STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. KERZKA, Trustee for the ROBERT C. KERZKA TRUST, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED September 10, 2013
v	No. 310938 Cheboygan Circuit Court
STEPHEN T. FARR and ANITA L. FARR, Individually, and STEPHEN T. FARR, Trustee for the STEPHEN T. FARR REVOCABLE TRUST, Defendants/Counter-Plaintiffs-Appellees.	LC No. 10-008107-CH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

The dispute in this case centers on the oil, gas and mineral rights to a 110-acre parcel in Cheboygan County. In 1990, Stephen and Anita Farr took ownership of the parcel along with the attendant mineral rights. The Farrs then entered into a land contract to sell the property to John Keasey and Richard Skellenger, but "reserved" the oil, gas and mineral rights for themselves in a duly recorded document. In 1994, when Keasey and Skellenger paid for the property in full, the Farrs gave them a warranty deed subject to reservations of record. Despite the Farrs' earlier reservation of the oil, gas and mineral rights, Keasey and Skellenger agreed to sell the property to Robert Kerzka and expressly included those rights in the purchase agreement.

Kerzka, as trustee of his personal trust that now holds title to the property, commenced this suit after the Farrs filed a 2009 notice of intent to retain mineral rights and entered a 2011 oil and gas lease with an energy company. The circuit court summarily upheld the Farrs' interest, but limited their ability to transfer their mineral rights subject to protections promised in the Keasey/Skellenger land contract addendum. We affirm.

I. BACKGROUND

On December 4, 1990, the Farrs entered a "memorandum of land contract" with Keasey and Skellenger for the sale of the Cheboygan County property "subject to the vendors[']s (sellers) reservation of all oil, gas and mineral rights." The parties simultaneously entered "addendum #1," which "bec[ame] part of the attached land contract." The addendum provided:

> Whereas, it is agreed and understood the sellers have reserved all oil, gas and mineral rights under the subject property, and that at any time they, the sellers, their successors or agents, have occasion to explore, search or attempt to remove any oil, gas or minerals, they must first have written consent of the purchasers of the subject property, or their successors for entering the premises.

Both documents were recorded with the county register of deeds.

On May 12, 1994, when Keasey and Skellenger had paid for the property in full, the Farrs conveyed a warranty deed in their favors. The deed granted the property "subject to easements, restrictions and reservations of record." The parties did not physically attach "addendum #1" to this deed, however. The warranty deed was also duly recorded.

Pending conveyance of the warranty deed, Keasey and Skellenger entered a "Uniform Buy and Sell Agreement" with Kerzka. The agreement asserted, "Mineral rights[,] if any, are included in the sale." On May 16, 1994, Keasey and Skellenger conveyed the property to Kerzka by warranty deed, indicating that the grant was "subject to easements, restrictions and reservations of record."

The title company employed by Kerzka apparently failed to look beyond the warranty deeds in the chain of title to determine if there existed any "easements, restrictions [or] reservations of record" affecting the land. Had it done so, Kerzka would have learned that the Farrs reserved the oil, gas and mineral rights to the subject property in the earlier memorandum of land contract and addendum #1.

In 2009, the Farrs recorded a "notice of intent to retain mineral rights" in the subject property. That document provided that it:

> gives notice that Owners are retaining their oil, gas, and minerals located in Cheboygan County, Michigan . . . .
>
> * * *
>
> The interest was created by a Warranty Deed recorded at Liber 612 and Page 136 at the Cheboygan County Register of Deeds. This notice is recorded to give record notice of the Owner's interest in minerals located on the Premises.

The Farrs apparently filed this notice when it entered negotiations in 2008 for an oil and gas lease with Contex Energy, but that deal did not come to fruition. Stephen Farr then transferred his interest to his trust and granted "a right of ingress and egress to mine, drill, and explore the premises for oil, gas, and other minerals and to remove such minerals from the Premises." (Kerzka also granted his property interest to his personal trust.)

