[Cite as ***OBLH, L.L.C. v. O'Brien***, **2015-Ohio-1208.]**

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

OBLH, LLC, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NO. 2013-T-0111**
DIANE K. O'BRIEN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2013 CV 679.

Judgment: Affirmed in part; reversed in part and remanded.

Donald A. Duda, Jr., Donald A. Duda, Jr., Co., L.P.A., and *Robert C. Kokor*, Robert C. Kokor Co., L.P.A., 48 West Liberty Street, Hubbard, OH 44425 (For Plaintiffs-Appellants).

Elizabeth H. Farbman, Roth Blair Roberts Strasfeld & Lodge, 100 East Federal Street, Suite 600, Youngstown, OH 44503 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Keith P. O'Brien, Thomas M. O'Brien, Jr., William C. O'Brien (hereinafter "the brothers"), and OBLH, LLC, appeal the judgment of the Trumbull County Court of Common Pleas, which dismissed portions of their amended complaint for failing to state a claim upon which relief can be granted. For the following reasons, we affirm in part and reverse in part the decision of the court below.

{¶2} On March 26, 2013, appellants filed a complaint against Diane K. O'Brien and The Diane K. O'Brien Revocable Trust (appellees herein); Carrizo (Utica) LLC ("Carrizo LLC"); and other unidentified defendants. On June 17, 2013, appellants were granted leave to file an amended complaint, instanter, which added Halcon Energy Properties, Inc. ("Halcon Inc.") as a defendant. The amended complaint alleged six causes of action: (1) breach of contract, (2) unjust enrichment, (3) damages to title to the real property, (4) promissory estoppel – detrimental reliance, (5) breach of fiduciary duty, and (6) damages.

{¶3} Appellants alleged the following relevant facts in their amended complaint. The brothers are the natural born sons of Thomas M. O'Brien, who passed away on June 7, 2011. Diane was Thomas's wife at the time of his death, but is not the brothers' mother. Thomas and Diane jointly owned certain real property in Hartford, Ohio, comprising approximately 114.50 acres. During his lifetime, Thomas orally promised the brothers that he would gift the Hartford property to them. On or before May 20, 2011, at Thomas's request, the brothers contacted legal counsel to create OBLH, LLC for the purpose of taking title to the Hartford property and to prepare a deed for the purpose of transferring the Hartford property from Thomas and Diane to OBLH, LLC. Also at Thomas's request, the brothers took the deed to Thomas for execution while he was hospitalized. However, Diane requested that execution of the deed not take place at that time. Diane orally promised the brothers that if Thomas passed away before he could execute the deed, she would transfer the property to them according to Thomas's wishes. Thomas passed away shortly thereafter without executing the deed.

{¶4} The complaint further alleges that on or about August 21, 2012, Diane "took action to change the title to the [Hartford] property that was then in the name of [Thomas and Diane] jointly to her sole name, instead of taking action to transfer the property to [appellants] as promised." Diane also reserved and deeded to herself "all oil, gas, and/or mineral rights" to the property. Subsequently, on or about August 28, 2012, Diane executed an oil and gas lease with Carrizo LLC for the Hartford property. Halcon Inc. acquired this lease by way of an assignment from Carrizo LLC on December 11, 2012.

{¶5} Carrizo LLC, Halcon Inc., and appellees each filed motions to dismiss appellants' first amended complaint. On October 23, 2013, the trial court issued a judgment entry dismissing Carrizo LLC and Halcon Inc. from the case with prejudice. The judgment entry also dismissed all claims in the amended complaint, except for promissory estoppel, finding that "the statute of frauds applies given the facts alleged[.]"

{¶6} Appellants filed a timely notice of appeal from this entry and raise two assignments of error:

> [1.] The trial court committed prejudicial error in granting the Defendant-Appell[ee]s' Motion to dismiss the Plaintiff-Appell[ant]s' claims for Breach of Contract, Unjust Enrichment, Damages to Title to Real Property, Breach of Fiduciary Duty and for Damages pursuant to Civ.R. 12(B)(6).
>
> [2.] The trial court committed prejudicial error by finding that the Plaintiffs-Appellants' claims [for] Breach of Contract, Unjust Enrichment, Damages to Title to Real Property, Breach of Fiduciary Duty and for Damages were barred by the Statute of Frauds.

{¶7} The assignments of error are consolidated for purposes of our analysis. Appellants argue the trial court erred in granting appellees' motion to dismiss the five claims at issue.

{¶8} When a trial court is presented with a Civ.R. 12 (B)(6) motion to dismiss, "[t]he factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom. It must appear beyond doubt that plaintiff can prove no set of facts entitling [plaintiff] to relief." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280 (1995) (citations omitted). "As long as there is a set of facts consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Huffman v. Willoughby*, 11th Dist. Lake No. 2007-L-040, 2007-Ohio-7120, ¶18.

{¶9} We review a trial court's ruling on a Civ.R. 12(B)(6) motion de novo. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. Therefore, our scrutiny is limited to the "four corners" of appellants' amended complaint and items properly incorporated therein. Pursuant to Civ.R. 8(A), "all that is required of a plaintiff bringing suit is '(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled.'" *Ivancic v. Enos*, 11th Dist. Lake No. 2011-L-050, 2012-Ohio-3639, ¶42, quoting Civ.R. 8(A).

{¶10} We consider each of the following dismissed causes of action in turn: damages to title to real property, breach of fiduciary duty, breach of contract, and unjust enrichment. Appellants also reference their sixth cause of action, entitled "damages," in their notice of appeal and briefly in their appellate brief. However, the allegations contained in that cause of action pertain only to Carrizo LLC, who was dismissed with

prejudice below and is not a party to this appeal. Accordingly, we do not address this cause of action herein.

Damages to Title to Real Property

{¶11} In their third claim for relief, appellants state that Diane encumbered the property with the oil and gas lease to Carrizo LLC, reserved the mineral rights, and retained the signing bonus. Appellants assert all of the following occurred as the direct and proximate result of these actions: (1) the value of the Hartford property was diminished; (2) appellants' expected title to the property was damaged; (3) appellants were unable to receive the full benefit of the parties' agreement and the unrestricted use of the property; and (4) appellants' ownership interests and title were severely diminished and encumbered.

{¶12} These assertions do not support a separate cause of action; in fact, this court finds no authority for a "damages to title to real property" cause of action. Rather, it appears appellants are asserting various measurements of damages that might apply to their other alleged causes of action. Appellants have not directed this court to any Ohio law that supports an independent cause of action for "damages to title to real property." *See* App.R. 16(A)(7).

{¶13} Accordingly, the trial court properly dismissed appellants' third claim for relief.

Breach of Fiduciary Duty

{¶14} Under their fifth claim for relief, appellants allege that Diane breached a fiduciary duty of care owed to them. To succeed on a claim for breach of fiduciary duty, a plaintiff must establish the existence of a duty, a breach of that duty, and an injury

proximately resulting therefrom. *Hurst v. Ent. Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, ¶39 (11th Dist.).

{¶15} A fiduciary relationship exists when "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 442 (1996); *see also Vinecourt Landscaping Inc. v. Kleve*, 11th Dist. Geauga No. 2013-G-3142, 2013-Ohio-5825, ¶35. When a fiduciary relationship is not created in a written contract or by law, the court may find it was created informally, but "*only* when *both parties* understand that a special trust or confidence has been reposed." *Umbaugh Pole Bldg. Co., Inc. v. Scott*, 58 Ohio St.2d 282 (1979), paragraph one of the syllabus (emphasis added); *see also Vinecourt Landscaping, supra*, at ¶36 (stating "a fiduciary relationship cannot be unilateral and may only exist where the parties have a mutual recognition of the relationship").

{¶16} Appellants' complaint fails to allege any facts to support a cause of action for breach of fiduciary duty. It simply alleges that "Defendants O'Brien held themselves out as being the fiduciary and care taker of the subject Hartford Property * * *." However, what appellees may have held themselves out to be in relation to a parcel of real property does not create a fiduciary relationship as established by this court's precedent. The complaint does not allege the creation, existence, or nature of any informal fiduciary relationship mutually recognized as such by appellants and appellees. Without first alleging facts that a fiduciary relationship in fact existed, appellants cannot demonstrate that a breach of a fiduciary relationship occurred.

{¶17} The trial court also stated this claim was barred by the statute of frauds. Based on the foregoing analysis, we do not find it necessary to address this conclusion. Appellants' claim for breach of fiduciary duty was properly dismissed for failing to state a claim upon which relief can be granted.

Breach of Contract

{¶18} In their first claim for relief, appellants allege that Diane's actions regarding the property's mineral rights were in breach of an oral agreement she made with the brothers prior to Thomas's death. Appellees respond this argument is barred by the statute of frauds because it is an agreement for the transfer of real property—an argument also espoused by the trial court in its judgment entry. On appeal, appellants argue that the doctrine of part performance provides them with an exception to the statute of frauds, and thus, the trial court erred in granting appellees' motion to dismiss this claim.

