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No. 17-3145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ECLIPSE RESOURCES – OHIO, LLC; ECLIPSE RESOURCES I, LP, Plaintiffs-Appellees, v. SCOTT A. MADZIA, Defendant-Appellant, XTO ENERGY, INC., Defendant-Appellee.	)	**FILED** Nov 30, 2017 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: BOGGS, BATCHELDER, and BUSH, Circuit Judges.

JOHN K. BUSH, Circuit Judge. The Oxford Oil Company ("Oxford") and Scott Madzia ("Madzia") entered into an oil-and-gas lease under which Madzia granted Oxford certain rights in his property. Oxford later assigned its rights in the lease to Eclipse Resources – Ohio, LLC and Eclipse Resources I, LP (collectively, "Eclipse"). The litigation below principally involved two distinct but related disputes. First, Madzia and Eclipse disagree as to whether the lease grants Eclipse the right to drill a wellbore through Madzia's property to access certain resources, and, if so, whether a subsurface-easement agreement subsequently conveyed by Madzia to Eclipse modified the lease so that Eclipse no longer held the contractual right to conduct such drilling. Second, Madzia contends that Eclipse breached a provision in an amendment to the lease that required Eclipse to "comply with all applicable federal, state and

local laws." Specifically, Madzia alleges that Eclipse submitted an old affidavit, rather than securing a new affidavit from Madzia (as Madzia alleges is legally required), in support of its application to state regulators for expedited approval to drill the wells.

The lease granted Eclipse broad rights to use Madzia's property to drill for oil and gas, including the right to transport oil and gas through Madzia's property "from other lands." Because the subsurface-easement agreement did not modify the lease, we affirm the district court's holding that Eclipse has the right to drill the wells through Madzia's property. Also, Madzia's claim for the alleged breach of the provision requiring compliance with all applicable laws fails because of Madzia's own breach of the lease, which required him to execute all documents convenient to carrying out the provisions of the lease—such as signing a new affidavit in support of Eclipse's permit application. Finally, we affirm summary judgment for Eclipse on Madzia's claim of bad faith arising from Eclipse's delayed fracking of certain wells. Therefore, for the reasons that follow, we affirm the judgment of the district court in all respects.

I

A. The Lease

Madzia is the owner of three adjacent tracts of land located in Harrison County, Ohio, comprising 128 acres. Madzia and Oxford entered into the oil-and-gas lease on April 10, 2006. In exchange for one dollar and royalty payments, Madzia granted Oxford broad rights to his property. The lease states, in relevant part, that Madzia

> does hereby grant unto the Lessee all of the oil and natural gas from *any source*, which includes methane produced or gathered from coal seams or other sources generally described as coalbed methane, and their constituents, in and under the lands hereinafter described, together with *the exclusive rights to drill for*, produce, collect, store and market oil and gas and their constituents and to inject air, gas, brine, and any other substance from any source into any subsurface strata other than potable water and minable coal stratas. Lessee shall have the exclusive right to conduct geophysical, seismic and other methods of exploration for oil or gas by parties other than Lessor without the express prior written permission of the

> Lessee. Lessee shall have *the right to transport from, across and through lands hereinafter described oil and gases and their constituents from the subject lands and other lands* which right to transport shall survive the term of this lease so long as transportation is continued. Lessee shall have the right to possess, use and occupy so much of said premises as is necessary and convenient to conduct its oil and gas related activities, including but not limited to the right to install, maintain and replace pipelines, meters, tanks, power stations, communication facilities *and other structures* required to produce, store and transport oil and gases and their constituents.
> . . .
> It is agreed that the rentals or royalties on any well, or wells, paid and to be paid as herein provided are and shall be accepted by Lessor as adequate and full consideration to render it optional with Lessee whether or not it shall drill a well, additional wells or wells to offset producing wells on adjoining or adjacent premises (emphases added).

Oxford drilled a well on Madzia's property in 2007. In June 2013, Eclipse assumed Oxford's rights in the lease.

B. The Amendment

On the same day that Eclipse assumed Oxford's rights in the lease, Eclipse and Madzia executed a document amending the lease. The amendment added a legal-compliance clause under which Eclipse agreed to "comply with all applicable federal, state and local laws and regulations relative to its operations on the Leased Premises." The amendment also contains a further-assurances clause, under which Madzia agreed "to promptly and duly execute and deliver any and all such further instruments, endorsements, agreements, consents, assignments and other documents" and to "take such further action as may reasonably be deemed necessary *or convenient* to carry out the provisions of this Amendment and the Oil and Gas Lease" (emphasis added). Finally, the amendment added a pooling provision that essentially gave Eclipse the ability to "pool" portions of Madzia's property with other lands to create drilling units.[1]

[1] A drilling unit, as defined by Ohio statute, "means the minimum acreage on which one well may be drilled." Ohio Rev. Code § 1509.01.

