STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. RORKE and PAMELA G. RORKE,

Plaintiffs-Appellants,

v

SAVOY ENERGY LP,

Defendant-Appellee.

UNPUBLISHED
May 18, 2004

No. 245317
Alcona Circuit Court
LC No. 02-010938-CK

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal of right the trial court's order granting defendant's motion for summary disposition. We affirm.

Defendant leased subsurface oil, gas, and mineral rights to a parcel of property, and plaintiffs later obtained its surface rights. Defendant also leased the drilling rights to a parcel adjacent to plaintiffs' land. This dispute arose when defendant used an existing well located on plaintiffs' land to horizontally drill underneath the adjacent property. Plaintiffs sued to stop defendant's use of the well on their property to access the adjacent parcel. The circuit court granted summary disposition to defendant pursuant to MCR 2.116(C)(10), holding that the lease granted defendant the right to drill outside the property's bounds from a well located within them.

On appeal, plaintiffs argue that the circuit court erred in concluding that the lease and a drilling permit granted defendant the right to drill from plaintiffs' surface to a bottom hole located under another surface owner's land. We disagree.

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). According to MCR 2.116(C)(10), summary disposition is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In an earlier appeal, we held that defendant was entitled to use any portion of the leasehold to drill without regard to any subsequent divisions to the surface ownership. *Rorke v Savoy Energy, LP*, 260 Mich App 251; ___ NW2d ___ (2003).

Plaintiffs now argue that the lease did not grant defendant the express right to use their surface land for operations on adjacent property outside the lease. We disagree. Through a

pooling clause, the lease expressly granted defendant the use of plaintiffs' surface for operations outside the bounds of plaintiffs' property. The pooling clause states,

> Lessee is hereby granted the right, . . . whether before or after production, to pool this lease for the production of oil, gas, condensate or carbon dioxide . . . with any other lease covering this above described land, or lands adjacent, contiguous, adjoining, or in the immediate vicinity thereof . . . .

Defendant also offered uncontroverted evidence that it petitioned the Department of Environmental Quality (DEQ) for a compulsory pooling of its interests. The DEQ permitted a pooling unit that included both parcels of land. Because the lease expressly granted defendant the right to pool its legally obtained mineral interests in adjoining parcels, defendant had the express right to use plaintiffs' surface to drill to adjacent land outside the bounds of plaintiffs' land. Therefore, the trial court correctly granted defendant summary disposition.

Plaintiffs argue that even if defendant had the right to use their land for operations involving adjacent property, defendant failed to accommodate them. They argue that the accommodation doctrine required defendant to balance their interests with its interests and accommodate their use of the property. We disagree. This fact-based issue was not raised in the trial court, so we have no record on which to base a decision. *Camden v Kaufman*, 240 Mich App 389, 399; 613 NW2d 335 (2000). Also, even in jurisdictions that apply the doctrine, the mineral-rights owners are under no obligation to accommodate the surface owners' use if the mineral owner's right to engage in the specified activity was expressly granted in the lease. *Landreth v Melendez*, 948 SW2d 76, 81 (Tex App, 1997).

Finally, plaintiffs contend that the original well was abandoned and title to it transferred to them. We already determined this issue in the previous appeal. We held that plaintiffs' abandonment claim was without merit because the lease had not been dormant for twenty years. *Rorke*, *supra* at 259.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra