STATE OF MICHIGAN

COURT OF APPEALS

GARY E. FRIEDLAENDER, LINDA GOSS, LINDA GOSS REVOCABLE LIVING TRUST, HEFCO LTD, ROSLYN F. LEVY, MITCHELL H. FRIEDLAENDER, MITCHELL H. FRIEDLAENDER REVOCABLE LIVING TRUST, ROBERT P. FRIEDLAENDER, and ROBERT P. FRIEDLAENDER REVOCABLE LIVING TRUST,

Plaintiffs-Appellees,

v

ARBOR PETROLEUM CO,

Defendant-Appellant

and

OLD KENT BANK,

Defendant.

UNPUBLISHED
October 22, 2002

No. 234291
Oakland Circuit Court
LC No. 99-017648-CZ

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

This case involves the terms of an oil and gas lease. Plaintiffs brought this action in circuit court, seeking a declaratory judgment that the lease term had expired. The circuit court denied defendant-appellant's motion for summary disposition and granted plaintiffs' motion for summary disposition, holding that the lease had terminated. Defendant appeals as of right from that decision. We affirm.

The facts in this case are undisputed. The instant lease agreements date back to October 25, 1978. Although there are six separate lease agreements, their terms appear to be identical. Plaintiffs are tenants in common, each owning an undivided 1/6 fee simple interest in the leased real property. Arbuckle Corporation was the original lessee, but Arbor Petroleum became the lessee, as Arbuckle's successor in interest, in 1985. In March 1987, Arbor mortgaged its interest in the oil and gas leases to defendant Old Kent Bank. In May 1998, Arbor ceased production and "shut-in" the wells. Arbor concedes that it failed to make a timely payment of shut-in royalties,

within 90 days from the date on which it shut-in the wells. The parties simply dispute the ramifications of this failure, under the terms of the lease. Plaintiffs argue that Arbor's failure to make a timely shut-in royalty payment triggered the lease's termination provisions. Arbor argues that its failure to make this payment is of no consequence, and that its leasehold continues.

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(10), a motion for summary disposition tests the factual support of the claim. *Id*.; *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). When reviewing a circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted or filed by the parties, to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra* at 337.

This case involves issues concerning the proper interpretation of contracts, which are questions of law that are subject to de novo review by this Court. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). When a motion for summary disposition involves the interpretation of a contract and the material facts are undisputed, summary disposition is appropriate if reasonable minds cannot differ regarding the application of an unambiguous word or phrase to the undisputed facts. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63-64; 620 NW2d 663 (2000). "The primary goal in interpreting contracts is to determine and enforce the parties' intent. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id*. at 63.

The lease provisions at issue here provide as follows:

> 2. It is agreed that this lease shall remain in force for a primary term of three (3) years from this date, and as long thereafter as any well is producing oil or gas in commercially paying quantities upon said land or upon a Unit which includes all or a part of said land with no cessation for more than 90 consecutive days. . . .
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> 4. If any well, capable of producing oil and/or gas, located on the leased lands, or on lands pooled or communitized with all or part of the leased lands, is at any time shut-in and production therefrom is not sold or used off the premises, nevertheless such shut-in well shall be considered a well producing oil and/or gas and this lease will continue in force while such well is shut-in, whether before or after expiration of the primary term. . . . For each well shut-in on the leased land, or on lands pooled or communitized with all or part of the leased lands, Lessee shall be obligated to pay or tender to Lessor in the same manner provided for payment of royalties based on the ability of each well to produce oil and or gas.
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> * * *

> 6. If during the primary term of this lease and prior to the discovery of oil and/or gas, operations hereunder shall result in a dry hole or holes on this and or lands communitized therewith, or operations under this lease shall end with the cessation of production, or from any other cause this lease shall not terminate, provided that Lessee shall again commence operations or tender the payment of rental in the manner and amount hereinbefore provided on or before the following dates: The next ensuing rental payment date, 90 days after the completion of the dry hole or 90 days after the cessation of production.

The parties agree that Article 2 contains the "habendum clause" of these oil and gas leases, setting forth both the primary lease term and the conditions necessary for an extended lease term. Article 2 sets forth a primary lease term of three years. The parties agree that the instant leases were no longer in the primary term, which expired on October 25, 1981. Article 2 also provides for an extended lease term, which continues as long "as any well is producing oil or gas in commercially paying quantities upon said land . . . with no cessation for more than 90 consecutive days." The parties agree that the instant leases were in the extended term, but disagree regarding whether the extended term expired.