The search for natural gas is apparently a big business in Cheboygan County. On May 7, 2010, Mason Dixon Energy, L.L.C. sent Kerzka a letter expressing an interest in an oil and gas lease over the property. EnCana Oil & Gas (USA), Inc. beat Mason Dixon to the punch, however, and actually entered an oil and gas lease with the Farrs on February 25, 2011.

On October 15, 2010, Kerzka filed suit to quiet title to the property's oil, gas, and mineral rights. Kerzka alleged that the Keasey/Skellenger memorandum of land contract and addendum #1 represented "merely an executory contract" and claimed that "title is not conveyed and mineral rights are not subject to reservation in such a document." The warranty deed later conveyed the Farrs' property interest to Keasey and Skellenger and that document did "not specifically reserve any mineral rights, and [did] not state it was given in fulfillment of a land contract." Kerzka averred that the Farrs' subsequently recorded notice of intent to retain mineral rights was therefore an improper cloud on his title. Kerzka also accused the Farrs of slandering his title.

The Farrs filed a counter-complaint to quiet title to the property's mineral rights. They asserted that they "reserved the oil, gas, and mineral rights in the Property when the surface estate was sold" and that Kerzka's "claim of ownership has created a cloud on the mineral title" and "interfered with [the Farrs'] ability to enter into an oil and gas lease." The Farrs also named the title company employed by Kerzka as a nonparty at fault pursuant to MCR 2.112(K).

Kerzka sought summary disposition, contending that in order for the Farrs to have reserved the oil, gas and mineral rights to the subject property, they would have had to include a specific reservation in the warranty deed conveyed to Keasey and Skellenger. Kerzka argued that a land contract conveys only equitable title and the seller retains legal title during the contract's pendency. As the seller maintains legal title, there is no legal interest to reserve when entering the land contract. When the land contract is completed, however, the seller conveys its legal title and can reserve a legal interest at that time. Even if the language in the land contract was sufficient to create a reservation when that contract was entered, Kerzka contended, that reservation was extinguished by the subsequent warranty deed, which did not include the same reservation.

The Farrs retorted that the Keasey/Skellenger land contract and addendum #1 were recorded documents that placed the world on notice of their reserved interest in the mineral rights to the subject property. Those recorded documents were part of the chain of title and any claim Kerzka might have would be against the title company that failed to bring the reservation to his attention.

On August 17, 2011, the circuit court rendered an opinion answering the question, "Does the language contained in the memorandum of land contract and addendum #1 recorded on December 27, 1990, create a reservation of the oil, gas and mineral rights in favor of the Defendant Farrs?" The court answered the question in the affirmative. The court rejected Kerzka's challenge that a reservation of rights cannot be made in a land contract.

> As a general rule, vendees to an executory land contract cannot remove oil, gas or other minerals from the subject property during the term of the land contract as that would constitute waste . . . . Likewise, as a general rule[,] the vendors do not have the right to go onto the property and remove any oil, gas or minerals from the property during the term of the land contract as the vendee is the equitable title holder.

> The parties to the Farr-Keasey/Skellinger [sic] land contract chose to expressly modify one of the general terms of a standard land contract concerning the oil and mineral rights. In Addendum #1[,] the parties to the land contract specifically agreed that the sellers reserved all oil, gas and mineral rights and the sellers, their successors or agents retained rights to go onto the property and remove oil, gas or minerals.
>
> The language of this addendum appears to satisfy the requirements of the Black's Law Dictionary definition of reservation in that it is a creation of a new right or interest by and for the grantor in the real property being granted to another.
>
> The difficulty in this case is that when the Farrs executed the deed to the Keaseys and Skellengers in 1994, they simply could have stated that they were reserving all oil, gas and mineral rights. Instead they chose to use the general language that the property was subject to reservations of record.
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> * * *
>
> In the present case, the [Farrs] did not use the best and most effective method available in order to put future entities in the chain of title on notice of [their] reservation of mineral rights; however, the [Farrs] did create a chain of title that was adequate to put a person on notice who performed a reasonably diligent search of the title on notice that a reservation of mineral, oil and gas rights existed as it was recorded by way of Addendum #1 . . . . This reservation is in the chain of title and provided adequate notice of its existence and therefore any subsequent grantees took their interest in this property subject to that reservation.

Accordingly, the circuit court ruled that Kerzka took his property interest subject to the Farrs' prior recorded reservation.

The court allowed Kerzka to amend his complaint and he alternatively argued that Stephen Farr improperly granted his personal trust rights beyond those permitted in addendum #1, by allowing the trust to enter the property and search for minerals without the landowner's consent. Kerzka also added a count charging the Farrs with failure to comply with the dormant mineral rights act (DMRA), MCL 554.291 and MCL 554.292, by failing to file a statutorily valid claim to reassert their interest in the property's mineral rights.

The Farrs then sought summary dismissal of Kerzka's additional claims. The Farrs contended that the limitations set forth in addendum #1 were recorded so EnCana (or any other successor in interest) would be aware of the terms and would be bound by them. The Farrs further argued that their mineral rights had not gone "dormant." Those rights were severed from the surface rights in 1994, and the 20-year statutory period had not expired with the Farrs taking no action to protect them.

In a May 21, 2012 opinion, the circuit court rejected Kerzka's abandonment claim as "[t]he 20-year period set forth in the statute does not run until May 12, 2014." The court agreed that "EnCana or any other successors and assigns of [the Farrs'] mineral rights are subject to the

limitations set forth in the addendum." Therefore, EnCana had to first to secure "written consent" of the landowners before entering the property to explore for or remove oil, gas or minerals. The court ruled that its order "would clearly spell out" the limitations of the EnCana lease and that the order would be recorded to put the world on notice.

This appeal followed.

II. STANDARD OF REVIEW

The circuit court granted summary disposition in the Farrs' favor pursuant to MCR 2.116(C)(10). "We review a trial court's decision on a motion for summary disposition de novo." *Zaher v Miotke*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307394, issued March 28, 2013), slip op at 3.

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, slip op at 3-4.]

"An action to quiet title is an equitable action that we also review de novo." *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011).

III. ANALYSIS

First and foremost, we note that an individual selling his or her property has the authority to retain the oil, gas and mineral rights. Generally, "[t]he owner of the land surface owns the minerals beneath his land." *Stevens Mineral Co v Michigan*, 164 Mich App 692, 696; 418 NW2d 130 (1987). Title to subsurface minerals may be severed from the surface rights, however. *Id.* Relevant to this appeal, severance can be accomplished by a reservation or an exception. *Id.*

The Farrs took steps to sever the oil, gas and mineral rights from the surface rights, beginning with the memorandum of land contract and addendum #1. Kerzka challenges that a grantor may not sever and "reserve" subsurface rights in a land contract. When parties enter a land contract, the vendor immediately conveys equitable title to the vendee, but continues to hold the property's legal title in trust until the purchase price is paid in full. *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 614, 616; 677 NW2d 829 (2004). The vendee's equitable title is a present interest and the vendee may sell, devise or encumber the

property. *Id.* at 614. As equitable title actually passes with the entry of a land contract, there is no reason that title to mineral rights cannot be affected by such a document.[1]

The question then becomes "how did the Farrs affect the mineral rights in the memorandum of land contract and addendum #1?" The Farrs assert that they "reserved" the subsurface rights in these documents.

In property law, the terms "reservation" and "exception" have come to be confused and used interchangeably. *Mott v Stanlake*, 63 Mich App 440, 442; 234 NW2d 667 (1975). The determination of which tool was employed must be based on the facts and not on the label used by the parties. *Id.* A "reservation" has been defined as:

> A clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such . . . . Reservation occurs where the granting clause of the deed operates to exclude a portion of that which would otherwise pass to the grantee by the description in the deed and 'reserves' that portion unto the grantor. [Black's Law Dictionary (6th ed), p 1307.]

A "reservation" "reserves to the grantor some right on the property." It "is something taken back from that which is granted—the creation of a new right or interest." 1 Cameron, Michigan Real Property Law (3d ed), § 10.11, p 351. "A reservation is really a legal fiction which treats the grantor's reservation as an implied grant from the grantee back to the grantor." *Stevens Mineral Co*, 164 Mich App 697.

An "exception" is described in similar terms. The term "exception" means "retention of corporeal interests by the conveyor of an estate in land." Restatement, Property § 473, cmt a, p 2970. "Interests which are included within the terms of an 'exception' . . . may exist in fee in the conveyor. They are not created by the conveyance; they merely continue to exist unaffected by it." *Id.* As described in Black's Law Dictionary (6th ed), p 559, an "exception" is an "exclusion of something from operation of contract or deed." It "operates to take something out of [the] thing granted which would otherwise pass or be included." *Id.* As stated by this Court, "[i]f the grantor retains title to the mineral interests described in a deed, it is an exception" and the grantor then has a fee interest in the minerals. *Stevens Mineral Co*, 164 Mich App at 697.

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[1] Kerzka contends that mineral interests cannot be deemed severed until legal title is transferred in a warranty deed. In doing so, Kerzka focuses on language in *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 493; 686 NW2d 770 (2004), overruled in part on other grounds *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012), that "[a] mineral interest is 'severed' when that interest is owned by a person different from the person who owns the surface estate." The surface estate is only "owned" by a different person, in Kerzka's estimation, when that estate is transferred by warranty deed. This view is overly simplistic and ignores that equitable title conveyed through a land contract is a present ownership interest.

Oil, gas and mineral rights to the subject property have always existed. The Farrs carved out and retained those interests when they sold the property to Keasey and Skellenger. The Farrs did not actually create new rights. Technically speaking, the retention of mineral rights in the land contract and addendum is an "exception," not a "reservation." Regardless of the technical label, the language in the Keasey/Skellenger warranty deed making their interest subject to "reservations" of record was sufficient for the Farrs to retain their "excepted" property interest, especially as it was a labeled a reservation. The documents were recorded and placed the world on notice that the Farrs possessed the subsurface rights to the property. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), citing MCL 565.29. And Keasey and Skellenger had no authority to convey an interest to Kerzka when that interest never belonged to them.

Kerzka argues that if the Farrs' subsurface rights were severed when the land contract was entered, then the 20-year period under the DMRA would have expired before the notice of intent to retain the mineral rights was recorded. MCL 554.291(1) provides:

> Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged, or transferred by instrument recorded in the register of deeds office for the county where that interest in oil or gas is located for a period of 20 years shall, in the absence of the issuance of a permit to drill an oil or gas well issued by the department of environmental quality, or its predecessor or successor, as to that interest in oil or gas or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which that interest in oil or gas is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of that interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, . . . within 20 years after the last sale, lease, mortgage, or transfer of record of that interest in oil or gas or within 20 years after the last issuance of a drilling permit as to that interest in oil or gas or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which that interest in oil or gas is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of that interest in oil or gas in underground gas storage operations, whichever is later, record a claim of interest as provided in section 2.

If an interest is deemed abandoned under subsection (1), title vests in the owner of the surface estate. MCL 554.291(2). To ensure that the property is not abandoned, the owner of the subsurface interests must record a "written notice" every 20 years. See generally MCL 554.292.

The memorandum of land contract and addendum #1 were entered on December 4, 1990. The 20-year period described in the DMRA expired on December 4, 2010. The Farrs recorded their notice of intent to retain mineral rights in 2009, before the expiration of the 20-year

statutory period. The Farrs' interests in the subsurface rights are now preserved through 2029. MCL 554.292(3). Accordingly, Kerzka is not entitled to relief under this alternate theory.

Affirmed. As the prevailing parties, the Farrs may tax their costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher