

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Laurie A. Abell, f/k/a Laurie A. Evan,
individually and as Trustee of the DDM Real
Estate Trust,

Plaintiff/Appellee,

vs.

GADECO, LLC,

Defendant/Appellant.

SUPREME COURT NO. 20160346

Civil No. 53-2014-CV-00828

ON APPEAL FROM JUDGMENT DATED SEPTEMBER 15,
2016 AND ORDERS DATED JULY 21, 2016 AND FEBRUARY
16, 2016

WILLIAMS COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DAVID W. NELSON

REPLY BRIEF OF APPELLANT

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[¶1] Defendant and Appellant GADECO, LLC (“GADECO”) hereby submits this Reply Brief in support of its appeal.

LAW AND ARGUMENT

I. Standard of Review

[¶2] In reviewing the summary judgment orders this Court must view evidence in the light most favorable to GADECO and where reasonable inferences are to be drawn, the inference must be drawn in favor of GADECO. *See Van Klootwyk v. Baptist Home*, 2003 ND 112, ¶ 8, 665 N.W.2d 679 (additional citations omitted). If the Court finds conflicting inferences could be drawn from the facts, summary judgment is not appropriate. *Hamilton v. Woll*, 2012 ND 238 ¶ 9, 823 N.W.2d 754. In its Appellee Brief, Laurie A. Abell, f/k/a Laurie A. Evans, individually and as Trustee of the DDM Real Estate Trust (“Abell”) contends the District Court made no “finding” regarding Abell’s refusal to engage in negotiations for a Surface Use Agreement. As this matter was before the Court on a motion for summary judgment, there were no findings. The District Court did, in ruling in favor of Abell, have to accept as true all of the factual allegations regarding Abell’s bad faith contained in the Affidavit of Gene Webb submitted in opposition to Abell’s motion. [Transcript of October 27, 2015 Summary Judgment hearing “2015 T” 27:21-22] This Court in reviewing the Order granting Summary Judgment must similarly accept as true all of those allegations. [See App. 33-47.] Those allegations, taken as true, establish that Abell acted in bad faith concerning the Surface Damage Agreement.

[¶3] After Abell granted GADECO permission to survey and stake a wellsite and after requesting GADECO move the surveyed location, Abell, in bad faith, refused to respond to numerous attempts by GADECO to discuss the terms of the Agreement. She did not

reject the Agreement or indicate she would not cooperate. Instead, she failed to respond to repeated attempts to contact her and intentionally caused sufficient delay to prevent GADECO from commencing further drilling operations in the hope of causing the termination of the GADECO Lease. [*Id.*] These factual assertions must be accepted as true by this Court.

II. “Operations” were conducted as defined by the Lease.

[¶4] The GADECO Lease provides it will extend beyond the stated primary term in three different ways: (1) production of oil and gas, (2) conducting operations as defined in the Lease or (3) existence of a well capable of producing oil and gas but shut in for lack of a market or outlet. [App. 68.] Abell devotes a significant amount of its analysis arguing GADECO did not conduct operations under the lease because GADECO was not authorized under North Dakota law to commence drilling operations without a permit to drill its well. Abell wrongfully assumes the definition of “operations” under the Lease is the same as “drilling operations” for which North Dakota law requires a permit. This assumption is not warranted. Operations as defined by the Lease are:

[A]ll operations for the drilling of a well for oil or gas, including building of roads, preparation of the drill site, moving in for drilling, drilling, deepening, plugging back, reworking or recompleting and also secondary recovery operations benefitting the leased premises.

[*Id.* (Emphasis added.)] Abell asks the Court to disregard the express language of the Lease which contains the parties’ contract in favor of the definition of “operations” contained in the applicable regulations governing drilling permits. Abell’s argument ignores the standard to be used when interpreting oil and gas leases. This Court has long held that leases are to be interpreted in the same manner as contracts. It is basic rule of contract interpretation that the plain language of the contract is used to determine its

meaning. The GADECO Lease contains plain language establishing that all activities to prepare the drill site are considered “operations.” Surveying and staking are activities to prepare the drill site.

[¶5] This conclusion is supported by the administrative regulation referenced by Abell restricting a well operator from proceeding to drill a well without a permit. That regulation acknowledges that surveying and staking are part of well site preparations and no permit is required for these activities. North Dakota Administrative Code Section 43-02-03-16 does not provide that surveying and staking are not “preparation of the drill site” under the terms of the GADECO Lease. The quoted section acknowledges that surveying and staking of a well site are well-site preparation and excludes those preparatory steps from the permit requirement. *See* N.D.A.C. § 43-02-03-16 (“Before any person shall begin any well-site preparation for the drilling of any well other than surveying and staking ...”) (emphasis added). Under both a plain reading of the GADECO Lease and the regulation cited by Abell, surveying and staking by GADECO extended the Lease.