Article 4 permits the lessee to "shut-in" a well, and yet continue the lease term. Here, in May 1998, Arbor shut-in the wells on the leased premises. In its motion for summary disposition, Arbor provided its reasons for shutting in the wells:

> In May of 1998, these wells were shut-in for several reasons. Lessee chose to evaluate the leasehold with current engineering data to determine the best way to further develop this field with technology not available twenty years ago. Moreover, as expressly allowed by the Leases, in Lessee's judgment, the terms, conditions and circumstances for producing the Leases were uneconomic or otherwise unsatisfactory.

Article 4 provides that, if "any well, capable of producing oil and/or gas, located on the leased lands . . . is at any time shut-in and production therefrom is not sold or used off the premises, nevertheless such shut-in well shall be considered a well producing oil and/or gas and this lease will continue in force while such well is shut-in." Further, Article 4 provides that, for "each well shut-in on the leased land," the lessee must pay the lessor "in the same manner provided for payment of royalties based on the ability of each well to produce oil and or gas."

Defendant-appellant Arbor argues that, under the express terms of Article 4, a shut-in well is always, by definition, "a well producing oil and/or gas." Because a shut-in well is considered a producing well, defendant-appellant Arbor argues that production could not be deemed to have ceased, and that the extended lease term therefore continues under Article 2. In order to be preserved for appellate review, an issue must be raised, addressed, and decided by the trial court. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000); *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Because Arbor never made this argument below, and because the circuit court neither addressed nor decided it, this issue has not been preserved for appellate review.

However, because this is an issue of law and all the necessary facts are before this Court, we will briefly address it. *Miller*, *supra* at 168. We conclude that a shut-in well does not, by

definition, satisfy the conditions set forth in Article 2 for continuing the lease's extended term. Article 2 requires a well to produce oil or gas "in commercially paying quantities" and prohibits cessation of production "for more than 90 consecutive days." A shut-in well, by definition, automatically satisfies the first requirement of Article 2, because it is considered a well producing oil and/or gas. However, a shut-in well is not automatically producing "in commercially paying quantities," nor is it automatically producing without "cessation for more than 90 days."[1]

Arbor next argues that the timely payment of shut-in royalties, as described in Article 6, is not required to continue the term of the lease. First, Arbor argues that Article 6 applies only during the primary term, and not during the extended term. The circuit court addressed this argument as follows:

> Defendant argues that the lease could not have terminated under paragraph 6 of the lease, as this Court found, because that paragraph only applies to the primary term of the lease, and this lease was not in the primary term when it allegedly terminated. However, paragraph 6 is not limited in its application to the primary term of the lease. If paragraph 6 is read as Defendant proposes, applying the provision, "during the primary term of this lease and prior to the discovery of oil and/or gas," to the entire paragraph, it would be nonsensical. The paragraph cannot both be limited to a time prior to the discovery of oil and/or gas, and still apply to "the cessation of production."

We agree with the circuit court's interpretation of the contract language. Article 6 applies during *both* the primary lease term and the extended lease term. If operations under the lease "end with the cessation of production," the lessee is required to take one of two actions, in order to prevent the lease from terminating: (1) re-commencing operations, or (2) tendering payment of royalties in a timely manner. Here, Arbor did neither.

In addition, Arbor offers another argument why Article 6 does not apply here. Arbor returns to its previous argument that a shut-in well is always, by definition, a producing well. Arbor contends that when a well is shut-in under Article 4, production does not cease, and Article 6 cannot be triggered. Again, Arbor never made this argument in the circuit court, and it is unpreserved for appeal. *Camden*, *supra* at 400 n 2; *Miller*, *supra* at 168.

Furthermore, we would conclude that defendant-appellant's argument is without merit. Article 2 of the parties' leases sets forth both the primary lease term and the conditions necessary for an extended lease term. If those conditions are not met, the lease term expires. Articles 4 and 6 are both designed to give the lessee some protection from automatic termination. Article 4 allows the lessee to cease production and shut-in a well. The extended lease term continues while the well is shut-in, under a theory of constructive production, while the lessee pays royalties "based on the ability of each well to produce oil or gas." Article 6 provides the timelines by which the lessee must act to prevent automatic expiration of the lease term under

[1] Further, Arbor's argument, if adopted, would seem to cause absurd results. If a lessee can extend the lease term simply by shutting-in its wells and ceasing payment, it could tie up the lessors' real property rights and prevent development on the leased land, in perpetuity.

Articles 2 and 4. The lessee must either re-commence production within 90 days or tender the payment of rental within 90 days from the cessation of production. We disagree that Article 6 can never apply to a shut-in well.

We conclude that the circuit court properly ruled that the parties' leases automatically terminated under Article 6, due to defendant-appellant's admitted failure to tender shut-in royalty payments in a timely fashion.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens