COMMON PLEAS COURT
MONROE COUNTY, OHIO

Clyde A. Hupp, et al.,	:	
Plaintiffs,	:	Case No. 2011-345
vs.	:	Judge Ed Lane Sitting by Assignment
Beck Energy Corporation,	:	
Defendant.	:	DECISION (On Pending Motions)

The above styled action is before the Court on the Complaint of the Plaintiff, Clyde A. Hupp and Molly A. Hupp, et al., for declaratory judgment and quiet title. This action was filed on September 14, 2011 and the two subsequent Complaints for Class Action and Amended Class Action were filed on September 29, 2011 and September 30, 2011, respectively. The Defendant, Beck Energy Corporation, has not filed an answer in this action, but has made an appearance. This action has not been certified as a class action as of the date of this decision. The Court is considering the pending motions prior to undertaking the required hearings in regard to class certifications. **Clyde A. and Molly Hupp are parties of record in this case and the correct style of the case is as set forth above. For some reason, unknown to this Court, the parties in this case have changed the style of this case. All future filings in this case will be correctly titled or subsequently stricken by Court order.**

The Defendant filed a Motion to Dismiss and/or Change Venue on November 30, 2011 with a brief in support. The Plaintiffs filed a Brief in Opposition to the Defendant's Motion to

Dismiss on January 5, 2012. On the same date, the Plaintiffs also filed a response to the Defendant's Motion to change venue. On February 16, 2012 the Plaintiffs filed a Motion for Summary Judgment with a supporting brief. On March 19, 2012 Chief Justice Maureen O'Connor of The Ohio Supreme Court assigned the case to the undersigned, Judge Norman Edward Lane, Jr., Judge of the Washington County Court of Common Pleas. On March 19, 2012 the Plaintiffs filed a Reply Brief in Support of their Motion for Summary Judgment. Thereafter, on March 23, 2012, the Court ordered the matter set for a Status Conference. The purpose of the Status Conference was to establish a briefing schedule for all of the motions that were being filed in this action. All attorneys of record participated in the Status Conference. A Status Conference was held by means of telephone conferencing on April 20, 2012. A Journal Entry was entered on April 25, 2012 establishing a briefing schedule for the pending motions. The briefing schedule required all responses to be filed by April 30, 2012 and replies to responses by April 13, 2012. All motions and replies have been timely filed either pursuant to an extension of time granted by the Court or within the original deadlines. The Defendant filed its Brief in Opposition to the Plaintiff's Motion for Summary Judgment on April 30, 2012 and the Plaintiffs filed a reply to that Brief on May 14, 2012. The matter has been under review by the Court since that date. The Court has reviewed all of the pleadings, all of the motions, memorandums and supporting affidavits provided to this Court and filed in this action. At present there are six named individual plaintiffs in this action. One plaintiff, Donald W. Yonally, was voluntarily dismissed without prejudice on April 12, 2012.

The Court will address all of the issues presented in the parties' various motions in this decision.

FACTUAL BACKGROUND

The Plaintiffs own various tracts of land in Monroe County, Ohio. The Defendant, Beck Energy, is an Ohio oil and gas producer that develops oil and gas interests in Ohio. Beginning in 2003 the Defendant entered into a number of oil and gas leases in Monroe County, Ohio. The Plaintiffs maintain that they have a potential class of 248 lessors. The leases that are involved in this action are leases generated by the Defendant. All leases are identical except as to a few blanks on each of the form leases that were filled in by the Defendant's representatives. These variations are: the date of the lease, the names and addresses of the lessors, and a rough description of the land by township and county. All leases have written in the blank in paragraph three a twelve month primary period/term. The delayed rental payment varies per lease and the name of the lessors varies with each lease. To date, no wells have been drilled in Monroe County pursuant to any of the leases that are involved in this action.

There are certain provisions of the form lease (see Plaintiffs' Exhibit 2 as attached to Plaintiffs' Complaint) that are at issue in this case. The key paragraphs are set forth below:

> 2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.
>
> 3. This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of $108.00 Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.
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> * * *

7. In the event a well drilled hereunder is a dry hole and is plugged according to law, this lease shall become null and void and all rights of either party hereunder shall cease and terminate, unless within twelve (12) months from the date of the completion of the plugging of such well, the Lessee shall commence another well, or unless the Lessee after the termination of said twelve month period resumes the payment of delay rental as hereinabove provided.

