



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-14-00905-CV

ESCONDIDO RESOURCES II, LLC,
Appellant

v.

JUSTAPOR RANCH COMPANY, L.C.,
Appellee

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2013-CV7-001396-D1
The Honorable Joe Lopez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: May 18, 2016

**AFFIRMED IN PART; REVERSED AND RENDERED IN PART; REVERSED AND
REMANDED IN PART**

We withdraw our opinion and judgment of May 11, 2016, and substitute this opinion and judgment in their stead. Escondido Resources II, LLC appeals the trial court's summary judgment in favor of Justapor Ranch Company, L.C., and its award of over \$12.6 million in damages and pre-judgment interest, specific performance, an accounting, and declaratory relief based on Justapor's causes of action for trespass, trespass to try title, and breach of contract. We affirm in part, reverse and render in part, and reverse and remand in part.

BACKGROUND

On June 24, 2008, Justapor and Escondido entered into an oil-and-gas lease regarding an 803-acre tract the parties refer to as “the Justapor Ranch.” The original lease required Escondido, lessee, to calculate and pay royalties to Justapor, lessor, on $\frac{1}{4}$ of all gas production based upon the highest of various pricing measures. The lease required Escondido to pay royalties within sixty days following each month’s production. The lease provided that “[i]n the event that such royalties are not paid and become delinquent, and there is no title dispute or title defect,” the lease terminates. The lease also contained a “true-up” provision, which provided, “In the event the prices and/or volumes used . . . in calculating and payment of production royalties paid . . . was [sic] less than those required to be paid, [Escondido] shall issue its check to make up the difference on or before March 1st of each year.” In 2011, the parties entered into another agreement under which Escondido would convey certain interests it acquired in the Justapor Ranch¹ to an entity designated by Justapor.

Justapor sued Escondido in 2013, alleging Escondido intentionally failed to pay the correct amount of royalties in violation of the lease and, as a result, the lease terminated. Justapor alleged causes of action for breach of contract, bad-faith trespass, and trespass to try title “to recover all the proceeds from production . . . less the partial payments by Escondido” after the lease terminated. Justapor requested an accounting and a declaratory judgment regarding the lease’s termination. Justapor further requested “a declaratory judgment as to the rights of the parties to this litigation vis a vis [sic] those certain 42 acres known, herein, as the Vacancy Tract.” Specifically, Justapor requested a declaration that “Escondido agreed to convey its entire interest in the Vacancy Tract, including the mineral and leasehold interests, to an entity designated by

¹ Evidence in the record suggests Justapor did not own the entirety of the surface and mineral estates of the Justapor Ranch in fee simple.

Justapor, that as of the date of this pleading, Escondido has failed to convey all of its leasehold interest, and that Justapor is entitled to a conveyance of all of Escondido's interest in the Vacancy Tract." Escondido generally denied Justapor's allegations and alleged several affirmative defenses, including waiver and estoppel.

Justapor filed a motion for summary judgment on the grounds there was no dispute that Escondido breached the lease by failing to reconcile royalty underpayments by March 1, 2012, or by March 1, 2013, and that the lease therefore terminated by its terms. Justapor argued it was entitled to judgment on its trespass and trespass to try title causes of action because Escondido admitted that it knowingly failed to pay Justapor as required by the lease. Justapor further argued it was entitled to summary judgment on its claims for a declaratory judgment regarding the Vacancy Tract. Escondido cross-moved for partial summary judgment on the ground that the lease did not terminate and argued it was entitled to summary judgment on Justapor's trespass and trespass to try title causes of action and claims for an accounting and declaratory judgment regarding the lease's termination. The trial court rendered a final summary judgment in Justapor's favor on all grounds raised in its motion and denied Escondido's cross-motion for partial summary judgment. Escondido now appeals.

STANDARD OF REVIEW

We review a summary judgment de novo. *Valores Corporativos, S.A. de C.V. v. McLane Co.*, 945 S.W.2d 160, 162 (Tex. App.—San Antonio 1997, writ denied). If opposing parties file cross-motions for summary judgment, each party has the burden to conclusively establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex. 1993). When the trial court grants one motion and denies the other, we should determine all issues presented and render

the judgment that the trial court should have rendered. *Comm'rs Court of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997).

DISCUSSION

Escondido argues Justapor did not conclusively establish its entitlement to summary judgment regarding Escondido's alleged 2012 and 2013 breaches of the true-up provision by failing to reconcile royalty underpayments by March 1st of either of those two years. Escondido also argues the trial court should have rendered summary judgment dismissing Justapor's trespass and trespass to try title causes of action and claims for an accounting and a declaratory judgment regarding the lease's termination because the lease does not support Justapor's position that the lease terminated.

A. March 1, 2012 Breach of Contract

Escondido concedes it did not reconcile over \$3,000 in royalty underpayments by March 1, 2012, but argues there is a fact issue as to its affirmative defenses of waiver and estoppel that would avoid summary judgment on a breach of contract claim.² Justapor responds Escondido waived this issue by not expressly presenting these affirmative defenses in response to Justapor's motion. "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). "[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)); *see, e.g., Sandhu v. Pinglia Invs. of Tex.*,

² We address the alleged 2012 and 2013 breaches separately because Escondido acknowledges "the theory and defenses for these two periods [2012 and 2013] are different."

L.L.C., No. 14-08-00184-CV, 2009 WL 1795032, at *6 (Tex. App.—Houston [14th Dist.] June 25, 2009, pet. denied) (mem. op.) (holding non-movant’s minimal responses that referred to affirmative defenses insufficient under *McConnell*); *Mercier v. Sw. Bell Yellow Pages, Inc.*, 214 S.W.3d 770, 774-75 (Tex. App.—Corpus Christi 2007, no pet.) (rejecting non-movant appellant’s argument that he fairly raised affirmative defenses in response to motion for summary judgment because affirmative defenses were raised merely by reference to summary judgment evidence).

In its reply brief, Escondido admits it did not expressly mention “waiver” or “estoppel” in its written response to Justapor’s motion for summary judgment, but cites to the “Background Facts” section of its response, which describes some evidence that might support its affirmative defenses of waiver and estoppel. Under *McConnell*, Escondido’s mere reference to summary judgment evidence does not expressly present its affirmative defenses of waiver and estoppel. *See* 858 S.W.2d at 341; *see also Sandhu*, 2009 WL 1795032, at *6; *Mercier*, 214 S.W.3d at 774. Therefore, we do not consider Escondido’s affirmative defenses of waiver and estoppel as grounds for reversal. *See* TEX. R. CIV. P. 166a(c). We affirm the summary judgment in favor of Justapor for Escondido’s 2012 breach of the true-up provision, and the award of actual damages in the amount of \$3,619.

B. Termination of the Lease

Escondido argues the trial court erred by rendering summary judgment that the March 1, 2012 breach of the true-up provision caused the lease to automatically terminate. Escondido argues the trial court should have granted its cross-motion and rendered summary judgment on Justapor’s trespass and trespass to try title causes of action and related claims for an accounting and declaratory judgment. Escondido contends the lease did not and could not terminate as a result of breaching the true-up provision. Paragraph XIV of the lease contains the termination provision:

Royalties payable to Lessor in the manner hereinabove provided for are due and payable to Lessor within a period of sixty (60) days following each month's production of oil or gas produced and sold from the premises. Thereafter, such payments shall be delinquent and will bear interest at the rate of Ten (10%) percent per annum, compounded monthly, until paid. In the event that such royalties are not paid and become delinquent, and there is no title dispute or title defect, this lease shall terminate ipso facto on the date that such royalties were due and not paid. In the event such royalties are not paid and become delinquent, Lessor without other notice than this paragraph, shall be authorized to file suit in the District Court of Webb County . . . for recovery of such delinquent royalties.³

Escondido argues that under paragraph XIV, the lease terminates only if Escondido owed royalties for monthly production and did not pay *any* royalties within the sixty days following a month's production. Justapor argues paragraph XIV means the lease terminates if Escondido fails to fully reconcile all royalty underpayments by the true-up deadline of March 1st.

“If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.” *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). In construing a written contract, our primary concern “is to ascertain the true intentions of the parties as expressed in the instrument.” *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). To ascertain the parties' true intentions, we “should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.” *Id.* If, after these rules are applied, the meaning of the contract remains uncertain or is susceptible to more than one reasonable interpretation, it is ambiguous. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

We also disfavor termination provisions when we construe contracts. *See Knight v. Chicago Corp.*, 183 S.W.2d 666, 671 (Tex. Civ. App.—San Antonio 1944), *aff'd*, 144 Tex. 98,

³ The parties agree there was no title dispute or title defect.

188 S.W.2d 564 (1945). If parties to a lease bind themselves to language that can be given no other reasonable construction than one that results in automatic termination of a leasehold estate, “it is the court’s duty to give effect thereto by declaring a termination, but if there is any uncertainty in the language so as to make it ambiguous or of doubtful meaning, relief should be denied them.” *Knight*, 144 Tex. at 103, 188 S.W.2d at 566 (citing *Decker v. Kirlicks*, 110 Tex. 90, 216 S.W. 385 (1919)).

