

San Antonio Court of Appeals Holds that Lessor Can Allow Third-Party to Drill through Lessee's Mineral Estate to Reach Adjacent Lease

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In a decision involving claims of underground trespass and tortious interference, the San Antonio Court of Appeals held that a surface owner could grant permission to a third-party to drill through the mineral estate underlying the surface and that the lessee “has no right to exclude others from the earth surrounding the oil and gas hydrocarbons” on the lease. *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 4933439, --- S.W.3d --- (Tex. App.—San Antonio, Aug. 19, 2015, no pet. h.). The holding allowed a lessee to use the surface of an *adjacent* estate to build pads and drill wells that bottom on its adjoining leasehold—provided that the adjacent lease does not bar such use and the surface owner consents.

Briscoe Ranch, Inc. is the lessor and Lightning is the lessee under a lease that grants “all mines of, and all oil, gas and all minerals, on and under the said land.” The Chaparral Wildlife Management Area (“**Chaparral WMA**”) is managed by the Texas Parks and Wildlife Department (“**TPWD**”) and occupies the surface adjacent to Lightning’s lease. Anadarko obtained leases beneath the Chaparral WMA. Anadarko’s lease requires it to use offsite drilling locations “when prudent and feasible.” Anadarko first unsuccessfully sought a surface use agreement from TPWD to drill wells. After its failed bid to TPWD, Anadarko obtained a Surface Use and Subsurface Easement Agreement from Briscoe Ranch. Anadarko planned to establish drill sites on Briscoe Ranch’s land to drill wells that bottom under the Chaparral WMA. Anadarko’s wells would pass through—but not produce directly from—Lightning’s leasehold. Anadarko informed Lightning of its plans to drill a first set of five wells.

After discussions between Anadarko and Lightning broke down, Lightning sued Anadarko, asserting claims for trespass and tortious interference with contract. The trial court denied the temporary injunction, and Lightning immediately filed an interlocutory appeal. The appellate court, however, agreed with the trial court, noting that Lightning’s own witnesses undercut its argument that it would suffer immediate and irreparable harm if Anadarko were permitted to drill. In particular, Lightning’s witnesses testified that: (1) a casing failure or blowout was highly unlikely, but even if one occurred, “that loss could be quantified and compensated based on reserve estimates;” (2) Lightning would have to drill the same additional offset wells if Anadarko were able to reach its lease from a different surface location; and (3) Lightning’s proposed wellbore would “never encounter” Anadarko’s wellbore because of Texas’s field spacing rules. See *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, No. 04-14-00152-CV, 2014 WL 5463956 (Tex. App.—San Antonio, October 29, 2014, pet. denied) (the petition for review was denied on September 4, 2015).

After initiation of the interlocutory appeal, the trial court granted summary judgment to Anadarko and Lightning again appealed. In this second appeal, Lightning again asserted that Anadarko had trespassed on its mineral estate and also tortiously interfered with Lightning’s lease. The court of appeals rejected both arguments.

The court first analyzed several Texas cases involving mineral estate rights and concluded that the surface estate owner, not the lessee, controls the earth beneath the surface estate. The court further held that “absent the grant of a right to control the subterranean structures in which the oil and gas molecules are held, the mineral estate owner does not control ‘the mass that undergirds the surface of the [conveyed land].’” The “surface estate owner controls the earth beneath the surface estate,” while the lessee has the right to produce the oil and gas in the ground.

The court of appeals noted that Lightning’s lease does “not expressly include any right to, or control of, any subterranean structures—the earth—underlying the surface estate.” Based on its analysis of Lightning’s lease and the case authorities, the court concluded that Lightning had “no right to exclude others from the earth surrounding the oil and gas hydrocarbons in [Lightning’s lease].” The court also determined that a plaintiff alleging trespass must show it owned or otherwise had the legal right to exclude others from the property. In the Court’s view, Lightning did not “own or control the earth surrounding any hydrocarbon molecules” within its lease and instead had a “fair chance to recover the oil and gas in or under” its lease. There was no evidence that Anadarko had bottomed or opened perforations within Lightning’s lease to support a trespass claim.

Based on these conclusions, the appellate court affirmed summary judgment on the trespass claim. The summary judgment evidence also showed that the surface owner had granted Anadarko permission to drill where it did, which the court found established a justification defense as a matter of law, defeating Lightning’s tortious interference claim regarding its lease agreement.