NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

DALE NASH, a single person,

Plaintiff/Appellee,

vs.

DCP OPERATING COMPANY, LP, an Oklahoma foreign limited partnership, formerly known as DCP Midstream, LP,

Defendant/Appellant.

Case No. 120,511

APPEAL FROM THE DISTRICT COURT OF
STEPHENS COUNTY, OKLAHOMA

HONORABLE KEN GRAHAM, DISTRICT JUDGE

AFFIRMED

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Trae Gray
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For Plaintiff/Appellee

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For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

DCP Operating Company appeals a decision of the district court refusing to order arbitration of Dale Nash's claims that DCP damaged his property while apparently operating or maintaining a pipeline. On review, we find that any arbitration agreement was confined to operations within the pipeline easement,

that DCP failed to allege that any of the damages were inside the easement, and the record indicates the damages were outside of the easement. Thus, we affirm.

BACKGROUND

In 1925, non-parties Luther and Lola Gentry entered into a "right of way agreement" granting non-parties Hall and Drisco Inc.

> the right of way to lay, maintain, operate, relay and remove pipe for line one rod wide on over and across the lands of the grantors, hereinafter described, for the purpose of transportation of Natural Gas, and with the right of ingress and egress to and from the same ....

The easement contained the following provision:

> The grantee shall pay all damages to fences, crops and the lands which, may be suffered by reason of laying, maintaining, operating or altering of said Pipe Line. If such damages are not mutually agreed upon between the parties hereto, then such damages shall be ascertained and determined by three disinterested persons one of whom shall be selected by the grantors, one by the grantee, and the third by the two so selected by the parties hereto. The award of any two of such persons so selected shall be binding on the parties hereto and shall be final and conclusive.

"[T]he lands" are described in the easement as encompassing all of the SW/4 of Section 4, Township 2 North, Range 8 West, in Stephens County. Nash now owns the surface of approximately seventy acres, all contained within the SW/4. Lastly, the easement states that it "shall bind and operate in favor of the respective parties hereto, their heirs, successors and assigns."

In May 2018, Nash filed a petition against DCP Operating, a successor to Hall and Drisco, alleging the following. In June 2016, a leak from DCP's pipeline

discharged oil and other harmful pollutants onto a neighbor's property.[1] DCP apparently attempted to remediate the problem by washing the pollution onto Nash's property and into a creek that flows through Nash's property. Nash further alleges that DCP contaminated the property with saltwater pollution, destroyed trees on Nash's land and discarded them into a creek, and made significant changes to the dirt around the creek which caused extensive erosion on Nash's property.

Nash further alleged that substantially the same pattern of behavior occurred in October 2017, and further that DCP had dug a trench on Nash's property to remove contaminated soil, and then, without permission, took soil from other parts of Nash's property to fill in the trench, causing further erosion. Nash's petition states eight theories of relief: trespass, nuisance, negligence, negligence *per se*, unjust enrichment, damage to real property, wrongful injury to timber, and a claim for punitive damages.

DCP answered in July 2018 with a general denial, which included an affirmative defense of an enforceable arbitration agreement. In October 2021, after three years of inactivity, DCP filed a motion to compel arbitration, arguing that the easement clause for settling damages constituted an agreement to settle Nash's claims by binding arbitration. The court held a hearing on this question

[1] We note that the original easement provides only for a pipeline "for the transportation of Natural Gas." Why a gas pipeline was leaking significant amounts of oil is not explained or addressed in the record.

in December 2021. No evidence was offered by either party. In May 2022, it issued an order denying arbitration from which DCP now appeals.

STANDARD OF REVIEW

A determination of the existence of a valid enforceable agreement to arbitrate is a question of law to be reviewed by a *de novo* standard where the parties do not dispute the evidence, but dispute only the conclusion to be drawn from such evidence. *Signature Leasing, LLC v. Buyer's Grp., LLC*, 2020 OK 50, ¶ 2, 466 P.3d 544, 545.