The third sentence of paragraph XIV provides the lease terminates if “such royalties are not paid and become delinquent.” The term “such royalties” is an unambiguous reference only to the royalties described by the paragraph’s first sentence: “Royalties payable to Lessor in the manner hereinabove provided for.” The phrase “Royalties payable to lessor in the manner hereinabove provided for” refers to the royalties calculated and payable by Escondido under the various pricing measures in Paragraph III(b). Paragraph XIV provides that those royalties “are due and payable to Lessor within a period of sixty (60) days following each month’s production.” The second sentence of paragraph XIV provides that “Thereafter” (i.e. after sixty days following each month’s production) “such payments shall be delinquent and will bear interest . . . until paid.” The term “such payments” refers to the prior sentence’s requirement that Escondido pay a correct amount of royalties based on the various pricing measures in paragraph III(b). Therefore, the term “such royalties,” as used in the termination provision, refers to the royalties due and payable within sixty days of each month’s production.

The termination provision provides that the lease terminates if “such royalties”—i.e. those due within sixty days after each month’s production—“are not paid and become delinquent.” The first sentence of paragraph XIV expressly states when royalties “are due and payable,” and the word “delinquent,” when used adjectivally to describe an obligation, means “past due or underperformed.” BLACK’S LAW DICTIONARY 460 (8th ed. 2004). Thus, if royalties “are due”

under paragraph III's requirement that Escondido pay Justapor royalties on $\frac{1}{4}$ of gas production, then the lease terminates if such royalties "are not paid."

Justapor argues royalties are due but "are not paid" if Escondido either underpaid by the sixty-day due date or paid nothing. However, if the termination provision is construed to terminate the lease if Escondido makes a timely underpayment of royalties after a month's production, then the true-up provision of the lease would be superfluous. That provision, found in paragraph III(g), provides: "In the event the prices and/or volumes used by Lessee in calculating and payment of production royalties paid to Lessor was less than those required to be paid, Lessee shall issue its check to make up the difference on or before March 1st of each year." Because construing Paragraph XIV to result in termination for an underpayment would render the true-up provision meaningless, that construction is not reasonable. *See Valence Operating*, 164 S.W.3d at 662.

Justapor also argues that "such royalties" are "not paid and become delinquent" if an underpayment is not reconciled by the March 1 true-up deadline. Justapor agrees that the phrase "Royalties payable in the manner hereinabove provided for" refers to the various pricing measures in paragraph III, but argues that the term "hereinabove" also "*explicitly* relates back to Escondido's obligation to annually true-up [sic] underpaid royalties by the March 1 deadline," which is also in paragraph III. Justapor further argues Escondido's "construction impermissibly renders [the 'hereinabove'] phrase meaningless." We disagree. The word "hereinabove" refers to some part or all of the lease prior to paragraph XIV. The parties agree the phrase "Royalties payable in the manner hereinabove provided for" refers to the various pricing measures in paragraph III(b), which is both part of the lease and prior to paragraph XIV. Thus, Escondido's construction gives meaning to the "hereinabove" phrase. Additionally, construing the phrase "In the event such royalties are not paid and become delinquent" requires us to determine *when* royalties are due. Paragraph XIV expressly answers that question: within sixty days following each month's production. Because

paragraph XIV expressly provides when royalties are due, the reference to “Royalties payable in the manner hereinabove provided for” cannot be reasonably understood as an attempt to define *when* “such royalties” are due by general reference to “hereinabove” provisions of the lease. If the phrase “Royalties payable in the manner hereinabove provided” is construed to include true-up payments, as Justapor argues, then the first sentence of paragraph XIV would be construed as follows: “[true-up payments that are due March 1st] are due and payable . . . within a period of sixty (60) days following each month’s production.” This construction would give conflicting dates for the true-up requirement.

Justapor expresses a concern with Escondido’s construction: “Escondido could simply tender a nominal royalty payment every month, never make any true-up payments and the Lease would never terminate.” However, under those circumstances, Justapor’s remedies would include suing for breach of contract to recover damages or for specific performance. Escondido also posited at oral argument that it might be reasonable for a court to hold that nominal royalty payments constituted a non-payment that would result in termination. Escondido’s position is supported by paragraph VI of the lease, which requires Escondido to perform all terms “in utmost good faith, and the failure to comply with this provision shall operate . . . as though no such term was performed or complied with.” Because Justapor’s motion for summary judgment did not argue Escondido’s monthly underpayments violated paragraph VI as a basis for termination under Escondido’s construction of the lease, the issue is not before us. However, Justapor’s suggestion that it lacks a remedy is not supported by the lease or Texas law.

We conclude that no part of paragraph XIV, including the termination provision, explicitly or implicitly refers to the true-up provision and that Justapor’s construction of the termination provision is not reasonable. We hold the termination provision unambiguously does not apply to

a breach of the true-up provision.⁴ We reverse the trial court's declaration that the lease terminated on March 2, 2012.

C. Trespass, Trespass to Try Title, Accounting & Declaratory Judgment

Justapor's sole ground for summary judgment on its trespass and trespass to try title causes of action, as well as its related claims for an accounting and declaratory relief regarding termination, is that the lease terminated because Escondido breached the true-up provision. In its cross-motion for partial summary judgment, Escondido requested that the trial court dismiss with prejudice Justapor's trespass and trespass to try title causes of action and its claims for an accounting and request for a declaration that the lease terminated. On appeal, Escondido challenges the trial court's denial of its motion. In Justapor's First Amended Petition (its live pleading), Justapor premised its trespass and trespass to try title causes of actions, as well as its related claims for an accounting and declaratory relief, on the lease's termination due to Escondido's 2012 and 2013 breaches of the true-up provision. We render judgment for Escondido on Justapor's trespass and trespass to try title causes of action, and its claims for an accounting and a declaration that the lease terminated. *See Comm'rs Court of Titus Cty.*, 940 S.W.2d at 81 (providing we should address all issues raised when reviewing cross-motions for summary judgment and render the judgment the trial court should have rendered).

D. March 1, 2013 Breach of Contract

As a result of the trial court's conclusion that the lease terminated on March 1, 2012, the trial court did not reach whether Justapor is entitled to damages based on Escondido's alleged 2013 breach of the true-up provision. The applicable standard of review requires that we "determine all

⁴ Because we hold the lease unambiguously does not provide for termination based on a breach of the true-up provision, we need not address Escondido's other arguments that the lease did not terminate. *See* TEX. R. APP. P. 47.1.

issues presented and render the judgment that the trial court should have rendered.” *Id.* In its motion for summary judgment, Justapor argued Escondido breached the true-up provision in 2013 as an alternative basis for summary judgment on its trespass and trespass to try title causes of action and related claims for accounting and declaratory judgment. In the “Conclusion” section of its motion, Justapor requested damages based on its causes of action, which included trespass, trespass to try title, and breach of contract, by reference to an affidavit attached to the motion for summary judgment. Escondido requests that we remand this issue to the trial court because Justapor did not conclusively establish its entitlement to summary judgment on its claim for damages based on Escondido’s alleged 2013 breach of contract.

The record is unclear whether Justapor intended to raise Escondido’s alleged 2013 breach of the true-up provision as an independent, alternative ground for summary judgment to recover breach of contract damages. Justapor also has not requested that we render judgment on this claim and award damages. Furthermore, we hold Justapor did not conclusively establish its entitlement to summary judgment as to this claim. Justapor’s motion for summary judgment argues Escondido breached the true-up provision in 2013 because Escondido did not properly calculate and pay royalties under the pricing measure contained in paragraph III(b)(iv) of the original lease. The pricing provision in paragraph III(b)(iv) is based on “the highest sales price of any gas were gas produced from the property could be present when sold to a third party.”

If the meaning of a contract is uncertain and doubtful, then summary judgment is improper “because the interpretation of the instrument becomes a fact issue.” *Coker*, 650 S.W.2d at 394. Furthermore, a “typographical mistake must yield to the well-established doctrine that written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, by perusing the entire document and to this end . . . words . . . obviously intended may

be supplied.” *Ussery Invs. v. Canon & Carpenter, Inc.*, 663 S.W.2d 591, 593 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed).

Justapor argues the meaning of paragraph III(b)(iv) is clear: “[I]f gas from the Lease is sold to more than one buyer then Escondido must pay Justapor royalties based on the highest price received and not on the average of the different prices received by Escondido.” Justapor also suggests there was a typo, and “were” should be “where.” Justapor’s construction primarily relies upon the language “the highest sales price.” However, no part of paragraph III(b)(iv) suggests that the provision applies if Escondido “sold gas to more than one buyer” or that the price is based on the price “received.” Moreover, “highest sales price” in paragraph III(b)(iv) is modified by the phrase “were [or where] gas produced from the property could be present when sold to a third party.” Justapor’s construction gives no meaning to that phrase. *See Valence Operating*, 164 S.W.3d at 662 (requiring courts concluding a party’s construction of a contractual phrase is reasonable to construe the contract to give meaning to all provisions). We also cannot say the parties obviously intended the word “were” to be “where.” *See Ussery Invs.*, 663 S.W.2d at 593. We hold Justapor’s construction is uncertain and doubtful, and therefore summary judgment is improper. *See id.* We remand Justapor’s claim for the alleged 2013 breach of the true-up provision.⁵

E. The “Vacancy Tract”

Escondido argues Justapor failed to conclusively establish its entitlement to declaratory relief and specific performance for Escondido’s breach of a 2011 letter agreement, separate from the oil and gas lease, under which Escondido agreed to transfer certain interests it acquired in the

⁵ Escondido did not cross-move for summary judgment on this breach of lease claim and requests that we remand this issue to the trial court. Because we hold Justapor did not conclusively establish the meaning of the pricing provision of paragraph III(b)(iv) on which it based its claim, we need not address Escondido’s other arguments that Justapor did not conclusively establish Escondido breached the true-up provision in 2013. *See TEX. R. APP. P. 47.1.*

Justapor Ranch to an entity designated by Justapor. The trial court's summary judgment declares Justapor is "entitled to a conveyance" of Escondido's interests in a part of the Justapor Ranch the parties refer to as the "Vacancy Tract" and orders Escondido to "fully effectuate such conveyance." Escondido contends Justapor did not establish it was entitled to a conveyance because it failed to produce any evidence it had designated an entity to which Escondido should convey its interest.

Justapor responds that Escondido waived this argument by not expressly presenting the argument in its response to Justapor's motion for summary judgment. "However, summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right. If a non-movant fails to present any issues in its response or answer, the movant must still establish its entitlement to summary judgment." *McConnell*, 858 S.W.2d at 343. "The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant." *Id.*

"Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract." *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied). "A party seeking specific performance must demonstrate that they have performed, or tendered performance, of their obligations under the contract." *Id.* Neither Justapor's briefs nor its motion for summary judgment cites any evidence that Justapor designated an entity to which Escondido should convey any property interests that Escondido has acquired in the Vacancy Tract. Justapor's pleadings also do not designate an entity for the conveyance. This was a pre-requisite to Escondido's obligation to perform under the agreement. Having reviewed the evidence Justapor produced in support of its motion for summary judgment, we hold Justapor failed to conclusively establish that it designated an entity to which Escondido should convey its interests in the Vacancy Tract. We conclude Justapor did not conclusively establish a breach of

contract upon which the trial court could award specific performance or a declaration that Escondido must convey its property interests to some non-designated, unidentified entity.⁶ We reverse the judgment's declaration and order regarding Escondido's conveyance of its interests in the Vacancy Tract and remand those claims for further proceedings.

Escondido further argues that because Justapor offered no evidence that Escondido had acquired any interests in the Vacancy Tract or that Justapor designated an entity to which Escondido should convey its property interests, there is no justiciable controversy. "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (quoting *Bexar-Medina-Atascosa Counties Water Control & Improv. Dist. No. 1 v. Medina Lake Protection Ass'n*, 640 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)). Justapor alleged Escondido breached the letter agreement by failing to convey Escondido's interests in the Vacancy Tract and is entitled to a conveyance. Escondido denied that it breached the letter agreement and thus Justapor is not entitled to a conveyance. We hold there is a justiciable controversy. *See id.* (holding case involved a justiciable controversy when the parties disputed plaintiff's right to relief).

CONCLUSION

We affirm the trial court's judgment in favor of Justapor and against Escondido in the amount of \$3,619.00. We reverse the trial court's declaratory judgments that the oil and gas lease between Escondido and Justapor terminated and that ownership of the minerals covered by the Justapor lease reverted to Justapor. We reverse the trial court's judgment for Justapor on its causes

⁶ Based on this holding, we need not address Escondido's other arguments that Justapor did not conclusively establish its entitlement to summary judgment on its claims for specific performance and declaratory relief regarding the Vacancy Tract. *See* TEX. R. APP. P. 47.1.

of action for trespass and trespass to try title and awarding damages, an accounting, and declaratory relief against Escondido. We render judgment that Justapor take nothing on its causes of action against Escondido for trespass, trespass to try title, and the associated claims for accounting and declaratory relief. We reverse the trial court's judgment granting Justapor declaratory relief and specific performance for Escondido's breach of the 2011 letter agreement. We remand Justapor's causes of action against Escondido for breach of the 2011 letter agreement and for the 2013 breach of the true-up provision to the trial court for further proceedings consistent with the court's opinion.

Luz Elena D. Chapa, Justice