{¶19} Ohio's statute of frauds, in pertinent part, is codified in R.C. 1335.05: "No action shall be brought whereby to charge the defendant, upon a * * * contract or sale of lands, tenements, or hereditaments, or interest in or concerning them * * *; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith * * *."

{¶20} Pursuant to Civ.R. 8(C), raising the statute of frauds in a responsive pleading is an affirmative defense. Because affirmative defenses "usually require reference to materials found outside the face of the complaint," a Civ.R. 12(B)(6) motion to dismiss should only be granted on that basis "where it is apparent from the face of the complaint that the defense is available." *Denlinger v. City of Columbus*, 10th Dist.

Franklin No. 00AP-315, 2000 Ohio App. LEXIS 5679, *13 (Dec. 7, 2000); *see also* *Jefferson v. Bunting*, 140 Ohio St.3d 62, 2014-Ohio-3074, ¶10-11; *Thomas v. Progressive Cas. Ins. Co.*, 2d Dist. Montgomery No. 24519, 2011-Ohio-6712, ¶36; *Gessner v. Vore*, 2d Dist. Montgomery No. 22297, 2008-Ohio-3870, ¶13. The statute of frauds is, in fact, a "fact-sensitive affirmative defense that is riddled with qualifications and exceptions." *Maguire v. Natl. City Bank*, 2d Dist. Montgomery No. 22168, 2007-Ohio-4570, ¶17 (quotation omitted). The doctrine of part performance is one of those exceptions.

{¶21} To remove an agreement from the requirements of the statute of frauds, part performance "must consist of unequivocal acts by the party relying upon the agreement, which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties *in statu quo*." *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 287 (1965), citing *Hughes v. Oberholtzer*, 162 Ohio St. 330, 339 (1954). However, "[i]f the performance can reasonably be accounted for in any other manner or if plaintiff has not altered his position in reliance on the agreement, the case remains within the operation of the statute." *Id.*

> [G]enerally possession of the land delivered and received under and in pursuance of the contract amounts to such part performance. But * * * to have that effect, the possession must be connected with and in consequence of the contract; it must be in pursuance to its terms and in part execution of them. In other words the possession must pursue and substantiate the contract.

Hughes, *supra*, at 338-339.

{¶22} In its judgment entry, the trial court stated "the real 'delivery of possession' in this case has to do with the mineral rights, and in that regard, there never was a

‘delivery of possession.’” We agree. Diane reserved possessory rights to “all minerals and mineral rights underlying the soil * * * and the right to use so much of the surface as may be necessary for the purposes of [their extraction].” However, the brothers allege that their oral agreement with Diane was for the entire bundle of property rights, mineral rights included. Construing the allegations in a light most favorable to appellants, we find that Diane’s transfer of title to the property, even with the mineral rights reserved, could be construed as part performance of the purported oral agreement.

{¶23} Further, appellants allege they withheld the deed from their ailing father for execution in exchange for Diane’s promise to transfer the property in accordance with their father’s wishes. The failure to have the deed executed, when they had the ability to do so, could be construed as an unequivocal act done in reliance upon the agreement that changed the brothers’ position to their detriment.

{¶24} We hold that appellants’ complaint, as regards their breach of contract claim, is sufficient to survive a Civ.R. 12(B)(6) motion to dismiss. Appellants must prove part performance by clear and convincing evidence in order to overcome the statute of frauds. *See Bumgarner v. Bumgarner*, 4th Dist. Highland No. 09CA22, 2010-Ohio-1894, ¶27. At this stage of the proceedings, it is not for the trial court to decide, or for this court to review, whether appellants can meet that burden. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural; it functions merely to test the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992); *see also Anderson v. Olmsted Util. Equip., Inc.*, 11th Dist. Trumbull No. 4047, 1990 Ohio App. LEXIS 1238, *14 (Mar. 30,

1990), *aff'd*, 60 Ohio St.3d 124 (1991) ("motions to dismiss * * * are not to be used to terminate litigation on its merits").

Unjust Enrichment

{¶25} Appellants also allege that Diane has been unjustly enriched by her "reservation of mineral rights by deed and the retention of the signing bonus for the oil and gas lease without [their] approval or consent," thereby depriving them of "the full benefit of the parties['] agreement."