Towards the end of 2013, Eclipse, under the pooling provision, pooled portions of Madzia's property with roughly 630 acres of other property to create the Madzia Unit.

C. The Madzia Wells, the JMW Wells, and the Madzia Affidavit

Two main sets of wells are at issue in this dispute: the "Madzia Wells" and the "JMW Wells." The Madzia Wells, drilled—without controversy—from a well pad on Madzia's property (the "Madzia Pad"),[2] consist of the Madzia Unit 2H, 4H, 6H, 8H and 10H wells. The JMW Wells, located north of Madzia's property, consist of the John Mills West Unit 1H and 3H wells.

In mid-2013, Eclipse sought a drilling permit for the Madzia Wells from the Division of Oil and Gas Resources Management at the Ohio Department of Natural Resources ("ODNR"). In doing so, Eclipse submitted an affidavit signed by Madzia stating that he owned the coal rights on the property and that he did not object to Eclipse's drilling the Madzia Wells (the "Madzia Affidavit"). In March 2014, Eclipse began drilling the Madzia Wells.

D. The Easement Agreement

Approximately one month later, Madzia and Eclipse entered into one more agreement, through which Madzia conveyed a subsurface easement to Eclipse. The easement agreement pertained to Madzia's property and "all contiguous or appurtenant lands currently owned or after acquired by" Madzia (the "Subsurface Tract"). Through the easement agreement, Madzia granted Eclipse

> a subsurface easement and right-of-way to enable [Eclipse] to drill a wellbore or wellbores across, through and under the subsurface of the Subsurface Tract, as to all depths and formations, and to provide [Eclipse] ingress to and egress from, and

[2] A well pad is "the area that is cleared or prepared for the drilling of one or more horizontal wells." Ohio Rev. Code § 1509.01.

> the right to penetrate, use and occupy, the entire subsurface of the Subsurface Tract for a wellbore or wellbores.[3]

The easement agreement adds that "[t]his subsurface easement and right-of-way is strictly limited in application and can only be used in conjunction with drilling operations on the [Madzia Wells] and for no other purpose or purposes whatsoever." The easement agreement concludes with an integration clause, providing:

> This grant contains all of the agreements between the parties with respect to the subject matter hereof, and no prior representations or statements, verbal or written, have been made modifying, adding to or changing the terms of the agreement. No amendments, modifications or revisions hereof shall be effective unless made in writing and signed by the parties hereto.

In May 2014, Eclipse approached Madzia about acquiring an additional easement that would specifically reference the JMW Wells. Madzia refused, wanting additional compensation.

E. The Reused Affidavit

Earlier, in March 2014, an Eclipse employee, Angela Knepp, contacted ODNR about obtaining a permit to drill the JMW Wells. Eclipse had already submitted an affidavit from Madzia to ODNR and secured a permit from ODNR to drill the Madzia Wells, and was inquiring into whether it could apply for a permit to drill the JMW Wells without submitting a new affidavit. Patty Nicklaus, an office assistant at ODNR, e-mailed in response, writing, "once you have received coal approval for at least one well on your pad, It [sic] follows that any future wells would have approval. So, you are more than welcome to expedite any future wells on your pads." Eclipse then submitted the Madzia Affidavit, previously used for the Madzia Wells, along with a permit application to drill the JMW Wells, and requested expedited review. Eclipse relied on the old Madzia Affidavit (the "reused affidavit") without Madzia's knowledge. On June 2, 2014, Eclipse received a drilling permit from ODNR for the JMW Wells.

[3] A wellbore is, unremarkably, "[t]he hole made by a well." Williams & Meyers, Oil and Gas Law 8-W (2017).

After this receipt, Eclipse began drilling the JMW Wells in June 2014 from the Madzia Pad, which was located on Madzia's property. Madzia sent a letter to ODNR on December 11, 2014, objecting to Eclipse's submitting the reused affidavit with the permit application to drill the JMW Wells. In January 2015, ODNR asked Eclipse to submit a new affidavit. When Eclipse asked Madzia to sign a new affidavit for the JMW Wells, he refused. On March 27, 2015, ODNR sent Eclipse a draft compliance agreement asserting that Eclipse violated state law by failing to submit the required affidavit. On March 4, 2016, ODNR issued suspension orders halting Eclipse's operations on the JMW Wells for violating state law. Ten days later, after the district court issued its first opinion in this case on March 2, 2016, granting Eclipse's motion to dismiss, ODNR terminated the suspension orders. ODNR appears content to wait on the outcome of this litigation and has not taken any further action against Eclipse.

F. Eclipse Suspends Operations on the Madzia Wells

Previously, in January 2015, Eclipse began hydrofracturing ("fracking")[4] the JMW Wells. But Eclipse suspended operations on the Madzia Wells before fracking the Madzia Wells. In other words, despite *drilling* the Madzia Wells before drilling the JMW Wells, Eclipse started *fracking* the JMW Wells before fracking the Madzia Wells, and Eclipse suspended operations on the Madzia Wells for a period of time. Eclipse later fracked the Madzia Wells in August and September 2016 and began selling gas from two of the Madzia Wells at the end of September 2016 and from the rest by October 2016.

