[Cite as *Barnes v. Res. Energy Exploration*, 2016-Ohio-4805.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DONALD P. BARNES, et al. PLAINTIFFS-APPELLANTS VS. RESERVE ENERGY EXPLORATION, et al. DEFENDANTS-APPELLEES	)	CASE NO. 14 BE 0013 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 12 CV 0197
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiffs-Appellants Donald & Katherine Barnes & The Olexa Family Trust:	Atty. Richard L. Lancione Atty. Tracey Lancione Lloyd Lancione, Lloyd & Hoffman 3800 Jefferson Street Bellaire, Ohio 43906
For Defendant-Appellee Reserve Energy Exploration Co. & Equity Oil and Gas Funds, Inc.:	Atty. John K. Keller Atty. Timothy B. McGranor Atty. Timothy J. Cole Vorys, Sater, Seymour and Pease LLP 52 E. Gay Street, P.O. Box 1008 Columbus, Ohio 43216-1008
For Defendant-Appellee XTO Energy, Inc. & Phillips Exploration, Inc.	Atty. Marion H. Little, Jr. Atty. Christopher J. Hogan Zeiger, Tigges & Little LLP 3500 Huntington Center 41 South High Street Columbus, Ohio 43215
JUDGES: Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	

Dated: June 28, 2016

[Cite as *Barnes v. Res. Energy Exploration*, 2016-Ohio-4805.]
WAITE, J.

{¶1} Appellants Donald and Katherine Barnes ("the Barnes") and The Olexa Family Trust (the Trust"), appeal from a Belmont County Common Pleas Court judgment granting summary judgment in favor of Appellees, Reserve Energy Exploration Company ("Reserve") and Equity Oil and Gas Funds, Inc. ("Equity"); as well as in favor of a separate summary judgment motion filed by Appellees, XTO Energy, Inc. ("XTO"), and Phillips Exploration, Inc. ("Phillips"). Appellants contend the leases in question are invalid and unenforceable due to an improper acknowledgment when the documents were executed and that the trial court erred in granting summary judgment when a genuine issue of material fact exists regarding the fraudulent conduct of Appellees. A review of the leases, testimony and trial record reveals the trial court did not err in granting summary judgment. Appellants' assignments of error are without merit and the judgment of the trial court is affirmed.

Overview of the Leases

{¶2} Appellants entered into two oil and gas leases on June 3, 2006, both of which are the subject of this action.

{¶3} The first lease pertained to 152.11 acres in Belmont County, Ohio. Reserve was the original lessee on lease one. It provides for a primary term of ten years, subject to an extension in the event of production or storage. During the primary term, Reserve was to pay a delay rental payment in the amount of five dollars per acre annually. Delay rental payments are to cease upon production or storage, whichever occurs first, or at the expiration of the primary term. The lease also contains handwritten provisions regarding Appellants' rights to approve well

sites, roads and pipeline routes in writing, language which was included at the request of the Barnes.

{¶4} The second lease was executed by the Barnes with Reserve and was also effective June 3, 2006. The subject parcel was an 18.86 acre tract of land also in Belmont County, Ohio. Absent the handwritten provisions that exist in lease one, the remaining terms and conditions of lease two are identical.

{¶5} Reserve subsequently assigned portions of its interest in both leases to Equity, XTO and Phillips. All are Appellees in the instant matter.

Procedural History

{¶6} On April 27, 2012, Appellants filed a complaint for declaratory judgment, initially naming Reserve, XTO and Equity as defendants, raising three claims: (1) the leases were improperly acknowledged and, thus, void; (2) fraud in the inducement; and (3) lessees failed to develop the property, in violation of express provisions of the leases. Appellants sought an order declaring both leases invalid, void and unenforceable.

{¶7} An answer was filed by Reserve on May 30, 2012 raising a number of defenses, including failure to state a claim, payments received, failure to join necessary parties, parol evidence, statute of limitations and failure to state a claim of fraud with particularity pursuant to Civ.R. 9(B). An answer was filed by XTO on June 1, 2012, asserting the same defenses as well as noting that PC Exploration was not "merged out of existence" but still retained an interest through assignment. Equity

filed its answer on June 28, 2012, setting forth all the same defenses as well as an assertion that Equity was a *bona fide* purchaser for value.

