STATE OF MICHIGAN

COURT OF APPEALS

ALMA LEE MISH, individually and as Trustee of the ALMA LEE MISH TRUST, and as Co-Trustee of the ROBERT T. MISH TRUST, and KELLY MISH, Co-Trustee of the ROBERT T. MISH TRUST,

Plaintiffs-Appellees,

v

ERVIN RICHTER and MARY RICHTER,

Defendants-Appellants,

and

MILDRED BLAESS, JAMES CROSS, and MARY LOU CROSS, individually and jointly, SHARLOTTE COOLEY, GEORGE ELLIOTT, LEO SAMMONS, and NORMA SAMMONS, individually and jointly,

Defendants.[1]

UNPUBLISHED
March 28, 1997

No. 183693
Genesee Circuit Court
LC No. 90-108951-CK

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

In this case involving an oil and gas lease and allegations of environmental contamination, defendants Ervin and Mary Richter appeal as of right[2] the trial court's grant of summary disposition on two counts of plaintiffs' complaint. We affirm.

I

Plaintiffs owned land that was subject to several oil and gas leases entered into by plaintiffs' predecessors. Defendant Ervin Richter owned lessee interests in two of these leases, the Elliott lease and the Wint lease. Pursuant to the Wint lease, the Arlie Wint #1 Well (the Wint Well) was drilled and

completed in 1946, producing oil and brine. Richter became the operator of this well in 1965. Pursuant to the Elliott lease, the Elliott-Sammons Unit No. 1 Well (the Elliott-Sammons Well) was drilled and completed in 1971 with Richter as the operator. Prior to 1989, this well produced oil, natural gas, and brine. The parties agree that no oil or gas has been produced from the well since April 1989.

Plaintiffs allege that Ervin Richter has been responsible for numerous instances of environmental contamination in and around their property. The Michigan Department of Natural Resources (DNR) has cited defendant for noncompliance with environmental regulations on numerous occasions since the early 1980s, including citations for the commission of waste, pollution contamination or damage by brine or salt water, and improper disposal of brine or salt water. In March 1988, Richter was ordered to submit a Remedial Action Plan to the DNR, which he failed to do. Because of the contamination at the two well sites, the DNR has determined the sites violate the Michigan Environmental Response Act, MCL 299.601 *et seq.;* MSA 13.31(1) *et seq*.[3] (commonly referred to as Act 307), and placed the sites on their published "Act 307 list," which has effectively rendered plaintiffs' land unmarketable.

Plaintiffs' third amended complaint alleged nine counts. In count IV, plaintiffs requested that the trial court order defendants to immediately undertake an environmental study of their land to identify the degree and extent of soil and groundwater contamination, find that defendants had violated the Environmental Response Act, order defendants to undertake any and all actions necessary to correct the violations, and order defendants to pay them damages and attorney and expert witness fees. In count V of the complaint, plaintiffs alleged that there had been a permanent cessation of production of oil and gas at the Elliott-Sammons Well, and the Elliott lease had therefore expired on its own terms. They asked that the trial court find that the lease had expired and order defendants to plug the well, remove all equipment, and level and clean the well site in compliance with DNR rules. Plaintiffs also requested an order that defendants record a release of the Elliott lease with the register of deeds and pay damages.

The trial court granted summary disposition against defendant Ervin Richter only on count IV and against defendants Ervin and Mary Richter on count V. Plaintiffs had filed their motions for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). It is not clear from the record which paragraph of MCR 2.116(C) formed the basis of the trial court's grant of summary disposition. When both parties rely on matters outside the pleadings, as these parties do, this Court will assume that the motion was granted pursuant to MCR 2.116(C)(10). *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995).

II

Defendant Ervin Richter first argues that the grant of summary disposition on plaintiffs' environmental claim must be reversed because the trial court failed to make findings of fact. This argument is without merit. When a trial court rules upon a motion for summary disposition pursuant to MCR 2.116(C)(10), the court "is not permitted to assess credibility, or to determine facts." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the

record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id.*

Defendant next argues that some of the evidence presented by plaintiffs was questionable or contested. However, defendant presented no documentary evidence concerning count IV in response to plaintiffs' motion for summary disposition. A party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) has the burden of showing that a genuine issue of disputed fact exists. The existence of a disputed fact must be established by admissible evidence. *Amorello v Monsanto Corp,* 186 Mich App 324, 329; 463 NW2d 487 (1990). The party opposing such a motion must produce documentary evidence to set forth specific facts demonstrating that there is a genuine issue for trial. *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). Defendant cannot now complain that material facts were in dispute when he failed to produce any documentary evidence to demonstrate those facts in response to plaintiffs' motion.

Defendant also argues that plaintiffs relied on facts not set forth in their third amended complaint and contends that the trial court should have required plaintiffs to plead these matters in a fourth amendment. We disagree. A complaint must contain only those facts and specific allegations that are "necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). Count IV of plaintiffs' complaint was sufficient to put defendant on notice of plaintiffs' allegation that, as operator of the Wint and Elliott-Sammons Wells, he had caused or permitted the release of hazardous substances and had failed to respond to requests from plaintiffs and the DNR to take the actions required by the Environmental Response Act.