II

Eclipse filed its original complaint on January 20, 2015, primarily seeking a declaratory judgment that "it was entitled to drill the JMW [W]ells from the Madzia Pad" and an order

[4] Fracking involves "[t]he forcing of fluids under pressure into the well so as to cause fracture of the target stratum." Williams & Meyers, Oil and Gas Law 8-H (2017).

requiring Madzia to execute an affidavit for the JMW Wells. Madzia filed his counterclaim on February 26, 2016, and later amended it to add XTO Energy. Madzia's amended counterclaim pleaded eleven counts against Eclipse and XTO Energy: trespass, declaratory relief, breach of the lease and amendment, breach of the subsurface-easement agreement, breach of the covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, slander of title, fraud, tortious interference with prospective business relations, and an injunction.

On May 18, 2015, Eclipse moved to dismiss Madzia's amended counterclaim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. On March 2, 2016, the district court granted Eclipse's motion as to all of Madzia's counts except for the alleged breach of the covenant of good faith and fair dealing. In dismissing the majority of Madzia's amended counterclaim, the district court held that the lease and amendment grant Eclipse the right to drill the JMW Wells through Madzia's property and that Eclipse did not violate the law, let alone breach any contract, by submitting the reused affidavit.

Relevant evidence was subsequently discovered, prompting Madzia to move for leave to file a second amended counterclaim on April 8, 2016. The discovered evidence pertained to the reused affidavit, so the district court, on July 5, 2016, vacated "its prior finding that Eclipse did not violate Ohio Revised Code § 1509.08" and granted Madzia leave to file a second amended counterclaim.

Madzia filed his second amended counterclaim on July 22, 2016, pleading six counts. Count I is a claim for declaratory relief as to whether, among other things, "the Lease, the Amendment, and/or the Subsurface Easement permit [Eclipse] to drill a wellbore or wellbores across, through, or under the subsurface of the Property for the [JMW Wells]." Count II alleges a claim for trespass because, according to Madzia, Eclipse does not hold the right to drill the JMW Wells through his property. Similarly, Count V is a claim for unjust enrichment in which

Madzia argues that Eclipse and XTO Energy "have obtained a benefit from Madzia because they have used the well pad site located on [Madzia's property] to drill the [JMW Wells] rather than constructing a new well pad on a different property." Count III pleads a breach of the lease, amendment, and easement agreement for, among other things, Eclipse's alleged violation of the Ohio Revised Code by submitting the reused affidavit for the JMW Wells, contrary to contractual provisions mandating compliance with all applicable laws. Count IV is a claim for breach of the covenant of good faith and fair dealing of the lease, amendment, and easement agreement based on Eclipse's delaying fracking the Madzia Wells, pooling some of Madzia's property into the JMW Wells Unit, and allegedly misleading ODNR by submitting the reused affidavit. Finally, Count VI seeks an injunction halting the use of Madzia's property by Eclipse and XTO Energy.

On August 5, 2016, Eclipse moved to strike certain claims contained in the second amended counterclaim, arguing that the district court had not granted Madzia leave to include these claims. On November 4, 2016, the district court granted Eclipse's motion to strike, dismissing Counts I, II, and V for declaratory relief, trespass, and unjust enrichment, respectively, under the law-of-the-case doctrine because they were not related to Eclipse's submitting the reused affidavit.

The parties then filed cross-motions for summary judgment on November 18, 2016. Eclipse, along with XTO Energy, sought summary judgment on all of the remaining counts of Madzia's second amended counterclaim. Madzia sought a declaratory judgment that Eclipse had violated the law with respect to the reused affidavit. Eclipse voluntarily dismissed all of its claims against Madzia on December 5, 2016. On January 20, 2017, the district court granted the motion by Eclipse and XTO Energy for summary judgment, and denied Madzia's motion. Madzia filed a timely notice of appeal on February 9, 2017. In addition to appealing the opinion

and judgment of January 20, 2017, Madzia also appeals "all non-final orders that merged into that final judgment," including the district court opinions and orders of March 2 and November 4, 2016.[5]

III

A. Standard of Review

The counts in Madzia's various counterclaims may be grouped as follows: (1) counts dismissed under Rule 12(b)(6); (2) counts originally dismissed under Rule 12(b)(6) that Madzia attempted to revive but the district court dismissed again under the law-of-the-case doctrine; and (3) counts in Madzia's second amended counterclaim that were dismissed at summary judgment–namely, alleged breaches of the lease, amendment, and easement agreement, and breach of the covenant of good faith and fair dealing inherent in those agreements.[6]

We review the district court's decision on the first set de novo. *See Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 382 (6th Cir. 2016). We review the district court's decision dismissing the second set under the law-of-the-case doctrine for abuse of discretion. *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002). We review the third set, decided in favor of Eclipse at summary judgment, de novo. *See Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016).

[5] Madzia's opening brief on appeal fails to raise any argument with respect to XTO Energy. XTO Energy is not a party to the lease, amendment, or easement agreement. At oral argument, Madzia conceded that he is not challenging the district court's grant of summary judgment in favor of XTO Energy. Oral Arg. Tr. 25:32–25:47 (Oct. 12, 2017). Additionally, because Madzia failed to raise any argument in its opening brief regarding XTO Energy, he has waived any arguments regarding XTO Energy. *See United States v. Bradley*, 585 F. App'x 895, 898 n.2 (6th Cir. 2014) ("This Court has held on numerous occasions 'that an issue is waived when it is not raised in the appellant's opening brief.'") (quoting *United States v. Pritchett*, 749 F.3d 417, 434 (6th Cir. 2014)). We therefore affirm the district court's grant of summary judgment and other orders in favor of XTO Energy.

[6] Madzia's papers on appeal do not mention his claim for an injunction.

B. Analysis

Madzia's counterclaims rise and fall on the outcome of three issues:

(1) Did the district court err in holding at the pleading stage that Eclipse has the right to drill the JMW Wells from Madzia's property?

(2) Did the district court err in holding at summary judgment that Madzia's claim for Eclipse's alleged breach of contract failed because Eclipse did not violate the law in submitting the reused affidavit and because Madzia himself was in breach?

(3) Did the district court err in holding at summary judgment that Eclipse did not breach the covenant of good faith and fair dealing when it delayed fracking the Madzia Wells?

We review all three determinations de novo.[7]

As the parties do not dispute, this diversity proceeding is governed by the substantive law of the forum state, Ohio. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). We therefore decide substantive issues based on how we believe the Ohio Supreme Court would rule. *See*

[7] Madzia also contends that the district court, in its November 4, 2016, opinion, dismissed his counterclaims for declaratory relief, trespass, indemnification, and unjust enrichment not under the law-of-the-case doctrine, but because the district court determined that the claims could not survive a motion to dismiss and that the new facts alleged "did not move the needle." Therefore, according to Madzia, we must consider that second dismissal under a de novo standard, and consider the new facts alleged pertaining to the scope of the lease dispute in a light most favorable to him.

The district court, however, did not consider the new facts alleged or determine that these counterclaims could not survive a motion to dismiss. Rather, the district court clearly stated that Madzia's counterclaims for declaratory relief, trespass, indemnification, and unjust enrichment were outside the scope of its previous ruling allowing Madzia to amend his counterclaim complaint. The district court had vacated its "prior finding that Eclipse did not violate Ohio Revised Code § 1509.08" by submitting the reused affidavit. Madzia attempted to include, again, his same counterclaims for declaratory relief, trespass, indemnification, and unjust enrichment. He also pleaded new facts pertaining to those counterclaims and the scope of the lease, not facts only relating to the reused affidavit. Because the district court had already dismissed these counterclaims, and had specifically instructed Madzia at a status conference that he could amend his counterclaim complaint only with respect to the reused affidavit, the district court again dismissed these counterclaims under the law-of-the-case doctrine, noting that "Madzia is going for the proverbial second bite of the apple, wasting the Court's judicial resources and straining the Court's credulity while so doing."

We review a district court's dismissal under the law-of-the-case doctrine for abuse of discretion. *Rouse*, 300 F.3d at 715. None of the exceptions precluding dismissal under the law-of-the-case doctrine is present here. *See Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006). We therefore affirm the district court's dismissal of Madzia's counterclaims for declaratory relief, trespass, indemnification, and unjust enrichment under the law-of-the-case doctrine, and we discuss the propriety of their original dismissal pursuant to Rule 12(b)(6) below.

Savedoff v. Access Grp., Inc., 524 F.3d 754, 762 (6th Cir. 2008) ("If the issue has not been directly addressed, we must 'anticipate how the relevant state's highest court would rule in the case . . . . Intermediate state appellate courts' decisions are also viewed as persuasive unless it is shown that the state's highest court would decide the issue differently.'") (quoting *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005)). For the reasons discussed below, we affirm.

i. The Lease Grants Eclipse the Right to Drill the JMW Wells from Madzia's Property