III. Abell Breached her Implied Duty of Good Faith.

[¶6] Abell entered into the Lease with GADECO authorizing GADECO to develop her mineral interest. In doing so, she also accepted the rights and obligations that flow from that Lease. The rights and obligations for a lessor include the right to receive payments if the well is productive and the obligation to not frustrate the development of minerals. *See Irish Oil & Gas, Inc. v. Reimer*, 2011 ND 22, 794 N.W.2d 715; *Sorum v. Schwartz*, 411 N.W.2d 652 (N.D. 1987). The implied duty of good faith is present in all contractual relationships. Specifically, in oil and gas leases, a lessor may not set up termination of its

lease by frustrating the efforts of the lessee to pursue development. [See Brief of Appellant ¶ 49.]

[¶7] Here, the facts in the Affidavit of Gene Webb establish that Abell acted in bad faith in an effort to frustrate GADECO's rights under the Lease. Abell cites to *Feland v. Placid Oil Co.*, 171 N.W.2d 829 (N.D. 1969) to support her position she had no duty to cooperate concerning the Surface Damage Agreement. *Feland*, however, is distinguishable. In *Feland*, a lessor refused to allow a salt water pit on its property and rejected the well operator's proposal to dig one. *Id.* at 831. This Court refused to find that failure to obtain permission for the proposed pit as an act that absolved lessee of its express and implied duty to restore production in a reasonable period of time. *Id.* at 834. Here, Abell did not refuse. Instead, she initially granted permission for surveying and staking of a well site, requested the well site be moved, indicated she would cooperate, thereafter delayed discussion on the terms of the proposed Agreement, and then refused to respond to numerous attempts to contact her. [App. 34.] These actions were done in bad faith. The delay tactics and refusal to communicate despite numerous attempts by GADECO, render Abell's actions more like those in *Sorum v. Schwartz*, wherein the court found lessor was estopped from seeking termination of his lease after refusing to accept service of a mandatory notice thereby delaying commencement of drilling operations and refusing to grant an easement for electric service. 411 N.W.2d at 655 (citing Williams, *Oil and Gas Law*, § 604.7, pp. 88.13-88.16).

[¶8] The District Court erred in disregarding Abell's bad faith and wrongful conduct. Abell attempted to set up termination of her oil and gas lease and should now be estopped

from seeking termination based on the results of her actions. The decision of the District Court finding GADECO's Lease terminated should be reversed.

IV. GADECO's Damages as a result of Abell's Breach of Obligation.

[¶9] GADECO, as part of its counterclaims, sued Abell for damages for her failure to cooperate with necessary utility easements. GADECO alleged Abell breached her obligations owed under GADECO's Lease or if that lease was invalid under the terms of the top lease Abell granted to Kodiak Oil and Gas (USA), Inc. ("Kodiak Lease") GADECO acknowledges it is not a party to the top lease. GADECO, however, as the operator of the wells now producing from the spacing unit that includes Abell's minerals is the only party capable of producing oil and gas from the spacing unit and, under the concept of pooling, GADECO stands in the place of all lessees regarding operations. Accordingly, GADECO alleged regardless of which lease was the effective lease, Abell was obligated to GADECO to cooperate with utility easements.

[¶10] The District Court properly found Abell was obligated under either lease to execute an easement and ordered Abell to execute an easement. The Court did not, however, properly analyze the impact of pooling on the issue of GADECO's claim for damages for Abell's initial breach of the obligation to execute a utility easement. Even assuming the Court properly determined GADECO's Lease to have expired, GADECO's development efforts in the spacing unit, including those seeking to install utilities, are considered development by all of the mineral lessees in a pooled unit. *See* N.D.C.C. § 38-08-08(1). Accordingly, Abell's obligations under the Kodiak Lease also obligated her to cooperate with GADECO's efforts to obtain utilities at the well locations and it also entitled GADECO to seek damages for the breach of this obligation.

[¶11] Abell contends the issue of damages under the top lease was not properly before the District Court. This argument is perplexing. In its Amended Answer and Counterclaim, GADECO alleged it was damaged as a result of Abell's refusal to grant the utility easement and that Abell had an obligation to sign the easement under either the GADECO Lease or the Kodiak Lease. [App. 65.] Further, this issue was fully briefed and argued to the District Court. [2015 T 35:1-6; App. 149, 153.] The District Court agreed Abell had an obligation to execute the easement. Damages flow from a breach of an obligation. GADECO's damages as a result of Abell's approximately 7-month refusal to execute a utility easement were properly before the Court.

[¶12] The decision of the District Court should be reversed and remanded for a hearing on the issue of GADECO's damages.

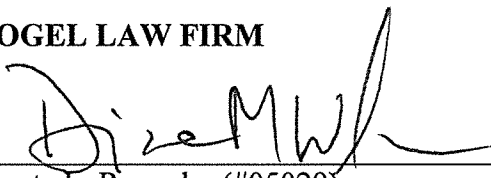
CONCLUSION

[¶13] GADECO respectfully requests this Court reverse the District Court's Orders and remand for trial.


Respectfully submitted this 31st day of January, 2017.

VOGEL LAW FIRM

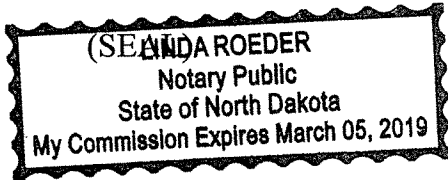
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Subscribed and sworn to before me this 31st day of January, 2017.




Notary Public, Burleigh County, North Dakota