[Cite as *Wilson v. Beck Energy Corp.*, 2016-Ohio-8564.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBERT C. WILSON	)	CASE NO. 15 MO 0010
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
BECK ENERGY CORP., et al.	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2014-083

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 30, 2016

[Cite as *Wilson v. Beck Energy Corp.*, 2016-Ohio-8564.]
WAITE, J.

{¶1} In this action involving an oil and gas lease, Appellant Beck Energy Corp., ("Beck") appeals an April 9, 2015 Monroe County Common Pleas Court's decision to grant summary judgment in favor of Appellee Robert C. Wilson ("Wilson"). While additional defendants were originally involved in the lawsuit these defendants are not part of this appeal. Beck asserts that the relevant parties modified the primary term of the lease from ten years to three years, but also agreed that the lease could be extended by a mutual consent provision. Beck contends that once it sent delay rental payments and Wilson accepted them, the mutual consent provision was triggered. This caused the primary term to revert back to the original ten-year term. For the reasons provided, Beck's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Wilson owns 41 acres of land situated in Adams and Center Township in Monroe County. On August 2, 2008, Wilson entered into an oil and gas lease with Beck Energy. The lease was later assigned to XTO Energy, Inc. ("XTO") on December 20, 2011; however, Beck reserved "all depths above the stratigraphic equivalent of the top of the Burkett Formation." (Appellant's Brf., p. 3.) The lease included a two-tiered habendum clause with a primary and secondary term. A primary term provides a definite term-of-year period within which the lease is effective. A secondary term allows for drilling to continue past the primary term if certain requirements are met. In this case, the primary term was originally set at ten years. However, on October 16, 2008, the parties entered into an agreement which

modified the primary term from ten to three years. The agreement ("2008 Agreement") stated:

> Beck Energy Corporation as Lessee and Robert C. Wilson as Lessor have both agreed if an oil and gas well is not drilled on their property within Three (3) years from the date of their oil and gas lease it will be cancelled.
>
> However, this lease may be extended by the mutual consent of both the Lessor and Lessee.

(10/16/08 Agreement, p. 1.)

{¶3} The lease mandated that Beck drill a well within the first twelve months of the primary term. However, the lease included a delay rental provision which allowed Beck to delay drilling if yearly delay payments in the total amount of $41 were paid quarterly to Wilson. If Beck paid the delay rental payments, the primary term of the lease would continue without drilling. If not, the lease would automatically revert back to Wilson. Beck tendered delay rental payments to Wilson on a quarterly basis from August of 2008 until February of 2014. Wilson concedes that he accepted and cashed each payment. Beck ceased payments after Wilson filed a declaratory judgment action against Beck, Exxon, and XTO on March 13, 2014.

{¶4} In the declaratory judgment action, Wilson claimed that the lease had expired due to nonproduction of oil and gas within the three-year primary term. All parties filed respective motions for summary judgment. On April 9, 2015, the trial court granted Wilson's motion for summary judgment and denied both Beck and

XTO's motions. Relevant to the issue at hand, the trial court found that Beck failed to drill a well by the specified deadline, consequently, the lease terminated by its terms. This timely appeal followed. We note that co-defendants Exxon Energy Corp. and XTO are not involved on appeal.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT APPELLEE'S ACCEPTANCE AND CASHING OF THE AGREED UPON DELAY RENTAL CHECKS DO NOT ESTOP APPELLEE FROM TERMINATING THE LEASE.

{¶5} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (1995).

{¶6} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E. 2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶7} The evidentiary materials that may be used to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

{¶8} "Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position on reasonable reliance on those facts to his detriment." *Castro v. Positron,* 4th Dist. No. 14 CA 39, 2016-Ohio-285, ¶ 19.

> Ohio "[c]ourts have recognized that a party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by that same contract or transaction," *Dayton Securities Assoc. v. Avutu*, 105 Ohio App.3d 559, 563, 664 N.E.2d 954, 957 (1995), a species of estoppel described as "acceptance of benefits" or "quasi estoppel." *Id*. at 564, 664 N.E.2d at 957 (citing *Hampshire Cty. Trust Co. of N. Hampton, Mass. v. Stevenson*, 114 Ohio St. 1, 13-17, 150 N.E. 726, 729–731 (1926)). "[S]trict adherence to some of the elements of technical estoppel, such as knowledge and reliance, may not be required for the doctrine to be invoked." *Id.* For estoppel to apply, the conduct of the party to be estopped must be "inconsistent" with the termination of the contract. *Stevenson*, 114 Ohio St. at 19, 150 N.E. at 731.

Sims v. Anderson, 2015-Ohio-2727, 38 N.E.3d 1123, ¶ 23 (4th Dist.), citing *Bonner Farms, Ltd. v. Fritz,* 355 Fed.Appx. 10 (6th Cir.2009).

