[Cite as *Kilburn v. Graham*, 2019-Ohio-2695.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

STEPHEN KILBURN,

Plaintiff-Appellant,

v.

GAIL GRAHAM ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 MO 0022

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2017-002

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

JUDGMENT:
Affirmed

Atty. Brent Stubbins, Atty. Kyle Witucky, Atty. Grant Stubbins, Stubbins, Watson, Bryan & Witucky Co., 59 North Fourth Street, P.O. Box 488, Zanesville, Ohio 43702, for Plaintiff-Appellant, and

Atty. Michael Shaheen, Atty. Kristina Herman, Shaheen Law Group, 128 South Marietta Street, P.O. Box 579, St. Clairsville, Ohio 43950, for Defendants-Appellees.

Dated:
June 19, 2019

Donofrio, J.

{¶1} Plaintiff-appellant, Stephen Kilburn, appeals the judgment of the Monroe County Common Pleas court granting summary judgment in favor of defendants-appellees, Steven Wells, Marcia Wells, Carl Wells, Patricia Wells, Julie Myers, and Thomas J. Myers, on his quiet title action concerning an oil and gas royalty.

{¶2} In 1919, Frieda and Chancy Ankrom were the owners of the surface rights of 120 acres of real property, more or less, in Malaga Township in Monroe County, Ohio (the property). In addition to the surface rights, Frieda and Chancy also owned an undivided 1/2 interest of the oil and gas royalty in the property.

{¶3} In a deed dated May 27, 1919, the Ankroms conveyed "unto F.F Burkhart, A.C. and E.L. Peters and H.J. Cooper the one-half part or share of their royalty of all [the oil] and gas in and under [the property]." Appellees are heirs of F.F. Burkhart.

{¶4} F.F. Burkhart died intestate on September 21, 1935. A certificate of transfer from the probate court filed February 12, 1937 conveyed from F.F. Burkhart to Hazel May Wells "the undivided one-sixth part of the oil and gas royalty" in the property.

{¶5} On November 18, 1980, Hazel filed a notice of preservation of her oil and gas royalty pursuant to R.C. 5301.52. This notice indicated that Hazel was the owner of "an undivided one-sixth part of the oil and gas royalty" of the property.

{¶6} On May 29, 1996, Hazel conveyed her entire one-sixth interest in the oil and gas royalty of the property to appellees Carl Wells and Patricia Wells.

{¶7} On June 2, 2005, appellant became the owner of the surface rights to the property via a warranty deed.

{¶8} On July 9, 2014, appellees Carl Wells and Patricia Wells conveyed "an undivided one-half interest in all of our ownership interest in the oil, gas and other minerals" to appellees Steven Wells and Julie Myers. Appellee Marcia Wells is the wife of appellee Steven Wells and appellee Thomas Myers is the husband of appellee Julie Myers.

{¶9} Appellant filed this action seeking, among other things, quiet title to the oil and gas interest and declaratory judgment. Appellant's quiet title claim was premised on the Marketable Title Act. Appellant's declaratory judgment claim sought a declaration that: appellees Carl and Patricia Wells only owned an undivided 1/32 interest in the oil and gas royalty of the property, appellee Steven Wells only owned an undivided 1/64 interest in the oil and gas royalty of the property, and appellee Julie Myers only owned an undivided 1/64 interest in the oil and gas royalty of the property. Appellant served all interest holders in this action but appellees were the only ones to appear. The trial court granted default judgment in appellant's favor against the non-answering interest holders.

{¶10} After discovery, appellant and appellees filed competing motions for summary judgment. The only dispute between the parties in these motions relevant to this appeal was the interpretation of "unto F.F Burkhart, A.C. and E.L. Peters and H.J. Cooper the one-half part or share of their royalty of all [the oil] and gas in and under [the property]" in the May 27, 1919 deed.

{¶11} Appellant argued that appellees were only entitled collectively to a 1/16 interest of the property's oil and gas royalty. He argued that in the 1919 conveyance, the Ankroms granted F.F Burkhart, A.C. and E.L. Peters, and H.J. Cooper only half of their 1/2 interest in the oil and gas royalty (the Ankroms only conveyed a total undivided 1/4 interest in the property's oil and gas royalty). He also argued that the conveyance distributed the undivided 1/4 interest in the royalty in fourths (F.F. Burkhart, A.C Peters, E.L. Peters, and H.J. Cooper each receiving an undivided 1/16 royalty). Appellant argued that because F.F. Burkhart only received an undivided 1/16 royalty from Frieda and Chancy, appellees were collectively entitled to only 1/16 of the royalty.

{¶12} Appellees argued the Ankroms conveyed their entire interest in the royalty to F.F. Burkhart, A.C. Peters, E.L. Peters, and H.J. Cooper. Appellees also argued the conveyance had only three separate grantees meaning F.F. Burkhart obtained one-third of the 1/2 of the royalty previously owned by the Ankroms (specifically, the Ankroms conveyed to F.F. Burkhart 1/6 of the total royalty). Appellees argued that because the Ankroms conveyed 1/6 of the total royalty to F.F. Burkhart, they were collectively entitled to 1/6 of the royalty.

{¶13} On September 19, 2018, the trial court granted appellees' motion for summary judgment and denied appellant's motion for summary judgment. The trial court held that the use of "the one-half" in the May 27, 1919 conveyance meant that the Ankroms conveyed their entire interest in the oil and gas royalty. The trial court also held that the conveyance transferred the royalty interest to three sets of grantees: (1) F.F. Burkhart, (2) A.C. Peters and E.L. Peters, and (3) H.J. Cooper. This meant that F.F. Burkhart owned 1/6 of the total oil and gas royalty and therefore, appellees were collectively entitled to 1/6 of the total oil and gas royalty.

{¶14} Appellant timely filed this appeal on October 18, 2018. Appellant now raises one assignment of error.

{¶15} Appellant's sole assignment of error states:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEES, RATHER THAN APPELLANT, AND FINDING THAT APPELLEES ARE THE OWNERS OF A 1/6 ROYALTY INTEREST IN THE OIL AND GAS UNDERLYING THE PROPERTY, RATHER THAN A 1/16 ROYALTY INTEREST.

{¶16} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law, and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ. R. 56(C); *Byrd v. Smith*, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶17} Summary judgment is appropriate when there is no genuine issue as to any material fact. 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).

{¶18} Appellant's assignment of error challenges the trial court's interpretation of the May 27, 1919 deed. Deed interpretations are also subject to a de novo standard of review. *Talbot v. Ward*, 7th Dist. Monroe No. 15 MO 0001, 2017-Ohio-9213, ¶ 54 citing *Saunders v. Mortenson*, 101 Ohio St.3d 86, 801 N.E.2d 452, 2004-Ohio-24.

{¶19} Written instruments "are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "The principles of deed construction dictate that a court presumes that a deed expresses the intentions of the grantor and grantee at the time of execution.* * *A court cannot interpret the parties' intent in a manner contrary to the clear, unambiguous language of the deed." *American Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶ 50 (7th Dist.). When determining the grantor's intent, a court must analyze the language used in 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." *Id.*, quoting *Larwill v. Farrelly*, 8 Ohio App. 356, 360 (5th Dist.31918).

{¶20} Appellant raises two separate arguments regarding his assignment of error. The first argument states:

The Ankroms Conveyed 1/2 of a 1/2 Royalty Interest, i.e. a 1/4 Royalty Interest

{¶21} Appellant argues that the trial court misinterpreted how much of the royalty interest the Ankroms conveyed. Appellant argues that a strict reading of the conveyance indicates that the Ankroms only conveyed half of their interest and not their entire interest in the oil and gas royalty.

{¶22} The amount of the oil and gas royalty the Ankroms conveyed in the May 27, 1919 deed is "the one-half part or share of their royalty of all [the oil] and gas in and under [the property]." (Plaintiff's Motion for Summary Judgment Ex. B). The trial court held that the phrase "the one-half" indicates that the Ankroms conveyed their entire interest.

{¶23} Appellant argues this portion of the conveyance is modified by the word "their." Appellant argues that this conveyance means that the Ankroms only conveyed one-half of "their" royalty and not their entire royalty interest.

{¶24} At the time of the conveyance, the Ankroms owned an undivided 1/2 interest in the oil and gas royalty. The fact that the conveyance granted "the one-half part or share of their royalty" indicates that the Ankroms intended to convey their entire interest in the royalty. "[T]heir share," indicates that the Ankroms only owned a portion of the royalty, not the whole royalty. As they conveyed "the one-half part or share," the deed shows that the Ankroms intended to convey their entire interest in the royalty.

{¶25} Turning now to appellant's second argument:

The Ankroms' Royalty Interest Was Conveyed In Fourths, Not Thirds

{¶26} Appellant argues that the trial court also misinterpreted the number of grantees in the May 27, 1919 conveyance. He argues that there was a total of four grantees, not three.

{¶27} The grantees in the conveyance are "F.F. Burkhart, A.C. and E.L. Peters and H.J. Cooper * * *." (Plaintiff's Motion for Summary Judgment Ex. B). The issue appellant raises is whether A.C. Peters and E.L. Peters were each given an individual share of the royalty or were given one share equal to F.F. Burkhart's and H.J. Cooper's shares. The trial court held that the conveyance grouped A.C. and E.L. Peters and they were collectively given a share equal to F.F. Burkhart and H.J. Cooper (the Ankroms conveyed their interest in thirds).

{¶28} Appellant cites *Huls v. Huls*, 98 Ohio App. 509, 130 N.E.2d 412 (1st Dist.1954), for the proposition that when a deed is silent as to the respective shares of the grantees, the law presumes that the grantees' shares are equal. *Id.* at 510-511. But the issue appellant raises with this argument is the number of grantees in the May 27, 1919 conveyance, not whether the grantees were given an equal share.

{¶29} Appellant argues that the trial court's judgment was based on the lack of a comma between A.C. and E.L. Peters. Appellant argues that the comma was inadvertently omitted and adding said comma would have required redrafting the entire deed as it was written in 1919. He also argues that the drafter of the deed "took a short cut by not writing Peters after A.C.'s name." (Brief of Appellant 7). These arguments do not have merit.

{¶30} Inferring why the drafter omitted any punctuation goes against the presumption that the words in the deed reflect the Ankroms' intent. There is no evidence that the lack of a serial or Oxford comma in the list of grantees was accidental. Similarly, inserting "Peters" after A.C. in the deed also goes against the presumption that the words in the deed reflect the Ankroms' intent.

{¶31} Analyzing the language of the deed, the Ankroms intended to convey their interest to three parties: (1) F.F. Burkhart, (2) A.C. and E.L. Peters, and (3) H.J. Cooper. This is indicated by the fact that the grantees are grouped by last name. A.C. and E.L. Peters were grouped together meaning that they collectively received the same amount of the royalty as F.F. Burkhart and H.J. Cooper. Ultimately, the trial court's interpretation of the May 27, 1919 conveyance was proper.

{¶32} Accordingly, appellant's sole assignment of error lacks merit and is overruled.

{¶33} 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 Appellant.

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.