[Cite as *O'Brandovich v. Hess Ohio Devs., L.L.C.*, 2021-Ohio-1287.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

ELI O'BRANDOVICH aka ELY O'BRANDOVICH, et al.,

Plaintiffs-Appellants,

v.

HESS OHIO DEVELOPMENTS, LLC, et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 JE 0007

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 17 CV 337

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Gregory W. Watts, *Atty. Matthew W. Onest*, and *Atty. William G. Williams*, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 4775 Munson Street NW, P.O. Box 36963 Canton, Ohio 44735-6963, for Plaintiffs-Appellants

Atty. Kevin Colosimo, and *Atty. Christopher Rogers*, Frost Brown Todd, LLC, Union Trust Building, 501 Grant Street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendants-Appellees, Ascent Resources — Utica, LLC and Utica Minerals Development, LLC

Atty. Rodger L. Puz, Dickie, McCamey & Chilcote, P.C., Two PPG Place, Suite 400, Pittsburgh, Pennsylvania 15222 and

Atty. Paul J. Schumacher, Dickie, McCamey & Chilcote, P.C., 600 Superior Avenue East, Suite 2330, Cleveland, Ohio 44114, for Appellees, Hess Ohio Developments, LLC and CNX Gas Company LLC

Dated: March 22, 2021

WAITE, J.

{¶1} Appellants Louis O'Bradovich, Rebecca and Paul Eberhart, Natalie Louise Basnett, Camille and John Keyoski, and Ely (aka Eli) and Sandra O'Bradovich appeal a March 5, 2020 decision of the Jefferson County Common Pleas Court which granted a Civ.R. 12(B)(6) motion to dismiss their complaint. The motion to dismiss was filed by Appellees Hess Ohio Developments, LLC ("Hess"), CNX Gas Company, LLC ("CNX"), Utica Minerals Development, LLC ("Utica"), Ascent Resources - Utica LLC ("Ascent"), and John Does 1-10. In this oil and gas action, Appellants argue that the trial court erroneously determined that a 1940 deed that reserved coal and "other minerals" included oil and gas rights. For the reasons provided, Appellants' arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This action involves 144.113 acres of land in Smithfield Township, Jefferson County. On February 22, 1940, Jefferson Coal Company ("JCC") transferred the surface rights to Lawrence T. Heil. The deed included language "[e]xcepting and reserving, however, to the Grantor herein, its successors and assigns, from all the underlying above

described Tracts Nos. 2 and 3 all the coal and other minerals in, upon or underlying all of the same." (7/27/17 Complaint, Exh. 1.) Critical to the issue at hand, the deed also reserved easements corresponding to the development of those interests.

{¶3} At various points in time thereafter, the following individuals appear to have obtained a portion of the surface rights: Ely O'Bradovich, Louis O'Bradovich, Rebecca and Paul Eberhart, Ely A. and Sandra E. O'Bradovich, Natalie Louise Basnett, Camille and John Keyoski. After a series of conveyances, Appellees obtained an interest in the minerals through the 1940 deed exception.

{¶4} On July 27, 2017, Appellants collectively filed a complaint against Appellees. The complaint raised several claims and sought, among other things: declaratory judgment that Appellees did not own the oil, gas, and hydrocarbon rights underlying the surface; quiet title; an injunction to prohibit Appellees from leasing, conveying, or transferring the mineral interests; and a finding of trespass based on Appellees' actions in drilling wells to remove minerals from the subsurface.

{¶5} On August 25, 2017, in lieu of filing an answer, Ascent and Utica filed a Civ.R. 12(B)(6) motion to dismiss the complaint. On September 12, 2017, Hess and CNX filed a Civ.R. 12(B)(6) motion to dismiss the complaint. Appellants filed a memorandum in response to both motions to dismiss. On September 18, 2017, the trial court held a motion hearing.

{¶6} On December 4, 2019, the trial court granted a request to substitute parties following the death of Ely O'Bradovich, Sr. It appears that the relevant parties were already plaintiffs, thus the effect of the entry served only to remove Ely O'Bradovich, Sr. as a party.