Defendant next contends that the trial court improperly relied on factual findings made by the DNR because, once the jurisdiction of the circuit court was invoked, the DNR was without authority to make factual findings. Defendant offers no authority to support this argument. This Court will not search for authority to sustain or reject a party's position. *Isagholian v Transamerica Ins Corp,* 208 Mich App 9, 14; 527 NW2d 13 (1994). Moreover, defendant's complaint that he has been placed in the awkward position of being required to follow both the trial court's findings and those of the DNR is without merit. The trial court's order merely requires defendant to perform actions required by the Environmental Response Act to determine the nature and extent of contamination and to undertake remediation required by the DNR.

Defendant also argues that some of plaintiffs' documentary evidence, including the deposition of a DNR geologist, presented only opinions and that the trial court apparently ignored the "quantity" element in the statutory definition of environmental contamination. However, defendant's own environmental expert admitted that she found the presence of certain toxins above levels recommended by the DNR. Moreover, defendant presented no documentary evidence to contradict that presented by plaintiffs. Where the party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Defendant next argues that the trial court erred because it did not determine the origin of the hazardous substances, and, therefore, the source remains an outstanding issue of fact. However, defendant presented no evidence to the trial court that another source of contamination existed. Therefore, this argument has no merit.

III

Defendants Ervin and Mary Richter contend that the trial court erred in granting summary disposition on plaintiffs' count alleging that the Elliott lease had expired on its own terms. Defendants argue that plaintiffs' actions in declaring the lease forfeited in 1987 and filing this lawsuit in 1990 constituted interference with their rights under the lease and excused them from further performance. Alternatively, defendants argue that they had no available means to dispose of the gas after a local processing plant closed in April 1989, and their performance under the lease was thus excused.

As explained in *Toles v Maneikis,* 162 Mich App 158, 164; 412 NW2d 263 (1987), "the oil and gas lease form is more the result of evolution than of initial drafting." An oil and gas lease "is not an isolated or private agreement, drafted by uninformed neighbors to roughly express their understanding, but is a technical contract, reflecting the development and present status of the law of oil and gas. . . . The lease should be read not only according to its words, but in connection with the purpose of its clauses." *Id.*

Oil and gas leases are considered to be speculative in nature. The terms of the leases are to be strictly construed in favor of the lessor. *Boyer v Tucker & Baumgardner Corp,* 143 Mich App 361, 364; 372 NW2d 555 (1985). Most leases provide for two distinct periods of duration: a definite term for exploration, usually called the primary term, during which the lease may be kept alive by drilling operations or the payment of delay rentals; and a second indistinct term, usually called the secondary term, which typically endures as long as production in paying quantities continues. 38 Am Jur 2d, "Gas and Oil," § 206.

"Oil and gas leases are construed to promote production and development." *Michigan Wisconsin Pipeline Co v Michigan Nat'l Bank,* 118 Mich App 74, 85; 324 NW2d 541 (1982). Oil and gas cannot be produced forever within the terms of an oil and gas lease. "[U]pon the halting of production, the lease is terminated." *Redman v Shaw,* 300 Mich 314, 319; 1 NW2d 555 (1942). The Legislature "has recognized the impermanency of oil and gas leases and provided for a method of the recording of the termination upon forfeiture." *Id.* That method is currently provided in MCL 554.281; MSA 26.1161, which provides in pertinent part:

> When any oil, gas or other mineral lease heretofore or hereafter given on land situated in any county of Michigan and recorded therein shall become forfeited, it shall be the duty of the lessee . . . within 30 days after the date of the forfeiture . . . to have such lease surrendered in writing, such surrender to be signed by the party making the same, his successors or assigns, witnessed and acknowledged and placed on record in the county where the leased land is situated, without cost to the owner thereof:

> Provided, That if the said lessee, his successors or assigns shall fail or neglect to execute and record such surrender within the time provided for, then the owner of said land may at any time after forfeiture serve upon said lessee, his successors or assigns, in person, or by registered letter, at his last known address . . . a notice in writing. . . .
>
> And the owner of said land may after 30 days from the date of service, registration or first publication of said notice, file with the register of deeds of the county where said land is situated, an affidavit setting forth that the affiant is the owner of said land; that the lessee, or his successors or assigns, has failed and neglected to comply with the terms of said lease, reciting the facts constituting such failure; that the same has been forfeited and is void. . . .
>
> If the lessee, his successors or assigns, shall within 30 days after the filing of such affidavit, give notice in writing to the register of deeds of the county where said lands are located that said lease had not been forfeited and that said lessee, his successors or assigns, still claim that said lease is still in full force and effect, then the said affidavit shall not be recorded. . . .