ANALYSIS

The original easement agreement between the parties provided that a certain class of disputes was to be settled by the decision of three chosen disinterested persons. Although this process bears a strong resemblance to other traditional non-arbitral procedures for settling property disputes, we will assume for the purposes of this opinion that it constitutes an early form of arbitration agreement that is binding on the present parties.[2]

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[2] We note another possible interpretation. At the time this agreement was made, easements in gross (as opposed to easements appurtenant), were still traditionally viewed as personal to the holder only. *See The Law of Easements & Licenses in Land*, Jon W. Bruce, James W. Ely, Jr., and Edward T. Brading, § 9:4–*Transfer of easements in gross* (March 2024 update). The common law initially adopted the position that such servitudes did not transfer to new owners. "The widespread use of easements in gross for such commercial activities as telephones, pipelines, transmission lines, and railroads caused judges to reconsider the rule prohibiting transfer" as applied to commercial easements. *Id.* § 9.5.

The cited treatise notes that this change in the status of "commercial" easements in gross began some ten to fifteen years after the agreement in this case was signed, citing *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938) as the case beginning the movement towards this view. *Id.* The same process is noted by *Weber v. Dockray*, 64 A.2d 631, 633 (N.J. Ch. Div. 1949):

Even assuming the parties intended to make some arbitration rights perpetual, however, a question is presented as to the scope of the agreement. Examining the face of the agreement as it was made in 1925, it initially contemplates two payments: a payment of forty dollars to secure the easement, plus "other valuable consideration." The evident "other consideration" was a payment to compensate for damages to the lands occasioned by Hall and Drisco laying the pipeline. These damages were to be agreed upon after the pipeline was installed and decided by a tribunal of three disinterested parties if agreement could not be reached.

There are obvious reasons for this arrangement. The Gentrys evidently owned the entire southeast quarter of section four and, although the width of the easement is defined in the agreement, neither the route nor the length of the pipeline is indicated, except that it will run "across the lands of the grantors."

> It is quite true that the common law refused protection to easements in gross and that a large number of cases in this country hold that the right is not transferable. In recent years, however, there has been a growing tendency to recognize the right to transfer easements in gross and to protect them as assignable interests in real estate

The Restatement (First) of Property § 489 cites case-by-case state law for the modern view that easements of a commercial character are alienable, but the earliest case cited is from 1945, and the entries for many states are within the last 30 years. This reinforces the view of the above cited treatise, that this change was recognized incrementally over a period of approximately eighty years. Likewise, although *Beattie v. State ex rel. Grand River Dam Auth.*, 2002 OK 3, ¶ 9, 41 P.3d 377, 381, states that "Oklahoma has long held that rights under a contract are presumed to be assignable, unless the parties expressly provide otherwise," it cites only a case from 1968, *Earth Products Co. v. Oklahoma City,* 1968 OK 39, 441 P.2d 399, 404, and the Restatement (Second) of Contracts, first published in 1981 for examples of this principle.

As such, in 1925, the language at issue here may have only been intended to ensure that any successor to Hall and Drisco could continue its right to use the easement at all, rather than confer a perpetual right to arbitrate any and all future claims for damages.

The parties could not, therefore, contemplate damages with any greater specificity than knowing that they would occur *somewhere* within the southeast quarter. Exactly what crops, fences, or other property would be damaged would have remained unknown until the pipe was actually laid.

As DCP interprets the agreement, however, it grants a right of way to damage land for pipeline purposes anywhere within a 160-acre area. As the company sees it, it was not merely an initial right that was effective until the actual position of the one rod[3] easement was known, but is a right attaching to the entire 160 acres that binds all successors on both sides in perpetuity. Thus, DCP argues in effect that it may damage any part of the southeast quarter and arbitrate compensation if it chooses to do so. We cannot agree with this interpretation.

First, the interpretation raises troubling questions as it contemplates a perpetual right to damage land *anywhere* in the southeast quarter for pipeline purposes, even though the pipeline runs within a very slim corridor. This would make little sense after the route of the easement was known and the pipeline was complete. It further renders the specification of a one-rod easement a nullity if it allows not only use of the easement, plus necessary ingress and egress, but also the perpetual use of the entire 160-acres for the purposes of maintaining, operating, relaying, or removing pipe. The easement effectively becomes one quarter of a mile wide instead of sixteen-and-a-half feet.

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[3] One rod is equal to sixteen feet, six inches.

