

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

BT ENERGY CORP., etc., et al.)	CASE NO. CV 12 783764
)	
Plaintiffs,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY GRANTING</u>
)	<u>PARHIZGAR'S AND THE</u>
KEYBANK, N.A., etc, et al.)	<u>INTERVENORS' MOTIONS FOR</u>
)	<u>SUMMARY DECLARATORY</u>
)	<u>JUDGMENT AND DENYING THE</u>
Defendants.)	<u>PLAINTIFFS' MOTION FOR</u>
)	<u>SUMMARY JUDGMENT</u>

John P. O'Donnell, J.:

This is a lawsuit seeking, among other things, a declaratory judgment of the parties' rights to the oil and gas under about 1,600 acres of land in Jefferson County, Ohio. Three parties have now moved for summary judgment and this entry follows.

THE PLEADINGS AND SUMMARY JUDGMENT MOTIONS

This case began with BT Energy Corporation and Stonebridge Operating Company, LLC's complaint for declaratory judgment against defendants Key Bank, N.A., as trustee of the Raymond Q. Armington Trust, and Shahrokh Parhizgar.¹ BT Energy and Stonebridge allege that they are the successor lessees to an October 26, 1981, oil and gas lease of land in Jefferson County between Raymond Armington, as lessor, and Burns & Elikan, a drilling company. The

¹ After the lawsuit was filed Parhizgar quitclaimed the property to Shahrokh Parhizgar, trustee of the Shahrokh Parhizgar Revocable Living Trust II. On July 23, 2014, Parhizgar, as trustee, was substituted as the defendant for Parhizgar as an individual. For ease in writing I refer here to the defendant as Shahrokh Parhizgar, but those references should be taken to mean Shahrokh Parhizgar, as trustee of the Shahrokh Parhizgar Revocable Living Trust II.

land was thereafter transferred by Armington to a trust with KeyBank as trustee.² In 1997 KeyBank, as trustee, used fiduciary deeds to transfer part of the land to Parhizgar and another part of it to intervenor Bruner Land Company. The complaint seeks a declaratory judgment that the lease remains valid between KeyBank, trustee, as lessor³ and the plaintiffs as lessees, and that Parhizgar has no legal title to the oil and gas rights at the property.

KeyBank answered the complaint by denying some of its allegations and admitting others, but asking for essentially the same relief sought by BT Energy and Stonebridge: a declaration that the lease is valid and KeyBank is the lessor.⁴

Parhizgar's answer generally denied the plaintiffs' allegations and sought a declaration that the lease is expired and that the plaintiffs and KeyBank have no rights in the property except for the right to remove coal. Parhizgar also filed a counterclaim⁵ against both plaintiffs with the following causes of action: declaratory judgment, slander of title, trespass, fraud, conversion and tortious interference with business relationships. The counterclaims allege: that the plaintiffs never had any right to the oil and gas at the property so that affidavits of compliance with the oil and gas lease that the plaintiffs and KeyBank filed in the Office of the Jefferson County Recorder slandered Parhizgar's title; that the plaintiffs' actions caused Chesapeake Exploration, LLC to back out of a deal to lease the oil and gas rights from Parhizgar; and that the plaintiffs have gone onto the land without Parhizgar's permission.

² KeyBank, N.A. is apparently the successor to Key Trust Company of Ohio, National Association, the named trustee on the 1997 fiduciary deeds.

³ The complaint alleges on its fifth page (the pages are not numbered) that KeyBank should be declared the "proper lessee." I assume this is a mistake and that the plaintiffs meant that KeyBank is the lessor. I can see no set of facts under which the bank would be a lessee.

⁴ See, generally, pages 3 and 4 of defendant KeyBank, N.A.'s July 11, 2012, answer.

⁵ I refer here to the second amended counterclaim filed on September 14, 2012.

At the same time as the counterclaim, Parhizgar asserted a cross claim⁶ against KeyBank with the same causes of action as the counterclaims, plus allegations of breach of contract (the 1997 deed from Key to Parhizgar) and to quiet title.

After the case had been pending for some months, Bruner Land Company, Inc., Chesapeake Exploration, LLC and CHK Utica, LLC intervened for a declaratory judgment on the basis that Bruner owns several hundred acres of land encompassed by the 1981 lease, and Bruner leased the oil and gas rights on that land to Chesapeake Exploration and CHK Utica in 2010. As a result, any declaration of the validity of the 1981 lease would affect Bruner, Chesapeake Exploration and CHK Utica. The intervenors' claim is for a declaratory judgment and to quiet title on the basis that the 1981 lease is invalid.⁷

After the pleadings closed and discovery was undertaken, the plaintiffs filed on April 29, 2013, a motion for summary judgment in their favor on the complaint for declaratory judgment and, accordingly, in their favor on all of the counterclaims of Parhizgar, Bruner Land Company, Chesapeake Exploration and CHK Utica. That motion was opposed on July 19, in separate briefs, by Parhizgar and the intervenors. At the same time, Parhizgar filed his own motion for summary judgment on the declaratory judgment claim and the intervenors separately moved for summary judgment on their declaratory judgment and quiet title claims. The plaintiffs and KeyBank then opposed Parhizgar's and the intervenors' motions for summary judgment.

⁶ I refer here to the second amended cross claim filed on September 14, 2012.

⁷ The proposed intervenors' complaint attached to their January 18, 2013, motion to intervene includes claims against the plaintiffs and KeyBank for slander of title and against the plaintiffs only for civil conspiracy and against KeyBank only for breach of contract, but the intervention pleading filed on March 29, 2013, contains only the claim for declaratory judgment and to quiet title.

Briefing on all three motions for summary judgment was complete on November 7, 2014,⁸ and this entry follows.

STATEMENT OF THE FACTS

The 1981 lease and the 1997 deeds

As of 1981, Raymond and Elizabeth Armington owned 17 tracts of land in Jefferson County. On October 26, 1981, they leased the rights to the oil and gas under the surface of that land to Burns and Elikan Drilling.

The lease gave Burns and Elikan Drilling the exclusive right to drill for and sell the oil and gas under the land. The lease was to last “for a term of Three (3) years and so much longer thereafter as oil, gas or their constituents are produced in paying quantities thereon.”

The contract required Burns and Elikan Drilling to pay Armington a royalty in the form of a percentage of the price paid for any oil or gas sold by the driller. But the lease also includes a "shut-in royalty" clause. That part of the lease applies if a well is drilled but out of service. In that event, the drilling company was still obligated to pay the Armingtons as follows:

Lessee shall pay Lessor a royalty at the rate of Five Hundred Dollars and No Cents (\$500.00) per year on each gas well while, through lack of market, gas therefrom is not sold or used off the premises, and while said royalty is so paid said well shall be held to be a paying well under the terms of this lease.

The parties agree that in 1982 a single well was drilled on the property. That well produced a minimum quantity of oil and gas but went out of production in 1986 and has been shut-in ever since. The parties also agree that no "shut-in royalty" was ever paid until February 9, 2012. On that date, counsel for the plaintiffs wired \$13,000 to KeyBank as 26 years of backdated shut-in royalty payments.

⁸ Parhizgar filed on November 7 a reply to KeyBank's October 23 supplemental brief in opposition. Later, on February 17, 2015, Parhizgar did file a notice of supplemental authority. Although I consider the briefing to be done as of November 7, I have considered the supplemental authority in deciding the motions.

In the meantime, after the 1981 lease, fee simple ownership of the land was transferred to a trust in the name of Raymond Armington with defendant KeyBank as trustee.⁹ Then, by a fiduciary deed signed on October 14, 1997, and recorded on November 18, 1997, KeyBank transferred about 1,600 acres of the leased land to defendant Shahrokh Parhizgar. The deed granted to Parhizgar all of the real property “excepting and reserving to [KeyBank] all coal as situated on the property” and “subject to restrictions, conditions, easements, *leases* and other matters of record.” (Emphasis in italics added.) The rest of the land that was part of the 1981 lease had been transferred on August 11, 1997, by a fiduciary deed from KeyBank to Bruner Land Company. That deed – which was recorded on October 16, 1997 – included the same language as the fiduciary deed to Parhizgar reserving the coal¹⁰ rights to KeyBank and making the transferred land subject to existing leases.