{¶8} The parties filed a stipulated entry granting leave for Appellants to file an amended complaint joining Phillips as a defendant in the action. The defendants all subsequently filed answers to the amended complaint. Phillips also filed a counterclaim for declaratory judgment, seeking an order that the leases were valid, specific performance, and for an order that the primary term be tolled during the pendency of litigation.

{¶9} Depositions of the Barnes as well as Tom and Marie Olexa (on behalf of the Trust) were taken. Appellees Reserve and Equity filed a motion for summary judgment on November 26, 2013. Appellees XTO and Phillips filed a motion for summary judgment on November 27, 2013. Appellants filed a response to both motions alleging additional claims of fraud.

{¶10} On January 31, 2014, the trial court issued a judgment entry granting summary judgment to all Appellees. The trial court also granted Phillips' motion for summary judgment on its counterclaim for declaratory judgment, holding that the leases were valid, granting specific performance and ordering the primary term tolled during the pendency of this litigation, including all appeals. The trial court specifically found: (1) the claim for improper acknowledgment fails due to a lack of fraud in the inducement at the time the leases were executed; (2) Appellants' additional claims for fraud in the inducement were barred as they were raised for the first time in a response brief in summary judgment and Appellants failed to demonstrate reliance

on the alleged fraud; (3) Appellants were barred by the applicable statute of limitations; (4) there was no breach of an implied or express covenant to develop; (5) there was adequate consideration to find mutuality of obligation under the leases; (6) failure of Appellants to tender back the delay rental payments precluded litigation of their claim for fraud; and (7) the leases did not violate public policy.

{¶11} Appellants filed this timely appeal, presenting two assignments of error. Initially it should be noted that, although Appellants assert two separate assignments of error, they fail to argue each assignment separately in their brief to this Court in violation of App.R. 16(A)(7). However, as both relate to fraud in the context of summary judgment, we will attempt to determine the arguments as they relate to each assignment of error and address them in a combined manner.

Assignments of Error Numbers One and Two

> THE TRIAL COURT COMMITTED ERROR WHEN IT DID NOT RULE THAT THE SUBJECT LEASES WERE VOID BECAUSE OF IMPROPER NOTARIZATION WITH FRAUD.
>
> THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS IN LIGHT OF THE FACT THAT THE PLAINTIFFS SHOWED THAT THERE WAS [SIC] GENUINE ISSUE AS TO A MATERIAL FACT.

Summary Judgment Standard

{¶12} When reviewing a trial court's decision in summary judgment, an appellate court applies a *de novo* standard of review. *Cole v. Am. Industries &*

Resources Corp., 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (1998). Therefore, we apply the same test as the trial court in deciding whether summary judgment was proper. Pursuant to Civ.R. 56(C), a court should grant summary judgment if there is no genuine issue of material fact and, when construing evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the movant is entitled to summary judgment as a matter of law. *State ex rel. Parsons v. Flemming,* 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A decision as to what constitutes "material fact" depends on the substantive law being litigated in the matter. *Hoyt, Inc. v. Gordon & Assocs., Inc.,* 104 Ohio App.3d 598, 603, 663 N.E.2d 1088 (8th Dist.1995).

{¶13} Appellants contend the trial court erred in not ruling the leases were fraudulent based on an improper acknowledgment. Specifically, Appellants claim their signatures were not acknowledged before a notary public. R.C. 5301.01(A) governs acknowledgment of a lease and requires a lease for real property to be signed by the lessor and acknowledged by that lessor before a notary or other specifically listed official. When the lease has been defectively executed and in the absence of fraud, the lease still remains enforceable between the parties to that lease. *Citizens Natl. Bank in Zanesville v. Denison*, 165 Ohio St. 89, 95, 133 N.E.2d 329 (1956). The Ohio Supreme Court has held:

> A deed without acknowledgment, or defectively acknowledged, passes the title equally with one acknowledged, as against the grantor and his heirs; but without an effectual acknowledgment a deed can not be

> recorded so as to afford notice of the conveyance to all the world. Acknowledgment has reference, therefore, to the proof of execution, and not to the force, effect, or validity of the instrument. * * * The validity of a deed at common law did not depend on its acknowledgment; and where acknowledgment is required, its object is the protection of creditors and purchasers.

Id. at 94.

{¶14} We have previously held that, in the absence of fraud, an oil and gas lease is enforceable between the parties and their assigns although the acknowledgment is defective. *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109, ¶ 35 (7th Dist.). *Accord Baxter v. Reserve Energy Exploration Co.,* 11th Dist. No. 2014-T-0113, 2014-T-0114, 2014-T-0115, 2014-T-0117, 2014-T-0118, 2014-T-0119, 2015-Ohio-5525, ¶ 18-36.

{¶15} Appellants do not contest that they signed the lease documents. Moreover, Appellants acknowledge legal authority that in the absence of fraud the leases are valid. Therefore, we must consider whether Appellants presented evidence as to each element of fraud.

Rescission and Tender Back

{¶16} Appellants do not assign as error the trial court's finding that their failure to tender back the delay rental payments under the lease precludes their assertion of a fraud claim. Citing *Berry v. Javitch, Block & Rathbone, L.L.P.,* 127 Ohio St.3d 480, 2010-Ohio-5772, 940 N.E.2d 1265, the trial court concluded that a party seeking

rescission must prove that they tendered back all consideration received under the agreement. When it is established that release of a claim was obtained by fraud in the inducement, that matter is voidable and a subsequent fraud claim cannot be pursued unless the party claiming fraud has tendered back any consideration received. *Picklesimer v. Baltimore & O.R. Co.,* 151 Ohio St. 1, 4, 84 N.E.2d 214 (1949). *Berry* and *Picklesimer* both related to rescission of a release in a tort claim, but the rule is not limited only to tort actions. *See, e.g., Haller v. Borror Corp.,* 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990) (rescission under an employment contract); *Block v. Block,* 165 Ohio St. 365, 135 N.E.2d 857 (1956) (alimony within a separation agreement); *Manhattan Life Ins. Co. v. Burke,* 69 Ohio St. 294, 70 N.E. 74 (1903) (rescission of a life insurance claim).

{¶17} In *Miller v. Bieghler,* 123 Ohio St. 227, 174 N.E. 774 (1931), the Ohio Supreme Court stated, "It would be inequitable to grant to plaintiff that which she now claims and at the same time leave her in possession of that which she received. She has not offered to do equity. That she has so done should affirmatively appear in her petition, and it is necessary to the assertion of her rights in a court of equity." *Id.* at 234. Moreover the Ohio Supreme Court has stated, "[w]here a contract has been procured by fraudulent representations of a party thereto, the party defrauded, after offering to return what he has received under the contract, may elect to have the contract set aside and be restored to his original position." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶18} Appellate courts, including this Court, have concluded that in a complaint seeking rescission of a contract, some statement offering a return to status quo must be included. *Ady v. Miller Day Iseli Energy Co.,* 7th Dist. No. 624, 1987 WL 11805 (May 28, 1987); *Bell v. Turner*, 4th Dist. Nos. 12CA14, 12CA15, 2013-Ohio-1323, ¶ 25. *See also Herzig v. Hunkin Conkey Constr. Co.,* 101 N.E.2d 255, 256-257 (8th Dist.1941). We have recently held that monies need not have actually been returned prior to raising the claim for rescission of the contract. "Tender, in this context, refers to an offer, not a completed transaction. The case law speaks of return or offer to return." *Yoskey v. Eric Petroleum Corp.,* 7th Dist. No. 13 CO 42, 2014-Ohio-3790, ¶ 29.

{¶19} Appellants accepted consideration in the form of delay rental payments from 2006, when the lease was signed, through 2010. In 2011, Appellants refused to accept the annual payments. Appellants have not tendered back any of the payments they received under the leases but have offered repayment, not in the original pleadings, but in the response to summary judgment and in their brief before this Court. In *Yoskey*, the offer of a return to status quo and tendering of the consideration was by means of a signed affidavit. *Id.* In the instant case, the offer was made at summary judgment stage. This offer of tender complies with *Yoskey*. As such, Appellants have met the requirement permitting them to raise a claim for fraud in the inducement.

Fraud in the Inducement

{¶20} To successfully assert a *prima facie* case for fraudulent inducement, Appellants must establish: (1) a representation material to the transaction was made; (2) it was made falsely, with knowledge that it was false or with utter disregard or recklessness regarding whether it was false; (3) the intent to mislead another into reliance on that representation; (4) justifiable reliance on the representation; and (5) injury proximately resulting from that reliance. *Burr v. Stark Cty. Bd. of Commrs*, 23 Ohio St.3d 69, 491 N.E.2d.1101(1986), paragraph two of the syllabus.

{¶21} Civ.R. 9, "Pleading Special Matters," states, in pertinent part, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Civ.R. 9(B).

{¶22} In order to prevail on a claim of fraud, a plaintiff must demonstrate all elements:

> (a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> (b) which is material to the transaction at hand,
>
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> (d) with the intent of misleading another into relying upon it,
>
> (e) justifiable reliance upon the representation or concealment, and

(f) a resulting injury proximately caused by the reliance.

Cohen v. Lamko, Inc., 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984). Moreover,

> The circumstances constituting fraud means the plaintiff must state the time, place and content of the false representation, the fact misrepresented, and what was obtained or given as a consequence of the fraud. The plaintiff must allege, at a minimum, the time, place and contents of the misrepresentation on which they relied. Generally, the pleadings must be sufficiently particular to appraise [sic] the opposing party of the claim against him.

Allied Erecting & Dismantling Co., Inc. v. Ohio Edison Co., 7th Dist. No. 10 MA 25, 2011-Ohio-2627, ¶ 41, citing *Haddon View Investment Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 158-159, 436 N.E.2d 212 (1982).

{¶23} In the instant matter, Appellants made multiple attempts at alleging fraud. However, they assert only the following in their appellate brief: (1) that an agent for Reserve, Gene Myers ("Myers"), told them that if they did not sign the leases and their neighbors did, they would lose their oil and gas to wells drilled on the neighboring land; (2) Myers provided a business card which indicated that he was a "field engineer"; and (3) the same business card indicated that Myers worked for Energy Consultants, Inc., a corporation that did not exist at the time the card was presented to Appellants. The first allegation was included in the pleadings. The two additional allegations were not raised in the initial complaint, the first amended

complaint or the second amended complaint. Instead, they were raised when Appellants responded to Appellees' motions for summary judgment.

{¶24} The trial court concluded that any allegations of fraud that were not included in the pleadings were barred. This conclusion caused the trial court to find in favor of Appellees on those allegations. The trial court cited to *Saikus v. Ford Motor Co.*, 8th Dist. No. 77802, 2001 WL 370650 (Apr. 12, 2001). In *Saikus*, the appellate court upheld the trial court's motion to strike a supplemental expert report submitted in response to a motion for summary judgment, concluding, "the [trial court] did not abuse its discretion by refusing to allow appellants to 'sandbag' [the defendant] with this new evidence." *Id.* at *4. The trial court in the instant matter also cited a Ninth District case for the proposition that a party cannot advance a claim for the first time in a motion in opposition to summary judgment, holding "[a] claim cannot be raised in a brief." *Williams v. Time Warner Cable*, 9th Dist. No 18663, 1998 WL 332937 (Jun. 24, 1998) at *2, fn. 3.

{¶25} Appellants must establish each of the necessary elements of fraud with sufficient particularity in order to prevail. *Paparodis v. Snively*, 7th Dist. No. 06-CO-5, 2007-Ohio-6910, ¶ 74. The requirement under Civ.R. 9(B) that fraud claims are to be stated with particularity exists fundamentally to give the opposing party "fair notice of the nature of the action." *DeVore v. Mutual of Omaha Ins. Co.,* 32 Ohio App.2d 36, 38, 288 N.E.2d 202 (1972). When, as here, Appellants did not raise the additional allegations until presented with both motions for summary judgment, the requisite notice of the alleged fraud which allows a party to defend such allegations is absent.

Therefore, the trial court did not err in refusing to consider the fraud allegations raised for the first time in response to summary judgment. As such, we will examine the claim of fraud only as asserted in the pleadings.

{¶26} Appellants' claim relates to the statement by Myers that they would lose their oil and gas if they did not sign the leases. In his deposition, Appellant Donald Barnes stated when Myers came to his home in June of 2006, "[Myers] told me even though we didn't sign our lease, he would still take our gas, that State of Ohio had changed their laws and that he could take our gas even though we didn't sign." (D. Barnes Depo., p. 71.) Thomas Olexa, representing the Trust, stated at his deposition: "I don't know the specific words, but under the impression that they could put a well on the neighbor's property and they could -- as long as they drill, they could take our oil and they didn't have to have a well on our property, and we would lose out, we'd get nothing." (T. Olexa Depo., p. 42.) At her deposition, Appellant Katherine Barnes testified Myers told her, "If we didn't sign, any drills that tended to be successful around our property, we would not get any royalties from." (K. Barnes Depo., p. 47.)