DCP's interpretation is more troublesome if we also consider that the entire southeast quarter has not remained in common ownership. Depending on how it is split, owners that do not have a pipeline anywhere near their land could still find their land subject to entry and damage "for pipeline purposes."

Case law indicates a more sensible interpretation. In cases where an easement is not defined, and initially exists only as a "right of way" across particular lands, courts have held that the width and route of the easement become fixed upon its physical usage. In *Lindhorst v. Wright*, this Court cited the Kansas case of *Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*, 561 P.2d 818 (Kan. 1977), and found it "persuasive and consistent with Oklahoma law," and adopted its reasoning. *Lindhorst v. Wright*, 1980 OK CIV APP 42, ¶ 9, 616 P.2d 450, 453. "[I]f however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress." *Id.* (quoting *Aladdin*, 561 P.2d at 822). *Lindhorst* further cited 28 C.J.S. Easements § 75, p. 753 for the principle that:

> If the grant or reservation is specific in its terms, it is decisive of the limits of the easement. On the other hand, where the easement is not specifically defined, it need only be such as is reasonably necessary and convenient for the purpose for which it was created.

A similar situation was noted again in *Baker v. Conoco Pipeline Co.*, 280 F. Supp.2d 1285, 1308 (N.D. Okla. 2003). In *Baker,* defendant Conoco cleared trees and vegetation for fifty feet around an easement located in Craig County. Plaintiff argued that the easement was only thirty-feet wide, and Conoco had no right to

clear trees outside that easement. Conoco argued that the description of the easement (and the accompanying arbitration agreement) included the entire property,[4] and hence it had a right under the easement to damage the entire property for pipeline purposes and arbitrate damages, the actual width and position of the easement being irrelevant. *Id.* at 1305-06.

Baker found a "dispute over the width of the easement or whether the Defendant had a right to remove trees outside the width of that easement," and remanded. Although the *Baker* court did not cite 60 O.S. § 54, the latter inquiry clearly should have been made pursuant to that statute. It states: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."

The inquiry here is somewhat simpler than these cases because, although the route of the easement is not defined in the contract, the width is defined, and we find no record evidence that the "actual use" of the easement extended beyond this width in the last ninety years. As such, the 1925 agreement initially contemplated damages to "the lands" in total because the route of the pipeline across the southeast quarter of section four was not defined, and Hall and Drisco initially had an easement to put a pipeline anywhere in the southeast quarter.

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[4] The legal description for "the right-of-way to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace two lines of pipe" in *Baker* provides as follows:

> North West Quarter (NW1/4) of North East Quarter (NE1/4) of South West Quarter (SW1/4) of Section Thirty (30) Township Twenty-four (24) North, Range Twenty-one (21) East, being the same land acquired and more fully described as per deed recorded in Record Conveyance Book 79 at page 307 of the records of Craig County, Oklahoma.

Doc. No. 21, Ex. A, easement.

Once the pipeline route was established, however, the servitude created by the grant extends only to the actual use to which it is put, *i.e.*, the one rod width of the easement in place. As such, we find that the agreement to arbitrate is confined to damage caused by maintaining, operating, relaying and removing pipe within the easement, not damage occurring anywhere within the entire southeast quarter of section four.

A party seeking to compel arbitration "must present a statement of law and facts showing an enforceable agreement to arbitrate the issues present in the petition." *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 16, 138 P.3d 826, 830; *Harris v. David Stanley Chevrolet, Inc.*, 2012 OK 9, ¶ 6, 273 P.3d 877, 879. We find no record here that DCP proved that the subject damages occurred within the one rod width of the easement. Indeed, DCP did not allege this in its motion, did not attach any evidence to its motion, and called no witnesses at the hearing. The company simply relied on the argument we reject here, that the dispute resolution language of the easement applies to the entirety of the southwest quarter and not the easement itself once the location of the easement was established. By contrast, Nash's petition alleges damages occurring throughout his seventy acres and in no way limits his claims to the confines of the easement. Indeed, Nash does not reference the easement in his petition, and it is not clear he is claiming any damages at all within the confines of the sixteen-and-one-half-foot easement. DCP was the party with the burden of showing an agreement to arbitrate the issues present in the petition. Because it failed to do so, we affirm.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

April 8, 2024