The single well remained in a state of desuetude for more than a decade after Parhizgar bought the property. Similarly, Bruner Land Company did not do much with the land it owned that was part of the 1981 lease. But technology for extracting gas from the underground shale improved over the years, and by 2010 it had become profitable to extract the gas from property in many parts of eastern Ohio, including Jefferson County, resulting in renewed attention to the land by its owners and outside parties.

In 2010, Bruner leased its oil and gas rights to the land originally covered by the 1981 lease to Dale Property Penn Services, LP, which then assigned its interest to Chesapeake Exploration and CHK Utica, LLC. Around that same time Parhizgar became aware of the increased value of his land and had negotiations with Chesapeake and at least one other driller to

⁹ Meanwhile, plaintiffs BT Energy Corp. and Stonebridge Operating Co., LLC allegedly succeeded to Burns and Elikan Drilling’s rights as the lessee.

¹⁰ The deed to Bruner Land Co. also reserved to KeyBank the timber rights to the land, but those are not at issue in this case.

lease the oil and gas rights. Because the 1981 lease was still of record and clouded what he believed to be his title to the oil and gas rights, Parhizgar recorded on January 6, 2012, an affidavit to the effect that the 1981 lease was null and void. Soon thereafter Stonebridge Operating made the purported shut-in royalty payment to KeyBank and the plaintiffs and KeyBank filed their own affidavits to the effect that the lease was still valid. This litigation ensued.

LAW AND ANALYSIS

The answers to two basic questions will resolve the declaratory judgment and quiet title claims and will dictate the viability of the causes of action for slander of title and trespass. First, did the 1997 deeds convey to Parhizgar and Bruner Land Company ownership of the subsurface oil and gas at each property? Second, is the 1981 lease still in effect so that the current leaseholder has the right to extract the subsurface oil and gas? I will address the questions in that order.

Did the deeds give Parhizgar and Bruner Land Company the oil and gas rights?

Raymond Armington had a fee simple interest in the real property in 1981 when he leased the oil and gas rights to Burns & Elikan Drilling. A fee simple is defined as the highest right, title and interest that one can have in land. It is the full and absolute estate in all that can be granted. *Stearns v. Devecka*, 5th Dist. No. 2001 AP11 0102, 2002-Ohio-3839, ¶42. Fee simple ownership includes the rights to the minerals under the land, but "it is possible for the total interest in real property to be divided in such a way that the surface estate is severed from the mineral estate," resulting in a situation where one person owns the surface and another owns or possesses the minerals below the land. *Bath Twp. v. Raymond C. Firestone Co.*, 140 Ohio App. 3d 252, 256 (9th Dist. 2000).

But whether a conveyance operates to separate the surface and subsurface into two different estates owned in fee by separate owners depends on the terms of the conveyance. The Ohio Supreme Court has held that an instrument which conveys the right to remove subsurface minerals *may* transfer fee simple ownership of the subsurface estate, even if the instrument is labeled as a lease, unless the grantor expressly restricts the transfer. See, *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499 (1907).

There is a restriction here: the term of the lease, i.e. for three years or until oil and gas are no longer produced in paying quantities, whichever is longer. Because of that, the lease to Burns & Elikan Drilling was just that: a lease. It was not a grant in fee simple of a subsurface estate.

In the case of a lease generally, the lessee obtains only a possessory interest in real property and may treat the property as if it is his own, within the limits of the lease and subject to liability to the fee simple owner for waste. In the case of the specific lease here, Burns and Elikan Drilling got the right to remove oil and gas from under the surface for a certain period of time but never obtained legal ownership. Even though, in theory, the lessee had the right to remove oil and gas forever – so long as oil or gas were produced in paying quantities or shut-in royalties were paid – the lessee never had legal ownership of the underground oil and gas: that remained with Armington.

Since fee ownership of the subsurface estate remained with Armington, leaving the lessee with the right to remove the oil and gas below the land until the end of the lease, when KeyBank, as trustee, transferred fee simple ownership of the property to Parhizgar and Bruner Land Company, the deeds operated to transfer not just the surface estate but also the subsurface estate, except for the coal under the ground, which was specifically reserved to the grantor.

