

ARKANSAS COURT OF APPEALSDIVISION II
No. CV-12-489RICHARD GAWENIS and SHERRY
GAWENIS

APPELLANTS

V.

ALTA RESOURCES, LLC, GRIFFITH
LAND SERVICES, INC.,
PETROHAWK PROPERTIES, LP, and
EXXON MOBIL CORPORATION

APPELLEES

Opinion Delivered June 5, 2013

APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. CV 2006-155]HONORABLE CHARLES E.
CLAWSON, JR., JUDGE

AFFIRMED

RHONDA K. WOOD, Judge

This case involves an oil-and-gas lease. In 2005, the appellants, Richard Gawenis and Sherry Gawenis, executed an oil-and-gas lease with Alta Resources, LLC, through its broker, Griffith Land Services, Inc.; Alta subsequently assigned the lease to Petrohawk Properties, LP, who in turn assigned it to Exxon Mobil Corporation (jointly “appellees”). A dispute arose concerning clear title, assignment of the lease, and payment of royalties. This appeal results from the circuit court’s directed verdict in favor of the appellees. We affirm.

In August 2006, appellees filed a complaint after discovering that the lease mistakenly described Section 28 as Section 26 and that a portion of the land in Section 19 was subject to a prior oil-and-gas lease (with Arkana). Appellees filed a partial release of that portion of

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Section 19 to avoid clouding the third-party's title. Appellees also sought damages for breach of warranty of title and asked the court to reform the lease to correct the reference to Section 28.

In January 2007, appellants filed a counterclaim. They asserted that the lease was void for lack of mutuality; that appellees had abandoned the lease by filing the partial release; and that appellees had breached the lease by failing to pay royalties. They asked the court to declare the lease void. The circuit court granted appellees' motion for summary judgment on the reformation of the lease. The remaining claims of appellees were voluntarily dismissed, leaving solely the appellants' counterclaim. On February 15, 2012, the appellants tried their counterclaim. At the conclusion of appellants' case, appellees moved for directed verdict, which the court granted.

Appellants raise the following points on appeal: (1) the circuit court erred in granting appellees' motions in limine as to alleged breaches by appellees; (2) the circuit court erred by granting appellees' motion in limine as to their partial release of leased acreage that demonstrates the contract lacked mutuality; (3) it was error to grant a directed-verdict motion when the lease was voided by appellees assigning it without appellants' consent; and (4) it was error to grant a directed-verdict motion when the appellees breached the lease by failing to pay royalties exactly as required in the lease.

I. Failure to Admit Extrinsic Evidence of Alleged Breaches

Appellants assert that the circuit court erred in refusing to admit extrinsic evidence of

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appellees' purported breaches of the lease. The appellants specifically contend that the court erred by allowing appellees to admit parol evidence in their case for reformation but would not admit extrinsic evidence in appellants' case-in-chief. This included evidence concerning issues involving the prior lease with Arkana and issues that appellants allege were discussed in negotiating the lease with appellees. Appellants contend the parol-evidence rule does not bar this evidence because it covered subjects about which the contract was silent. While their statement of the law is correct, their statement concerning the contract is not. The contract was not silent on the terms in question. Paragraphs 5, 13, 17, and 18 specifically addressed the issues raised by appellants. The parol-evidence rule is a rule of substantive law in which all antecedent proposals and negotiations are merged into the written contract and cannot be added to or varied by parol evidence. *Simpson v. Braden*, 2011 Ark. App. 250. Such evidence is inadmissible if it tends to alter, vary, or contradict the written contract but is admissible if it tends to prove a part of the contract about which the written contract is silent. *Id.* We will not reverse a circuit court's ruling allowing or disallowing evidence on the basis of the parol-evidence rule absent an abuse of discretion. *Armstrong Remodeling & Constr., LLC, v. Cardenas*, 2012 Ark. App. 387, ___ S.W.3d ___. We cannot, therefore, say that the trial court abused its discretion in granting the motions in limine on the basis of the parol-evidence rule since the contract was not silent on these issues. Likewise, we cannot find an error in the circuit court's admission of parol evidence for purposes of reformation. Parol evidence is

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admissible in reformation cases based on mutual mistake. *Stalter v. Gibson*, 2010 Ark. App. 801, 379 S.W.3d 710.

II. *Failure to Admit Evidence of Partial Release of Leased Acreage*

Appellants convolute the issue regarding the court's refusal to admit evidence of the partial release of lien. The extrinsic evidence is not admissible under the parol-evidence rule for the same reasons as stated previously. The contract was not silent as to this issue and provided for unilateral release of leased acreage. Paragraph 12 of the lease provided the following: "Lessee may at any time and from time to time surrender this Lease as to any part or parts of the lands by delivering or mailing a release to Lessor, or by placing a release of record in the county, where the lands are located." The appellants further contend the circuit court erred by not admitting the partial release of lien to demonstrate that the lease lacked mutuality of obligation.

Mutuality of obligation is an essential element of a contract. *Jordan v. Diamond Equip. & Supply Co.*, 362 Ark. 142, 207 S.W.3d 525 (2005). However, the validity of a contract does not always depend on mutuality of obligation; mutuality of obligation involves the exchange of promises, and it becomes a nonissue when performance is given. *Id.* Mutuality of obligation is not at issue as there was performance under the lease. Appellees performed by paying appellants a signing bonus and royalties amounting to over \$340,000.

III. *Assignment of the Lease Without Consent*

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Appellants' third point is that the circuit court erred in granting a directed verdict because appellees materially breached the lease by assigning it without their consent. Paragraph 9 of the lease provided that the lessee would obtain written consent from the lessor before assigning the lease to a third party "which consent shall not be unreasonably withheld" In April 2006, Griffith assigned the lease to Alta. Alta transferred the lease to Petrohawk in December 2007. Petrohawk assigned the lease to Exxon in December 2010. Appellants did not consent to these transfers.

Appellees respond that appellants waived this purported breach; that they unreasonably withheld consent to assignment; and that, even if there was a breach of the assignment provision, it was not material and did not require forfeiture. Appellees correctly point out that a consent to alienation by a tenant cannot be withheld unreasonably unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent. *Warmack v. Merchs. Nat'l Bank of Fort Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981). They argue that after signing the lease, appellants refused to consent to *any* assignments. This was despite appellants' knowledge that Griffith was acting as a broker for Alta and that Alta had paid the signing bonus. After the lease was signed in 2005, Mr. Gawenis told Griffith that he would not consent to any assignment. Appellees attempted on a number of occasions to obtain appellants' written consent to assignment without success.

In determining whether a circuit court properly granted a directed-verdict motion, we

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review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Smith v. Heather Manor Care Ctr., Inc.*, 2012 Ark. App. 584, ___ S.W.3d ___. A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.*

When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Spann v. Lovett & Co.*, 2012 Ark. App. 107, 389 S.W.3d 77. A “first breach” by one contracting party may release the other party from its contractual duties if the first breach is material and sufficiently serious. *Id.* A material breach is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. *Id.* An influential circumstance in determining whether a breach is material is the extent to which the injured party will obtain the substantial benefit that he reasonably anticipated. *Id.* This is also true when the contract is an oil-and-gas lease. *TXO Prod. Corp. v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985); *Schaffer v. Tenneco Oil Co.*, 278 Ark. 511, 647 S.W.2d 446 (1983).

We cannot say that the circuit court erred in determining that there was not substantial evidence that would allow the jury to determine the breach was material. The parties contemplated assignment from the beginning, the lease provided for assignment, the appellants

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refused to consider consent to any assignments, and they received the substantial benefits anticipated under the lease despite the assignments.

IV. Failure to Pay Royalties as Required in the Lease

Appellants' final point is that the circuit court erred by directing a verdict for the appellees when it was alleged appellees had breached the lease by not paying royalties as specifically provided. Appellees originally paid Mr. Gawenis for a one-eighth royalty instead of a three-sixteenths; he was paid on a net, not a gross, basis; and he received no payments for a period of time. Mr. Gawenis, however, admitted that he had received all payments due since production began in 2007 and that he had cashed those checks. Appellants did not demonstrate that appellees' initial failure to pay the correct amounts, the delay in payment, and their failure to pay interest on the royalties were sufficient to avoid a directed verdict. As stated previously, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Smith*, App. 584, ___ S.W.3d ___. Once again, we cannot find that fair-minded people could reach different conclusions as to whether appellants had obtained the substantial benefit they had reasonably anticipated under the terms of the lease. Accordingly, the circuit court did not err in granting the directed verdict.

For the foregoing reasons, we affirm the decision of the circuit court.

Affirmed.

PITTMAN and WALMSLEY, JJ., agree.

Thomas Law Firm, by: *Albert J. Thomas, III*, for appellants.

Perkins & Trotter, PLLC, by: *G. Alan Perkins* and *R. Scott Morgan*; and *Graddy & Adkisson (LLP)*, by: *William C. Adkisson*, for appellees.