STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. BOTT,

Plaintiff/Counterdefendant/Third-Party Defendant-Appellant,

v

DAVID EMERSON BURGESS and SANDRA TREVENA BURGESS,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees.

UNPUBLISHED
September 19, 1997

No. 189729
Otsego Circuit Court
LC No. 90-004670-CZ

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Plaintiff John A. Bott appeals as of right from the order granting defendants' (also counterplaintiffs') motion for summary disposition under MCR 2.116(C)(10) on their breach of contract claim and awarding them $5,305,075.60 in damages and interest. We reverse and remand for trial.

In 1990, plaintiff brought suit against defendants and others to quiet title to property that plaintiff acquired from defendants pursuant to a 1973 land contract. In connection with the existing oil and gas leases on the property, Paragraph 14 of the land contract provided:

> [A]ll monies derived subsequent hereto, from the leasing of oil, gas and mineral rights under leases presently existing on said premises, shall be divided on a 50-50 basis between Seller and Purchaser until the expiration of said leases; PROVIDED, however, that should oil, gas or mineral production be realized from said premises during the term of those leases now extent [sic], the monies received from said production shall be divided on a 50-50 basis between seller and purchaser until termination of production. In the event of non-production, all oil, gas and mineral rights shall vest in purchaser upon expiration of the primary term of said leases or release thereof.

This paragraph was incorporated by reference into the warranty deed given to plaintiff by defendants when plaintiff paid off the land contract in January of 1975.[1] In his original suit, plaintiff sought a declaratory judgment that the leases were invalid or had expired by their own terms and that the property was clear of any interests other than plaintiff's interest. Defendants then filed a countersuit in which they alleged that plaintiff breached the terms of the land contract by failing to pay defendants the fifty percent royalty from production and development of the gas and oil on the property.

In March of 1992, plaintiff entered into a settlement agreement with the other defendants under which he agreed to ratify the mineral rights lease originally given by Dion and Grace A. Geraldine [the Geraldine lease].[2] That lease covered approximately 440 of the 860 acre parcel[3] plaintiff purchased from defendants and entitled the lessor to a one-eighth royalty interest in any oil, gas or minerals produced from the property. This one-eighth royalty interest is the only interest defendants had in the production proceeds generated under the Geraldine leases at the time plaintiff and defendant entered into the land contract at issue. Under the settlement agreement, plaintiff acquired the remaining seven-eighths interest in the Geraldine lease and agreed to drill five additional wells within one year. That is, plaintiff made substantial investments independent of the interest in the Geraldine leases he purchased from defendants. On June 1, 1992, consistent with the terms of the settlement agreement, those parties other than defendants in the instant appeal also entered into a "unitization" agreement that pooled the interests of the parties in the property at issue with another parcel also owned by plaintiff. The 1040 acre unit created by the unitization agreement is referred to as the J. A. Bott Antrim field. The agreement provided that a well drilled anywhere in the unitization area was to be deemed a well drilled under the Geraldine lease.

On November 12, 1992, defendants filed their first motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that they were entitled to judgment as a matter of law on their breach of contract claim because, in ratifying the Geraldine lease, plaintiff confirmed and admitted that there were unexpired leases existing on the property in which defendants held a fifty percent interest under the land contract. Plaintiff argued that paragraph 14 of the land contract was ambiguous because the parties were unaware of the existence of the Geraldine lease at the time of the conveyance. The trial court found that there was no mutual mistake of fact and that defendants were entitled to fifty percent of the proceeds from the leasing and production under the Geraldine lease. That decision was affirmed by this Court in a memorandum opinion issued November 4, 1994, in which this Court stated that paragraph 14 of the land contract "clearly states that defendants are entitled to fifty percent of all monies derived from the leasing of oil, gas and mineral rights under the leases existing at the time of the signing of the land contract." *Bott v Burgess*, memorandum opinion of the Court of Appeals, issued November 4, 1994 (Docket No. 164216).[4]

On March 23, 1995, defendants again moved for summary disposition pursuant to MCR 2.116(C)(10), contending that there existed no genuine issue of material fact and that plaintiff had admitted the amount of damages in answers to interrogatories and requests for admissions. Defendants argued that they were entitled to fifty percent of 860/1040 of the proceeds from production prior to unitization on June 1, 1992, because the premises consisted of 860 acres of a 1040 acre oil and gas field, and the field was metered and produced as one unit. Proceeds from production received by

plaintiff from February, 1991 through May, 1992 were $1,736,399.40. In addition, defendants asserted that they were entitled to fifty percent of *all* production after June 1, 1992, because under the unitization and settlement agreements, the Geraldine lease was now considered to be covering all the wells in the 1040 acre field. According to plaintiff's admissions, he had received approximately $4,068,446.91 in proceeds since June 1, 1992. Defendants also sought consequential damages for the loss of the tax credits that they would have been able to claim under IRC § 29, 26 USC 29 (1986). Plaintiff responded that defendants had never asserted a right to anything more than half of the one-eighth royalty interest under the Geraldine lease and that the settlement and unitization agreements could not expand defendants' interest in the property beyond that provided for in the land contract. Plaintiff also claimed that unresolved factual issues precluded summary disposition, such as whether paragraph 14 referred to royalty payments or production payments. Plaintiff argued that his admissions were not determinative of damages because they were gross figures that did not take into account post-production costs. Finally, plaintiff denied that the Burgesses were entitled to § 29 gas tax credits because such a claim was never pleaded, discovery had closed and the witness' affidavit was defective under MCR 2.119(B).

The trial court relied on this Court's opinion in Docket No. 164216 to hold that defendants were entitled to fifty percent of the monies derived from the leases. The court also determined that defendants were entitled to half of the proceeds from the entire J. A. Bott Antrim field after June 1, 1992, because the unitization agreement provided that after that date the Geraldine lease was deemed to cover all wells on the unitized property. The court found that paragraph 14 was not ambiguous in this regard. Plaintiff argues that this interpretation is erroneous because at the time of contracting the parties intended the provision only to entitle defendants to fifty percent of the one-eighth royalty interest provided for in the Geraldine lease, as applied to the original 440 acres of the property covered by that lease and from which there was no production prior to June 1, 1992.

An order granting or denying a motion for summary disposition is reviewed de novo. *Northland Wheels Roller Skating Center v Detroit Free Press*, 213 Mich App 317, 322; 539 NW2d 774 (1995). Summary disposition of all or part of a plaintiff's claim is appropriate pursuant to MCR 2.116(C)(10) only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmoving party, the court must determine whether a record might be developed on the available evidence which would leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition in a claim for breach of contract, a court may interpret the contract only where the terms are clear. *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 Mich App 703 (1994).

Although the law of the case doctrine holds that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue, the doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined in arriving at that decision. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991); *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994). In Docket No. 164216, this Court did not consider the effect, if any, of the settlement and

unitization agreement on defendants' interest; it considered only whether defendants were entitled to fifty percent of the income from the leases existing at the time the land contract was executed. In contrast, here defendants are claiming that they are entitled to fifty percent of the remaining seven-eighths interest subsequently acquired by plaintiff pursuant to the settlement agreement as well as fifty percent of production from a field that encompasses land that was not part of the property defendant sold to plaintiff.

It is well settled in Michigan that the intent of the parties should be determined in light of the circumstances existing at the time the contract was made. *Nelson v Big Rapids Gas Co*, 299 Mich 284, 297; 300 NW 89 (1941). Events occurring after the contract was entered into are not controlling factors in determining the intent of the parties at the time the agreement was entered into. *Id*. at 298. Therefore, here, the trial court erred in granting summary disposition because a genuine issue of material fact exists with regard to whether the parties intended defendants to share in subsequent expansions of plaintiff's interest in the Geraldine lease or in proceeds from production from lands defendants never owned. While plaintiff may have an executive duty to protect defendants' interest in the land, see 2 Williams and Meyers, Oil and Gas Law, § 339.2 at 208-212, that duty does not necessarily encompass an obligation to maintain or increase production at his own expense. Because the effect, if any, of the settlement and unitization agreement on the terms of the land contract was not decided by this Court in Docket No. 164216, the law of the case doctrine does not resolve all the issues raised by the present matter. See *Thorin*, *supra* at 697.

Further, our previous decision in Docket No. 164216 addressed only "defendants' entitlement to fifty percent of the monies derived from the Geraldine leases." This Court did not consider or decide the issue whether "monies received from said production" means net proceeds or gross proceeds. Royalties described as a share of proceeds of production are addressed in 3 Williams and Meyers, Oil and Gas Law, § 646.1:

> A royalty or other non-operating interest may be described as a share of the "proceeds" of production without a clear specification as to whether proceeds "at the well" or proceeds "at the place of sale" is meant. Under such circumstances there arises a difficult construction question: are net proceeds the appropriate basis of settlement between operating and non-operating owners, or should such settlement be based on gross proceeds? In many jurisdictions there is inadequate case authority on this construction problem to make results predictable. [*Id*., pp 610-611.]

Because "monies received from said production" may be understood either as net proceeds or gross proceeds, the second clause of paragraph 14 also raises a question of fact precluding summary disposition. *Michaels*, *supra* at 649. This Court recently held in *Schroeder v Terra Energy, Ltd*, ___ Mich App ___; ___ NW2d ___ (Docket No. 184132, issued 4/25/97, slip op at 6), that a royalty owner typically shares in some of the costs of production and processing. *Id*. at 4. The Geraldine lease itself provides for a royalty on all gas, oil and minerals "produced and saved from the premises;" such language has generally been construed as requiring the royalty owner to contribute to post-production costs. 3 Williams and Meyers, Oil and Gas Law, § 645, pp 593-609.

Accordingly, we find several genuine material factual issues here. Specifically, the effect of subsequent expansions of plaintiff's interest in the Geraldine lease, and of plaintiff's income from production proceeds on land not purchased from defendants, on defendants' entitlement to a portion of the production proceeds under paragraph 14 must be determined. Further, defendants' responsibility for post-production costs on the portion of proceeds they receive under paragraph 14 must be determined. This Court's decision in Docket No. 164216 did not address these issues. The existence of these material factual issues requires reversal of the summary disposition in favor of defendants and remand for a trial on the merits.

Plaintiff raises for the first time on appeal the claims that the property consists of 780 acres rather than 860 and that defendants are no longer the real parties in interest because they have conveyed one-third of their interest in the property to their attorney. Because these issues were not properly raised before or considered by the trial court, they have not been preserved for appellate review. *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). However, on remand, it will likely be necessary to resolve these issues. Determination of the size of the parcel defendants sold plaintiff is integral to interpreting paragraph 14's "production . . . from said premises" language. Similarly, plaintiff's argument that the trial court erred in awarding defendants the lost value of the tax credits is not preserved where plaintiff failed to raise any substantive challenge to the claim before the lower court.[5] *Id*. We also decline to address plaintiff's claims that the trial court erred in calculating statutory interest on the award since we are remanding for trial.

Finally, we conclude that the trial court did not abuse its discretion in appointing a receiver. *Weathervane Window, Inc v White Lake Construction Co*, 192 Mich App 316, 322; 480 NW2d 337 (1991). In his answers to interrogatories, plaintiff admittedly received millions of dollars in proceeds from production on the premises and made no provision for setting aside any part of the proceeds to satisfy defendants' claim. Although plaintiff claimed in the court below that these figures merely represented gross production revenues, in the answer to interrogatory 5 he indicated that the figures were the amount received after deduction of costs. *Id*. In the absence of a receiver, the court's ability to enforce its judgment would have been seriously undermined.

Reversed and remanded. We do not retain jurisdiction. Plaintiff being the predominant prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman

[1] We note that the purpose of the "provided" clause is somewhat unclear on a first reading of paragraph 14. We believe that the most straightforward interpretation of the paragraph is to read the first clause as referring to monies derived from the leases, regardless of production, and to read the second clause (which begins "PROVIDED,") as referring to monies derived from actual production under the leases.

[2] After the execution of the settlement agreement, the claims with regard to the other defendants were dismissed with prejudice.

[3] As discussed below, plaintiff disputes the size of the parcel purchased from defendant; plaintiff contends that it was only a 780 acre parcel.

[4] The Supreme Court denied leave to appeal on June 30, 1995. *Bott v Burgess*, 449 Mich 865; 535 NW2d 793 (1995).

[5] Plaintiff asserted only that the affidavit was defective and that defendants failed to properly plead a claim for the tax credits.