{¶7} On March 5, 2020, the trial court granted the Civ.R. 12(B)(6) motion and dismissed the complaint. It is from this entry that Appellants timely appeal.

Civ.R. 12(B)(6)

{¶8} This action was dismissed pursuant to Civ.R. 12(B)(6). "A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint." *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649, ¶ 11 (7th Dist.), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶9} When reviewing a Civ.R. 12(B)(6) motion, "the court must accept the factual allegations contained in the complaint as true and draw all reasonable inferences from these facts in favor of the plaintiff." *Kimble, supra*, at ¶ 11, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order to grant a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. However, "[i]f there is a set of facts consistent with the complaint that would allow for recovery, the court must not grant the motion to dismiss." *Kimble, supra*, at ¶ 11, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

{¶10} A Civ.R. 12(B)(6) claim is reviewed de novo. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING APPELLEES MOTION TO DISMISS COMPLAINT.

{¶11} Appellants assert that the plain language of the 1940 deed omitted any reference to oil, gas, and hydrocarbon interests, thus those interests were not reserved or excepted and were transferred along with the surface rights. Appellants argue that the Ohio Supreme Court has declared that a deed omitting any reference to oil and gas rights which does not otherwise show an intent to include such interests does not reserve or except those rights. See *Detlor v. Holland,* 57 Ohio St. 492, 49 N.E. 690 (1898). Appellants contend that the easement language is geared towards coal mining, not oil and gas development, and does not demonstrate an intent to include any interest in oil and gas. Even if this Court were to accept Appellees' arguments, Appellants argue that they are entitled to a remand for purposes of admitting extrinsic evidence to demonstrate the parties' intent in accordance with this Court's decision in *Sheba v. Kautz,* 2017-Ohio-7699, 97 N.E.3d 893 (7th Dist.).

{¶12} In response, Appellees argue that the general rule in Ohio law provides that the phrase "other minerals" includes oil and gas interests if the easement language within the deed is general enough to allow for the extraction of oil and gas. Appellants urge that the easement language here provides for the "exploring, drilling, testing, mining and removal of said coal or other minerals." (7/27/17 Complaint, Exh. 1.) Appellees distinguish the instant deed from that in *Detlor* as the easement in that case did not include language relating to the extraction of oil and gas and was drafted at a time when oil and gas development was not common. As to Appellant's request for a remand,

Appellees urge that there is no extrinsic evidence available in this matter due to the age of the deed.

{¶13} This case turns on only one relevant issue. The narrow issue before us is whether the phrase "other minerals" in the instant deed included the oil, gas, and hydrocarbon interests. Ohio law has been developed in this area through a series of cases, each of which was addressed within the parties' briefs.

{¶14} The first of these cases is *Detlor.* The *Detlor* deed included an exception/reservation of coal and "other valuable minerals." *Id.* at 502. The *Detlor* Court acknowledged that the phrase looked at in its "broadest sense, would include petroleum oil." *Id.* at 504. However, when taking all matters into consideration, the court held that this language was insufficient to reserve oil and gas rights. The Court acknowledged that small amounts of oil were being produced within ten to twenty miles of the property, however, there was no evidence to suggest that the grantor had any knowledge of that limited production. *Id.* at 503. Importantly, the Court relied on the fact that the easement language pertaining to the *Detlor* mineral rights could not be seen as applicable to oil production. The Court noted the absence of words such as "derricks, pipe lines, tanks, the use of water for drilling, or the removal of machinery used in drilling or operating oil or gas wells." *Id.* at 503.

{¶15} The next case to provide guidance on this issue is *Gordon v. Carter Oil, Co.,* 19 Ohio App. 319 (5th Dist.1924.). While the *Gordon* opinion does not provide a detailed analysis, the court determined that the deed was devoid of any evidence that the parties intended the phrase "other minerals" to include oil and gas in accordance with *Detlor*. *Id.* at 322.

{¶16} In *Hardesty v. Harrison,* 5th Dist. 1928 WL 2553 (Mar. 5, 1928), the language in the relevant deed reserved "all the coal, clay and mineral rights." *Id.* at *1. The court held that this language did sufficiently reserve oil and gas rights, as "there is nothing within the deed in question which shows that the parties contemplated something less general than all substances legally ogzibable [sic] as minerals." *Id.* at *2.

{¶17} The Fourth District addressed the issue in *Jividen v. New Pittsburgh Coal Co.,* 45 Ohio App. 294, 187 N.E. 124 (4th Dist.1933.). The *Jividen* court reviewed whether the deed language "all coal and other mineral" sufficiently reserved oil and gas interests. *Id.* at 295. The court noted that the specific deed at issue was unique, as it stated: "This deed to convey the surface only." *Id.* at 296. Because the deed specifically conveyed only the surface, the court held that it was unnecessary for the grantor to expressly reserve all minerals. However, the court held that the reference to "all coal and other mineral" would have been sufficient even if the deed had not clearly conveyed only surface rights because the easement included language that was not inconsistent with the development of oil and gas, and the development of oil and gas had become prominent within the general area. *Id.* at 297.

{¶18} Next we turn to *Muffley v. M.B. Operating Co., Inc.,* 5th Dist. No. CA-6910, 1986 WL 12348 (Oct. 27, 1986.). The deed language reserved "all minerals, clay, and coal." *Id.* at *1. Interestingly, the *Muffley* court held that this language was insufficient to include oil and gas interests because such production had become common place within the county at the time the deed was executed in 1960. Given the fact that production of oil and gas had been occurring for decades, the court determined that, given this

knowledge, language pertaining to oil and gas should have been included if it was intended. *Id.* at *2.

{¶19} In *Wiseman v. Cambria Products Co.,* 61 Ohio App.3d 294, 572 N.E.2d 759 (4th Dist.1989.), the deed reserved "all the coal, iron-ore, and other minerals." *Id.* at 296. The court held that this language included oil and gas because the easement included "full and free rights of ingress, egress, regress and of way, and other necessary or convenient rights and privileges, in, upon, under and over the same for the purpose of mining, removing, and taking away as well the coal, iron-ore and on and underlying the said land as other coal, iron-ore and minerals[.]" *Id.* While specific terms relating to the production of oil and gas did not appear within the easement language, the court found that "[n]othing in the deed qualified or limited the term 'other minerals.' " *Id.* at 299.

{¶20} The next three cases to address the issue emanate from this Court. The first is *Coldwell v. Moore,* 2014-Ohio-5323, 22 N.E.3d 1097 (7th Dist.). In that case, we reviewed whether oil and gas were included in a reservation of "the coal and other minerals." *Id.* at ¶ 35. We focused our analysis on the easement language, which involved two tracts of land. The easement pertaining to the first tract stated:

> [T]he right to use any and all entries and other passage ways under said lands for the purpose of transporting and coal from adjoining and contiguous territory; and also the right and privilege to the use of the necessary surface over said coal for the purpose of erecting, constructing and maintaining the necessary air shafts and air courses to ventilate mines for the removal of said coal and other minerals, and the coal from adjoining and contiguous territory, said air shafts to be kept in such repair and so guarded by said

> grantee, its successors and assigns, so as not to endanger stock on said premises.

Id. at ¶ 35.

{¶21} The easement language pertaining to the second tract stated:

> Also the right to enter upon the surface of said premises with workmen to erect all necessary buildings upon the same for the carrying on of the business of mining and shipping upon the same for the carrying on of the business of mining and shipping coal and other minerals; also the right to sink all necessary air shafts on said premises and of building all railroad tracts and car switches necessary for said mining business, and necessary roads to and from any mine or mines that may be opened and operated on said premises.

Id. at ¶ 36.

{¶22} We held that the language pertaining to both tracts of land sufficiently reserved oil and gas interests. We noted that the deed conveyed the surface only, thus it was unnecessary for the grantor to specifically reserve oil and gas rights. Despite this, we undertook an analysis of the easement language and acknowledged the general rule in Ohio provides that, absent specific language to the contrary, the phrase "minerals" includes oil and gas. We explained that as the easement language within the deed was not inconsistent with the development of oil and gas, the deed reserved those minerals. *Id.* at ¶ 43.

{¶23} Three years after *Coldwell,* we again reviewed this issue in *Sheba, supra.* The deed in *Sheba* reserved "all the mineral & coal." *Id.* at ¶ 3. The deed was executed in 1848, well before the *Detlor* deed which was executed in 1890. We explained that the *Detlor* Court strongly relied on the fact that the deed was executed at a time when oil and gas drilling was not commonplace. Thus, we found that if the age of the deed in *Detlor* was dispositive, the same result should occur in *Sheba*, as no evidence was produced to find otherwise*. Id.* at ¶ 35.

{¶24} The most recent case was released while the instant matter was pending. In *Corso v. Miser*, 7th Dist. Jefferson Nos. 19 JE 0018, 19 JE 0019, 2020-Ohio-5293, a 1906 deed conveyed coal interests to Henry Wick, excepting the number eight seam. *Id.* at ¶ 3. In 1943, the property was conveyed to the appellants and included a reference to the Wick exception. In 1949, the property was again conveyed through a deed that stated: "Excepting and reserving from the above described Real Estate, all coal and mineral underlying the same with the right to mine and remove the same as shown in deed to Henry Wick, where in said coal was conveyed, reference to which is hereby made for a more complete statement thereof." *Id*. at ¶ 4.

{¶25} The issue on appeal was whether the phrase "all coal and mineral" in the 1949 deed included oil and gas interests. *Id*. at ¶ 4. We held that it did not, because the phrase that followed ("as shown in deed to Henry Wick, where in said coal was conveyed") constituted limiting words. *Id*. at ¶ 30. Thus, the mineral interests passed in 1949 were intended to be only those interests granted to Wick in 1906. We explained that if that limiting phrase had not been included, the language "all coal and mineral" would have included the oil and gas interests in accordance with our prior decisions in *Sheba, supra*;

Coldwell, supra. *Id*. at ¶ 32. Appellants in the present case filed a notice of supplemental authority relying on *Corso.* Because *Corso* was based on a fact not present in the instant case, the limiting language, it is readily distinguishable from the instant matter.

{¶26} It is clear from this line of cases that we are now to begin our analysis with a presumption that the phrase "other minerals" includes oil and gas interests. With that in mind, it must then be determined if the deed demonstrates whether the parties intended to include oil and gas interests. If the deed is ambiguous, then the parties are permitted to introduce extrinsic evidence to demonstrate the parties' intent. See *Sheba, supra*; *Corso, supra.*

{¶27} Accordingly, we turn to the language of the deed in this matter to determine if it demonstrates the parties' intent. When doing so, courts look to whether the easement language includes language that may be relevant to the extraction of oil and gas. Here, the easement language states:

> Excepting and reserving, however, to the Grantor herein, its successors and assigns, from all the underlying above described Tracts Nos. 2 and 3 all the coal and other minerals in, upon or underlying all of the same, together with a free and uninterrupted right of way or entry, into, upon, under and use of said surface lands at such points and in such manner as may be proper, necessary or convenient for the purpose of digging, mining, ventilating, draining, removing and carrying away said coal, and the right, privilege, use, and possession of any part of said lands necessary or required for the purpose of buildings, structures, railroads, switches, pole lines, waste materials from said mine, or other facilities necessary or convenient for the

mining and removal of said coal without compensation therefor or damages in respect thereof, together with the right to mine and remove through the above described premises other coal either now belonging in to or which may hereafter be acquired by Grantor, its successors or assigns; and also the right to dump and deposit waste material in spoil banks upon the surface thereof, and to use, occupy and possess any of said surface lands above described for haulage ways or rights of way, and to change the course of any streams or drainage, surface or subterranean, without liability for injury thereto or damages in respect thereof, or to build or place railroad spurs or tracts, machinery, materials, supplies and equipment thereon for the mining and removal of said coal whether by the deep mine method of by the stripping or open-pit method, and further to use, occupy; and possess any part of the surface thereof for waste and deposit of over-burden material in said spoil banks in such places and manner necessary, convenient or required for the mining and removal of any of said coal hereby reserved, and to use, occupy and possess any of the surface of the above described premises necessary, convenient or required for the exploring, drilling, testing, mining and removal of said coal or other minerals, without compensation therefor, whether or not herein enumerated, connected with or appertaining to the mining and removal of all of said coal or other minerals hereby reserved. And the Grantee herein, for himself, his heirs, executors, administrators and assigns, for the consideration aforesaid and by the acceptance of this deed, covenants and agrees with the Grantor herein, its

> successors and assigns, and does hereby, waive all damages in any manner arising, connected with or appertaining to the mining and removal of said coal and other minerals from the above described premises or the use, exercise or enjoyment of any or all of the foregoing rights and privileges, including the right of surface support, damage or injury to any streams, subterranean or surface water courses, and further waives any right, claim or demand whatsoever for compensation for the use of any of said surface land by virtue of the exercise of any or all of the foregoing rights and privileges.*"*

(7/27/17 Complaint, Exh. 1.)

{¶28} The easement language most closely tracks the language of the *Coldwell* deed. Appellants are correct that the *Coldwell* deed conveyed only the surface, so it was unnecessary to also include specific reservation of mineral rights. However, in *Coldwell* we did, in fact, analyze the language of the deed and determined that this language would have included oil and gas interests, as nothing within the reservation language was inconsistent with the development of oil and gas.

{¶29} In both the instant case and *Coldwell,* the easement language does appear to pertain mostly to coal extraction. This language, however, is not inconsistent with the development of oil and gas. Importantly, the language in the instant deed is even more general and broad than *Coldwell's*, as it includes the right "to use, occupy and possess any of the surface of the above described premises necessary, convenient or required for the *exploring, drilling, testing, mining and removal of said coal or other minerals*." (Emphasis added).

{¶30} This language is also consistent with *Detlor*, which specifically remarked on the absence of the word "drilling." While it is true that drilling is involved in the development of most minerals, it is also consistent with the development of oil and gas. The fact that the term applies to multiple minerals does not change the fact that it also applies to the production of oil and gas.

{¶31} All of the cases where the phrase "other minerals" have been found not to include a reservation of oil and gas rights are clearly distinguishable as the law regarding this issue has evolved in Ohio over time. If oil and gas was not commonly being produced at the time the deed was written, we cannot presume it was intended to include these minerals. Once production in Ohio became fairly commonplace, however, we may expect some reference to oil and gas when using the general language "other minerals." This has come to mean that, in Ohio, we start with the presumption that the general phrase may include oil and gas rights so long as the language can be reasonably seen to include these minerals in some way and other language in the deed does not exclude these minerals. In the instant matter, the deed on which the entirety of the complaint is based does not exclude oil and gas in its broad reservation language and, in fact, must be read to include these minerals in looking at the relevant language in the easement. Hence, as the complaint is entirely based on claims that are only valid if oil and gas rights were not so reserved, the trial court was correct in dismissing this complaint.

{¶32} Appellants argue that, at the least, the case should be remanded to allow them to introduce extrinsic evidence consistent with *Sheba.* However, as previously discussed, extrinsic evidence is only produced where the deed is ambiguous. Here, the

deed is not ambiguous. We also recognize that due to the age of the deed, it is unlikely any valid extrinsic evidence would be available.

{¶33} Because this matter was dismissed pursuant to Civ.R. 12(B)(6), the record before us is limited. However, it is sufficient to determine that, as a matter of law, the 1940 deed intended to include oil and gas interests as "other minerals."

{¶34} Accordingly, Appellant's sole assignment of error is without merit and is overruled.

Conclusion

{¶35} Appellants argue that the trial court erroneously determined that a 1940 deed that reserved coal and "other minerals" included oil and gas rights. For the reasons provided, Appellants' arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the 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 Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellants.

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.