Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00052-CV

Billy C. **WHITFIELD** and Carolyn Whitfield,
Appellants

v.

Charles Thomas **ONDREJ**, et al.,
Appellees

From the 81st Judicial District Court, Karnes County, Texas
Trial Court No. 12-10-00231-CVK
Honorable Stella Saxon, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: December 21, 2016

AFFIRMED

Billy C. Whitfield and Carolyn Whitfield are the grantees under a deed executed on February 15, 2001 by Flavia Smith, Isabella A. Ondrej, and Genevieve Maher as grantors. On October 29, 2012, the Whitfields filed the underlying lawsuit against the heirs of Isabella A. Ondrej (the "Ondrej Heirs"),[1] Genevieve Maher,[2] Rock Chalk Royalties, Ltd., and Chocktaw Energy Ltd.

[1] Ondrej died in 2008.

[2] Maher was declared *non compos mentis* before the lawsuit was filed and was served through her guardian Karen Bradley. Maher died on January 4, 2015, while the underlying cause was still pending, and Bradley was appointed as executrix of Maher's estate. For simplicity purposes, the opinion will continue to refer to Maher.

Partnership.[3] The Whitfields asserted a claim to reform the deed, sought specific performance of an addendum to a lease, and sought a declaratory judgment that they owned the minerals in and under the property described in the deed. The trial court signed separate orders first granting summary judgment in favor of Rock Chalk Royalties and Choctaw Energy[4] and then granting summary judgment in favor of the Ondrej Heirs and Maher. The Whitfields only appeal the second order, asserting the trial court erred in granting summary judgment on their claims for deed reformation and specific performance.[5] We affirm the trial court's judgment.

BACKGROUND

In 1998, the Whitfields entered into a lease pursuant to which they leased 108.54 acres of land in Karnes County, Texas (the "Property") from Ondrej, Smith, and Maher. The parties then signed an Addendum II to the lease effective April 17, 1998. The Addendum II contained an option allowing the Whitfields to purchase the Property through December 31, 2000. The option included "all mineral rights with the exception of and specifically excluding Lessors royalty interest in the J. S. MOCZYGEMBA Well # 1 (the existing pool lease)." The Addendum II further provided, "Negotiation for any Lessor royalty interest to be done on an individual basis outside and not a part of the property purchase agreement."

On February 15, 2001, Smith, Ondrej, and Maher executed a deed conveying the Property to the Whitfields. In the section of the deed entitled "Reservations from and Exceptions to Conveyance and Warranty," the deed excepted two recorded easements and the "Terms, conditions and stipulations of Oil, Gas and Mineral Lease between Tom Holodziejczyk, et ux. and H. D.

[3] Rock Chalk Royalties and Chocktaw Energy purchased Smith's interest in the property.
[4] The order stated that the trial court found that Rock Chalk Royalties and Choctaw Energy were subsequent purchasers for valuable consideration without notice of the Whitfields' claims.
[5] Because the Whitfields do not appeal the summary judgment in favor of Rock Chalk Royalties and Choctaw Energy, our opinion will contain no further discussion of those defendants.

Bruns dated June 4, 1964, and recorded in Volume 327, Page 498, of the Deed Records of Karnes County, Texas." The deed further provided as follows:

> Grantors do hereby except and reserve under themselves, their heirs, successors and assigns, all of the oil, gas and other minerals of every kind or character (whether similar or dissimilar) on, in, under or that may be produced from the said land above described and every part thereof, together with the right of ingress and egress for the purpose of exploring for, drilling for, producing and marketing said oil, gas and other minerals, including the right to use all or any part of the surface of said land as may be necessary or convenient in connection with all or any of said purposes. The mineral reservation reserved herein shall terminate, upon the cessation and plugging of the producing well which is located on the herein described property or with property with which the above described property is pooled together with the termination of any or all of the existing lease or leases as to any land described herein. The interest of any such Lessee, its successors and assigns, shall revert to Grantees, their heirs, successors and assigns, provided however that the Grantors, as to any existing oil, gas or other mineral lease or leases, shall be entitled to receive all of any royalties, production payments, shut-in royalties or other payments due or to become due under any such existing lease or leases.

On February 23, 2005, the Whitfields conveyed the Property to themselves as trustees of The Whitfield Family Trust by a warranty deed. Under the section of the deed entitled "RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY," the deed stated:

> This conveyance is made and accepted subject to the following matters, to the extent same are in effect at this time. Any and all restrictions, covenants, conditions, rights-of-way, mineral reservations, mineral leases and easements, if any, relating to the hereinabove described property, but only to the extent they are still in effect shown of record in the hereinabove mentioned County and State, and to all zoning laws, regulations ordinances of municipal and/or other governmental authorities, if any, but only to the extent that they are still in effect, relating to the hereinabove described property.

On October 29, 2012, over eleven years after the Property was initially conveyed to the Whitfields, they filed the underlying lawsuit. In their petition, the Whitfields alleged they exercised the option to purchase the Property before December 31, 2000, and the parties agreed to extend the closing date to February 14, 2001. The Whitfields alleged no further discussion or

negotiations were had regarding the mineral or royalty interest prior to closing; therefore, they "presumed that the mineral exception contained in the deed had the legal effect of conveying to them all minerals to the Property with the exception of the single producing well known as the JS Moczygemba Well #1." The Whitfields further alleged that a landman contacted them in November of 2008 and informed them of the discrepancy between the mineral reservation language in the Addendum II and the mineral reservation language contained in the deed.[6] The Whitfields asserted claims for specific performance of the Addendum II, reformation of the 2001 deed, and declaratory judgment regarding the ownership of the minerals.

The Ondrej Heirs and Maher's guardian filed answers asserting numerous affirmative defenses, including statute of limitations. They also filed traditional and no evidence motions for summary judgment. The Whitfields filed a counter-motion for partial summary judgment. The trial court signed an order granting the motions filed by the Ondrej Heirs and Maher's guardian and denied the motion filed by the Whitfields. The trial court subsequently signed an order severing the parties' claims for attorney's fees into a separate cause. The Whitfields appeal.

STANDARD OF REVIEW

One of the grounds on which the Ondrej Heirs and Maher's guardian moved for summary judgment was the affirmative defense of statute of limitations. Because we hold the limitations defense is dispositive of the Whitfields' claims, we address only this ground.

We review a summary judgment de novo. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment has the burden of establishing that no material fact issue exists and the movant is entitled to judgment as a matter

[6] In their depositions, the Whitfields stated they did not review the deed when they received it in 2001, but admitted that when the landman informed them of the discrepancy, they reviewed the deed and the Addendum II, saw the discrepancy, and understood the minerals had not been conveyed.

of law. TEX. R. CIV. P. 166a(c). In reviewing the granting of a traditional summary judgment, we consider all the evidence in the light most favorable to the non-movant, indulging all reasonable inferences in favor of the non-movant. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

"A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense." *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). To establish the affirmative defense of limitations, a defendant is required to (1) "conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury." *Id.* "If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations." *Id.*

DEED REFORMATION

The statute of limitations for deed-reformation claims is four years. *Cosgrove v. Cade*, 468 S.W.3d 32, 35 (Tex. 2015). Because the Whitfields asserted the limitations period was tolled by the discovery rule, the Ondrej Heirs and Maher were required to negate the discovery rule. *KPMG Peat Marwick*, 988 S.W.2d at 748. Under the facts of this case, we are guided by the Texas Supreme Court's decision in *Cosgrove* with regard to the applicability of the discovery rule and the disposition of the limitations issue.

In *Cosgrove*, Barbara Cosgrove purchased over two acres of land from Michael and Billie Cade in 2006. 468 S.W.3d at 35. The parties' real estate contract stated the Cades were to retain all mineral rights; however, the deed granted the land in fee simple with no reservation of mineral rights. *Id.* The deed was recorded in October of 2006. *Id.* "It [was] undisputed that the deed

mistakenly — but unambiguously — failed to reserve mineral rights." *Id.* In 2010, the Cades discovered the "problem" with the deed's mineral reservation from an oil and gas company. *Id.* In February of 2011, the Cades sued Cosgrove to reform the deed and for breach of contract, and both parties moved for summary judgment. *Id.* The trial court ruled the Cades' claims were barred by limitations, but the court of appeals reversed, holding the discovery rule delayed the accrual of limitations. *Id.*

The Texas Supreme Court reversed, asserting "[p]lainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes." *Id.* at 34. The court held parties to a deed are charged, as a matter of law, with actual knowledge of what the deed includes and excludes, and limitations runs from the date of execution.[7] *Id.* at 37.

After the Texas Supreme Court's decision in *Cosgrove*, the Amarillo court considered a case with facts similar to the instant case. *See Goss v. Addax Minerals Fund, LP*, No. 07-14-00167-CV, 2016 WL 1612918 (Tex. App.—Amarillo Apr. 21, 2016, pet. denied). In that case, the sellers and the buyer entered into a contract that provided the sellers would not retain any mineral interests. *Id.* at *1. The deed the sellers executed and recorded in December of 1994, however, contained the following paragraph:

> **RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY**: Reservations, restrictions and easements of record, and current year ad valorem taxes. LESS, SAVE AND EXCEPT HEREFROM ALL OIL, GAS AND OTHER MINIERALS, IN, UNDER AND PRODUCED FROM THE ABOVE DESCRIBED PROPERTY.

In November of 2005, the president of the title company signed an affidavit stating a scrivener's error in preparing the deed erroneously reserved the mineral estate, and the affidavit was recorded

[7] In their brief, the Whitfields argue the holding in *Cosgrove* applies only to grantors, not grantees. We disagree. In *Cosgrove*, the Texas Supreme Court squarely adopted the following rule: "***Parties*** are charged as a matter of law with knowledge of an unambiguous deed's material omissions from the date of its execution, and the statute of limitations runs from that date." 468 S.W.3d at 37 (emphasis added).

on November 30, 2005. *Id*. The sellers had died, and their interest passed to their grandson who sold it to Addax Minerals Fund LP. *Id*. The purchasing company also dissolved, and its owner, David V. Goss, received its interest in the property. *Id*. Goss subsequently sued Addax seeking a reformation of the deed and asserting the accrual of his claim was tolled by the discovery rule. *Id*. at *2. The trial court declared Addax to be the owner of the mineral interest. *Id*.

The Amarillo court held the deed was unambiguous and left the mineral estate in the sellers. *Id*. at *4. Citing *Cosgrove*, the court also held the discovery rule had no application because the retention of minerals by the grantors was plain on the face of the deed. *Id*. at *5.

In the instant case, the Whitfields argue the deed is ambiguous because the exception of the existing oil and gas lease is inconsistent with the general reservation of the mineral interest. Whether a deed is ambiguous is a question of law. *Hausser v. Cuellar*, 345 S.W.3d 462, 467 (Tex. App.—San Antonio 2011, pet. denied). A deed is only ambiguous if it is subject to two or more reasonable interpretations. *Id*. In this case, the deed first listed the specific exceptions recorded in the deed records which included two easements and the oil and gas lease. The deed then generally reserved the mineral interest subject to a possible reverter. Therefore, on its face, the deed plainly and unmistakably reserved the mineral interest in the grantors, making the discovery rule inapplicable. *See Goss*, 2016 WL 1612918, at *5. Although the Whitfields argue the reservation of the mineral interest is inconsistent with the language contained in the Addendum II, "[i]n cases like these which involve an unambiguous deed, the conspicuousness of the mistake shatters any argument to the contrary." *Cosgrove*, 468 S.W.3d at 37. The Whitfields' first issue is overruled.

SPECIFIC PERFORMANCE

Just like a deed reformation claim, a claim for specific performance of a contract for conveyance of real property has a four-year statute of limitations. *Lyle v. Jane Guinn Revocable*

Trust, 365 S.W.3d 341, 354-55 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(1) (West 2002). In this case, the cause of action accrued in 2001, when the option to purchase was exercised and the deed was executed. For the same reasons previously discussed, the plain and unmistakable reservation of the mineral interest in the 2001 deed also precludes the application of the discovery rule to the Whitfield's claim for specific performance. *See Cosgrove*, 468 S.W.3d at 39. The Whitfields cannot circumvent the inapplicability of the discovery rule by simply recasting their deed reformation claim as a claim for specific performance. *Id*. (holding plaintiffs cannot circumvent the inapplicability of the discovery rule simply by recasting their deed-reformation claim as a breach-of-contract claim). The Whitfields' second issue is overruled.[8]

CONCLUSION

Because the Whitfields' deed reformation claim and claim for specific performance are barred by limitations, the trial court properly granted summary judgment in favor of the Ondrej Heirs and Maher. Accordingly, the trial court's judgment is affirmed.

Rebeca C. Martinez, Justice

[8] Because our disposition of the Whitfields' first and second issues is dispositive of both of the claims they appeal, we need not address the Whitfields' third issue. *See* TEX. R. APP. P. 47.1.