NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

GEORGE W. LINDER, SENIOR, TRUST, WILLIAM H. LINDER, II, TRUSTEE Appellant v. EAST RESOURCES MANAGEMENT, LLC Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 730 MDA 2012

Appeal from the Judgment Entered April 4, 2012
In the Court of Common Pleas of Tioga County
Civil Division at No(s): 983CV2010

BEFORE: BOWES, J., OLSON, J., and WECHT, J.

DISSENTING MEMORANDUM BY WECHT, J.: **FILED MAY 13, 2013**

The learned majority accurately and thoroughly states the factual and procedural history of this matter, and aptly relates the principles of contract law that must govern our disposition of the case *sub judice*. However, I respectfully dissent from today's decision. I would find that the contract terms purporting to extend the lease for ten additional years are ambiguous. I would reverse the trial court's entry of summary judgment and remand for further proceedings, including fact-finding to establish the intent of the parties to the contract.

It is beyond cavil that an unambiguous contract will be enforced according to its plain language. ***T.W. Phillips Gas & Oil Co. v. Jedlicka***,

42 A.3d 261, 267 (Pa. 2012). In enforcing the agreement, we do so according to the accepted and plain meaning of the language used, without regard to any alleged silent intentions of the contracting parties. ***Id.*** Pursuant to the parol evidence rule, our Supreme Court has held:

> Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence.

Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. Super. 2004) (internal quotation marks and modification omitted).

However, when a term in the contract is ambiguous, "parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances." ***Id.*** (quoting ***Estate of Herr***, 161 A.2d 32, 34 (Pa. 1960)). The court must determine as a matter of law whether a contract is ambiguous, *i.e.*, "susceptible of different constructions and capable of being understood in more than one sense." ***Hutchison v. Sunbeam Coal Corp.***, 519 A.2d 385, 390 (Pa. 1986). Should the court so conclude, to the extent conflicting parol evidence is offered to resolve the ambiguity, a fact-finder must determine the intent of the parties. ***Id.***

In the instant case, the provision in question provided as follows:

> EXTENSION OF TERM: Lessee may extend the primary term for one additional period equal to the primary term by paying to Lessor at any time within the primary term an Extension Payment equal in amount to the annual Delay Rental as described, multiplied by a factor of **N/A**, or by drilling a well on the Leasehold which is not capable of commercial production.

Oil and Gas Lease, 9/27/2000, at 1 (emphasis added). The "N/A" was handwritten into a blank space in the lease.

Appellants do not argue that the N/A creates an ambiguity regarding the multiplier that should apply if the extension provision is effective, although that might be a fertile argument inasmuch as, based upon my confessedly and blessedly vague recollection of my education in mathematics, one cannot multiply a term by the symbol "N/A." However, setting that issue aside, Appellant contends instead that the "N/A" renders ambiguous the meaning of the entire clause in which it appears.

While we may not "rely upon a strained contrivancy" to establish the presence of ambiguity, it is sufficient that the term in question be "reasonably or fairly susceptible to being understood in more than one sense." ***Steuart v. McChesney***, 444 A.2d 659, 663 (Pa. 1982). I do not read Pennsylvania law to require that ambiguity be found only when two or more possible meanings of the suspect provision are in equipoise; it will suffice that a reasonable reader might understand the term in two or more ways.

I believe that the insertion of "N/A" in a performative clause amid a larger provision, when that clause calls not for a determination of application

or non-application but for a multiplier, calls into question the entire provision. If a multiplier is not to be employed in a given calculation, the obvious term to insert in place of the multiplier is the number one. Indeed, Appellants proffered evidence that Appellee inserted the numeral one in the same blank space in a materially identical lease executed by Appellee with another lessor at approximately the same time. That the parties to the lease before us did otherwise creates a patent ambiguity as to whether the "N/A" was inserted to obviate the multiplier, or was intended entirely to vitiate Appellee's right to renew the lease. In my opinion, that ambiguity cannot be resolved as a matter of law.

To be clear, I respect the trial court's and the majority's respective determinations that the insertion of "N/A" merely nullified the prescribed multiplier without undermining the effectiveness of the entire extension provision. Moreover, to reach the result that I reach, I need not maintain that nullification of that provision is the more likely result of a trial based upon a fact-finder's review of parol evidence. And that is the point: Without that fact-finding, we cannot know. It is sufficient to note that I believe there are at least two ways to read the provision, given the idiosyncratic presence of a handwritten "N/A" in a line that calls for the insertion of a numeral.

I would conclude as a matter of law that the term in question rendered the entire extension provision patently ambiguous, requiring resolution by a fact-finder by reference to parol evidence, rather than resolution by a court

as a matter of law. Consequently, I would reverse the trial court's entry of summary judgment and remand for trial. Thus, I respectfully dissent.