8. In the event as well drilled hereunder is a producing well and the Lessee is unable to market the production therefrom, or should production cease from producing well drilled on the premises, or should the Lessee desire to shut in producing wells, the Lessee agrees to pay th Lessor, commencing on the date one year from the completion of such producing well or the cessation of production, or the shutting in of producing wells, an advance royalty in the amount and under the terms hereinabove provided for delay rental until production is marketed and sold off the premises or such well is plugged and abandoned according to law. In the event no delay rentals are started, the advance royalty payable hereunder shall be made on the basis of $1.00 per acre per year.

9. The consideration, land rentals or royalties paid and to be paid, as herein provided, are and will be accepted by the Lessor as adequate and full consideration for all the rights herein granted to the Lessee, and the further right of drilling or not drilling on the leased premises, whether to offset producing wells on adjacent or adjoining lands or otherwise, as the Lessor may elect.

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16. In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots, and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.

17. In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have 30 days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of 30 days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches

> shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.
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> ***
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> 19. . . . no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties. . . .

MOTION TO CHANGE VENUE

At the present time, no jury demand has been filed in this action. If this matter proceeds as an action to the Court, there has been a de facto change of venue by reason of Judge Selmon recusing herself from this case and The Chief Justice of The Supreme Court of Ohio assigning this case to the undersigned. If a jury demand is timely filed in the future, the Court will revisit the issue of venue should it be brought to the Court's attention in a subsequent motion. The motion to change venue is denied without prejudice.

DEFENDANT'S MOTION TO DISMISS

On November 30, 2011 the Defendant filed a combined Motion to Dismiss and/or Change Venue. Pursuant to Oh. Civ. R. 12(B)(6) the Defendant seeks to have this Court dismiss this action pursuant to the provisions of paragraph 17 of the lease.

The Plaintiffs admit that they have not complied with paragraph 17 of the subject lease.

A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of a complaint. Dowdy v. Jones, 7th Dist. No. 10-CO-21, 2011-Ohio-3168, ¶14. For a trial court to dismiss a complaint pursuant to Civ.R.

12(B)(6), it must appear beyond doubt that the plaintiffs can prove no set of facts that would entitle them to the relief sought. Ohio Bureau of Workers' Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, __ N.E.2d __, ¶12. "The allegations in the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* Moreover, a complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theories on which the plaintiffs rely. Fahnbulleh v. Strahan, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). Instead, the Court must examine the complaint to determine whether the allegations provide for any relief on any possible theory. *Id.*

Defendant's motion to dismiss herein is predicated on a single proposition: that Plaintiffs did not provide thirty days written notice to this Defendant prior to commencing this action. The Plaintiffs maintain that the Leases which form the contractual basis for these parties are void as against public policy and unenforceable, and under any reasonable construction of said Leases, were materially and substantially breached by the Defendant reducing the contractual requirement of a notice to a meaningless act from which no benefit could be derived.

Public policy analysis requires a Court to consider the impact of a contract at issue in a case upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.).

Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-21, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). *See also* State v. Baldwin Producing Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To this end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; *Northampton Building Co.* at 198-99.

Historically, the ultimate duration of oil and gas leases has been the subject of tension between lessors, lessees and the courts. Jacobs v. CNG Transmission Corp., 332 F.Supp.2d 759, 786 (W.D. Pa. 2004). Because fixed-term leases were disadvantageous to lessees if production was not achieved until the end of the term, the initial term was shortened and supplemented with (1) what became known as an "unless" drilling clause, under which the lessee had the right to postpone development by paying a delay rental, and (2) a surrender clause under which the lessee could terminate his obligations as to unproductive property. *Id.*, n.15 (citing 2 Summers, *The Law of Oil and Gas*, §289). Lessees then devised leases under which the lessee could extend the exploration period for as long as they considered payment of delay rentals worthwhile. *Id.* This was effected by what became known as a "no-term lease," featuring a habendum clause that simply conveyed the premises subject to a list of conditions, one of which was the payment of a rental. *Id.*

However, the no-term lease was not favored by the courts. *Id.* One line of cases held that, because the lease failed to establish a time beyond which the lessee could not delay development and the payment of royalties, it was unfair and unenforceable against the lessor. *Id.* The other line of cases read into the no-term lease an implied condition compelling the lessee to drill within a reasonable time, the breach of which was cause for forfeiture. *Id.*

The Plaintiffs' position in this matter is that their leases with the Defendant are a no-term leases: through the boilerplate embedded in their leases, exemplified by Defendant's failure to commence any drilling on any of the Plaintiffs' lands, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the acreage in perpetuity, either by making nominal delay rental payments pursuant to paragraph 3 of the Lease, or by determining in its own judgment that the premises are capable of producing oil or gas in paying quantities pursuant to paragraph 2.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties."*** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779. Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The mineral leases in Ionno v. Glen-Gery Corp., 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation during which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. ***Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.***

