that the FAA does not require an oral hearing on a motion to compel arbitration. In regard to the applicability of the FAA, Appellees argue that the choice of law provision is irrelevant to this determination. Regarding the declaratory judgment claims, Appellees contend the FAA expressly displaced any state law or statute that exempts certain claims from arbitration.

{¶25} A trial court's decision to grant or deny a motion to stay proceedings pending arbitration is generally reviewed for an abuse of discretion. *Smith v. Javitch Block, L.L.C.*, 8th Dist. Cuyahoga No. 110154, 2021-Ohio-3344, ¶ 8, citing *Ventures, LLC v. Rowe*, 11th Dist. Portage No. 2011-P-0053, 2012-Ohio-4462, ¶ 18-19; *River Oaks Homes, Inc. v. Krann*, 11th Dist. Lake No. 2008-L-166, 2009-Ohio-5208, ¶ 41. However, "[a] trial court's grant or denial of a stay based solely upon questions of law, however, is reviewed under a de novo standard." *Smith* at ¶ 8, citing *Buyer v. Long*, 6th Dist. Fulton No. F-05-012, 2006-Ohio-472, ¶ 6; *Pantages v. Becker*, 8th Dist. Cuyahoga No. 106407, 2018-Ohio-3170, ¶ 7.

{¶26} We note that Appellants raise two arguments within this assignment of error: the trial court improperly refused to hold a hearing, and the court erroneously determined that the FAA applies to this matter. Because the first argument is dispositive, we will not address the latter argument.

{¶27} We begin by noting that whether the FAA or OAA applies is irrelevant to the necessity of a hearing. The two statutes at issue, R.C. 2711.02 and R.C. 2711.03, are the mechanisms to allow parties to bring an issue within the purview of the arbitration process. In other words, it is the procedural vehicle which parties use to enforce an arbitration clause regardless whether the FAA or OAA applies.

{¶28} Appellees' motion to compel arbitration and to stay court proceedings pending arbitration were brought pursuant to both R.C. 2711.02 and R.C. 2711.03. There is no question that a trial court is not required to hold a hearing on a motion to stay proceedings pending arbitration pursuant to R.C. 2711.02. However, R.C. 2711.03 provides that "[t]he court shall hear the parties."

{¶29} Previously, the Ohio Supreme Court was tasked with determining whether R.C. 2711.02 requires a hearing. See *Maestle v. Best Buy Co*., 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7. The Court distinguished the two statutes and explained that they serve different purposes and that the procedural requirements of R.C. 2911.03 do not apply to R.C. 2711.02. The Court ultimately held that the parties' motion was filed under R.C. 2711.02, not R.C. 2711.03, and so did not require a hearing. *Id.* at ¶ 21. This has led appellate districts to assume that R.C. 2711.03 does require such a hearing with some caveats.

{¶30} Research reveals no caselaw deciding that denial of a request for a hearing pursuant to R.C. 2711.03 was proper. The Eighth District has determined that, while a court must hold a hearing on request, in order to constitute reversible error the request must be specific. *AJZ's Hauling, L.L.C. v. TruNorth Warranty Programs of N. America*, 8th Dist. Cuyahoga No. 109632, 2021-Ohio-1190, ¶ 45. In *AJZ's Hauling*, the court found the language "hearing requested" to be insufficient. *Id*. The court explained that the language must specifically request an evidentiary or oral hearing. It does not appear that any other district requires such specificity when requesting a hearing.

{¶31} In contrast, the Ninth District has held that R.C. 2711.03 requires a trial court to hold a hearing on a motion to compel arbitration in all cases. See *Matheny v. Norton*, 9th Dist. Summit No. 26166, 2012-Ohio-2283. The Ninth District held that "[w]hen the record indicates that the trial court did not conduct a hearing, this Court will reverse without addressing the merits of the trial court's decision." *Matheny v. Norton*, 9th Dist. Summit No. 26166, 2012-Ohio-2283, ¶ 8.

{¶32} The Twelfth District has also reversed a trial court's decision to deny a motion to compel arbitration without a hearing. *Barar v. HCF, Inc*., 12th Dist. Fayette No. CA2005-02-008, 2005-Ohio-6040. The Twelfth District held that the statute R.C. 2711.02 requires a hearing, but it is unclear whether the appellant in that case requested a hearing. Thus, it is unclear if they have joined the Ninth District in deciding that the statute requires a hearing in every case or only upon request.

{¶33} Nearly every other appellate district has taken a different approach and have held that a hearing must be afforded only if a party makes a request. However, if the parties fail to request a hearing, this failure does not constitute reversible error if the

parties were otherwise heard. Examples of a party being otherwise heard include: conducting discovery, failing to request discovery, and filing for summary judgment. *Hoppel v. Feldman*, 7th Dist. Columbiana No. 09 CO 34, 2011-Ohio-1183, ¶ 41, citing *Eagle v. Fred Martin Motor Co*., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.); *Mattox v. Dillard's, Inc*. 8th Dist. Cuyahoga No. 90991, 2008-Ohio-6488; *Liese v. Kent State University*, 11th Dist. Portage No. 2003-P-0033, 2004-Ohio-5322.

{¶34} This Court falls within this line of cases. In *Hoppel,* we acknowledged that the appellant did not request a hearing on a motion to compel arbitration, thus the hearing had been waived. *Id.* at ¶ 41. Turning to the issue of whether the parties had otherwise been heard, we found that the appellant had been permitted to file an affidavit, thus had been given the opportunity to advance his position. *Id.* at ¶ 42.

{¶35} While it does not appear that the First, Third, and Tenth Districts have ruled on this issue, most other districts have joined the approach taken by this Court. See *Haight v. Cheap Escape Co.,* 2d Dist. Montgomery No. 25345, 2013-Ohio-182; *Chrysler Fin. Servs. v. Henderson,* 4th Dist. Athens No. 11CA4, 2011-Ohio-6813; *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, 874 N.E.2d 795 (5th Dist.), ¶ 30; *Liese, supra.* We note that while the Third and Tenth Districts have not ruled on this specific issue, both courts have recognized that R.C. 2711.03 requires a hearing. See *Barhorst, Inc. v. Hanson Pipe & Prods. Ohio, Inc.*, 169 Ohio App.3d 778, 2006-Ohio-6858, 865 N.E.2d 75 (3rd Dist.), ¶ 8; *Wolfe v. J.C. Penney Corp*., 10th Dist. No. 18AP-70, 2018-Ohio-3881, 111 N.E.3d 126.

{¶36} Notably, the Second District held that although the plaintiff failed to request a hearing, another party had done so. *Moran v. Riverfront Diversified, Inc*., 197 Ohio

App.3d 471, 2011-Ohio-6328, 968 N.E.2d 1 (2d Dist.). Thus, the Court remanded the case on other grounds and instructed the trial court to hold a hearing, as at least one party made the request. *Id.* at 14. Similarly, the Sixth District has found that even if a party has not specifically requested a hearing, it can be inferred from the parties' actions. *N. Coast Inn, Inc. v. Wright & Assoc., Inc.*, 6th Dist. Erie No. E-97-134, 1998 WL 422933, *4.

{¶37} Here, Appellants requested "a hearing on this matter as required under R.C. § 2711.03 and the opportunity to conduct discovery in advance of the requested hearing." (2/18/20 Plaintiffs' Response, pp. 8-9.) Appellants cited to *Hoppel* in support of their request. It is clear that the trial court understood Appellants' specific request, as it scheduled a hearing on the matter multiple times. However, hearings were continued on multiple occasions. Inexplicably, despite Appellants' request and the initial scheduling, the court changed course and determined that it had sufficient information to proceed to judgment. While it is true that the court had a plethora of evidence and arguments before it, based on the plain language of the statute at issue the court had no authority to deny a hearing, once it was requested. The record reflects that the court allowed the parties to brief the issue of whether a hearing was required, but misinterpreted *Hoppel* by failing to acknowledge that a court can rule that the parties were otherwise heard only if a hearing is not requested.

{¶38} While we recognize the duration and complexity of the litigation in this matter, Appellants' request for a hearing pursuant to R.C. 2711.03 was properly asserted and must be granted. The parties' arguments regarding the merits of this matter are premature in this regard. Hence, the matter is reversed for the sole purpose of holding

the hearing Appellants properly requested. Appellants' second assignment of error has merit and is sustained.

Conclusion

{¶39} For the reasons provided, Appellants' arguments pertaining to the preliminary injunction do not involve a final appealable order. As to its arguments regarding the arbitration, the trial court improperly denied Appellants' stay and the matter is reversed and remanded for purposes of holding a hearing pursuant to R.C. 2711.03.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' first assignment of error does not involve a final appealable order and is dismissed and its second assignment is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is dismissed in part and reversed in part. We hereby remand this matter to the trial court for purposes of holding a hearing pursuant to R.C. 2711.03 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.