{¶26} "[U]njust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938). To survive a motion to dismiss on this claim, the plaintiff must show "(1) the defendant received a benefit; (2) the defendant possessed an appreciation or knowledge of that benefit; and (3) the benefit was received under circumstances that would make it unjust for the defendant to retain the same without paying for it." *Warren Concrete & Supply, Inc. v. Strohmeyer Contracting, Inc.*, 11th Dist. Trumbull No. 2010-T-0004, 2010-Ohio-5395, ¶36, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984).

{¶27} In dismissing this claim, the trial court determined that, "by application of the statute of frauds, it cannot be said that the Hartford property and/or its mineral rights ever 'belonged' to the Plaintiffs." The trial court also stated the only "'benefit' conferred by the Plaintiffs to Mrs. O'Brien was not pushing a deed execution upon their ailing father (and her)."

{¶28} We disagree with the trial court's holding and find that the Ohio Supreme Court's holding in *Hummel* allows the complaint to survive a Civ.R. 12(B)(6) motion to dismiss. The *Hummel* Court held:

> *Even though a contract is unenforceable under the Statute of Frauds because it is not in writing*, a plaintiff who has fully performed his part of the contract may maintain an action for money had and received against the other contracting party who is the recipient of a benefit to his unjust enrichment, by the plaintiff's performance, but refuses to perform himself; the basis of the liability is the quasi-contractual relation to which the law gives rise.

Hummel, *supra*, at 528 (emphasis added). In addition, the benefit received by the defendant in *Hummel* was not directly conferred by the plaintiffs: "the [plaintiffs] fully performed the oral contract by paying the premiums and as a result the [defendant] received the proceeds of the policy [from the third party insurance company] for which [the defendant] gave nothing in return." *Id*. at 529. Similarly here, Diane allegedly received a benefit conferred upon her by a third party, to wit: the "reservation of mineral rights by deed and the retention of the signing bonus for the oil and gas lease" from Carrizo LLC, as a result of the brothers not presenting the deed to Thomas for execution at the hospital.

{¶29} The essential elements of appellants' unjust enrichment claim are that Diane retains a benefit which in justice and equity belongs to the brothers. In construing the allegations in the complaint in a light most favorable to appellants, we find the claim has been sufficiently pled to survive a Civ.R. 12(B)(6) motion to dismiss.

Conclusion

{¶30} Appellants' assignments of error have merit to the extent indicated; it was improper for the trial court to dismiss appellants' claims for breach of contract and unjust enrichment.

{¶31} We further hold that appellants are only permitted to move forward on these claims with respect to the one-half share of the property owned by Thomas. The complaint fails to allege facts sufficient to establish that Diane was at any time obligated to transfer her own interest in the mineral rights to the property. The fact that Thomas instructed the brothers to take steps to transfer the property during his life did not in any way obligate Diane to execute the deed with respect to her interest.

{¶32} The judgment of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶33} I respectfully dissent from the decision of the majority. The judgment of the trial court should be reversed, in toto, and the plaintiffs-appellants (the O'Brien children) should be allowed to pursue all claims and/or causes of action alleged in their First Amended Complaint without regard for the alleged "one-half share of the property owned by Thomas." *Supra* at ¶ 31.

{¶34} Since the claims at issue were dismissed pursuant to Civil Rule 12(B)(6), it is essential to recall that we are limited to consideration of the pleadings and that all factual allegations must be presumed true. *O'Brien v. Univ. Community Tenants Union,*

Inc., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶35} With respect to the O'Brien children's claim for breach of fiduciary duty, the majority asserts that the "complaint does not allege the creation, existence, or nature of any informal fiduciary relationship mutually recognized as such by appellants and appellees." *Supra* at ¶ 16. In fact, the First Amended Complaint alleges that "in or around May 2011 and at times thereafter, the Defendants O'Brien held themselves out as being the fiduciary and care taker of the subject Hartford Property until such time that the Hartford Property could be transferred to the Plaintiffs." First Amended Complaint at ¶ 56.

{¶36} Under any fair and reasonable interpretation of the First Amended Complaint, the O'Brien children did allege the existence of an informal fiduciary relationship by virtue of the defendants' representations to this effect. Since the complaint alleged that the defendants held themselves out as fiduciaries with respect to the Hartford Property, for present purposes, the defendants were fiduciaries of the Hartford Property.