It is true that the transfers were made "subject to" the oil and gas lease, to the extent the lease was still valid. But KeyBank's argument that the deeds thus reserved to it the *ownership* of the oil and gas rights is unavailing. When the fee owner of real property leases all or part of that property, the lease survives a transfer of the fee to a new owner unless the lease's terms specify otherwise. The lease here is silent about what happens upon a transfer of ownership. So, assuming for the moment that the lease was still in effect when fee ownership of the surface and subsurface estates (except for coal) transferred to Parhizgar and Bruner Land Company, the fiduciary deeds transferred ownership of the leased subsurface estates to Parhizgar and Bruner Land Company with the limitation that the lessee still had the right to remove oil and gas.

In short, just as KeyBank became the new lessor when Armington transferred the entire property to the trust, Parhizgar and Bruner Land Company became the new lessors (if the lease was still in effect) when they acquired the property.

Of course, if the lease had terminated before the transfers then there was no lease for the subsurface estate to be "subject to" and Parhizgar and Bruner Land Company just as surely acquired the entire fee simple estate with the sole exception of the subsurface coal.

The record evidence is unequivocal: Parhizgar and Bruner Land Company own the oil and gas rights.

Is the lease still in effect?

A lease is a contract and Ohio courts apply traditional contract principles when interpreting their provisions. *Pool v. Insignia Residential Group*, 136 Ohio App. 3d 266, 270 (1st Dist. 1999). In construing the provisions of a contract, the court must determine the intent of the parties at the time the contract was made and give effect to the parties' intentions, which are presumed to reside in the plain language of the contract. *Id.* When the terms of the contract are

clear and unambiguous, courts may not create a new contract by finding intent not expressed in those terms. *Id.*

Typically, an oil and gas lease, like the lease in this case, contains a primary fixed term and a secondary term that extends the lessee's rights under the lease only on certain conditions described in the lease. *Chesapeake Exploration, L.L.C. v. Buell*, Slip Opinion No. 2015-Ohio-4551, ¶77. If the conditions of the secondary term are not met, the lease terminates by the express terms of the contract and by operation of law and reverts the leased estate in the lessor. *Id.*

The primary term of the lease here is three years. By the express terms of the contract that period ended on October 26, 1984. The secondary term of the lease is for "so much longer [after October 26, 1984] as oil, gas or their constituents are produced in paying quantities thereon." Based upon the record evidence, the well went out of production in 1986. Accordingly, in 1986 the conditions of the secondary term were not met, the lease terminated by its express terms and, by operation of law, the leased estate – i.e., the subsurface oil and gas rights – reverted to the owner.

Where paying quantities are not produced the lease does allow the secondary term to be extended by the payment of an annual five hundred dollar royalty, and that "while said royalty is so paid said well shall be deemed to be a paying well under the terms of this lease." But the royalty is required to be paid within 20 days of the end of a month where no oil or gas is sold. That period ended a generation before the 2012 attempt at shut-in payments in this case and those payments cannot be deemed to have extended the lease since the secondary term expired in 1986.

The lease expired, and the subsurface oil and gas rights at issue reverted to the owner, no later than 20 days after the end of 1986, i.e. the last possible date a shut-in payment could have been made. Any action taken after that date to revive rights under the lease was ineffectual. As a result, when KeyBank, as trustee, transferred fee simple ownership, except the coal rights, ten years later to Parhizgar and Bruner Land Company there was no oil and gas lease for the new owners' interest to be "subject to."

Summary declaratory judgment

The oil and gas lease expired no later than January 20, 1987, and fee ownership of the oil and gas rights was acquired by Parhizgar and Bruner Land Company through the 1997 fiduciary deeds from KeyBank, as trustee. There are no genuine issues of material fact here and the parties are entitled to a summary declaratory judgment of their rights and obligations under the lease.

Because the oil and gas lease is no longer valid and because the 1997 fiduciary deeds conveyed ownership of the oil and gas estates, I make the following declarations:

- 1) The oil and gas lease originally recorded in the Office of the Jefferson County Recorder at volume 57, pages 751-763, expired by its terms no later than January 20, 1987, and has been invalid since that date at the latest.
- 2) The plaintiffs BT Energy Corporation and Stonebridge Operating Co., LLC, both of whom claim an interest in the leased oil and gas rights under assignments of rights created under the original lease, have no right to the subsurface oil and gas at the original leased premises and have no right to enter upon the surface estate, nor did they have any such rights at any time since late January 1987 to the extent assignments to them were made before then.