{¶27} When asked at his deposition what he had told Appellants regarding this matter, Myers testified:

> I told people if that came up, that royalties are paid only to folks who are involved in that particular unit of 80 acres. That was the plan that I was told at the time. If they had one acre inside the 80-acre unit, they would receive 1/80th of the royalties. If they had 40 acres inside the unit, that

> would be half; therefore, they would receive half the royalties. If they owned no acres within the designated unit, they would receive zero royalties.

(G. Myers Depo., p. 30.)

{¶28} Whether Myers' statements to Appellants were as Appellants contend or more like Myers stated at his deposition, both characterizations are Myers' assertions of what he thought the law of Ohio was for Appellants vis-à-vis their oil and gas rights. As an agent for Reserve, Myers was not a licensed Ohio attorney nor was he acting as a fiduciary for Appellants. It has been long held that, "under Ohio law, a representation of law is an opinion and cannot form the basis of an action for fraud in the absence of a fiduciary relationship." (Citations omitted.) *Lynch v. Dial Finance* Co. *of Ohio No. 1,* 101 Ohio App.3d 742, 750, 656 N.E.2d 714, 720 (8th Dist.1995).

{¶29} Further, Ohio has recognized the "rule of capture" in the oil and gas lease context. The rule states that the owner of a parcel of land can acquire title to the oil and gas produced from that well although that oil and gas may have migrated from adjoining lands. *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 272, 67 N.E. 494 (1903). Ohio had long held to an unfettered interpretation of the "rule of capture." *Id.*, *See also, Kelly v. Ohio Oil. Co.,* 57 Ohio St. 317, 49 N.E. 399 (1897). However, due to the harsh consequences to neighboring land owners, Ohio law has evolved on this issue and the "rule of capture" has been limited by the doctrine of correlative rights. In *Schrimsher Oil & Gas Exploration v. Stoll,* 19 Ohio App.3d 274, 484 N.E.2d 166 (9th Dist.1984), the Ninth District held,

> The principle set forth in *Kelly v. Ohio Oil Co.* (1987), 57 Ohio St. 317, namely, that drilling an oil well near one's property line does not interfere with the legal rights of the adjoining landowner so long as the operations are confined to the land on which the well is drilled, is clearly outmoded and has been superseded by the regulations limiting drilling based on R.C. Chapter 1509.

Id., paragraph one of the syllabus. R.C. 1509 codifies the doctrine of correlative rights so that a landowner who exercises their right to drill for oil and gas has a duty to exercise that right without negligence or waste. R.C. 1509, *et seq*.

{¶30} In the instant matter the trial court concluded that the "rule of capture" has not been abrogated in Ohio. This is an accurate statement, as it has only been limited. Myers' alleged statement that if Appellants did not execute a lease agreement and the adjoining property owners did, the oil and gas could lawfully be obtained by a neighboring well [absent negligence or waste] by those neighboring leaseholders was not a misstatement of Ohio law. Thus, there was no fraud. Appellants also had the burden of demonstrating that the alleged statements made by Myers were knowingly false when they were made, and, in addition, that Appellants justifiably relied on the statements to their detriment. The record is devoid of any evidence pertaining to either of these two elements.

{¶31} Based on the foregoing, Appellants' first and second assignments of error are without merit and are overruled.

Conclusion

{¶32} Appellants first assert the two leases at issue were improperly executed due to a failure to have the signatures notarized. However, it has long been the law in Ohio that, absent fraud, an oil and gas lease is enforceable between the parties even though the acknowledgment is defective. Appellants acknowledged they signed the leases. As such, the leases are valid between the parties. Their first assignment of error is without merit. Appellants also contend the trial court erred in granting summary judgment on their fraud claims. Appellants made multiple allegations of fraud throughout the proceedings to the court below but many were raised too late in the proceedings. As most of the fraud allegations were presented only in response to Appellees' motions for summary judgment, the trial court did not err in disregarding those. The remaining allegations of fraud relate to the "rule of capture" which has not been entirely abrogated in Ohio, but only limited. The statement alleged as fraudulent by Appellants does not satisfy the elements of fraud, as the statement provides an accurate interpretation of the law in Ohio. Appellants' second assignment of error is also without merit and overruled. The judgment of the trial court is hereby affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.