The district court, at the pleading stage, found that the lease and amendment granted Eclipse the right to drill the JMW Wells from Madzia's property and that the easement agreement did not amend these rights. We review this decision de novo, taking into account only the facts in Madzia's first amended counterclaim complaint,[8] accepting them as true, and construing those allegations in favor of Madzia to determine whether his counterclaim states a "claim to relief that is plausible on its face." *See Ohio Pub. Emps. Ret. Sys.*, 830 F.3d at 382–83 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Madzia granted Eclipse broad rights in the lease, including "the oil and natural gas from any source," the "exclusive right to drill for . . . oil and gas," and "the right to transport from, across and *through* lands hereinafter described oil and gases and their constituents from the subject lands *and other lands*" (emphases added). "[A] contract must be construed in its entirety and in a manner that does not leave any phrase meaningless or surplusage." *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 363 (6th Cir. 2014) (internal quotation marks omitted). Interpreting the contractual language of "from, across, and through" so as not to render

[8] We note that some citations to the record refer to Madzia's second amended counterclaim. However, for the purposes of deciding Madzia's appeal of the dismissal of his counterclaims under Rule 12(b)(6), particularly the scope of the lease and the easement agreement, we limit our analysis to the alleged facts before the district court, which are found in Madzia's first amended counterclaim and primarily comprise the text of the agreements.

it surplusage, it is clear that Madzia granted Eclipse the rights to drill for oil and gas and to use broadly the surface and subsurface of his property in transporting oil and gas.

The Ohio Supreme Court has consistently used dictionary definitions to determine the common meaning of a word. *Campus Bus. Serv. v. Zaino*, 786 N.E.2d 889, 891 (Ohio 2003). "Across" is defined as

> [e]xpressing direction: located in a direction forming a cross with, or transverse to . . . expressing motion or comparable action: *from one side to the other of*; right through or over, in any direction except lengthwise . . . [e]xpressing position: on the other side of, beyond, over . . . [i]n a position or direction crossing the length of something, transversely; (hence) from side to side, from corner to corner;[9]

and "[o]n, at, or from the other side of . . . [s]o as to cross, through . . . [f]rom one side to the other."[10] "Through" is defined as "*[i]n one side and out the opposite or another side of* . . . [a]mong or between; in the midst of"[11] and

> from one end, side, or surface of (something) to another; (a) from one side of (an opening or gap) to the other; (b) from one end or boundary of (a place or area) all the way to the other; along the whole length of (a passage); (c) *in at one side or surface of (a solid object) and out at another, esp. so as to pierce or penetrate*.[12]

While some overlap exists between the two definitions, it makes little sense to read both "across" and "through" as "from one side to the other." To do so would incorrectly render either word unnecessary surplusage. *See Eastham*, 754 F.3d at 363. Rather, the more reasonable interpretation of the term "across" here pertains to transporting oil from one side of Madzia's property to the other side. The use of the term "through," in turn, denotes transporting oil in

[9] *Across*, Oxford English Dictionary B(1)(a), 2(a), 3, http://www.oed.com/view/Entry/1864 (last visited Oct. 26, 2017) (emphasis added).

[10] *Across*, American Heritage Dictionary 16 (2000).

[11] *Through*, American Heritage Dictionary 1803 (2000) (emphasis added).

[12] *Through*, Oxford English Dictionary 1(a), http://www.oed.com/view/Entry/201386 (last visited Oct. 26, 2017) (emphasis added).

such a way as to penetrate Madzia's property; in other words, to penetrate one side of Madzia's property and emerge at another side.

Additionally, while the lease's grant to Eclipse of "all of the oil and natural gas" is restricted by the clause "in and under the lands hereinafter described,"[13] no such clause restricts Eclipse's rights to drill for and transport oil and gas across and through Madzia's land. That is, while the lease grants Eclipse the right to only the oil and gas under Madzia's land, it does not so restrict the oil and gas that Eclipse can drill for and transport *through* Madzia's land, giving Eclipse the "rights to drill for . . . oil and gas" and the "right to transport . . . oil and gases . . . from the subject lands *and other lands*" (emphasis added). The phrase "other lands" naturally includes adjacent lands, such as the lands north of Madzia's property containing the JMW Wells. As a final emphasis of expansive contractual language, the lease grants Eclipse "the right to *possess, use and occupy* so much of said premises *as is necessary and convenient to conduct its oil and gas related activities*, including but not limited to the right to install, maintain and replace pipelines, meters, tanks, power stations, communication facilities and other structures required to produce, store and transport oil and gases and their constituents" (emphasis added).

In light of the foregoing, we agree that the lease unambiguously grants Eclipse the rights to drill for and to transport oil and gas through Madzia's property. Therefore, we hold that the lease provides Eclipse the right to drill the JMW Wells from Madzia's property.

ii. The Easement Agreement Does Not Modify the Lease

According to Madzia, even if the lease grants Eclipse the right to drill the JMW Wells, the subsequently executed easement agreement modified the lease to remove this right from

[13] This of course makes sense, as one landowner generally cannot grant the right to possess property in and under another landowner's land.