- 3) KeyBank, N.A., as trustee, has no right, title or interest in the subsurface oil and gas at the portion of the original leased premises now owned by Parhizgar. KeyBank, N.A., as trustee, does own the subsurface coal at the property and, with it, the concomitant right to reasonable use of the surface estate to extract the coal.
- 4) KeyBank, N.A., as trustee, has no right, title or interest in the subsurface oil and gas at the portion of the original leased premises now owned by Bruner Land Company. KeyBank, N.A., as trustee, does own the subsurface coal and the timber 16 inches in diameter one foot above the ground at the property if sold separately from the land. With that ownership KeyBank, N.A., as trustee, also has the concomitant right to reasonable use of the surface estate to extract the coal and I do not make a specific declaration on the exact bounds of the trustee's use of the land to extract timber other than to conclude that the trustee has some right to be on the surface estate in connection with continuing ownership of the timber.
- 5) Shahrokh Parhizgar became the fee owner of the subsurface oil and gas rights on the property conveyed to him by the Key Trust Company of Ohio, National Association, as trustee, by a fiduciary deed dated October 14, 1997, and recorded in the Office of the Jefferson County Recorder on November 18, 1997, at volume 252, page 374.
- 6) The Bruner Land Company became the fee owner of the subsurface oil and gas rights on the property conveyed to it by the Key Trust Company of Ohio, National Association, as trustee, by a fiduciary deed dated August 11, 1997, and recorded in the Office of the Jefferson County Recorder on October 16, 1997, at volume 248, page 122.

- 7) The affidavit of lease compliance, etc., filed by KeyBank, N.A. on February 10, 2012, with the Office of the Jefferson County Recorder at volume 984, pages 618-692, is invalid and of no force and effect.
- 8) The affidavit of compliance with oil and gas lease filed by Eddy Biehl on February 14, 2012, with the Office of the Jefferson County Recorder at volume 985, pages 303-317, is invalid and of no force and effect.
- 9) The amendment and ratification of oil and gas lease between Key Trust Company of Ohio, N.A. and Stonebridge Operating Co., LLC and BT Energy Corp. on February 13, 2012, and filed on February 14, 2012, with the Office of the Jefferson County Recorder at volume 985, pages 318-321, is invalid and of no force and effect.
- 10) The amended affidavit of compliance with oil and gas lease filed by Eddy Biehl on February 29, 2012, with the Office of the Jefferson County Recorder at volume 987, pages 405-419, is invalid and of no force and effect.

Entry of summary judgment

Consistent with the foregoing, the plaintiffs' motion for summary judgment is denied in every respect, Parhizgar's motion for summary declaratory judgment is granted, and the intervenors' motion for summary judgment is granted in every respect.

Accordingly, summary judgment is entered as follows on the various affirmative claims of the parties: in favor of Shahrokh Parhizgar and against the plaintiffs and defendant KeyBank, N.A. on the plaintiffs' complaint for declaratory judgment; against defendant KeyBank, N.A. on the prayer for relief at pages 3-4 of its answer to the complaint; in favor of Shahrokh Parhizgar and against the plaintiffs and defendant KeyBank, N.A. on Parhizgar's second amended counterclaim and crossclaim for declaratory judgment; and in favor of intervenors Bruner Land

Company and Chesapeake Exploration, LLC and CHK Utica, LLC on their counterclaim against the plaintiffs and crossclaim against KeyBank, N.A. for declaratory judgment.

Parhizgar's other counterclaims and crossclaims remain pending.

IT IS SO ORDERED:

Judge John P O'Donnell

January 18, 2016

Date

SERVICE

A copy of this journal entry was sent by email on January 18, 2016, to the following:

John E. Triplett, Jr., Esq.
triplett@theisenbrock.com
Regis E. McGann, Jr., Esq.
regis_e_mcgann@yahoo.com
Attorneys for the plaintiffs

William E. Gerstenslager, Esq.
bill@gocolex.com
Attorney for defendant KeyBank, N.A.

Gary A. Corroto, Esq.
gcorroto@lawlion.com
Maria C. Klutinoty Edwards, Esq.
mklutinotyedwards@lawlion.com
Attorneys for defendant Parhizgar

Clay K. Keller, Esq.
ckkeller@jacksonkelly.com
Attorney for the intervenors

Judge John P. O'Donnell