

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-11-00292-CV**

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**DSTJ, L.L.P., SUCCESSOR TO DSTJ CORPORATION, AND MILESTONE  
OPERATING, INC., Appellants**

**V.**

**M & M RESOURCES, INC., ENERGY LAND RESOURCES A/K/A ENERGY  
LAND RESOURCES LAND SERVICES, A.M. PHELAN, III AND DANIEL  
PHELAN, Appellees**

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**On Appeal from the 60th District Court  
Jefferson County, Texas  
Trial Cause No. A-172,979**

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**MEMORANDUM OPINION**

This is an appeal from two partial summary judgments, as well as a final judgment following a trial on the merits, in a dispute concerning oil and gas leases and an assignment. Appellants DSTJ, L.L.P., successor to DSTJ Corporation (“DSTJ”), and Milestone Operating, Inc. (“Milestone”) raise seventeen issues for our consideration.<sup>1</sup> In

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<sup>1</sup> Appellants also attempt to assert an additional issue in a supplemental brief. However, we need not consider it. *See* Tex. R. App. P. 38.3 (“The appellant may file a reply brief addressing any matter in the appellee’s brief.”).

addition, appellees M & M Resources, Inc. (“M & M”), Energy Land Resources a/k/a Energy Land Resources Land Services (“ELR”), A.M. Phelan, III, and Daniel Phelan also raise two cross points pertaining to the jury’s failure to affirmatively answer question one of the jury charge. We reverse the trial court’s summary judgments and final judgment and remand the cause for further proceedings consistent with this opinion.

### PROCEDURAL BACKGROUND

M & M filed a petition for declaratory judgment against DSTJ. M & M contended that it obtained several oil, gas, and mineral leases from four mineral owners in various tracts of land in Jefferson County, including a tract known as the Blackman Tract. M & M pleaded that it assigned approximately twenty-one leases to DSTJ, and that pursuant to the terms of the assignment, M & M was to receive “a 0.5% override royalty from DSTJ for any oil and gas production off any of the leased tracts, including the Blackman Tract.”

The assignment provided as follows, in pertinent part:

If Assignee [DSTJ] fails to make any payment under this Assignment when due, and still fails to pay within 30 days following receipt of Assignor’s written demand for payment . . ., Assignor shall have the option to terminate this Assignment in its entirety at the expiration of that 30-day period by filing written notice of termination in the real property records of Jefferson County, Texas. Upon termination, the Leases shall automatically revert to Assignor without any further action, together with all of Assignee’s right, title[,] and interest in all equipment, personal property[,] and fixtures located on, or held or used in connection with the Leases. The reverted interests shall be free of all liens, security interests, production burdens and other encumbrances and defects created by, through[,] or under Assignee, all of which shall be void as to Assignor.

The assignment is not signed by DSTJ, and the only signature blank that appears on the assignment is the blank for A.M. Phelan's signature in his capacity as president of M & M.

According to M & M's petition for declaratory judgment, DSTJ drilled the Quail No. 1 well on the Blackman Tract, and although Quail No. 1 was a producing well from approximately October 2003 until April 2004, DSTJ made no royalty payments to M & M pursuant to the assignment. M & M contended that DSTJ's failure to make royalty payments constituted a default of DSTJ's obligations under the assignment. M & M argued that the terms of the assignment permitted M & M to terminate it based upon DSTJ's alleged failure to pay royalties, and that M & M had complied with the terms of the assignment and given notice of termination to DSTJ. M & M sought a judgment that declared that the assignment was terminated in its entirety; that any title, right, or interest DSTJ held in the leases was terminated; that M & M owned all title, rights, and interests in all equipment, personal property, and fixtures located on, held, or used in connection with the leases; and that the Quail No. 3 well "is bottom holed at an illegal location and is an illegal well." ELR contended that it owned an undivided interest in the minerals that are subject to a lease executed by an individual named Chauncey Shephard Barrier ("Barrier"). ELR alleged that the lease obligated "DSTJ and/or Milestone" to commence drilling operations by May 2, 2003, or pay delay rentals, and that DSTJ and Milestone

failed to do either. M & M and ELR also sought attorney's fees pursuant to section 37.009 of the Texas Civil Practice and Remedies Code.