Eclipse. Madzia focuses on the limitation in the easement agreement that it "is strictly limited in application and can only be used in conjunction with drilling operations on the [Madzia Wells] and for no other purpose or purposes whatsoever." Madzia then argues that the "integration clause" makes clear that the easement agreement, with such a limitation, overrides the lease and "precludes [Eclipse] from drilling the JMW [W]ells from Madzia's [p]roperty." The integration clause states that the easement agreement "contains all of the agreements between the parties *with respect to the subject matter hereof* and no prior representations or statements, verbal or written, have been made modifying, adding to or changing the terms of the agreement" (emphasis added). Madzia also asserts that the word "enable" in the easement agreement's phrase that it "enables[s] [Eclipse] to drill a wellbore" must show that Eclipse did not previously possess this right. We disagree. Because the easement agreement does not evince a clear intent to modify the lease, and because the subject matter of the easement agreement and lease differ, we hold that the easement agreement does not modify the lease.

To modify a previously executed agreement, a subsequently executed agreement must "specifically evidence[] an intent" to do so. *Columbia Gas Transmission Corporation v. Ogle*, 172 F.3d 47, 1998 WL 879583, at *3 (6th Cir. 1998) (unpublished table decision). In *Columbia Gas*, an oil company, Columbia, entered into a lease with the Ogle family for "the right to conduct geological studies to determine an appropriate place for a gas storage reservoir on the Ogles' property" in Ohio. *Id.* at *1. Two years after signing the lease, Columbia attempted to drill the first well on the Ogles' property, only to discover that a pipeline needed to be installed. *Ibid.* The Ogles asked Columbia to build the pipeline closer to their home so they could more easily access the free gas provided to them under the lease. *Ibid.* Columbia agreed, but realized it needed a separate right-of-way agreement for the pipeline. *Ibid.* Columbia and the Ogles executed the right-of-way agreement, which contained a marginal notation, stating, "only one

above-ground well setting to be installed above-ground only." A lawsuit followed. *Id.* at *2. The Ogles argued that the notation limited Columbia to one well on their property. *Id.* at *1. Columbia countered that the notation's purpose was to limit the number of pipeline valves that would stick out above the ground. *Id.* at *2.

Applying Ohio law, we held that the right-of-way agreement did not modify the lease. *Id.* at *3. We first found that "the original lease clearly and unambiguously contains no limitation on the number of wells" and that, therefore, "the defendants must demonstrate that the right of way agreement modified the original lease." *Ibid.* We then reasoned that "[a] subsequent agreement does not modify unambiguous terms in a preceding contract unless the subsequent agreement specifically evidences an intent to do so." *Ibid.* Because we found "no such indication" that the right-of-way agreement "specifically evidence[d] an intent to modify the lease," we affirmed the district court's dismissal of the Ogles' claim. *Ibid.*

Here, we already have determined that the lease unambiguously grants Eclipse the right to drill wellbores on Madzia's property for the JMW Wells. Madzia must therefore demonstrate that the easement agreement modifies the lease. He fails to do so. The easement agreement does not specifically evidence an intent to modify the lease. By contrast, the amendment, for example, clearly reflects an intent to modify the lease, as Madzia recognizes in his citation to the amendment as an example of the proposition that "a subsequent agreement can modify an earlier agreement without entirely superseding the earlier agreement." Madzia fails to note, however, that for every modification to the lease, the amendment explicitly states "[t]he following provision is hereby added to and made a part of the Oil and Gas Lease," or something similar, and, of course, is entitled an "amendment" to the lease. The easement agreement fails to include similar language, never even references the lease, and fails to include any other language expressing a clear intent to amend the lease.

Madzia also argues that the "subject matter" of the easement agreement is the right to drill on his property and that, therefore, the easement agreement's integration clause vitiates any previous agreements related to Eclipse's general ability to drill wellbores through his property. But Madzia's argument overlooks at least two reasons that the subject matter of the easement is not the same as that of the lease.

First, the subject matter differs because the bundle of rights conveyed by the lease is much larger than that granted under the easement. The lease, by its terms, grants Eclipse broad authority to use both the surface and subsurface of Madzia's land for many purposes relating to oil and gas, not just for drilling and transporting oil and gas. Eclipse has a "vested right to the possession of the land" for all of these purposes. *See Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897); *see also Chesapeake Expl., L.L.C. v. Buell*, 45 N.E.3d 185, 189–93 (Ohio 2015) (discussing the treatment of oil-and-gas leases under Ohio law). At the same time the lease excludes the property owner from essentially any use of the land granted Eclipse. In contrast, the easement agreement allows Eclipse to use only the subsurface of Madzia's land and only for the purpose of drilling wellbores, without excluding any of the property owner's uses of the land: "It is understood and agreed that this agreement is *a subsurface easement and right-of-way only* and in no way grants or conveys any part of the underlying fee simple estate of any lands owned by the Grantor" (emphasis added). The easement agreement thus explicitly recognizes that its subject matter—a subsurface easement and right-of-way—is far more limited in its permissive and exclusionary effects than the impact of the cornucopia of rights granted to the lessee under the lease.