{¶9} Beck presents four "issues presented" within its sole assignment of error. As Beck's issues essentially argue the same point, they will be addressed together. Although the parties entered into the 2008 Agreement which changed the primary term to three years, Beck is correct that the agreement stated the lease "may be extended by mutual consent of both the Lessor and Lessee." (Appellant's Brf., p. 3.) Beck argues that because it sent delay rental payments beyond the three-year period and Wilson accepted them, this demonstrates such mutual consent. Further,

Beck contends that the theory of estoppel applies when a litigant's actions are inconsistent with that litigant's legal position. Beck argues that Wilson's continued acceptance of the quarterly delay rental payments is inconsistent with his request to terminate the lease.

{¶10} In response, Wilson contends that the 2008 Agreement between the parties modified the primary term from a ten-year term to a three-year term. Based on the 2008 Agreement, the primary term ended in October of 2011. Wilson admits that he accepted payments after that date. He argues, however, that Ohio law does not support estoppel when a landowner accepts and cashes delay rental payments.

{¶11} Resolution of this matter depends on whether Wilson's acceptance of the delay rental payments served to extend the lease beyond the three-year term and, if so, how long the primary term was so extended. The 2008 Agreement states that:

> Beck Energy Corporation as Lessee and Robert C. Wilson as Lessor have both agreed if an oil and gas well is not drilled on their property within Three (3) years from the date of their oil and gas lease it will be cancelled.
>
> However, this lease may be extended by mutual consent of both the Lessor and Lessee.

(10/16/08 Agreement, p. 1.)

{¶12} Addressing, first, whether Wilson's acceptance of the delay rental payments extended the primary term, there is a lengthy history of Ohio cases

discussing whether a landowner's acceptance of delay rental or royalty payments estop landowners from terminating the lease. The cases predominantly address royalty payments; however, they provide some guidance on the issue. The decisions consistently conclude that a landowner is estopped from seeking termination of a lease when his or her actions are inconsistent with termination of the lease. See *Castro, supra,*; *Yoder v. Artex Oil Co.,* 5th Dist. No. 14 CA 4, 2014-Ohio-5130; *Price v. K.A. Brown,* 7th Dist. No. 13 MO 13, 2014-Ohio-2298; *Bonner Farms, supra.*

{¶13} The relevant caselaw originated with *Litton v. Geisler,* 80 Ohio App. 491, 76 N.E.2d 741 (4th Dist.1945). In *Litton,* the Fourth District held that "acceptance of rents or royalties under an oil and gas lease such as the one here under consideration is a waiver of forfeiture for breach of any covenant or condition for which such rents or royalties are paid." *Id.* at 494. Thirty years after *Litton,* this Court held that a landowner's acceptance of quarterly delay rental checks were inconsistent with the landowner's attempt to terminate the lease. *Rayl v. East Ohio Gas Co.,* 46 Ohio App.2d 175, 179, 348 N.E.2d 390 (7th Dist.1975). Four years later, the Fifth District held that "[b]efore a party is estopped by the receipt of benefits from a transaction to deny the validity of the transaction it must initially appear that he is not otherwise entitled to those benefits." *Stitzlein v. Wiley,* 5th Dist. No. CA-318, 1979 WL 209691,* 2 (Dec. 12, 1979). The court held that landowners are entitled to royalty payments regardless whether a lease is valid or not. Thus, estoppel cannot be based on the acceptance of royalty payments.

{¶14} In 1988, we reviewed a supplemental agreement to a lease where the parties modified the drill deadline to "stave off cancellation of the original lease due to lack of production." *Gedco Oil & Gas Joint Venture v. Early,* 7th Dist. No. 631, 1998 WL 56488, *1 (May 25, 1988). The agreement provided a specific deadline for production and provided for cancellation of the lease in the event that production did not occur by the date. The only royalty payment the landowners received was a *de minimis* payment made six months after the deadline. We held that the landowner's acceptance of this payment was not inconsistent with the landowner's attempt to terminate the lease.

{¶15} Basing its decision on Ohio law, the Sixth Circuit reached a similar holding in *Bonner Farms, supra.* In *Bonner Farms,* the landowner's attorney sent the oil and gas company a letter stating that if the company continued to remove oil and gas from the property during litigation, the landowners were entitled to 12.5% of the royalties if the lease was found valid and 100% if the lease was deemed forfeited. *Id.* at 13. The Sixth Circuit held that the landowner's acceptance of the royalty payments was not inconsistent with their attempt to terminate the lease as they were entitled to the value of what was removed from their land. The case was distinguished from *Rayl, supra* as the landowners in that case additionally cashed delay rental payments and received free gas.

{¶16} In 2014, we revisited the issue in *Price*, *supra.* The lease in *Price* required two wells to be drilled within six months of each other. *Id.* at ¶ 5. In the event that the wells were not timely drilled, the company was required to either

release the lease or pay shut-in royalties. The first well was timely drilled in 1988; however, the second well was not drilled until 1995. The company argued that the landowners had ratified the lease by: accepting royalty payments, taking gas for personal use, and failing to take affirmative action to terminate the lease in a timely manner. We noted that, unlike *Litton,* the landowners did not receive royalties, except for five *de minimus* payments made ten years after the second well was drilled. *Price* at ¶ 24. Accordingly, we held that the landowner's acceptance of a benefit for which they were entitled to did not estop them from seeking to terminate the lease based on a claim of nonproduction. *Id.* at ¶ 25. More recently, the Fourth District revisited the issue and stated that resolution of the issue "turns on the facts of each case and whether the acceptance of the benefit is inconsistent with the landowner's legal position concerning the lease." *Sims, supra*, ¶ 26, citing *Bonner Farms, supra,* at 15; *Stitzlein, supra,* at 2.

{¶17} The facts of this case are slightly distinguishable from all of these cases as there is a mutual consent provision within the 2008 Agreement that allows the parties to extend the primary term. This case is also distinguishable from many of them as the payments at issue are delay rental payments, not royalty payments. All of the cited cases, though, state that the issue turns on whether the landowner's acceptance of the benefit is consistent with their legal position. Here, Appellant accepted and cashed delay rental payments up until two weeks before filing this action in 2014 while taking the legal position that the lease had expired in 2011 based on the three-year primary term.

{¶18} There is an important difference between delay rental payments and royalty payments. Delay rental payments allow a lessee to defer drilling a well during the primary term by compensating the landowner for the delay. Royalty payments reflect the landowner's share of the value of the oil or gas produced from their property. See *Bohlen v. Anadarko E&P Onshore, LLC.,* 4th Dist. No. 14 CA 12, 2014-Ohio-5819, 26 N.E.3d 1176.

{¶19} While a landowner is clearly entitled to receive the value of oil or gas produced from the land regardless of whether a lease is valid, a landowner is only entitled to receive delay rental payments when a lease is valid, as these payments are made in exchange for deferring drilling during the primary term. If a lease is terminated, the primary term is also terminated. The right to defer drilling within the primary term is predicated on the existence of a primary term. This is in line with the established principle that an oil and gas lease expires on its own terms when oil and gas is not produced within the primary term and "once the primary term of the Lease expires, the delay rental provision is no longer applicable." *Castro, supra,* ¶ 18, citing *Bohlen* at ¶ 20; *Hupp v. Beck Energy Corp*., 2014-Ohio-4255, 20 N.E.3d 732, ¶ 82 (7th Dist.) Consequently, the continued acceptance of delay rental payments is inconsistent with a landowner's position that the lease, and primary term, is terminated.

{¶20} Extension of the primary term here was to be by "mutual consent." Mutual consent is determined from the surrounding facts and circumstances. *Areawide Home Buyers, Inc.,* 7th Dist. 04 MA 154, 2005-Ohio-1340, ¶ 28. Here,

Wilson continued to accept delay rental payments until February of 2014, two and half years after the lease purportedly ended. Wilson's acceptance of delay rental payments for two and a half years after he contends the lease was terminated, coupled with Beck's continued payment of the delay rentals, demonstrated mutual consent.

{¶21} However, the theory of estoppel requires a showing of detrimental reliance. There is no detrimental reliance in this matter as the parties did not agree to a specific term of years in the event that the lease was extended by the mutual consent provision. "A modification to a contractual provision is an agreement by the parties to change or modify the term in question." *B.R. Kettering Towne Ctr. L.L.C. v. Golden City Ballroom L.L.C.,* 2d Dist. No. 26718, 2016-Ohio-5159, ¶44. The parties originally agreed to a ten-year primary term. That term was then modified by the parties to reflect a three-year term. Once the parties modified the term, the ten-year term was replaced by the three-year term and there is nothing within the record to suggest that the mutual consent provision allowed the lease term to revert back to ten years. While the notification document contains undated handwritten language setting out a drill schedule, only Wilson initialed the writing. See *Union Sav. Bank v. White Family Cos. Inc.,* 183 Ohio App.3d 174, 2009-Ohio-2075, 916 N.E.2d 816 (2d Dist.), ¶ 26, citing 17 Ohio Jurisprudence 3d, Contracts, Section 68 (no contract exists when one party does not sign or approve of a written document.)

{¶22} Without a defined primary term, this lease is akin to a month-to-month lease that terminates once one party decides to terminate. Once Wilson stopped

cashing the delay rental payments in February of 2014, Wilson put an end to the primary lease and the lease terminated. The parties did not agree to a set term. Hence, any other determination would, in effect, create an invalid perpetual lease. Based on all of the above, Beck cannot show detrimental reliance on the continued primary term of the lease and the estoppel argument must fail. Accordingly, Beck's assignment of error is without merit and is overruled.

Conclusion

{¶23} Beck contends that Wilson's continued acceptance of delay rental payments after the primary term ended triggered the mutual consent provision in the parties' 2008 Agreement. Regardless, the primary term ended once Wilson stopped cashing the delay rental payments because, once extended, there was no set lease term in the 2008 Agreement other than "mutual consent" revoked by the refusal to cash delay rental checks. No language in the 2008 Agreement caused reversion to the original ten-year term. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.