The Elliott lease provided for a primary term of two years and allowed for a secondary term "if lessee shall commence to drill within said primary term" for "as long thereafter as oil and gas, or either of them, is produced by lessee from said land." The parties do not dispute that production at the Elliott Well ceased in April 1989 and had not resumed. Defendants argue, however, that the notices of forfeiture plaintiffs filed with the register of deeds and served on defendants in November 1987 constituted interference with defendants' rights under the lease that was sufficient to relieve them of their obligation to produce or further develop minerals. Defendants responded to the notices in the matter provided by the statute, depriving the notices of any affect on their rights as lessees. Therefore, the notices filed by plaintiffs did not affect defendants' rights or obligations under the Elliott lease.

Defendants also contend that the litigation instituted by plaintiffs constituted additional interference. They cite the following from Williams & Meyers, Oil and Gas Law, § 808:

> The constructive duty of cooperation applies as well to lessor as to lessee. Thus, if lessor interferes with lessee's efforts to discharge his implied obligations, performance by the lessee may be excused. . . . [W]here lessee has already drilled and is producing, does a cancellation suit prevent continued production? . . . [T]he answer is probably yes. If the lessee continues to produce he may be subject to the claim that he is a bad faith trespasser and hence liable for the full value of the oil or gas, with no set-off for costs of operation. At any rate, continued operation after suit is filed may put the burden of showing good faith on the lessee, and this is an unwarranted burden imposed on him by the lessor's wrongful claim of forfeiture.

Plaintiffs argue that the concept that litigation excuses a lessee's performance originated in cases that dealt strictly with lessees who were sued while in the process of drilling or reworking a well and is not applied in cases where the lease has been extended to a secondary term. They cite an Oklahoma opinion that distinguishes the two types of cases, holding that "the principle that all duties are suspended during litigation comes from cases which deal strictly with lessees who were sued while in the process of drilling or reworking a well." *Duerson v Mills*, 648 P2d 1276, 1278 (1982). The Oklahoma court noted that in the primary term of a lease, equitable considerations, such as the amount of the lessee's investment, present a compelling argument for suspending certain duties. However, the court found "a substantial distinction" where the lease was in its secondary term.

> Such a suit presents no compelling circumstances to excuse any of the lease terms. On the contrary, if lessee's duty to produce is legally suspended, pendente lite, it logically follows he may not be compelled to produce at all. Such a corollary is unacceptable for two reasons: (1) cessation of a producer could harm, if not "kill" the well; and, (2) such a suit usually involves a marginal well. . . . The rule argued by [the lessee] would unfairly create a "safe zone" of nonproduction during what is, as a practical matter, mandatory litigation. . . . It unfairly gives the producer the advantage of litigation time during which he need not show any return at all. [*Id.*, 1278-1279.]

We find the logic of the Oklahoma court compelling and believe that the better view is that the a lessor's filing of a lawsuit to declare that an oil and gas lease has expired on its own terms during the lease's secondary term does not excuse the lessee's performance under the lease.

Defendants also cite *Michigan Wisconsin Pipeline Co, supra* at 74, for its holding that when a lessee acts as a reasonable and prudent operator, his nonperformance under the lease might be excused. "Where a lessee-operator does not abandon production and takes reasonable steps to market gas, resulting in substantial benefits to both it and the lessors, its conduct should be tested under the reasonable and prudent operator standard." *Id.* at 86. However, unlike the lessee in the *Michigan Wisconsin* opinion, defendants totally ceased production and had not attempted to find alternative means to manufacture and market their products. Therefore, they are not entitled to the excuse of performance granted under the reasonable and prudent operator standard.

Finally, defendants argue, without citing authority, that the trial court lacked jurisdiction to order the Elliott-Sammons Well plugged because this subject matter is within the jurisdiction of the Supervisor of Wells. Again, this Court will not search for authority to sustain or reject a party's position. *Isagholian, supra* at 14.

Affirmed.

/s/Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

[1] There were additional defendants who were fractional owners of the oil and gas interests at issue. These defendants, sometimes referred to in the parties' pleadings as "the unlocatable defendants," were served process by newspaper publication and did not participate in the litigation.

[2] The present appeal was filed before the effective date of the 1995 amendment to MCR 2.604(A).

[3] The Environmental Response Act, MCL 299.601 *et seq.*; MSA 13.31(1) *et seq.*, was repealed effective March 30, 1995, after the trial court entered its final judgment in this case. The Legislature amended the Environmental Response Act and recodified it within the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*; MSA 13A.101 *et seq.* On appeal, the parties quote from both the superseded and recodified statute. As it applies to defendant, as operator of an oil and gas facility at the time of an alleged release, the liability portion of the statute remains essentially the same. When this action was filed and decided, the liability provision of the Environmental Response Act, MCL 299.612(1); MSA 13.32(12)(1), provided in pertinent part:

> (1) Notwithstanding any other provisions or rule of law and subject only to the defenses set forth in sections 12a and 12b, if there is a release or threatened release from a facility that causes response activity costs to be incurred, the following persons shall be liable under this section:
>
> (a) The owner or operator of the facility.
>
> * * * * *
>
> (2) A person described in subsection (1) shall be liable for all of the following:
>
> (a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this act.
>
> (b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this act.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.