This Court must, under the current state of Ohio law, consider the allegations in the Plaintiffs' Complaint as true, and must draw any reasonable inferences from them in favor of the Plaintiffs. When doing so, this Court cannot say beyond doubt that the Plaintiffs can prove no set of facts that would entitle them to the relief sought. Therefore, for all of the reasons set forth herein above and hereafter, the Defendant's Motion to Dismiss is not well taken and the same shall be denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs filed their Motion for Summary Judgment in this action on February 16, 2012. The Defendant filed its Brief in Opposition on April 30, 2012. The Plaintiffs further filed a reply to the Defendant's opposition on May 14, 2012 and on March 19, 2012 filed a reply brief in support of their Motion for Summary Judgment.

The Plaintiffs' Motion for Summary Judgment sets forth several distinct issues. First, the Plaintiffs maintain that their lease with the Defendant is a lease in perpetuity and as such is void and unenforceable as against the public policy of The State of Ohio. Secondly, the Plaintiffs maintain that the Defendant breached the implied covenant to reasonably develop their land and by doing so the leases are now null and void. Thirdly, the Plaintiffs maintain that the lease provisions for foregoing development by the payment of delayed rentals has expired because the Defendant failed to commence a well within the required times. The Defendant has countered the Plaintiffs' assertions by stating that it had not received the written notice required from the Plaintiffs setting forth any alleged noncompliance by the Defendant with the lease's terms. Plaintiffs maintain that they do not have to give notice because the leases were void *ab initio*. The Defendant also maintains that the sole remedy that the Plaintiffs are entitled to is damages and not forfeiture of the leases. The Plaintiffs maintain that because the leases are void and unenforceable from the beginning they are entitled to forfeiture of the lease.

A Summary judgment is a procedural vehicle used to terminate legal claims without factual foundation." Gross v. Western-Southern Life Ins. Co., 85 Ohio App.3d 662, 667, 621 N.E.2d 412 (1st Dist. 1993). A Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [civil rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Todd Development Co. v. Morgan, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, &22. *See also* Civ.R. 1(B).

Civ.R. 56(C) mandates that a court enter summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* When a motion for summary judgment has been made and properly supported, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* The parties moving for summary judgment need only prove their own case: the movants do not bear the initial burden of addressing any affirmative defenses the nonmovant may assert. *Id.*, syllabus and &13.

"Summary judgment is appropriate where no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the nonmoving party's claim or defense." Gross, 85 Ohio App.3d at 667. The mere existence of a factual dispute is insufficient to preclude summary judgment only disputes over material facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment. *Id.* "The construction of written contracts and instruments of conveyance is a matter of law." Alexander v. Buckeye Pipe Line Co., 553 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. This Court finds that the instant case involves the construction of written leases and in light of the Defendant's undisputed failure to commence any development activity pursuant to those leases, the clear public policy of Ohio has been violated. There is no dispute as to any material fact; reasonable minds can reach no conclusion other than one reached herein by this Court that is adverse to the Defendant; and Plaintiffs are entitled to judgment as a matter of law on this issue.

The Plaintiffs also maintain that their leases with the Defendant are perpetual leases under which there has been no development of oil and gas and therefore the leases are void and unenforceable as against public policy. Central to the understanding of this issue are paragraphs two and three of these parties' leases. Paragraph two provides as follows:

> "This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the lessee for a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the lessee, or as the premises shall be operated by the lessee in the search for oil and gas and as provided in paragraph 7 following."

Paragraph 7 of the parties' leases deal with the event that if a well is drilled that is a dry hole. Paragraph number 3 of the parties' lease is also central to an understanding of the issue at hand. Paragraph 3 of the parties' leases provide that:

> "This ease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of ______ Dollars each year, payment to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced."

The Defense maintains that a reasonable interpretation of these form leases is that they shall drill a well within twelve months or have the right to pay the delayed rental for a period of ten years and drill the well within that period. The Defendant wrote all of the leases involved herein. If that was their intention then they should have stated it in their leases. That was never their intention or they would have written this language into their leases. It probably only became their intention when they were confronted with this lawsuit and law of Ohio on this issue. The Plaintiffs maintain that this is a lease in perpetuity and violates public policy. The lease by its term requires that a well be drilled within twelve months or that delayed payments be made quarterly to preserve the right to drill at a later date. This Court does not find in either paragraph 2 or 3 any limitation on the number of years that the delayed rental can be paid. Further, paragraph 2 provides that the leases have a term of ten years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities. They have no provision for a well to be drilled. It also leaves the determination of what paying quantities means up to the Defendant. It gives no deadline for the time in which once a well is commenced that it be completed. A well is deemed "commenced" when preparations for drilling have been commenced. There is no deadline for the completion of a well. Some of the cases cited to the Court by the Defendant refer to the term "well" and not "lease". This case is not dealing with a situation where a well has been drilled. No wells have been drilled on any of the Plaintiffs' leases in Monroe County per the allegations of the Plaintiffs in their briefs.