{¶37} Stated otherwise, if a fiduciary relationship may be created by a party holding him- or herself out as a fiduciary, then the O'Brien children's complaint is sufficient in this regard. *See*, *e.g.*, *Hill v. Irons*, 160 Ohio St. 21, 26, 113 N.E.2d 243 (1953) ("[a] trust * * * is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it") (citation omitted); *Kessler v. Totus Tuus, L.L.C*, 185 Ohio App.3d 240, 2009-

Ohio-6376, 923 N.E.2d 1160, ¶ 22 (11th Dist.). Dismissal at this stage of the proceedings only tests the sufficiency of the complaint. Based on the allegation that the defendants held themselves out as fiduciaries with respect to the Hartford Property, the O'Brien children are certainly capable of proving a set of facts entitling them to relief based on a theory of breach of fiduciary duty.

{¶38} The lower court's dismissal of this claim should be reversed.

{¶39} The majority also errs by affirming the trial court's dismissal of the O'Brien children's Third Claim for Relief (Damages to Title to the Real Property). The majority posits that the O'Brien children have asserted "various measurements of damages," but that an "independent cause of action for 'damages to title to real property'" does not exist in Ohio law. *Supra* at ¶ 12.

{¶40} Although the Third Claim for Relief does not state an independent cause of action, there is no reason to dismiss it for failing to state a claim upon which relief could be granted. The majority sets forth no reason why the O'Brien children would not be entitled to such damages if they should prevail on one or more of their stated causes of action. Ohio's liberal standard of notice pleadings requires "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). The division of a complaint into "claims for relief" is not mandated by law, but is a matter for the drafter of the complaint to adopt as seems best. In their Third Claim, the O'Brien children incorporate by reference the other paragraphs of the Complaint and give notice that they seek damages for the diminution of value and cloud placed upon the title to the Hartford Property. There is nothing improper about stating such a claim in this manner,

irrespective of its artfulness or utility. Under the majority's logic, it would also be appropriate to dismiss the Sixth Claim for Relief (Damages), since it, too, fails to state an independent cause of action (despite incorporating by reference every other allegation in the Complaint).

{¶41} Finally, I dissent from the majority's sua sponte decision to limit the O'Brien children's potential recovery "to the one-half share of the property owned by Thomas (the father)," based on the Complaint's purported failure "to allege facts sufficient to establish that Diane (the stepmother) was at any time obligated to transfer her own interest in the mineral rights to the property." *Supra* at ¶ 31. There are two issues with the majority's conclusion.

{¶42} First, the Complaint itself contradicts the majority's assertion. The Complaint asserts that "the decedent, Thomas M. O'Brien had his sons contact legal counsel to prepare a deed for execution by the Decedent and the Defendant Diane K. O'Brien to transfer the Hartford Property to the Plaintiffs." Complaint at ¶ 19. "[H]owever, the Defendants Diane K. O'Brien and/or the Diane K. O'Brien Revocable Trust * * * requested that execution not take place at that time and made an oral promise to the Plaintiffs that if the decedent passed away prior to the execution of the Deed, the Defendant Diane O'Brien would nonetheless transfer the property to the decedent's sons pursuant to his wishes." Complaint at ¶ 20. "[O]n several occasions following the death of Thomas M. O'Brien, the Plaintiffs contacted the Defendants O'Brien to secure the transfer of the Hartford Property and was [sic] repeatedly told orally and via e-mail that the Hartford Property would in fact be transferred in accordance with the wishes of the Plaintiffs' father." Complaint at ¶ 24.

{¶43} Thus, it must be accepted as fact that the father intended that both he and the stepmother would transfer the property to the children, the stepmother promised to transfer the property pursuant to the father's wishes and subsequently reaffirmed that the property would be transferred in accordance with his wishes. It is natural and reasonable to infer that the promise to transfer "the Hartford Property" included the stepmother's mineral rights.[1] The majority writes that "[t]he fact that Thomas instructed the brothers to take steps to transfer the property during his life did not in any way obligate Diane to execute the deed with respect to her interest." *Supra* at ¶ 31. The majority fails to recognize that Diane's promise to transfer the property in accordance with Thomas' wishes would obligate her to execute the deed with respect to her interest.

{¶44} Second, the majority's decision to limit the O'Brien children's recovery to one-half the value of the property is problematical because the trial court imposed no such restriction on their recovery with respect to the claim for promissory estoppel. The majority appears to be granting on its own accord relief neither sought in the court below, nor granted by the trial court, nor raised as error on appeal. There is no justification for such action by this court.

{¶45} For the foregoing reasons, I respectfully dissent and would reverse, in toto, the judgment of the trial court granting the defendants' motion to dismiss.

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1. This is particularly obvious if one considers the unexecuted deed prepared according to the father's wishes and attached to the original Complaint. According to this document, both the father and stepmother were to have quit-claimed "all such right and title" in the Hartford Property to OBLH, LLC without reservation of mineral rights.