[Cite as *Johnson v. Consol. Coal Co.*, 2015-Ohio-2246.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

R. LEE JOHNSON, ET AL.,	)	CASE NO. 13 BE 3
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	OPINION
	)	
CONSOLIDATED COAL COMPANY, ET AL.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 10-CV-0317

JUDGMENT: Affirmed.

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 8, 2015

APPEARANCES:

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DeGENARO, J.

{¶1} Plaintiffs-Appellants, R. Lee Johnson, Frances K. Johnson, Edwin C. Johnson, Sarah H. Johnson, and William Lovejoy appeal the January 7, 2013 judgment of the Belmont County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees Consolidated Coal Company and Oxford Mining Company, LLC, in a property dispute involving coal rights. On appeal, the Johnsons argue that pursuant to several written instruments, they reserved certain coal rights over 65 acres of the property at issue. They also argue the instruments at issue were ambiguous and that the trial court should have considered parol evidence when making its decision.

{¶2} The Johnsons' arguments are meritless. The instruments at issue are clear and unambiguous and therefore the trial court properly declined to consider parol evidence about the parties' intent. The 1975 Deed failed to reserve for the Johnsons the No. 9 coal seam interest in the disputed 65 acres. Accordingly, summary judgment in favor of Appellees was proper and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On December 18, 1975, the Johnsons entered into an agreement to sell 263.38 acres in Harrison County and 151.12 acres in Belmont County to the now defunct Holmes Land Company. The Johnsons owned the surface and No. 9 seam coal rights in Harrison County, but only the surface rights in Belmont County. The 1975 Agreement provided for the "trade or exchange (of) coal rights in, to and under" the property. Holmes paid the Johnsons 1.5 million dollars plus the potential for royalties if the value of coal mined exceeded a certain amount. The Johnsons conveyed the Harrison County tracts to Holmes on December 17, 1975, via general warranty deed. The 1975 Deed contained no reservations of the No. 9 coal seam, nor did it expressly reserve the 65 acres that are disputed in this case.

{¶4} The parties entered into a subsequent agreement in 1977, which modified and superseded the 1975 Agreement. The sale price was increased from 1.5 million dollars to 2.1 million dollars. The 1977 Agreement contained additional provisions for the circumstances surrounding and ramifications of the possibility that

Holmes "should sell, convey, trade or exchange its coal and surface rights in, to and under the Real Property." More specifically, it provided that if Holmes were to "sell, convey, trade or exchange its coal and surface rights" in the property, the Johnsons would then receive an additional sum in the event that the royalty on the actual coal sales were greater than the sum ($2.1 million) initially paid to the Johnsons.

{¶5} Additionally, while the 1975 Agreement had provided that the Johnsons could re-purchase the property should they so desire at the expiration of *15 years* from the date of the agreement, the 1977 Agreement extended this option to *35 years* from the date of the 1977 Agreement (concluding February 19, 2012).

{¶6} Subsequent to the 1977 Agreement, but later that same year, Holmes leased its coal interest in the property to Consolidated Coal Company. Holmes conveyed the property to Consolidated in 1982. In March 2009, Consolidated leased the property to Oxford, via an assignment of leases. In June 2009, Consolidated transferred its coal rights in the No. 9 coal seam to Oxford via limited warranty deed, and Oxford began mining operations on that coal seam.

{¶7} On July 13, 2010, the Johnsons filed a complaint in the Belmont County Court of Common Pleas against Oxford and Consolidated seeking a declaration of the interests of themselves and the defendants with regard to the coal mining rights on the property, money damages for mining that had actually occurred and an injunction to prevent further mining. These claims all centered on the Johnsons' argument that they retained coal rights to the No. 9 coal seam on 65 acres of the property.

{¶8} The Johnsons contended that it was not their intention to sell all of the coal rights involved in the property. Rather, they claimed to only convey the mineable acreage. They claimed that in 1946 and 1947, approximately 57 acres of coal were mined from the Johnsons' acreage in Harrison County. This left a 206 acre coal reserve. In 1977, 141 acres of that 206 acre reserve were mineable. The remaining 65 acres could not be mined at that time due to a gas line, a road and minimum blasting distances. However, they asserted that by the time the complaint was filed in 2010, the 65 acres had become mineable in that the gas line was abandoned, the road was vacated and the minimum blasting distances were voided due to the removal of

barns, houses and other structures. They claimed to have certain coal rights to those previously unmineable 65 acres.

{¶9} The Johnsons moved for summary judgment based upon, *inter alia*, the affidavits of Appellants, Edwin Johnson and R. Lee Johnson, and correspondence from 1976 from the President of Holmes, which the Johnsons claim establish that the 65 acres at issue were reserved from the their conveyance to Holmes in 1975, and are therefore not available to Consolidated or Oxford.

{¶10} They also pointed to the following language in the 1977 Agreement:

> The selling price of the Real Property has been based upon an estimate of the number of tons of coal, which can be economically mined, removed from the Real Property and subsequently sold. The selling price was arrived at by applying the following percentages to the estimated tonnage of coal on the Real Property * * *

{¶11} Consolidated opposed the Johnsons' motion for summary judgment and filed its own cross-motion for summary judgment asserting that based upon the terms of the 1975 Agreement, 1975 Deed and/or the 1977 Agreement, no reservation of the 65 acres at issue was made by the Johnsons. Further it claimed that extrinsic evidence submitted by the Johnsons should be barred from consideration by the trial court based upon the application of the parol evidence rule. Oxford also opposed the motion for summary judgment and filed its own cross-motion, making similar arguments.

{¶12} The trial court denied the Johnsons' motion for summary judgment and granted Consolidated's and Oxford's cross-motions, finding that based upon the plain terms of the 1975 Deed and the 1977 Agreement, the Johnsons conveyed all their interest in the property to Holmes in 1975 and no reservation of the 65 acres of coal or the No. 9 coal seam was made.

Summary Judgment

{¶13} In their sole assignment of error, Appellants assert:

"The Belmont County Court of Common Pleas erred, as a matter of law, when it overruled Plaintiff-Appellants' Motion for Summary Judgment and sustained Defendant-Appellees' Motion for Summary Judgment."

{¶14} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in de novo review. *Parenti v. Goodyear Tire & Rubber Co*., 66 Ohio App.3d 826, 829, 586 N.E.2d 1121 (9th Dist.1990). Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000).

{¶15} "The construction of written contracts and instruments of conveyance is a matter of law." *Alexander v. Buckeye Pipe Line Co*., 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus, quoting *Graham v. Drydock Coal Co*., 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). "When construing a deed, a court must examine the language contained within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *McCoy v. AFTI Properties, Inc.*, 10th Dist. No. 07AP-713, 2008-Ohio-2304, ¶8.

{¶16} The Johnsons argue that because the sale price for the property conveyed was based on an estimate of how much economically mineable coal existed under the property in 1975, they only conveyed the portions of the property which contained economically mineable coal as of that date. Further, they contend that the trial court should have considered parol evidence to ascertain the true intent of the parties.

{¶17} Appellees argue that the language of the Deed and Agreements is clear and unambiguous. Thus, they assert that the trial court properly declined to consider any extrinsic evidence about the parties' intent. Moreover, they argue that the 1975 Deed, which was recorded, conveyed the entire No. 9 coal seam without reservation, exception or limitation and that summary judgment in their favor was therefore proper.

{¶18} Turning first to the parol evidence issue, Ohio's common law rule provides that " 'a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.' " *Bellman v. American International Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, 865 N.E.2d 853, ¶7, quoting Black's Law Dictionary (8th Ed.2004) 1149. "The rule 'operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form,' * * * and it 'assumes that the formal writing reflects the parties' minds at a point of maximum resolution and hence, that duties and restrictions that do not appear in the written document were not intended by the parties to survive." *Id*., quoting Black's Law Dictionary at 1149-1150.

{¶19} In the trial court, the Johnsons appeared to concede that the language of the Agreements and Deed was unambiguous. *See, e.g*., the Johnsons' Memorandum Concerning Discovery and Supplementation of Motions and Memorandum Contra Summary Judgment, at p. 1-2 (agreeing with Oxford Mining that "this is a matter of contract and deed interpretation to be made by the Court, the documents speak for themselves. They clearly delineate the rights, duties and obligations in ownership interest of the parties." *See also* the Johnsons' Reply Memorandum in Support of Their Motion for Summary Judgment, at p. 3. ("Plaintiffs agree with Defendants that the documents are clear and unambiguous when the Court determines, by operation of law, that the Agreements survived the Warranty Deed in question.")

{¶20} However, on appeal they now assert that extrinsic evidence is necessary to determine the parties' true intent because the written instruments are "ambiguous as to the amount of minable coal that was sold by the Johnson Family and purchased by the Holmes Land Company * * *."

{¶21} This argument is meritless. The following language, upon which the Johnsons rely, does not appear to create an ambiguity as to the amount of mineable coal sold: "The selling price of the Real Property has been based upon an estimate of the number of tons of coal, which can be economically mined, removed from the Real Property and subsequently sold." This language merely demonstrates how the purchase price of the property was calculated.

{¶22} The Johnsons rely on *Muskingum Coal Co. v. Eastern Hocking Coal Co*., 122 N.E.2d 408 (2d Dist.1953). In that case, there was an ambiguity in the agreement for sale that required clarification and therefore extrinsic evidence was permitted. Specifically, the agreement for sale of mining rights provided:

> It is further agreed that if any other acreage is found to be owned by first party in any of the sections included in Schedule A of Perry County and Schedule B of Morgan County, first party desires to sell and second party agrees to purchase the same and said acreage shall be added hereto and paid for at the rate of Forty Dollars ($40) per acre, payable in installments as aforesaid.

Id. at 408.

{¶23} Since the terms of the written agreement in *Muskingum* specifically contemplated the fact that additional acreage may be "found to be owned at a later date," the appellate court concluded that extrinsic evidence was permitted to show "what lands had later been found to be owned by defendants and covered by the contract; likewise, the defendants could, by the introduction of extrinsic evidence, show what lands were then known and not later found to be owned, and not intended to be covered by the contract." *Id*. at 410.

{¶24} However, there is no such ambiguity in the written agreements in the case at bar. Rather, the pertinent instruments, i.e., the 1975 Deed, and the 1977 Agreement (which superseded and abrogated the 1975 Agreement), specifically identify the exact acreage that is being transferred by the parties.

{¶25} Turning to the relevant language in those instruments, first, the 1977 Agreement provides:

> WHEREAS, on December 18, 1975, the Sellers conveyed to Purchasers by general warranty deed the property more particularly described in the attached Exhibit "A," [which contains metes and bounds descriptions of First Tract, Second Tract, Third Tract] which property shall hereinafter be referred to as the "Real Property,"

* * *

IT IS THEREFORE, AGREED:

1. For and in consideration of the payment provided for in this Agreement, the Sellers have transferred and conveyed to the Purchaser by general warranty deed the Real Property, receipt of which is hereby acknowledged * * *"

{¶26} Second, the relevant grant in the 1975 Deed is as follows:

R. LEE JOHNSON and FRANCES K. JOHNSON, husband and wife, BILL LOVEJOY and MARTHA LOVEJOY, husband and wife, and EDWIN C. JOHNSON and SARAH H. JOHNSON, husband and wife, the Grantors, for a valuable consideration, the receipt of which is hereby acknowledged, grant, with covenants of general warranty, to HOLMES LAND COMPANY, the Grantee, whose tax mailing address is P.O. Box 939, Sugarcreek, Ohio 44681, the following described real property:

FIRST TRACT

Situated in the Township of Athens, County of Harrison and State of Ohio, and known as and being Lot No. 2 and part of the northwest quarter of Section 16, Township 9, and Range 5 and being more particularly described as follows:

[metes and bounds description] and containing 82.0813 acres.

Excepting the No. 8 coal and mining rights (Volume 78, Page 403 of the Records of Deeds of Harrison County, Ohio).

SECOND TRACT

Situated in the Township of Athens, County of Harrison and State of Ohio, and known as and being a part of the south half of Section 16, Township 9 and Range 5 and being more particularly described as follows:

[metes and bounds description] and containing 213.8 acres, more or less.

Excepting the No. 8 coal and mining rights heretofore sold and conveyed.

Excepting from the above-described First and Second Tracts the following described premises:

Situated in the Township of Athens, County of Harrison and State of Ohio, and known as and being a part of the northwest and southwest quarters of Section 16, Township 9, and Range 5 and being more particularly described as follows:

[metes and bounds description] and containing 32.50 acres, more or less.

Leaving in the two tracts herein conveyed 263.3813 acres, more or less.

Excepting and reserving unto the said Grantors, R. Lee Johnson and Frances K. Johnson, husband and wife, Bill Lovejoy and Martha Lovejoy, husband and wife, and Edwin C. Johnson and Sarah H. Johnson, husband and wife, their heirs and assigns, all the coal underlying the above-described two tracts below the No. 9 vein and all the oil and gas thereunder.

The above-described two tracts being the same premises conveyed to R. Lee Johnson, Edwin C. Johnson and Martha Lovejoy by Certificate for Transfer of Real Estate dated December 10, 1974, of record in Volume 181, Page 42 of the Records of Deed of Harrison County, Ohio.

{¶27} Based upon the plain language of the 1975 Deed, the Johnsons absolutely conveyed their rights to the No. 9 coal seam, along with the surface rights of the property to Holmes. Neither the 65 acres nor the No. 9 coal seam was reserved in the 1975 Deed.

{¶28} As the Twelfth District has explained:

> The cardinal rule in the construction of deeds is that the parties' intention at the time of the execution of the instrument controls. * * * A deed's language is conclusively presumed to express the parties' intention absent uncertainty in the language employed. * * * If the language used is clear and unambiguous, extrinsic oral evidence may not be resorted to for purposes of defining and determining the mutual understanding of the parties.

(Internal citations omitted.) *Sword v. Sword*, 86 Ohio App.3d 161, 166-67, 620 N.E.2d 199, (12th Dist.1993).

{¶29} Further, the 1977 Agreement makes no mention of a reservation of the 65 acres, the No. 9 coal seam, or unmineable acreage.

{¶30} For these reasons, the Johnsons have no claims against Appellees, Holmes' successors-in-interest, with regard to the disputed acreage. Therefore, the trial court properly granted summary judgment in favor of Appellees.

{¶31} In sum, the Johnsons' sole assignment of error is meritless. The instruments at issue are clear and unambiguous and therefore the trial court properly declined to consider parol evidence about the parties' intent. The 1975 Deed failed to reserve for the Johnsons the No. 9 coal seam interest in the disputed 65 acres. Accordingly, summary judgment in favor of Appellees was proper and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.