Public policy analysis requires this Court to consider the impact of the contract at issue upon society as a whole. Eagle v. Fred Martin Motor Co., 157 Ohio Spp.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶63 (9th Dist.).

> "Public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

> Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy."

Brown v. Gallagher, 179 Ohio App.3d 577, 2008-Ohio-6270, 902 N.E.2d 1037, ¶10 (4th Dist.). Courts will reject any effort to enforce a contract that is against public policy, either directly or indirectly, or to claim benefits thereunder. Taylor Building Corp. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12 ¶61; Polk v. Cleveland Railway Co., 20 Ohio App. 317, 320-321, 151 N.E. 808 (8th Dist. 1925); Buoscio v. Lord, 7th Dist. No. 98-C.A.-151, 1999 Ohio App. LEXIS 6204, *4 (Dec. 17, 1999); Conny Farms, Ltd. v. Ball Resources, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶26.

"[A]ctual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations." Eagle at ¶64. Unlike a contract that is merely voidable at the election of one of the parties, a contract is void *ab initio* if it seriously offends public policy. Walsh v. Bollas, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992); Dunn v. Bruzzese, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶81 (7th Dist.).

The Ohio Supreme Court has clearly and unequivocally articulated the public policy of the State of Ohio in regard to the extraction of oil and gas. "It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc., 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); Northampton Building Co. v. Board of Zoning Appeals, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996). See also State v. Baldwin Producing

Corp., 10th Dist. No. 76AP-892, 1977 WL 199981, *2 (Mar. 10, 1977). To that end, political subdivisions - entities representing all persons within their territorial boundaries and not simply promoting the private interests of individual contracting parties - are prohibited from enacting ordinances, rules and regulations restricting oil and gas production that are more stringent than state requirements. Newbury Township at 389-90; Northampton Building Co at 198-99. It would be inconsistent to permit a private operator to unilaterally ban the development of significant oil and gas resources indefinitely, solely for personal gain and over the objection of its lessors.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question clearly, unequivocally and seriously offend public policy in that they are perpetual leases that, by their terms and the payment of a nominal delayed rental may never have to be put into production. The Plaintiffs are also entitled to summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land by failing to drill any wells on any of the Plaintiffs' acreage. This provision violates the implied covenant to reasonably develop.

The leases in this case are, in effect, a no-term leases: through the boilerplate prepared by the Defendant and contained in the leases, the Defendant has the unilateral right to indefinitely postpone development and extend the time in which it may develop the Plaintiffs' acreage in perpetuity. Paragraph 2 provides that the leases shall continue in force for a term of ten years "and so much longer thereafter as oil or gas. . . are capable of being produced on the premises in paying quantities, in the judgment of the Lessee . ." but does not impose a time limitation as to how long this Defendant can extend the duration of the leases by exercising its judgment. Paragraph 3 provides that the leases shall become null and void if a well is not commenced within twelve (12) months, "...unless lessee shall thereafter pay a delay rental of ____ Dollars each year, ..." but likewise does not impose a limitation as to how long this Defendant can avoid termination by paying delay rentals. Furthermore, pursuant to the language contained in paragraph 13 of the leases ("failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part"), Defendant could ostensibly cease making the delay rental payments referenced in paragraph 3; but still retain the ability under paragraph 2 to extend the leases indefinitely by exercising its unfettered subjective judgment. Also, only Defendant has the unilateral right to terminate the leases, or any part thereof, by surrender. Lease, paragraph 15.

> "[T]he presumption is that a lease is made for the purpose of immediate development, unless the contrary appears in the contract of the parties." *** The implied covenant to develop the leasehold for mineral production with due diligence and for the mutual benefit of both parties grew out of "the public interest which is concerned with the development of the natural resources of the state."

Jacobs, 332 F.Supp.2d at 779 . Upon a lessee's failure to develop the leasehold within a reasonable time, "both public and private interests demanded judicial termination of the lease to make possible the use and alienation of the land for oil and gas or for other purposes." *Id.* at 782.

The coal leases in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), contained no time limitation within which mining operations were to be commenced, but required the lessees to pay advance minimum royalties each year, to be applied against amounts anticipated to become due from future mining operations. In concluding that the lessees had breached their implied obligations under their lease, the Ohio Supreme Court enunciated the policy in Ohio:

> The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.