Second, there is a temporal distinction between the subject matter of the lease versus that of the easement agreement. The lease grants rights for only the term of the lease. The lifespan of the easement agreement, in contrast, may be far longer. When an easement has no limitation

as to time (as is the case here), the easement grants rights in perpetuity unless terminated or abandoned. *See Junction R. Co. v. Ruggles*, 7 Ohio St. 1, 6 (1857) ("The instrument itself containing no limitation as to time, the duration of the easement granted would be perpetual, unless terminated by a release or abandonment.").

In short, the subject matter of the lease differs from that of the easement agreement not only in the extent of rights that are conveyed but also in how long those rights may be enjoyed. The easement agreement's integration clause thus does not modify the lease.[14]

Accordingly, for the reasons discussed above, the easement agreement fails to modify the rights granted in the lease.

iii. Madzia's Claims for Trespass, Indemnification, and Unjust Enrichment Were Properly Dismissed

Madzia argues that we should reverse the district court's dismissal of his claims for trespass, indemnification, and unjust enrichment because the district court erred in concluding that Eclipse had the right to drill the JMW Wells. Because we affirm the district court's decision that Eclipse held the right to drill the JMW Wells, we also affirm the district court's dismissal of Madzia's trespass, indemnification, and unjust-enrichment claims.

iv. The Affidavit

The district court, at summary judgment, dismissed Madzia's claim that Eclipse breached the lease and amendment by submitting the reused affidavit. The district court provided two reasons for its dismissal: first, because Madzia himself was in breach of the lease, and second, because Eclipse did not violate the law by failing to provide a new affidavit for the JMW Wells given that ODNR's practice at the time was to accept reused affidavits.

[14] We also note that courts are not permitted to use extrinsic evidence to create an ambiguity in an otherwise unambiguous contract. *See Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 763 (6th Cir. 2008). We therefore decline to draw any inferences about the lease from the parties' use of the word "enable" in a separate subsequently executed contract—the easement agreement.

We review a district court's grant of summary judgment de novo. *Brown*, 844 F.3d at 565. "Summary judgment is appropriate where the evidence in the record, viewed in its entirety, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Ibid.* (internal quotation marks omitted). "We must assume the truth of the non-moving party's evidence and construe all inferences from that evidence in the light most favorable to the non-moving party.'" *Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

Madzia contends that Eclipse's submission of the reused affidavit violated Ohio law, and therefore constituted a breach of the amendment's legal-compliance clause, which required Eclipse to "comply with all applicable federal, state and local laws and regulations." However, the Ohio statute that Madzia cites does not state that the submission of a reused affidavit is unlawful. *See* Ohio Rev. Code §§ 1506.06(D), 1506.08. Failing to submit the proper paperwork for a permit application might result in failure to obtain a permit, but it does not amount to a positive violation of law, which is required to breach the legal-compliance clause.

In March 2014, Eclipse contacted ODNR to ask whether it could expedite its JMW Wells application, "without the [new] affidavit considering we already went through the entire process for [previous wells on the same pad]." The ODNR representative responded by stating that because Eclipse had received a permit for a previous well on the same pad, "[i]t follows that any future wells would have approval, [s]o, you are welcome to expedite any future wells on your pad." Moreover, ODNR's permitting manager testified that it was ODNR's practice to approve permit applications which relied on reused affidavits. Accordingly, in June 2014, ODNR issued permits for Eclipse to drill the JMW Wells.

However, in December 2014, Madzia contacted ODNR to complain about Eclipse's use of a reused affidavit in its JMW Wells expedited permit application. It was only at this point that

ODNR seemingly changed its interpretation of the state law and asked Eclipse to submit a new affidavit.

As soon as ODNR requested a new affidavit, Eclipse contacted Madzia to obtain it. Pursuant to the further-assurances clause in the amended lease, Madzia must "take such further action as may be reasonably necessary or convenient to carry out the provisions of this Amendment and the Oil and Gas Lease." Madzia concedes that he refused to sign the affidavit for the JMW Wells. Because we held that Eclipse was entitled to drill the JMW Wells, and because an affidavit was necessary for expedited review by ODNR, the affidavit would have been "convenient" for Eclipse to carry out the provisions of the lease and amendment.