In its answer, DSTJ entered a general denial, and specifically pleaded lack of consideration, estoppel, complete offset of obligations, and DSTJ Corporation was not a proper party. DSTJ also pleaded that "the reversionary clause in the assignment is unenforceable as a penalty[,]” that ELR, the Phelans, and M & M “have repudiated the Blackman and Gilleland leases and are estopped from claiming they have terminated[,]” as well as that all conditions precedent to termination have not been met. In addition, DSTJ pleaded for all costs expended in drilling the Quail Nos. 1 and 2 wells or the net salvage value or benefit conferred, and asserted that appellees lacked standing. DSTJ also pleaded that appellees' claims were “barred by illegality and unclean hands[,]” and that the statute of frauds applied to the assignment.

DSTJ also filed a counterclaim and third party petition, in which it asserted a counterclaim against M & M, as well as third party claims against ELR and ELR's owners, the Phelans. DSTJ contended that the Phelans and ELR were landmen engaged by DSTJ to lease certain mineral properties in the Blackman Tract and another property known as the Gilleland Survey. According to DSTJ's third party petition, the Phelans and ELR acted as DSTJ's agents and, as such, had a fiduciary and contractual relationship with DSTJ. DSTJ contended that the duties of ELR and the Phelans included determining title to the proposed lease properties, ascertaining the proper parties to the

leases, properly acquiring and leasing the minerals, paying lease bonuses, recording the lease instruments, and transmitting the proper documents to DSTJ and “[i]n return it was agreed that [ELR] would be compensated at an hourly rate, plus expenses, and would receive an overriding royalty interest in the mineral estates leased.” In October 2003, ELR purchased an undivided fifty percent ownership in the mineral rights from Barrier.

DSTJ claimed that M & M had already recorded the assignment before the assignment was provided to DSTJ for review, that the assignment was not the product of arm’s length bargaining, and that the assignment was adhesionary, unconscionable, punitive, and constituted a cloud on the title to the mineral estates. According to DSTJ, the Phelans and ELR acted against DSTJ’s interests and engaged in self dealing by attempting to obtain mineral fee interests in the Blackman Tract. DSTJ alleged causes of action for breach of fiduciary duty and “special and confidential relationship[,]” breach of the duty of good faith and fair dealing, breach of contract, fraud and constructive fraud, negligence, statutory fraud in a real estate transaction, violation of the Texas Deceptive Trade Practice-Consumer Protection Act (“DTPA”), declaratory judgment and reformation of the contract, conversion, tortious interference with business relationships, resulting and constructive trust, and sought to recover the “costs, reasonable value[,] or net salvage value of the improvements to the leased premises based on equitable principles and quantum meruit.” Appellees filed a general denial and asserted affirmative defenses of statute of limitations, statute of frauds, contributory negligence, waiver of

right to sue, illegality, acceptance, unclean hands, estoppel by deed, lack of good faith, waiver of the right to sue under the DTPA, and that DSTJ lacked status as a consumer under the DTPA.

Milestone joined the litigation by filing an intervention and petition in interpleader. Milestone, the oil and gas operator who drilled the Quail No. 1 well, contended that it held funds to which competing interests had been asserted. Milestone tendered into the registry of the court \$1041.37, representing the overriding royalties from production of Quail No. 1, and \$13,017.32, representing the lessor's royalties from production. The trial court signed an order granting Milestone's interpleader.

M & M filed a traditional motion for partial summary judgment, in which it contended that DSTJ had breached the terms of the assignment (which M & M refers to as a "conveyance") by failing to make royalty payments to M & M despite the production obtained from Quail No. 1. M & M also asserted that pursuant to the terms of the assignment, DSTJ's failure to pay royalties after receiving M & M's written demand for payment constituted a breach of the terms of the assignment, and that M & M had exercised its right to terminate the lease. Attached to the motion as summary judgment evidence were the affidavits of A.M. Phelan, III and Daniel C. Phelan, copies of the leases at issue, a copy of the assignment from M & M to DSTJ, written demands to DSTJ for payment of royalties, documents pertaining to Milestone's application for permit to drill, recomplete, or re-enter, M & M's file-stamped notice of termination, excerpts from

the depositions of three individuals, and documents showing that the royalties at issue had been paid into the registry of the court.

In its response to M & M's traditional motion for partial summary judgment, DSTJ contended that, using funds provided by DSTJ, ELR procured the subject leases in the name of its alter ego, M & M. DSTJ argued that when M & M assigned the leases to DSTJ, the assignment was imposed on DSTJ without negotiation and was not signed by a representative of DSTJ. DSTJ asserted that fact issues exist "as to whether M & M possessed any, or sufficient title from which a reversionary interest could be reserved in the purported conveyance by assignment to DSTJ." DSTJ also maintained that genuine issues of material fact exist as to whether M & M had any enforceable right to an overriding royalty interest because the assignment did not satisfy the statute of frauds. DSTJ argued that there was a genuine issue of material fact as to whether it owed an overriding royalty interest to M & M because ELR and M & M owed DSTJ "an amount that exceeded the overriding royalty for lease bonus that had been received but not paid to lessors or returned to DSTJ." DSTJ further contended that M & M could not rely upon ratification because M & M had not pled the doctrine, and that genuine issues of material fact exist as to whether DSTJ ratified the assignment.