Id. At 134.

The "long term" lease in *Ionno* and the Beck Leases in this case are no-term leases bestowing upon the lessees the unilateral right to extend in perpetuity the time within which to develop the leased premises. As in *Ionno*, there has been no development of Plaintiffs' acreage over a period of years. Like the lease in *Ionno* under which there had been no development, the leases herein are unenforceable as against public policy.

The Plaintiffs are entitled to summary judgment in this matter because the leases in question seriously offend public policy in that they are perpetual leases. The Plaintiffs are also entitled to Summary judgment because of the Defendant's breach of the implied covenant to reasonably develop the land and by failing to drill any wells on any of the acreage that implied covenant has been violated.

"[T]he only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving *** royalties based upon the amount of minerals derived from the land." Ionno, 2 Ohio St.3d at 133 n.2, 443 N.E.2d 504. "[W]here a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence." *Id.* At 133. In *Ionno,* the Ohio Supreme Court found a lease to be subject to the implied covenant to reasonably develop where it set forth no time period in which mining operations were required to commence, and contained "no express disclaimer of the covenant to develop within a reasonable time." *Id.* At 133.

The leases in this case contain neither a "specific reference to the timeliness of development" no "a time period in which mining operations were required to commence." Paragraph 3 of the lease provides that the lease shall "terminate" if a well is not commenced within the twelve-month period, the remainder of that paragraph ostensibly permits the Defendant to delay development indefinitely by paying annual delay rentals. Paragraph 2 of the lease also permits the Defendant to delay development indefinitely by determining in its judgment that oil or gas is "capable of being produced on the premises in paying quantities." A lease in which the development period can be delayed into perpetuity at the option of the lessee clearly satisfies the *Ionno* criteria under which an implied covenant will arise.

The implied covenant to develop the land with reasonable diligence serves to allow lessors "to secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Ionno* at 134. To allow lessees to hold land under a mineral lease without making any effort to mine would contravene the nature and spirit of the lease. *Id.*

Ohio courts have recognized a number of implied covenants that arise in oil and gas leases, including both the covenant to drill and initial exploratory well and the covenant of reasonable development, as well as covenants to explore further, to market the product and to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence. *American Energy Services, Inc. V. Lekan,* 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams,* 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶32-37.

The United States Supreme Court recognized the implied covenant to reasonably develop in *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255 (1934). The court saw no need to resort to the law of the state in which the case arose, stating that the covenant to develop the tract with reasonable diligence "is to be implied from the relation of the parties and the object of the lease." *id.* At 278-79.

> The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable.

Id. at 280. The court criticized the lessee's assumption that it could hold its lease indefinitely without commencing any operations to discover or extract the minerals to which its lease applied.

> The [lessee's] officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does comport with the obligation to prosecute development with due regard to the interests of the lessor.

Id. At 281.

The Defendant maintains that its lease clearly disclaims all implied covenants. The lease does contain a general disclaimer of implied covenants. However, the lease also later refers to implied covenants.

In Ohio, as elsewhere, "[a]bsent express provisions to the contrary, an oil and gas lease includes an implied covenant to reasonably develop the land." *Beer v. Griffith,* 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus; *Ionno*, 2 Ohio St.3d at 132, 443 N.E.2d 504. The covenant to reasonably develop arises in the absence of an "express disclaimer of the covenant to develop within a reasonable time." *Ionno* at 133.

Ambiguities in contracts are to be construed against the proponent of the instrument. *Doe v. Ronan,* 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49. "Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed." *Id.* "In determining whether contractual language is ambiguous, the contract must be construed as a whole *** so as to give reasonable effect to every provision in the agreement." *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008) (applying Ohio law). Where a contract as a whole can be reasonably interpreted to support either party's position regarding the scope of a particular clause, the contract is ambiguous as to that issue, and must be construed against the drafter. *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003).

In this case, the parties' lease first provides the lessor with the right to bring an action against the lessee for breach of an implied obligation. Lease, paragraph 17. Two paragraphs later, the lease purports to disclaim any implied covenants. Permitting the lessor to sue based on the breach of an implied obligation cannot be reconciled with a blanket disclaimer of all implied obligations or covenants. Because the lease can reasonably be interpreted to allow or disallow a lessor to maintain an action for breach of an implied obligation, the lease is ambiguous and must be construed against the Defendant, the proponent of the language at issue.

This lease contains contradictory provisions permitting the Plaintiffs to bring legal action against the Defendant for breaching implied obligations while at the same time disclaiming all implied obligations. Moreover, the provisions ostensibly vesting discretion in the Defendant to drill or not to drill either (1) renders the lease illusory unless coupled with an implied covenant to reasonably develop, or (2) is ambiguous with respect to whether the discretion to drill or not to drill applies only to "further" drilling beyond what is required to produce oil or gas, or (3) is unenforceable as against public policy if construed to indefinitely allow Beck to elect to drill or not to drill for all purposes. Accordingly, in that all of these provisions are ambiguous, all provisions must be construed against the Defendant, rendering the general disclaimer of implied obligations ineffective.

Where general provisions of a contract conflict with specific provisions of the same document, the specific provisions generally control. *Edmondson v. Motorists Mutual ins. Co.,* 48 Ohio St.2d 52, 53, 356 N.E.2d 722 (1976); *Hoepker v. Zurich American Inc., Co.*, 3d Dist. No. 140318, 2003-Ohio-5138, ¶11; *Monsler v. Cincinnati Cas. Co.*, 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (10^{th} Dist. 1991). Paragraph 17 of the Beck Lease sets forth specific procedures to be followed in the event a lessor believes Beck to have breached either an express or implied obligation. Paragraph 19 generally disclaims all implied obligations. In that the specific provision in paragraph 17 setting forth a lessor's rights in the event Beck breaches an implied condition controls over the general disclaimer in paragraph 19, the disclaimer is ineffective.

The stated purpose of this lease is "drilling, operation for, producing and removing oil and gas and all the constituents thereof." The lease contains no suggestion that either defendant or lessor had any other objective. The implied covenant to reasonably develop the land effectuates the parties' intent as reflected by the express purpose of the lease.

To give effect to the fundamental purpose of an oil and gas lease as well as to the implied covenant to reasonably develop the land, provisions in the lease bearing on the extent of development may modify or reflect the standard of reasonableness in the implied covenant.

Streck v. Reed, 9th Dist. No. 1221, 1983 WL 4132, *3 (June 8, 1983). The lease must be construed in a manner that will give effect to all the provisions in the lease, both express and implied. *Id.*

The provision in a mineral lease for annual advance payments does not relieve the lessee of its obligation to reasonably develop the land. *Ionno*, 2 Ohio St.3d at 134, 443 N.E.2d 504.

> The questions of working diligently and of paying rent or royalties are entirely separately matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum.

Paragraph 3 of this lease specifies that the Lease "shall become null and void" and the rights of the parties "shall cease and terminate" unless a well is commenced within twelve months (subject to the effect of paying delay rentals). The parties necessarily determined that twelve months was a reasonable time in which to commence a well. In construing this lease, the Court hereby finds that the implied covenant to reasonably develop the land required the Defendant to commence a well within one year. As the Defendant failed to do so, and in fact, has failed to commence a single well on any portion of any of the Plaintiffs' acreage, even though more than three years have elapsed since the lease covering the Hustacks' property was executed, almost six years have elapsed since the Hubbards executed their lease, nine years have elapsed since Donald Yonley executed his Lease, and more than six years have elapsed since David Majors executed his Lease, it has breached the implied covenant to reasonably develop Plaintiffs' Acreage.

When construing the evidence most strongly in favor of the Defendant as required by the Ohio Rules of Civil Procedure, this Court is convinced that reasonable minds can come to but one conclusion, and that conclusion is adverse to the Defendant. This Defendant's lease clearly and unequivocally breaches the implied covenant to reasonably develop the Plaintiffs' land and violates the public policy of the State of Ohio and the Plaintiffs are entitled to summary judgment on this issue. As stated herein above, the lease involved in this action is a lease in perpetuity. By paying delayed rentals, this land could potentially never be developed by the Defendant's payment of a very minimal payment to the Plaintiffs.

While not controlling, our neighboring state of Pennsylvania has decided the issues presented by this course. It is interesting because Pennsylvania has taken the same position taken by the Ohio Supreme Court on the issues presently before this Court in this matter. *Hite v. Falcon Partners*, 2011 Pa.Supr. 2, 13 A.3d 942 (2011), is in many respects similar to the instant case. The *Hite* lease and this lease are both "unusual" types of no-term leases. 13 A.3d at 947. They do not contain traditional habendum clauses which definitively designate a primary term (the time period in which the lessee has the right to develop the leased premises) and a secondary term (the period following the primary term in which the lessee can reap a long-term return on the efforts and funds expended to develop the premises.) The *Hite* lease and this lease each contain language purporting to enable the lessee to indefinitely extend the primary term at the lessee's option.

The *Hite* lease provided for a one-year primary term that the lessees could extend indefinitely either by continuing operations for production of oil or gas, or by paying annual delay rentals of two dollars per acre. 13 A.3d at 944. The lessees in *Hite* simply paid delay rentals for years without commencing any drilling, depriving the lessors of the royalties they would have received from the production of their oil or gas.

The court noted that "[r]oyalty-based leases are to be construed in a manner designed to promote the full and diligent development of the leasehold for the mutual benefit of both parties." *Id.* At 945. The court reviewed the history of mineral leases, noting the evolution from a definite term that left the lessee at a disadvantage if minerals were discovered near the end of the term, to a variable term expressed by a habendum clause providing for a fixed period for development, with an option to extend the lease for "as long thereafter" or "so long as" the specified minerals were produced in paying quantities, enabling the lessee to continue to reap a return for the money spent to develop the property. *Id.* At 946.

Even if a written lease did not expressly require the lessee to develop the property in a timely manner or suffer forfeiture, courts recognized an implied obligation to develop the leasehold. *Id.* As a result, leases specifying a fixed primary term with a "thereafter" clause began to incorporate "delayed rental" clauses relieving lessees of the obligation to immediately develop the property. *Id.* "[C]ourts have interpreted delay rentals to be 'limited to the initial term of the lease.'" *Id* at 947; *Jacobs*, 332 F.Supp.2d at 786.

As noted in Plaintiffs' public policy argument, section II.B., *supra*, lessees began crafting leases permitting the lessee to extend the exploration period for as long as he considered payment of the delay rental worthwhile, giving rise to the "no term lease," which courts rejected under one of two rationales. *Hite* at 947. One rationale was that because the lease did not fix a time beyond which the lessee could not delay actual development and the payment of royalties-the consideration for the lease-the lease was unfair and therefore unenforceable against the lessor. *Id.*

The other rationale was that no-term leases contained an implied condition requiring the lessee to drill within a reasonable time or forfeit the lease. *Id.*

The *Hite* court observed that to a landowner unsophisticated in the legalities of leasing minerals the terms of the lease indicated a one-year term during which the lessee was to commence development. 2011 Pa.Super.2, 13 A.3d at 948. "If the lease could be extended in perpetuity though the payment of $2.00 per acre per year, there would be little need for the parties to agree on a one-year lease term." *Id.* Rejecting the lessee's contention that the leases enabled it to maintain production rights indefinitely as long as delay rentals were paid, the court opined that delay rentals relieve the lessee of the obligation to develop the land during the primary term only. *Id.* Accordingly, a single two-dollar-per-acre delay rental relieved the lessee of any obligation to develop the leasehold during the one-year primary term. *Id.* Once that primary term expired, the mere payment of delay rentals could not preserve the lessee's drilling rights. *Id.*

Permitting the lessee to pay delay rentals indefinitely, thereby denying the lessors the financial benefits of actual production, would contravene the presumed intention of the parties in executing the leases in the first place, as well as the notion that delay rentals are intended to "spur the lessee toward development." *Id.* Moreover, construing the leases as creating an indefinite term would provide the lessee with vested property rights for the mere payment of a nominal delay rental, a concept at odds with the traditional construction of the property rights conveyed by an oil and gas lease. 13 A.3d at 949. Accordingly, the *Hite* court held that the terms of the leases being construed limited the privilege of foregoing production by paying delay rentals to the one-year primary term; once the primary term ended and the lessee failed to commence production, the leases expired. *Id.*

Like the *Hite* lease, this lease is a no-term lease which, on its face, purports to enable the Defendant to extend the term indefinitely, without any development, by simply paying nominal delay rentals and/or determining that the leased acreage is capable of producing.

A contract is illusory when, by its terms, the promisor "retains an unlimited right to determine the nature or extent of his performance; the unlimited right in effect destroys his promise and thus makes it merely illusory." *Century 21 v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist. 1980); *Thomas v. Am. Elec. Power Co.*, 10th Dist. No. 03AP1192, 2005-Ohio-1958, ¶32. Courts generally disfavor interpretations that render contracts illusory, preferring a meaning that gives the contract vitality. *Thomas*, ¶32.

Construing this lease consistently with *Hite*, limiting the Defendant's ability to forego development to the twelve-month primary term set forth in paragraph 3, would prevent the Defendant's promise to drill from being illusory and would promote public policy and the expressed intent of the parties to develop the Acreage.

For all the reasons set forth herein above the Plaintiffs are entitled to summary judgment. The remaining issue is whether or not forfeiture is an appropriate remedy for the Plaintiffs and whether or not the Defendant is entitled to a 30 day notice of cure as provided for in the lease. For the reasons set forth herein after, this Court believes that forfeiture of these leases is the appropriate remedy because they were void *ab initio* and as such the Plaintiffs do not have to give the Defendant the contractual notice to cure notice.

