

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellee,

v

IRVING NAGEL d/b/a IRNA MINERALS,

Defendant-Appellant.

UNPUBLISHED

July 5, 1996

No. 180997

LC No. 91-70040-AA

Before: Smolenski, P.J., and Holbrook, Jr., and F. D. Brouillette,* JJ

PER CURIAM.

Defendant appeals as of right from a grant of summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10) and denial of defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10) in this suit to enforce an administrative consent order. Defendant and the Department of Natural Resources (DNR) entered into an administrative consent order that would lift an interim order shutting-in defendant's oil wells if, among other things, defendant commenced clean-up measures. We affirm.

Defendant argues that summary disposition was improperly granted in favor of plaintiff because the following material facts were in dispute: (1) whether defendant knowingly and voluntarily executed or authorized execution of the administrative consent order; (2) whether the DNR committed fraud in its representations to defendant; (3) whether the DNR fraudulently induced defendant to sign the administrative consent order; (4) whether the administrative consent order was void for lack of consideration or breach of a material provision; and (5) whether the administrative consent order was entered into by mistake or as a result of duress.

Defendant's arguments regarding whether there were material facts in dispute as to defendant's knowledge and voluntariness in executing the consent order and the DNR's fraudulent inducement are meritless. Defendant withdrew these affirmative defenses.

* Circuit judge, sitting on the Court of Appeals by assignment.

Because consent orders are treated like contracts, *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994), lack of consideration or breach of a material provision is a basis for not enforcing a consent order. Defendant argues that the bargained-for consideration was the lifting of the interim order shutting-in his oil wells. However, the consent order states that the wells would not be reopened unless defendant commenced remedial clean-up measures. Since defendant failed to do so, the order shutting the wells was not lifted. In essence, defendant is arguing that the bargained-for consideration was contradictory to the written consent order. Parol evidence is not admissible to vary the terms of a contract that are clear and unambiguous. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Thus, no genuine issue of material fact existed whether there was a lack of consideration or breach of a material provision.

Defendant argues that an issue of fact existed regarding whether the parties were mistaken as to the import of the consent order. A contractual mistake is a belief that is not in accord with facts in existence. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982). Defendant has not alleged that the parties were mutually mistaken regarding the facts in existence.

To raise an issue of duress, a party must allege that the person applying the coercion acted unlawfully. *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 35; 523 NW2d 810 (1994), rev'd in part on other grounds, 450 Mich 887 (1995). Defendant did not provide any evidence that the DNR's threats of civil or criminal penalties were illegal. Moreover, defendant was represented by counsel when he entered into the administrative consent order.

Therefore, defendant did not raise any genuine issues of material fact as to his affirmative defenses of lack of consideration or material breach of contract, mutual mistake, or duress.

Defendant also argues that the consent order was void as a matter of law because plaintiff did not have the authority to undertake the remedial and enforcement measures provided in the consent order. In this case, the DNR did not exceed its authority. MCL 319.6(1); MSA 13.139(6)(1). Therefore, the trial court properly granted plaintiff's motion for summary disposition and denied defendant's cross-motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis J. Brouillette