According to DSTJ, genuine issues of material fact existed concerning whether ELR and M & M violated fiduciary duties to DSTJ that would vitiate the assignment provision and whether the use of the assignment breached the parties' agreement.

Furthermore, DSTJ argued that genuine issues of material fact exist as to whether M & M was an alter ego of ELR and the corporate form of M & M was used to perpetuate fraud and to evade an existing legal obligation. DSTJ attached as evidence excerpts from the depositions of A.M. “Mickey” Phelan, Terry Bomer, and three other individuals, as well as a copy of the assignment and excerpts from the testimony of A.M. “Mickey” Phelan and another individual from the first trial, which ended in a mistrial.

M & M, ELR, and the Phelans also filed a traditional motion for partial summary judgment in their capacity as counter-defendant and third-party defendants. M & M, ELR, and the Phelans contended that they were entitled to partial summary judgment as to DSTJ’s counterclaim and third-party claims because DSTJ accepted the assignment and was therefore bound “as a matter of law” by all of the assignment’s terms, the terms of the assignment released appellees from all causes of action asserted by DSTJ, the facts stipulated to by DSTJ in the assignment “preclude” all of DSTJ’s causes of action against appellees, DSTJ waived its rights under the DTPA in the assignment, and there was no fiduciary, special, or confidential relationship between DSTJ and appellees. As summary judgment evidence, M & M, ELR, and the Phelans attached the assignment and copies of the depositions of Terry Bomer and Donald Harlan.

In response to appellees’ traditional motion for partial summary judgment as counter-defendant and third-party defendants, DSTJ argued that genuine issues of material fact exist as to whether M & M acquired any title to convey to DSTJ by



assignment; whether title was held in trust for DSTJ; whether DSTJ “agreed to the terms of the assignment[.]” since the assignment was not signed by DSTJ, the assignment’s terms were not negotiated beforehand, and representatives of DSTJ objected to the terms of the assignment; whether M & M owed fiduciary duties to DSTJ; and that various terms of the assignment were unenforceable because the assignment was not agreed to and signed by DSTJ. Attached to DSTJ’s response as evidence were the depositions of Robert Mayfield, A.M. “Mickey” Phelan, Terry Bomer, Donald Harlan, and Ronald Moore.

On October 9, 2009, the trial court signed an “Order Granting Plaintiff, M & M Resources, Inc.’s First Amended Motion for Partial Summary Judgment” and an “Order Granting Counter-Defendant, M & M Resources, Inc.’s First Amended Motion for Partial Summary Judgment[.]” In its order granting partial summary judgment to M & M in its capacity as plaintiff, the trial court ordered and declared that the assignment terminated; any right, title, or interest held by DSTJ in the leases terminated; all of DSTJ’S right, title, or interest in all equipment, personal property, and fixtures “located on, or held or used in connection with the leases” terminated; and M & M had right, title, and interest in all such equipment, personal property and fixtures; and directed the clerk to pay M & M \$1,041.37 plus interest, “representing overriding royalties from production from the Quail Unit No. 1 well located on the Blackman tract, and which was interpled into the registry of the District Clerk of Jefferson County, Texas[,] by Milestone Operating, Inc.”

In its order granting partial summary judgment to M & M in its capacity as counter-defendant, the trial court simply ordered “that DSTJ, take nothing by way of [its] counterclaims asserted against M & M Resources, Inc. in Defendant’s Fifth Amended Counterclaim and Third Party Petition . . . .” Neither order explained the basis on which the trial court was granting summary judgment. The trial court did not enter summary judgment in favor of ELR. The case then proceeded to trial on the remaining claims, which included ELR’s claim against DSTJ and Milestone for royalties under the Barrier lease, as well as DSTJ’s claim against ELR for breach of fiduciary duty.

#### ISSUE FOUR

In their fourth issue, DSTJ and Milestone argue that the trial court erred by granting M & M’s partial motion for summary judgment because the statute of frauds precludes enforcement of the overriding royalty provision in the assignment. Because this issue is dispositive, we address it first.

“Declaratory judgments decided by summary judgment are reviewed under the same standards of review that govern summary judgments generally.” *Cadle Co. v. Bray*, 264 S.W.3d 205, 210 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see* Tex. Civ. Prac. & Rem. Code Ann. § 37.010 (West 2008). We review summary judgment orders *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant for a traditional summary judgment must establish that no genuine issues of material fact exist

and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549. If the movant produces sufficient evidence to establish its entitlement to summary judgment, the burden shifts to the non-movant to produce evidence that raises a genuine issue of material fact. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223-24 (Tex. 1999). Because the summary judgment here does not specify the grounds for the trial court's ruling, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Knott*, 128 S.W.3d at 216.

An agreement that is not to be performed within one year from the date of the agreement is not enforceable against a party unless the agreement, or a memorandum of it, is in writing and signed by the party. Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(6) (West 2009); *see also Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982). The statute of frauds exists to prevent fraud and perjury with respect to certain types of transactions. *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001); *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 142 (Tex. App.—Corpus Christi 2006, pet. denied). The statute of

frauds is an affirmative defense in a suit for breach of contract, and it renders a contract that falls within its purview voidable and unenforceable. Tex. R. Civ. P. 94; *Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489-90 (1943); *Moritz v. Bueche*, 980 S.W.2d 849, 856 (Tex. App.—San Antonio 1998, no pet.). The party relying upon the statute of frauds to avoid contractual liability must plead the statute of frauds as an affirmative defense. Tex. R. Civ. P. 94.

The issue of whether a contract falls within the statute of frauds is generally a question of law. *Bratcher v. Dozier*, 162 Tex. 319, 346 S.W.2d 795, 796 (1961); *Lathem v. Kruse*, 290 S.W.3d 922, 926 (Tex. App.—Dallas 2009, no pet.); *Rittmer v. Garza*, 65 S.W.3d 718, 722 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The party pleading the statute of frauds bears the initial burden of establishing its applicability. *See Otto Vehle & Reserve Law Officers Ass'n v. Brenner*, 590 S.W.2d 147, 152 (Tex. Civ. App.—San Antonio 1979, no writ). Once the applicability of the statute of frauds is established, the burden then shifts to the plaintiff to establish that the contract falls within an exception to the statute of frauds. *See id.*; *Mann v. NCNB Tex. Nat'l Bank*, 854 S.W.2d 664, 668 (Tex. App.—Dallas 1992, no writ); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 705 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Brenner*, 590 S.W.2d at 152. “Whether the circumstances of a particular case fall within an exception to the statute of frauds is generally a question of fact.” *Adams*, 754 S.W.2d at 705.

The parties seem to agree that the statute of frauds applies to overriding royalty interests and mineral interests, including the leases and assignment at issue in this case, but dispute whether the facts place this case within an exception to the statute of frauds. *See Consol. Gas & Equipment Co. of Am. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966) (An overriding royalty in an oil and gas lease is an interest in real estate that falls within the statute of frauds.). As evidence in support of its first amended motion for partial summary judgment, filed in its capacity as plaintiff, M & M attached the affidavit of A.M. “Mickey” Phelan (“Mickey”), in which Mickey averred that DSTJ had no right, title, or interest in the Blackman leases prior to the execution of the assignment on September 10, 2002, and any right, title, or interest held by DSTJ was derived solely from the assignment. M & M’s summary judgment evidence also included a copy of the May 28, 2002, oil, gas, and mineral lease between Barrier as lessor and M & M as lessee, as well as Milestone’s application for a drilling permit, which was filed on July 19, 2004. In addition, M & M’s summary judgment evidence included an excerpt from the deposition of Donald Harlan, who testified that the only right DSTJ had to drill the Quail No. 1 well was derived from the rights conveyed by the assigned lease, as well as an excerpt from the deposition of Terry Bomer, who testified that DSTJ had the right to drill because DSTJ paid for the leases and was trying to amicably resolve the issue of the assignment with Mickey.

DSTJ's response to M & M's first amended motion for partial summary judgment included excerpts from Mickey's deposition, which included Mickey's testimony that M & M was never instructed by DSTJ to take the Blackman leases in M & M's name, and that Mickey did not recall whether he had informed Harlan or Bomer that M & M intended to take the leases in M & M's name. The deposition excerpt also included Mickey's testimony that M & M had agreed to obtain the leases on behalf of DSTJ, and that DSTJ had objected to the terms of the assignment.