When causes of forfeiture are specified in an oil and gas lease, other causes cannot be implied. *Beer*, 61 Ohio St.2d at 119, 399 N.E.2d 1227, paragraph three of the syllabus. However, "[w]here legal remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant." *Id.*, paragraph four of the syllabus. Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. *Ionno*, 2 Ohio St.3d at 135, 443 N.E.2d 504. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of an implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. *Id.*

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income." *Moore*, 2008-Ohio-5953, &48. Where a lessee's failure to drill or mine within a reasonable period of time would allow the lessee to encumber the lessor's property in perpetuity, without any return of income to the lessor arising from drilling or mining operations, breach of the implied covenant to develop the land could result in forfeiture. *Id.* The decision to order a forfeiture of an oil and gas lease is within the trial court's discretion. *Id.*, ¶51.

In *Beer*, the court upheld a partial forfeiture (or cancellation) where the lessee had performed no work on the leased property for over a year, and had financial and operating difficulties. 61 Ohio St.2d at 121-22, 399 N.E.2d 1227. The court stated that even if the lessee had sufficient resources from which to pay damages, forfeiture of the lessee's continued interest in unexploited acreage was warranted to assure the development of the land and the protection of the lessor's interests. *Id.* at 122, 399 N.E.2d 1227. In *Lekan*, the court upheld a forfeiture where the lessee had limited experience; had drilled but never sold gas from a well on the lessor's property, even though he had placed three wells on other lessors' property into production; and functioned as a "mom and pop" operation without employees. 75 Ohio App.3d at 216-17, 598 N.E.2d 1315.

In the instant case, the parties' lease does not specify any grounds for forfeiture. The Defendant has held leases to Plaintiffs' lands for years without drilling even an initial exploratory well, encumbering Plaintiffs' property for nominal delay rental payments. Forfeiture is warranted to assure the protection of Plaintiffs' interests in their lands. Moreover, even if damages could do justice to the parties, calculating a damage award would be speculative at best because no exploration or drilling has ever taken place. Accordingly, forfeiture is warranted in this case because legal remedies are clearly inadequate.

Plaintiffs did not provide written notice to the Defendant pursuant to paragraph 17 of the lease, "setting out specifically in what respects lessee has breached this contract," and affording the Defendant thirty days to cure any breach. However, the Defendant lacks the means to cure either the defects in or its breaches of the lease. Plaintiffs' compliance with the technical requirement of providing notice prior to commencing this action would serve no purpose.

A lessee's "midnight-hour attempts to save the lease" are insufficient to preserve the lessee's rights under an oil and gas lease that has been breached. *American Energy Services v. Lekan*, 75 Ohio App.3d 205, 214, 598 N.E.2d 1315 (5th Dist. 1992); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶50; *Gisinger v. Hart*, 115 Ohio App. 115, 184 N.E.2d 240 (4th Dist. 1961). In *Lekan*, the court found that once the conditions of the lease had ceased to be met, the lease terminated "by the express terms of the contract *** and by operation of law and revest[ed] the leased estate in the lessor." 75 Ohio App.3d at 212, 214.

In *Gisinger,* the lessees made no effort to develop the leasehold until ten days before expiration of the primary term. Finding it improbable that gas or oil would be produced before the end of the term, the court held the effort was "too little too late," and rejected the lessees' claim for an extension of the term. 115 Ohio App. At 117.

Moreover, it is well settled that the law will not require a vain act. *E.g., State ex rel. Marcolin v. Smith,* 105 Ohio St. 570, 603, 138 N.E. 881 (1922); *Gerhold v. Papathanasion,* 130 Ohio St.342, 346, 199 N.E.353 (1936); *Coleman v. Portage County Engineer,* 191 Ohio App.3d 32, 2010-Ohio-6255, 944 N.E.2d 756, ¶38 (11th Dist.). In the instant case, the purpose of the notice requirement in paragraph 17 of the lease is to provide the Defendant with an opportunity to cure any breach. However, the lease is void as against public policy. The Defendant cannot cure its breach in a timely manner. The Plaintiffs are entitled to summary judgment as requested and to the forfeiture of all rights of the Defendant to the oil and gas under the Plaintiff's properties. The Defendant's rights in the subject bases are forfeited. Court costs shall be assessed against the Defendant.

ENTER AS OF DATE OF FILING:

/s/ Ed Lane

Judge Ed Lane

c: Attorney Zurz/Ropchok/Peters
Attorney Bauerle/Hirsch