IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

MOLLY T. BLAZEK

Plaintiff

v.

RESERVE ENERGY EXPLORATION COMPANY, et al.

Defendants

CASE NO. 12 CV 013

ORDER

This matter having come on before this Court upon Plaintiff Molly T. Blazek's (Blazek's) Motion for Partial Summary Judgment, Defendant Reserve Energy Exploration Company's (Reserve's) Motion For Summary Judgment and XTO Energy Inc. and Phillips Exploration, Inc.'s (XTO's) Motion For Summary Judgment, Responses and Replies to the same and Defendant Reserve Energy Exploration Company's Motion to Strike Exhibits and Deny Plaintiff's Request for Judicial Notice. After having considered said filings this Court makes the following finding.

DEFENDANT RESERVE'S MOTION TO STRIKE EXHIBITS AND DENY JUDICIAL NOTICE

This Court shall first consider Defendant Reserve's Motion To Strike Exhibits And Deny Judicial Notice. Plaintiff's Response to Defendant Reserve's Motion For Summary Judgment includes certain exhibits that have not been sworn, certified nor

authenticated by affidavits. A document that is not listed in Civ. R. 56 may be considered only if it is "accompanied by a personal certification that it is genuine or is incorporated by reference in a properly framed affidavit pursuant to Civ.R.56(E)." McPherson v. Goodyear Tire and Rubber Company, 9th Dist. No. 21499, 2003-Ohio-7190, para.10 (2003), rev'd on other grounds. Based upon the same and Civ. R. 56 this Court grants said Motion to Strike.

As to Defendant Reserve's Motion To Deny Judicial Notice, this Court finds that Plaintiff's Response requests this Court to take judicial notice of the geologic data attached as Exhibit C consisting of an Ohio Department of Natural Resources (ODNA) Map showing the Marcellus Shale formation. Additionally, this Court is asked to take judicial notice of Exhibit D being a PowerPoint presentation from ODNR and titled "The Marcellus Shale Play-Geology, History and Oil and Gas Potential in Ohio, Oct. 2010." "Judicial notice is a highly limited process reserved for clearly indisputable facts, for example the time of sunrise or sunset on a particular day or the boundaries of a state or county." Shahar v. Bowers, 120 F.3d 211, 214 (11th. Cir. 1997) (applying Federal Rule of Evidence 201, being similar to Ohio's Rule of Evidence 201).

Exhibit C is dated 2010 and the map in Exhibit D is dated 2011. The relevant discussions in the case at bar took place in 2006 between landman Gene Myers, the Plaintiff and Plaintiff's Son. "Courts may not take judicial notice of irrelevant facts." United States ex rel Branch Consultants, L.L.C. v. Allstate Insurance Co., 668 F. Supp. 2d 780, 789 (E.D. La 2009). This Court finds said exhibits to be irrelevant due to their dates of creation and further to not be proper exhibits for judicial notice by this Court.

SUMMARY JUDGMENT STANDARD

Ohio Rule of Civil Procedure Rule 56 provides that summary judgment is warranted when "it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Ohio Rule of Civil Procedure 56(c).

Pursuant to Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267, 274 (1977) summary judgment is appropriate when the moving party demonstrates that (1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion that is adverse to the party against whom the motion is made.

STATEMENT OF FACTS

On May 7, 2006, Plaintiff Molly T. Blazek entered into an oil and gas lease with Reserve Energy Exploration Company. This lease involved 239.50 acres situated in Pultney Township, Belmont County, Ohio. The Plaintiff agreed to receive five dollars per acre and further agreed to a ten year primary term. Reserve thereafter assigned the lease to XTO Energy, Inc. and Phillips Exploration, Inc. Prior to signing the lease, Ms. Blazek and her Son, Ernest Blazek, met with Gene Myers, (Myers) a landman negotiating leases

for Reserve. The Blazeks sat down with Myers and "read through {the lease} and reviewed it together... {Myers} went through the line items, the clauses in the contract." E. Blazek Depo. at 66-67. Ms. Blazek signed the lease and Count One of her Complaint alleges that her signature was not properly notarized.

Ms. Blazek viewed her son as her agent in the negotiations and had "full confidence in him." M. Blazek Depo. at 90, 92. It was her opinion that he did a good job negotiating the lease. Id at 145.

The Lessee was required to pay $1,197.50 annually as a delay rental payment. The Lessee made each payment and the Plaintiff accepted each payment, through May 2011. In May 2012, the Lessee timely tendered a check in the amount of $1,197.50 and the Plaintiff refused to accept the same.

PLAINTIFF'S CLAIMS

The Plaintiff sets forth four theories seeking to void the lease in question:

Count I The Lease was not properly notarized and should be declared void.

Count II The Lease is void because Reserve/XTO are in material breach of the implied covenant to reasonably develop Plaintiff's oil and gas.

Count III The Lease is void based upon the tort of fraud in the inducement.

Count IV The terms of the Lease are unconscionable and therefore contrary to Ohio public policy.

The Plaintiff's Partial Summary Judgment Motion seeks relief on Counts II and IV.

COUNT I
IMPROPER NOTARIZATION

The Plaintiff seeks relief alleging improper acknowledgment of her signature in violation of ORC 5301.01. When an instrument is defectively executed, in the absence of fraud, the instrument is enforceable between the parties. Citizens Nat'l Bank v. Dennison,165 Ohio St. 89, 94 (1996). A conveyance of mineral rights that was improperly notarized by the grantee in violation of ORC 5301.01 none the less " passed title as against" the grantors and their heirs. Swallie v. Rosenberg ,190 Ohio App. 3d 473, 479-80 (7th Dist. 2010).

Despite a defective acknowledgment it was held that because the parties intended to enter into a valid oil and gas lease, the lease in question was "enforceable [by the assignee of the lessee] in equity as a contract to make a lease." Carruthers v. Johnston Petroleum Corp.,1980 WL 354011, *5 (Ohio App.5th Dist., June 5, 1980). Enforceability of the improperly acknowledged instrument extends to assignees. " Since a defective mortgage is valid between the parties, and since an assignee obtains the rights of his assignor then the mortgage is effective between the parties and their assigns." Seabrooke v. Garcia, 7 Ohio App. 3d 167, at Syllabus 2 (9th Dist. 1982).

Absent fraud, this Court finds an improperly notarized instrument to be enforceable between the parties and their assigns.

COUNT II
IMPLIED COVENANT TO REASONABLY DEVELOP

Plaintiff's Second Count claims a breach of an implied covenant to reasonably develop the oil and gas. Plaintiff's Lease contains a ten year primary term. The Lessee's obligation to drill or develop the lease extends for ten years subject to the payment of an annual delay rental. The payment of delay rentals during the primary term negates any implied covenant to develop. 5-8 Williams and Meyers, Oil And Gas Law sec. 835.1; Jacobs v. CNG Transmission Corp., 565 Pa. 228 (2001); Kachelmacher v. Laird, 92 Ohio St. 324, 332 (1915).

The Lease herein expressly provides for the development of the oil and gas, provides for delay rental payments and contains a primary term of ten years. Since Harris v. Ohio Oil Co., 57 Ohio St. 118 (1897), Ohio courts have held "there can be no implied covenants in a contract in relation to any matter that is specifically covered by the written terms of the contract itself." Kachelmacher, supra at 324 para. 1 of the Syllabus. Based upon the same, the Plaintiff cannot claim a breach of an implied covenant to develop to void the lease herein.

COUNT III FRAUD IN THE INDUCEMENT

Plaintiff alleges fraud in the inducement as grounds to void the Lease she entered into on May 7, 2006.

In Cohen v. Lamko, 10 Ohio St. 3d 167 (1984), the Ohio Supreme Court set out

the following as elements of a fraud:

(a) a representation or, where there is a duty to disclose, a concealment of a fact,

(b) which is material to the transaction at hand,

(c) made falsely, with knowledge of its falsity, or with 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.

Firstly, the Plaintiff relies on an allegation of improper notarization to support the fraud claim. If the instrument in question was improperly acknowledged after the Lease was signed, as alleged by the Plaintiff, the same cannot act as a fraudulent inducement for the Plaintiff to have signed the document.

Plaintiff claims that she was fraudulently induced to sign the Lease based on Reserve's alleged statement that "if she didn't sign the lease, that a well would be put on her neighbor's property and she would lose her gas and not be paid for it." 2d Am. Compl. para.12. If this statement were made it is not fraudulent pursuant to the "rule of capture" set forth in Nw Ohio Nat. Gas Co. v. Ullery, 67 N.E. 494 (1903).

Plaintiff alleges she was induced to sign the Lease by Reserve's statement that "under clause 18 on the lease, if she would obtain a better offer at any time that Reserve would either meet that better offer or release this lease to her." Clause 18 actually states that any new lease "shall be subordinate to this lease." Additionally, any such statements allegedly made by Reserve are barred by the parol evidence rule which precludes evidence of conversations and declarations which occur prior to or contemporaneous

with a written contract and which attempt to vary or contradict terms contained in the writing AmeriTrust Co. v. Murray, 20 Ohio App.3d 333, 335 (1984).

The Plaintiff claims that information was withheld from her concerning the development of the Marcellus and Utica shale, essentially understating the value of the lease. E.g., Am. Compl. para12; Pl's Resps. to Interrogatories at 17. Conversely, Plaintiff also argues that the "potential royalties are overstated by a (minimum) factor of (8) eight." (See Pl.'s Mem. Opp'n., 6. Having previously ruled that Plaintiff's Exhibits C and D relating to overstatement were not properly authenticated, this Court also notes that Plaintiff testified that she did not remember reading any of the documents provided by Gene Myers. (M. Blazek Depo., at 63-76).

As to understating the value, the Defendants point to the Affidavit of Joseph W. Haas who stated:

> At the time the lease was signed in May 2006, Reserve was unaware of the potential for profitable development and exploration of the Utica Shale in Belmont County.

The Defendant Reserve did not hold a fiduciary or similar relationship of trust or confidence with the Plaintiff. Reserve had no duty to disclose. "The duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relationship of trust and confidence between them." Federated Management, 137 Ohio App. 3d 366, 383 (10th Dist. 2000).

Regarding the overstatement of the estimated production of the Marcellus Shale and the Plaintiff's claim that Reserve understated the amount of time it would take to drill, this Court finds said statements to be predictions or opinions of what the future may hold. "In order to maintain an action for fraud, the misrepresentation must be knowingly

or recklessly made regarding an existing or ascertainable fact." Gervace v. Master Foods, Inc. 8th Dist., No. 37643, 1978 Ohio App. LEXIS 7981 at *13. Fraud cannot be predicated upon promises or representations relating to future actions or conduct. Aetna Insurance Co. v. Reed , 33 Ohio St. 283 (1877).

"When a party is defrauded by means of a contract, the party may affirm the contract and sue for damages," or "the non-breaching party may rescind the contract." Fenix Enters. v. M & M Mortg. Corp., 624 F. Supp. 2nd 834, 842 (S.D. Ohio 2009). Rescission requires a tendering back of any consideration received under the contract. "This court has long held that an action for fraud in the inducement ... is prohibited unless the plaintiff tenders back the consideration received and rescinds the lease." Berry v. Javitch, Block & Rathbone, L.L.P., 127 Ohio St. 3d 480, 483 (2010).

The Plaintiff has failed to establish the elements for fraud in the inducement and additionally has failed to tender back the consideration received by her from 2006 to 2011 thereby making rescission unavailable to her.

COUNT IV UNCONSCIONABILITY

In Count IV the Plaintiff takes the position that the Lease terms herein are unconscionable and therefore are void as contrary to public policy. A claim of unconscionability requires the Plaintiff to demonstrate that the Lease is both procedurally and substantively unconscionable. Procedural unconscionability is based on the "relative bargaining positions of the parties." Reynolds v. Crokett Homes, Inc., 2009-Ohio-1020 paras 16-17 (7th Dist.2009). When determining the bargaining position of the parties, a

court will consider multiple factors including the "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question." Id. "The party claming a contract is unconscionable must introduce 'actual evidence' regarding these factors before a court can consider that a contract is procedurally unconscionable." Id.

In determining substantive unconscionability a court must look to "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability," and further "the terms themselves and whether they are commercially reasonable." Id.; Bushman v. MFC Drilling, 9th Dist. No. 2403-M, 1995 Ohio App. LEXIS 3061 at *8-9 (1995) holds that the "mere fact that the terms of an executed contract turn out to be unfavorable to one of the parties does not override the fundamental concept in Ohio law that parties enjoy freedom of contract and are bound to the contractual relationship that they create."

Regarding procedural unconscionability, the Plaintiff graduated from high school, holds a bachelors degree in science and nursing, managed an emergency room for seven years and served for fifty years as an emergency room nurse. The Plaintiff worked at a hospital following her retirement from 2003 to 2011. During this time she had no vision problems and according to her Son Ernest Blazek she was able to hear what was going on and had the capability and knowledge to read the Lease at the time she executed it. {E. Blazek Tr. At 113-114). Ernest Blazek assisted his Mother and acted as her agent in the Lease negotiations. Mr. Blazek has an undergraduate degree from The Ohio State

University and a masters degree from the University of Dayton. Prior to the signing of the Lease, he had significant real estate dealings while engaged in subdividing property into lots.

The Plaintiff had an ample opportunity to review the Lease. Ernest Blazek affirmed the same in his deposition when he stated he, the Plaintiff and landman Myers "read through {the lease} and reviewed it together... {Myers} went through the line items, the clauses in the contract." Depo. of E. Blazek at 66-67.
According to Mr. Blazek, Mr. Myer's review of the Lease was "very thorough." Id. Considering the same, the Plaintiff has failed to establish procedural unconscionability.

As to substantive unconscionability, the Plaintiff fails to point to any terms of the Lease that she claims are unfair aside from the price for the delay rentals. The terms of the Lease are standard terms common in the oil and gas industry at the time the Lease was executed. See Haas Aff., para. 4. The Plaintiff claims the delay rental payments of $5.00 per acre are unfair. The market rate for a bonus payment and/or delay rental payment for an oil and gas lease covering land in Belmont County, Ohio and entered into on or around May 2006 was approximately $5.00 per acre. Id. The Plaintiff has failed to establish grounds for procedural unconscionability and substantive unconscionability. The Plaintiff has failed to establish that the Lease at issue is contrary to public policy.

Additionally, claims for unconscionability are governed by a four year statute of limitations pursuant to ORC 2305.09 (D). See Price v. EquiFirst Corp., N.D.Ohio No. 1: 08-CV-1860, 2009 U.S. Dist. LEXIS 28113, at *20-21 (April 1, 2009). Fraud and conversion are subject to a discovery rule but other 2305.09 claims accrue when the act occurs. Helman v. EPL Prolong Inc., 139 Ohio App. 3d 231, 249 (7th Dist. 2000). The

Lease herein was executed on May 7, 2006. This action was filed on January 10, 2012, beyond the time of the applicable statute of limitations for an unconscionability claim.

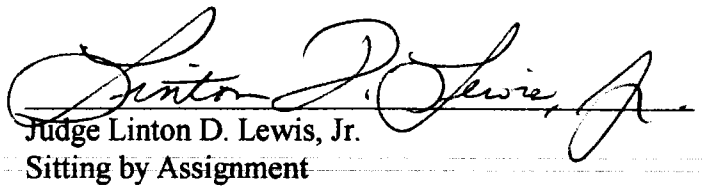
CONCLUSION

After having considered Plaintiff Molly T. Blazek's, Defendant Reserve Energy's and Defendants XTO Energy and Phillips Exploration's Motions For Summary Judgment and after construing the evidence most strongly in favor of the nonmoving party and having determined that there is no genuine issue as to any material fact and that reasonable minds can come to but one conclusion and further that there is no just reason for delay, this Court makes the following ruling.

This Court finds that Reserve Energy, XTO Energy and Phillips Exploration are entitled to judgments as a matter of law. This Court grants the Motion for Summary Judgment of Reserve Energy. This Court grants the Motion for Summary Judgment of XTO and Phillips Exploration. This Court denies the Motion for Partial Summary Judgment of Plaintiff Molly T. Blazek. As to the Phillips Motion, it is granted Summary Judgment in re: the counterclaims for declaratory judgment finding said Lease to be valid, for specific performance of said Lease and further for an order tolling the primary term of the Lease during the pendency of this litigation including the pendency of any appeal. The Plaintiff shall within thirty days from the date of this Judgment Entry, execute curative documents necessary to bring the Lease in question in compliance with

the requirements of ORC 5301.01. Costs shall be assessed to the Plaintiff. This is a final appealable order.

IT IS SO ORDERED.



Judge Linton D. Lewis, Jr.
Sitting by Assignment

ENDED

CLERK SERVED COPIES ON ALL THE PARTIES OR THEIR ATTORNEYS

WITHIN THREE (3) DAYS OF ENTERING THIS JUDGMENT UPON THE JOURNAL, THE CLERK SHALL SERVE NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR. SERVICE SHALL BE MADE IN A MANNER PRESCRIBED IN CIVIL RULE 5 (B) AND SHALL BE NOTED IN THE APPEARANCE DOCKET. CIVIL RULE 58.