DSTJ also attached to its response excerpts from the deposition of Bomer, which included Bomer's testimony that he told Mickey "that the assignment as it existed wasn't anything that we bargained for, wasn't our agreement, wasn't the intent of our agreement, . . . we did not agree to give him control of all the issues that he has assumed control of, and . . . I also remember sending him via e-mail a copy of our suggested corrections." Bomer testified that DSTJ believed it was granted the right to drill because it had paid for the leases. In addition, attached to DSTJ's response were excerpts from the deposition of Harlan, who testified that DSTJ chose to proceed with drilling because

first of all, we thought we had been handed fraudulent assignments; and we thought that could be corrected, that we would ultimately prevail. Secondly, we had made a multiple well commitment [with a drilling contractor] of drilling and to forfeit on that would have cost us a very large amount of money with no hope of ever getting a return and, weighing all the factors, we decided to go ahead.

Moreover, DSTJ attached excerpts from the deposition of Ronald Moore, who testified that he had raised several issues with Mickey concerning the terms of the

assignment, including the reversionary provision. Moore testified that he and Mickey had also discussed M & M's taking the leases in its name rather than DSTJ's and recording the assignment before the assignment had been delivered to DSTJ. DSTJ also attached an excerpt from Mickey's testimony from the first trial. During that proceeding, Mickey testified that he did not dispute that M & M had a duty to assign the leases to DSTJ because the leases belonged to DSTJ. In addition, Mickey testified during the first trial that M & M never gave DSTJ the opportunity to indicate its acceptance of the assignment by signing it, and that M & M could have negotiated the assignment's terms with DSTJ, but did not do so. Mickey also testified that if DSTJ had refused to accept the assignment, M & M would have refused to assign the leases to DSTJ.

Finally, DSTJ attached to its response excerpts from the deposition testimony of Thomas Zabel. Zabel testified that the leases belonged to DSTJ, who had retained M & M to acquire the leases on DSTJ's behalf. When asked whether the Phelans or ELR ever acquired any legal interest in the leases, Zabel testified, "Well, that's a difficult question. I mean, they acquired record title to the leases. There's record title, and there's equitable title . . . . And you've got to look at both record title and equitable title." According to Zabel, equitable title of the leases rested with DSTJ.

The terms of the assignment (and DSTJ's alleged ratification or acceptance of the assignment's terms) were the sole basis of M & M's motion for partial summary judgment. As discussed above, the summary judgment evidence concerning whether

DSTJ ratified or accepted the assignment, thereby removing it from the purview of the statute of frauds, was conflicting; therefore, genuine issues of material fact remained. The summary judgment evidence indicated that DSTJ had objected to the terms of the assignment, but hoped to resolve the issue amicably. The summary judgment evidence also indicated that there were fact issues concerning whether DSTJ agreed to permit M & M to acquire the leases in M & M's name rather than DSTJ's. Accordingly, M & M did not meet its burden of establishing its entitlement to summary judgment. *See* Tex. R. Civ. P. 166a(c); *Sw. Elec. Power Co.*, 73 S.W.3d at 215; *Randall's Food Mkts., Inc.*, 891 S.W.2d at 644. We sustain issue four and reverse the trial court's order granting summary judgment to M & M in its capacity as plaintiff. We need not address the remaining issues raised by the parties, as they would not result in greater relief. *See* Tex. R. App. P. 47.1.

Because the trial court erred by granting the motion for summary judgment and declaring that any right, title, or interest held by DSTJ in the leases, as well as DSTJ's equipment, personal property, and fixtures located on, held, or used in connection with the leases, had terminated, the trial court likewise erred by granting M & M's motion for summary judgment in its capacity as counter-defendant, since all bases for summary judgment asserted in that motion depended upon the validity of the assignment. Therefore, we also reverse the partial summary judgment entered in favor of M & M in its capacity as counter-defendant. Finally, because the trial court should have afforded



DSTJ the right to try the fact issues concerning the assignment and whether it falls within an exception to the statute of frauds, we also reverse the trial court's final judgment, which was entered after the remaining issues were tried on the merits, and we remand the cause for further proceedings consistent with this opinion. *See Adams*, 754 S.W.2d at 705 (Whether a document falls within an exception to the statute of frauds is generally a question of fact.).

REVERSED AND REMANDED.

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STEVE McKEITHEN  
Chief Justice

Submitted on March 22, 2012  
Opinion Delivered June 28, 2012  
Before McKeithen, C.J., Gaultney and Kreger, JJ.

**DISSENTING OPINION**

On the only issue reached by this Court, I respectfully dissent, because after a producing well is drilled, it seems late to claim no acceptance, performance, or ratification. *See Thomson Oil Royalty, LLC v. Graham*, 351 S.W.3d 162, 166 (Tex. App.—Tyler 2011, no pet.).

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DAVID GAULTNEY  
Justice

Dissent Delivered  
June 28, 2012