Accordingly, Madzia's refusal to sign the affidavit for the JMW Wells constituted a breach of the lease, and he is not entitled to the benefit of his breach. In analyzing an alleged contractual breach under Ohio law, we have explained that it is "axiomatic that a party cannot benefit from its own breach." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 817 (6th Cir. 1999) (citing *Market Street Assoc. Ltd. P'ship v. Frey*, 941 F.2d 588, 592 (7th Cir. 1991) (holding that "a contracting party cannot be allowed to use his own breach to gain an advantage by impairing the rights that the contract confers on the other party"); *Morgan v. Crowley*, 85 S.E.2d 40, 49 (Ga. Ct. App. 1954) ("A party cannot take advantage of his own default in the performance of a contract. The provision of the contract sought to be invoked by the defendant, insofar as it related to a breach by him, was for the benefit of the plaintiff, and he cannot be heard to plead his own breach as a defense.")). We therefore affirm the district court's grant of summary judgment in favor of Eclipse dismissing Madzia's claim that Eclipse breached the lease and amendment by failing to comply with all applicable laws.

v. Eclipse Did Not Act in Bad Faith

Finally, Madzia argues that the district court erred in holding that Eclipse did not breach the duty of good faith inherent in the lease, amendment, and easement agreement when Eclipse "delay[ed] the fracking of the Madzia [W]ells to retaliate against Madzia."[15] The district court granted Eclipse's motion for summary judgment on Madzia's bad-faith claims. We therefore review de novo, *Brown*, 844 F.3d at 565, and we affirm.

Ohio law "imposes an implied duty of good faith on parties to any contract." *Wendy's Int'l, Inc. v. Saverin*, 337 F. App'x 471, 476 (6th Cir. 2009). The breach of good faith is not a standalone action, however, unless the contract is silent on the relevant issue. *See id.* at 476–77; *Savedoff*, 524 F.3d at 764. In other words, "[i]f the contract is silent, as opposed to ambiguous, with respect to a particular matter . . . '[t]he parties to a contract are required to use good faith to fill the gap . . . .'" *Savedoff*, 524 F.3d at 764 (second alteration in original) (citations omitted) (quoting *Burlington Res. Oil & Gas Co. v. Cox*, 729 N.E.2d 398, 401 (1999)).

According to the lease, Eclipse "may drill a well or wells upon said premises at any time . . . or may decline to drill a first or subsequent well or wells." The lease also contains a provision entitled "Option to Drill" that provides:

> It is agreed that the rentals or royalties on any well, or wells, paid and to be paid as herein provided are and shall be accepted by Lessor as adequate and full consideration to render it optional with Lessee whether or not it shall drill a well, additional wells or wells to offset producing wells on adjoining or adjacent premises.

Eclipse's option to drill is dispositive here. The terms unambiguously represent an agreement between Madzia and Eclipse that the royalties Madzia is due to receive under the lease are sufficient to allow Eclipse the freedom to choose whether to drill a well. Drilling, in the oil and

[15] On appeal, Madzia does not pursue his bad-faith claims in his second amended counterclaim related to misleading ODNR and to pooling.

gas context, is the "[a]ct of boring a hole through which oil and/or gas may be produced if encountered in commercial quantities." Williams & Meyers, Oil and Gas Law 8-D (2017). Fracking involves "[t]he forcing of fluids under pressure *into the well* so as to cause fracture of the target stratum." *Id.* at 8-H (emphasis added). One cannot frack *a well* without having drilled the well into existence first. Therefore, the contractual freedom to drill or not drill, and thus delay any payments that Madzia might receive from a decision to not drill, inherently includes the option not to frack a well. In other words, it makes little sense to read into the lease a good-faith requirement to frack a well after drilling has begun when the lease explicitly allows Eclipse to forgo drilling entirely. Therefore, the lease is not silent on the issue raised by Madzia's bad-faith claim here, so Eclipse cannot breach the implied duty of good faith.

At any rate, even if the lease were silent on this issue, Eclipse did not act in bad faith. Madzia attempts to argue that Eclipse's efforts to delay fracking the Madzia Wells are *per se* proof of bad faith, as he offers no other explanation for why such a delay constitutes bad faith other than that Eclipse must be doing it in bad faith. Madzia presents this argument despite negotiating with Eclipse and granting Eclipse the contractual freedom to decline to conduct any drilling, let alone fracking, as previously discussed.

Eclipse also has provided ample explanation, via unrebutted affidavits and depositions, for its delay in fracking the Madzia Wells. For example, Eclipse had concerns about underground pressures and a marked decline in commodity prices, which influenced its decisions regarding the chronology of drilling and fracking certain wells. Moreover, Eclipse's decision to shut down its operations applied "field-wide," not just to operations on the Madzia Pad. The decision to shut down also financially harmed Eclipse, causing Eclipse to pay Halliburton approximately $700,000 as a penalty for not having the required amount of ongoing operations on the Madzia Wells and the JMW Wells.

Madzia's argument, in contrast, relies on mere speculation. He simply argues in a conclusory manner that Eclipse delayed fracking the Madzia Wells in bad faith. At Madzia's deposition, when asked for any evidence that he had to support his assertion of bad faith, he replied "[i]t's my belief."

We therefore affirm the district court's holding that Eclipse did not breach the implied covenant of good faith and fair dealing in the lease, amendment, and easement agreement.

IV

In light of the foregoing, we **AFFIRM**.