[Cite as **Ischy v. Northwood Energy Corp.**, 2022-Ohio-4755.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

TIMOTHY ISCHY ET AL.,

Plaintiffs-Appellants,

v.

NORTHWOOD ENERGY CORPORATION,

Defendant,

and

EQUINOR USA ONSHORE PROPERTIES, INC.,

Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 21 MO 0010

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2019-079

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

JUDGMENT:
Affirmed.

Atty. Timothy B. Pettorini, Atty. Jeremy D. Martin, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308, for Plaintiffs-Appellants and

Atty. Timothy B. McGranor, Atty. Gregory D. Russell, Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. 1008, Columbus, Ohio 43215, for Defendant-Appellee.

Dated:
December 20, 2022

Donofrio, P. J.

{¶1} Plaintiffs-Appellants, Timothy Ischy and John R. Ischy, appeal from a Monroe County Common Pleas Court judgment granting summary judgment in favor of defendant-appellee, Equinor USA Onshore Properties, Inc. (Equinor), on appellants' claims for a declaratory judgment that an oil and gas lease expired by its terms, mineral trespass, and breach of an implied duty of good faith and fair dealing.

{¶2} The Ischys are the owners of approximately 297 acres of land in Monroe County (the Property). Timothy Ischy originally leased oil and gas rights for the Property to defendant, Northwood Energy Corporation (Northwood), on April 5, 2012 (the Lease). Equinor is the current lessee under the Lease.

{¶3} The Lease contains a primary term of five years ending on April 5, 2017. The Lease also contains a potential secondary term. The Lease provides several alternative ways for continuing into the secondary term. These include: (1) actual production in paying quantities; (2) "operations," as defined in the Lease, in the pursuit of oil and gas on the Property or land pooled with the Property; (3) advanced minimum royalty (AMR) payments for wells drilled but not yet producing; and (4) the lessee paying an extension payment of $5,000 per net mineral acre. The Lease also gives Equinor the sole discretion as to if and when to pool the Property with other properties. And the Lease requires the Ischys to give written notice and an opportunity to cure if they believe Equinor breached the Lease or defaulted before the Ischys can initiate any litigation.

{¶4} In 2014, Equinor began preparations to drill on the R&D Hilltop Unit, which did not include the Property. On July 18, 2016, Equinor pooled 0.19 acres of the Property into the R&D Hilltop Unit. (Head Dep. Exs. 1, 7). Production from the R&D Hilltop U2H Well began on August 5, 2017. (Head Aff. ¶ 20).

{¶5} Beginning in November 2014, Equinor also began preparations to drill the Isaly U1H Well on the Isaly Unit. The Isaly Unit traverses the Property. The parties dispute whether these preparations constituted "Operations" under the Lease. Equinor did not formally create the Isaly Unit until August 28, 2017.

{¶6} In 2017, Timothy Ischy went to Equinor's office to discuss the extension payment he believed he was entitled to so that Equinor could extend the Lease. (T. Ischy Dep. 33-34; T. Ischy Aff. ¶¶ 4-7). Equinor directed Timothy to address his complaints with Northwood. (T. Ischy Dep. 33-34; T. Ischy Aff. ¶¶ 4-7). Timothy then had several telephone conversations with Equinor's Landman regarding extension payments. (T. Ischy Dep. 33-34; T. Ischy Aff. ¶¶ 4-7). Equinor did not make any extension payments to the Ischys.

{¶7} On March 14, 2019, the Ischys filed a complaint against Equinor and Northwood seeking a declaration that the Lease expired by its terms, that Equinor's production of oil and gas from their property was a mineral trespass, and that Equinor breached an implied duty of good faith and fair dealing.

{¶8} On June 11, 2019, Equinor tendered a payment to Timothy Ischy. Equinor believed this payment to be an AMR payment under the Lease for the R&D Hilltop Unit. The Ischys did not believe the payment was an AMR payment. The Ischys, however, accepted the payment.

{¶9} Next, Equinor filed a motion for summary judgment on June 10, 2021. It argued the Lease had extended into a secondary term and remained in full force and effect. The Ischys filed a response in opposition.

{¶10} On November 17, 2021, the trial court granted Equinor's summary judgment motion. It found the Lease remained in full force and effect because: (1) Equinor's operations on the R&D Hilltop Unit held the Lease into its secondary term; (2) the Ischys waived all implied covenants in the Lease; (3) Equinor's operation on the Isaly Unit independently held the Lease into its secondary term; (4) Equinor's payment of AMR payments independently held the Lease into its secondary term; and (5) the Ischys failed to provide Equinor with written notice of the alleged breach before filing the lawsuit as required by the Lease. For all of these reasons, the trial court found that the Lease

remained in full force and effect. Because it found no genuine issue of material fact existed, the trial court granted summary judgment in favor of Equinor.

{¶11} The Ischys filed a timely notice of appeal on December 17, 2021. They now raise a single assignment of error.

{¶12} The Ischys' sole assignment of error states:

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES.

{¶13} The Ischys argue the trial court erred in granting Equinor's summary judgment motion.

{¶14} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" 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 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶15} "[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." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

{¶16} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id.*;

Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶17} The Ischys break their assignment of error into four issues for our review. Each issue contests one of the trial court's findings and reasons for granting summary judgment.

{¶18} The Ischys' first issue for review states: "May the trial court disregard the implied covenant of good faith and fair dealing inherent between parties to an agreement where a lessee intentionally pools only a small fraction of a lessor's property into an oil and gas production unit to extend the lease beyond its primary term without paying an extension payment when future development is contemplated[?]"

{¶19} The trial court found that Equinor's "operations" in preparing to drill the R&D Hilltop Unit began prior to the expiration of the primary term of the Lease and, therefore, these operations extended the Lease into its second term. The Ischys argue, however, that any R&D Hilltop Unit operations did not extend the Lease because Equinor breached the implied duty of good faith and fair dealing by pooling just 0.19 acres of the Property into the R&D Hilltop Unit in a bad faith attempt to hold the entire Lease beyond its primary term without paying for an extension. They assert every contract carries with it an implied duty of good faith and fair dealing. Consequently, they take issue with the trial court's finding that:

> The parties have expressed herein their entire understanding and agreement, and it is expressly stipulated that no implied covenants or conditions whatsoever shall be read into this Lease (except covenants of title and quiet enjoyment ordinarily implied in a grant) including without limitation any covenants or conditions relating to the development of the Premises within a certain time frame, relating to the production of any wells, offsets or otherwise, relating to any other operation of the Lessee hereunder or to the measure of diligence therefore, or relating to anything to be done by the Lessee including the plugging and abandoning of any wells at any time for any reason.

(Judgment Entry, quoting Lease ¶ 13).

{¶20} The Ischys argue that no lessor would intentionally enter into a Lease with a producer who has no obligation to act in good faith. Moreover, they assert that to interpret the general disclaimer as to waive the covenant of good faith and fair dealing is against public policy.

{¶21} The Ischys contend that Equinor's plans to develop both the R&D Hilltop Unit and the Isaly Unit demonstrate Equinor's intent to pool just enough of the Property into the R&D Hilltop Unit to hold the Lease beyond the primary term so that Equinor would not be required to pay the extension payment before it could develop the Isaly Unit. The Ischys point to the following facts for support.

{¶22} Equinor originally applied for a permit to drill the R&D U2H well on June 24, 2015. The drilling for the R&D U2H well included 1,317.43 acres, including 121.13 acres of the Property. (Ozmet Dep. 40). The Decreased Setback presentation to the Ohio Department of Natural Resources in the R&D U2H permit shows that the R&D U2H was part of a development that included the Isaly wells. (Equinor's SJ Motion, Ex. B-3). But nothing delineated between the R&D Hilltop and Isaly wells. Eventually, the R&D Hilltop Unit and the Isaly Unit were divided and the R&D Hilltop Unit was formed as a 640-acre unit. (Ozmet Dep., Ex. 7). According to Ozmet, unit acreage is often reduced in order to drill longer laterals and still comply with unit acreage limitations set by leases. (Ozmet Dep. 34). The Ischys assert a genuine issue of material fact exists as to whether the creation of the R&D Hilltop Unit, specifically including the Property, was done in good faith or for the purpose of avoiding the payment of the Lease bonus.

{¶23} Moreover, the Ischys argue the Property was outside of the area of optimum production of the R&D U2H well. They assert lateral wells are spaced far enough apart so that they drain separate reservoirs. (Head Dep. 34). The Ischys point out that the Property is approximately 1,305 feet from the R&D U2H well. (Turner Dep. 34-35, Ex. 8). But Equinor requested a variance of 968 feet from the next planned well (the R&D U1H well) in its R&D U2H well permit application. Therefore, when the R&D Hilltop Unit was formed, the 0.19 acres of the Property was approximately 412 feet from the R&D U2H's area of optimum production.

{¶24} In discussing whether the breach of the duty of good faith and fair dealing exists as an independent claim, the Ohio Supreme Court has stated:

> In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement. See *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 443, 662 N.E.2d 1074 (1996); Restatement of the Law 2d, Contracts, Section 205 (1981); see also R.C. 1301.304. We have recognized that " ' "[g]ood faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could have not been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.' " *Ed Schory & Sons* at 443–444, 662 N.E.2d 1074, quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir.1990).
>
> As a comment in the Restatement explains, "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement, Section 205, Comment a. However, we have rejected the contention that a party breaches the implied duty of good faith and fair dealing merely by seeking to enforce the contract or by acting as permitted by its express terms. *Ed Schory & Sons* at 443–444, 662 N.E.2d 1074; see also *Wendy's Internatl., Inc. v. Saverin*, 337 Fed.Appx. 471, 477 (6th Cir.2009) (applying Ohio law); 23 Lord, Williston on Contracts, Section 63:22 (4th Ed.2003).

Lucarell v. Nationwide Mut. Ins. Co., 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶¶42-43. The Court then reiterated that "there is no independent cause of action for breach of the implied duty of good faith and fair dealing apart from a breach of the underlying contract." *Id.* at ¶ 45.

{¶25} The Ischys admit that they did not raise a distinct claim for breach of contract in this case, instead arguing that their claim for breach of the implied duty of good faith and fair dealing, is in fact, a breach of contract claim. In their Reply Brief, the Ischys

reiterate that there is an implied duty of good faith and fair dealing in every contract. They then state, "Consequently, Plaintiffs necessarily claim that Equinor breached the Lease; the claim simply concerns more than just an express term of the Lease." (Reply Brief, p. 3).

{¶26} The Ischys cannot maintain their breach of the implied duty of good faith and fair dealing claim. The Ohio Supreme Court has stated that such a claim cannot exist independent of a claim for breach of the underlying contract.

{¶27} Additionally, this court addressed a somewhat similar issue in *Valentine v. PayPal, Inc.*, 7th Dist. Jefferson No. 20 JE 0010, 2021-Ohio-1159, ¶ 13, where the parties' contract gave PayPal the "sole discretion" in certain matters. Citing *Lucarell*, supra, this court stated that a party to a contact does not breach the implied duty of good faith and fair dealing by seeking to enforce the contract as it is written. 2018-Ohio-15, ¶ 13. We noted that Valentine agreed to abide by PayPal's dispute resolution process and gave PayPal "sole discretion" in resolving disputes. *Id.* at ¶ 10. We pointed out that PayPal enforced the contract as written and acted in a manner permitted under the contract's express terms by deciding the buyer-seller dispute in its "sole discretion." *Id.* at ¶ 13.

{¶28} Similarly, in this case, the Lease gives Equinor the "sole discretion" to determine the size of each unit pooled. The pooling provision in the Lease provides in relevant part:

> POOLING/UNITIZATION. *Lessee is granted the right at any time to pool* and unitize the Premises or *any portion thereof*, as to any or all strata or stratum, with any other lands for the production of Leased Minerals. * * * Lessee shall have the right to form separate units in separate strata, to establish, alter, amend, revise or eliminate any or all units from time to time, and to determine the proper size and shape of each unit, *all in Lessee's sole discretion.*

(Emphasis added; Lease ¶ 5). Thus, The Lease explicitly gives Equinor the right to pool any portion of the Property, no matter the size of the pooled portion, in its sole discretion.

{¶29} Equinor formed the R&D Hilltop Unit on July 18, 2016, containing 0.19 acres of the Property. This occurred well before the expiration of the Lease's primary term. It is undisputed that Equinor was then engaged in operations on the R&D Hilltop Unit. The Lease expressly permitted Equinor to pool any portion of the Property. So when Equinor pooled the portion of the Property and engaged in operations under the Lease prior to the expiration of the primary term, it triggered the provision extending the Lease into its secondary term.

{¶30} Based on the Lease language and the above-cited case law, the trial court properly granted summary judgment in favor of Equinor. Because the Lease was maintained past its primary term, it remained in effect. On this basis alone, we can affirm the trial court's judgment.

{¶31} The Ischys' second issue for review states: "Do activities occurring off the leased premises constitute 'operations' such that the lease is extended beyond its primary term where the plain language of a lease requires that, to do so, the lessee's operations occur on the leased premises or lands utilized therewith, and no pooled unit has been formed[?]"

{¶32} The Ischys argue the purported operations that occurred on the Isaly Unit cannot extend the Lease into its second term because Equinor did not pool other properties into the Isaly Unit until over four months after the primary Lease term's expiration. They claim the trial court erred as a matter of law in concluding that operations on the Isaly U1H well independently extended the Lease into its second term. They assert the plain language of the Lease required that operations occur on the Property or lands pooled before the expiration of the primary term in order to extend the Lease. They cite to the Lease's operations provision, which states the Lease will extend to a second term, "[i]f, at the expiration of the Primary Term, Leased Minerals are not being produced in paying quantities from the Premises, or lands pooled therewith, and the Lease is not being held pursuant to any other provision of this Lease, but Lessee is then engaged in operations thereon * * *." (Lease, ¶ 18). The Ischys state the plain language states that operations must be occurring on the Property or on lands pooled with the Property.

{¶33} The Ischys note the trial court found that the R&D Hilltop Unit was formed on July 18, 2016, which was the effective date of the Declaration of Pooled Unit for the

R&D Hilltop Unit. They point out the Declaration of Pooled Unit for the Isaly Unit was not effective until August 24, 2017. (Head Dep., Ex. 2). Therefore, the Ischys assert Equinor did not pool the other properties into the Isaly Unit until it filed the Declaration of Pooled Unit, which states: "Lessee, in consideration of the premises, acting under and by virtue of the power and authority conferred and granted by the provisions of the Leases, do hereby include, consolidate, combine, pool, and unitize the Leases[.]" (Head Dep., Ex. 2). The Ischys assert then, that at the expiration of the Lease's primary term on April 5, 2017, the Isaly Unit had not yet been formed. Thus, the Ischys argue, the operations that the trial court relied on for the Isaly site were not operations that occurred on the Property or acreage pooled with the Property that would extend the Lease.

{¶34} The parties expressly agreed that "operations" under the Lease included not only drilling, testing, and completing a well on the Property but also included all preparatory work related to the operations. Equinor engaged in extensive operations preparing for, incident to, and relating to the drilling and completing of the Isaly N well before the end of the Lease's primary term. It was permitting and designing the well pad, conducting site surveys, and permitting the well. (Head Aff. ¶¶ 22-23, Exs. 19-20; Head Dep. 17, 55-61, Ex. 19). The Ischys do not dispute this work or the fact that there was no interruption in these operations for more than 90 days. They also do not dispute that the Isaly N well is located on, and was drilled horizontally through the Property.

{¶35} What the Ischys argue, however, is that these operations were not occurring on the Property. Therefore, they claim these operations cannot be used to hold the Lease until the pooling of the Isaly Unit, which occurred after the primary term of the Lease.

{¶36} As to this point, the Lease broadly defines "operations" to include:

> [T]he drilling, testing, completing (including by horizontal and slant hole well completion techniques), reworking, recompilation, deepening, plugging back, or repairing of a well (and all work preparatory, incident or related to any such operation) in search for or in an endeavor to obtain, restore, maintain, or to increase production of oil, liquid hydrocarbons, or gas, or any of them.

(Lease at ¶ 18).

{¶37} The Lease further provides:

> If, at the expiration of the Primary Term, Leased Minerals are not being produced in paying quantities from the Premises, or lands pooled therewith, and the Lease is not being held pursuant to any other provision of this Lease, but the Lessee is then engaged in Operations thereon, this Lease shall remain in full force so long as Operations are prosecuted (whether on the same or different wells) with no cessation of more than ninety (90) consecutive days, and if they result in production, so long thereafter as Leased Minerals are produced in paying quantities from the Premises or lands pooled therewith.

(Lease ¶ 18).

{¶38} According to these Lease terms, if Equinor was engaged in drilling a well, or engaged in any work preparing for or related to drilling a well on the Property or any land pooled, then the Lease was extended into a secondary term.

{¶39} Equinor's preparatory actions involving the Isaly Unit constituted "operations" under the Lease sufficient to extend the Lease into a secondary term. Equinor began preparatory work in November 2014, and the preparations continued with permitting and designing the well pad, tree felling and excavation work for the access road to the well pad and construction of the well pad, site surveys, and permitting for the Isaly N well. (Head Aff. ¶¶ 22-23, Exs. 19-20; Head Dep. 17, 55-61, Ex. 19). The Ischys do not dispute these operations. They also do not dispute that these actions are preparatory, incident to, and related to the Isaly N well. The Ischys further do not dispute that the Isaly N well was drilled through the Property, that production began in November 2018, or that production has been in paying quantities.

{¶40} The only issue then, is the Ischys' argument that all of the above operations should be ignored because they did not occur on the Property and could not be relied on as "operations" under the Lease until the formal pooling of the Isaly Unit on August 24, 2017, four months after the expiration of the Lease's primary term. This argument, however, is not supported by the language of the Lease.

{¶41} The Lease defines "operations" as including, "drilling, testing, completing (including by horizontal and slant hole well completion techniques), * * * (*and all work preparatory, incident or related to any such operation*) in search for or in an endeavor to obtain, restore, maintain, or to increase production of oil, liquid hydrocarbons, or gas, or any of them." (Lease at ¶ 18). The definition of "operations" does not state that this work must be done at any particular location or on the leased premises. And certain preparatory work or work related to drilling, such as designing and permitting, would necessarily not occur directly on the leased property or property pooled with it. Thus, under the Lease's definition of "operations" it was not required that the "operations" be performed on the Property itself.

{¶42} The Lease goes on to state that if at the expiration of the primary term, oil and gas is not being produced in paying quantities from the Property, or land pooled with the Property, but Equinor is "then engaged in Operations thereon," the Lease will remain in effect as long as operations continue with no cessation for more than 90 consecutive days and if they result in production in paying quantities.

{¶43} The Ischys do not dispute that operations never ceased for more than 90 consecutive days nor do they dispute that the Isaly well has been producing in paying quantities.

{¶44} Given the broad definition of "operations" under the Lease, Equinor's preparatory activities constituted "operations" so as to continue the Lease into a secondary term. Thus, the trial court properly granted summary judgment in favor of Equinor on this basis. Because the Lease was maintained past its primary term, it remained in effect.

{¶45} The Ischys' third issue for review states: "Does the purported acceptance of checks tendered by a lessee cause a lease to extend beyond its primary term or ratify bad faith conduct where payments are owed regardless of lessee's conduct or where payments are made without notice to lessor's counsel and incorrectly identified or calculated[?]"

{¶46} The trial court found that Equinor paid, and appellants accepted, an AMR payment for the R&D Hilltop Unit, which extended the Lease into a secondary term independent of any operations.

{¶47} The Ischys argue the purported AMR payment did not independently extend the Lease beyond its primary term. They contend a genuine issue of material fact exists as to whether their acceptance of the June 11, 2019 check caused the Lease to enter its secondary term. The Ischys note they filed this lawsuit on March 14, 2019. Three months later, on June 11, 2019, Equinor purportedly issued to Timothy Ischy, an AMR payment for the R&D Hilltop Unit. However, the Ischys point out that the statement Equinor gave to Timothy Ischy with the purported AMR payment did not state that it constituted an AMR under the Lease. (T. Ischy Dep., Ex. 5; T. Ischy Aff. ¶14). Instead, the Ischys assert, the statement provided that it was a "Manual Shut-In Royalty." (T. Ischy Aff. ¶ 14; T. Ischy Dep., Ex. 5). Additionally, the Ischys point out, Equinor issued this payment over two years after the expiration of the Lease's primary term. Thus, The Ischys argue a genuine issue of material fact exists as to whether cashing of the check by Timothy Ischy extended the Lease and/or barred the Ischys' claim.

{¶48} The Ischys further take issue with the trial court's finding that their purported acceptance of the royalty payments associated with production from the R&D U2H well and their alleged failure to repudiate the pooling of the Property into the R&D Hilltop Unit constituted a ratification of the R&D Hilltop Unit. They claim they were unaware of Equinor's plans and operations prior to the expiration of the Lease's primary term. In addition, they argue that these payments were de minimis.

{¶49} The relevant Lease provision here states:

> If at any time after the expiration of the Primary Term of this Lease, there is at least one well on the Premises or any property unitized therewith, and such well or wells are (a) shut in before or after production therefrom for any reason for a period in excess of 90 days (it being agreed by the parties that no payment is required if the shut in period is less than 90 days) or (b) producing at a marginal rate which would not result in the payment of royalties at the minimum royalty rate set herein or (c) unable to have production marketed from the Premises for any reason, including without limitation cost, lack of infrastructure, or lack of capacity or (d) for any other reason not being operated or producing in a way that generates royalties in excess of the AMR, as defined herein, Lessee may tender an annual

> Advance Minimum Royalty ("AMR") of Five Dollars ($5.00) per net mineral acre of the Lease being held by such well.

(Lease ¶ 4(C)).

{¶50} The trial court found that within 90 days of the receipt of the complaint, Equinor paid the Ischys AMR payments for the R&D Hilltop Unit, which the Ischys accepted. Thus, the court concluded that this was yet another reason the Lease entered its secondary term.

{¶51} Timothy Ischy admits to cashing checks from Equinor in the months following the filing of the complaint. Equinor contends they were AMR payments, which operated to extend the Lease. Timothy Ischy, however, averred that the checks did not indicate that they were AMRs. Instead, he averred that they contained a statement that they were payments for a "Manual Shut-In Royalty." (T. Ischy Aff. ¶ 14). It appears then, that there may have been an issue of fact as to what exactly the payments were for.

{¶52} But since the Lease had already extended into its secondary term under other Lease provisions, this is not a reversible error.

{¶53} The Ischys' fourth and final issue states: "Does a lessor fail to satisfy the condition precedent of written default notice to a lessee when he repeatedly notified lessee of its default and those instances were disseminated amongst the lessee's agents in written form two years prior to the lessor's lawsuit[?]"

{¶54} The trial court found that the Ischys' claims were premature and dismissed them because the Ischys failed to serve written notice to Equinor fully describing its breach or default prior to filing the lawsuit in accordance with the Lease provision stating:

> This Lease shall not be deemed forfeited or canceled and no litigation shall be initiated until Lessor has given Lessee written notice fully describing the breach or default including without limitation the failure to pay any royalties hereunder, and then only if Lessee fails to commence actions to remedy the breach or default within 90 days from the receipt of the notice.

(Lease ¶ 12).

{¶55} The Ischys argue they clearly put Equinor on notice of its breach in April 2017, when Timothy Ischy went to Equinor's office to inquire about his extension bonus. (T. Ischy Dep. 33). He spoke with Equinor's representatives on two more occasions. (T. Ischy Dep. 53; T. Ischy Dep. ¶¶ 6-7).

{¶56} The Ischys assert Equinor was well aware of their concerns. They cite to an April 26, 2017 communication from Equinor Landman Parker Malone to his colleagues that included a copy of the Lease and stated that it was pooled into the R&D Hilltop Unit and was held by operations being conducted on the R&D U2H well. (T. Ischy Dep., Ex. 18). In response, Pat McAndrews wrote back, "I just spoke to Mr. Ischy and he is very upset. He has a copy of the Unit that is recorded in the courthouse and he can't understand how Statoil can hold his 300 +/- acres lease by utilizing only 0.19 acres in the R&D Unit." (T. Ischy Dep., Ex. 18). To which Parker Malone stated, "we can completely understand his frustration." (T. Ischy Dep., Ex. 18). To which Joshua Ozmet stated that McAndrews "could quite easily nail down Parker's points with Mr. Ischy and he should be somewhat ok." (T. Ischy Dep., Ex. 18).

{¶57} The Ischys argue that the above communications among Equinor's Land Department employees demonstrate that Equinor was aware of their concerns and discussed how to address them. They argue that because they gave Equinor actual notice of their concerns, written notice was not required. Thus, the Ischys contend the trial court erred as a matter of law in finding they failed to comply with the Lease's notice provision since Equinor had actual notice of the alleged breach.

{¶58} In order for a party to be bound to a contract, the party must consent to its terms, the contract must be certain and definite and there must be a meeting of the minds of the parties. *Ameritech Publishing, Inc. v. Snyder Tire Wintersville*, Inc., 7th Dist. Jefferson No. 09 JE 35, 2010-Ohio-4868, ¶ 23, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991) (vacated on other grounds); *State ex rel. Bayus v. Woodland Park Properties*, 7th Dist. Mahoning No. 05 MA 169, 2007-Ohio-3147, at ¶ 22. There is no dispute in this case as to any of these elements. Consequently, the Ischys were bound by the terms of the Lease.

{¶59} The Lease is explicit that before the lessor (the Ischys) can initiate litigation or deem the Lease canceled, they must give the lessee (Equinor) "written notice fully

describing the breach or default." (Lease ¶ 12). It is undisputed that the Ischys did not given Equinor written notice of breach or default.

{¶60} But a party's failure to give notice in writing, as required by a contract, will not necessarily preclude recovery on the contract. *Gollihue v. Natl. City Bank*, 10th Dist. Franklin No. 11AP-150, 2011-Ohio-5405, ¶ 22. This court has found the failure to follow the written notice provision of a construction contract could be construed as harmless if there was evidence of constructive or actual notice. *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227, 786 N.E.2d 921, ¶ 76 (7th Dist).

{¶61} In this case, the parties do not dispute that Timothy Ischy brought his concerns to Equinor in April 2017, when he went to Equinor's office and spoke to its representatives in person. Thus, Ischy put Equinor on actual notice of an alleged breach of the Lease. Equinor's representatives discussed his concerns among themselves, demonstrating their actual knowledge of Timothy Ischy's allegations. Given the fact that Equinor had actual knowledge of the Ischys' allegations, their failure to provide written notice before commencing litigation may have been harmless.

{¶62} Nonetheless, as discussed above, there are several other justifications for summary judgment in favor of Equinor.

{¶63} Accordingly, the Ischys' sole assignment of error is without merit and is overruled.

{¶64} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

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

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.