Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-18-00128-CV

EVANS RESOURCES, L.P.; EVANS I, LTD.; EVANS I DEVELOPMENT, LTD.; MICHAEL SCOTT EVANS, INDEPENDENT CO-EXECUTOR AND ROSE ELAINE EVANS SHOCK, INDEPENDENT CO-EXECUTRIX OF THE ESTATE OF GLORIA A. EVANS, DECEASED; AND JONATHAN J. EVANS, Appellants

V.

DIAMONDBACK E&P, LLC AND DIAMONDBACK O&G, LLC, Appellees

On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CV54404

M E M O R A N D U M O P I N I O N

In a "Paid Up Oil and Gas Lease," Appellant Evans Resources, L.P. granted Bluestem Energy, LP the right to produce oil and gas from 651 acres in Midland

County (the Land). In a companion Surface Agreement, Appellants Evans I, Ltd.; Evans I Development, Ltd.; Michael Scott Evans, independent co-executor and Rose Elaine Evans Shock, independent co-executrix of the Estate of Gloria A. Evans, deceased;[1] and Jonathan J. Evans granted Bluestem the right to use the surface of the Land in its operations. Bluestem subsequently assigned its rights under both contracts to Appellee Diamondback E&P, LLC. Appellee Diamondback O&G, LLC is an affiliate of Diamondback E&P. (Appellees will be referred to collectively as Diamondback).

Appellants sued Diamondback for breach of contract after Diamondback failed to make payments that Appellants claimed were owed under the parties' agreement. Diamondback filed a motion for summary judgment on the ground that the parties' contract did not require Diamondback to pay the amounts demanded by Appellants. The trial court granted summary judgment in favor of Diamondback.

In their first four issues, Appellants assert that Diamondback failed to meet its burden to establish that it was entitled to judgment as a matter of law and that the trial court erred when it construed the parties' contract to contain a condition precedent, when it failed to harmonize all provisions of the parties' contract, and when it found a condition precedent in the contract when there was a reasonable interpretation of the contract that avoided a forfeiture by Appellants. In their fifth and sixth issues, Appellants contend that summary judgment was improper because there are genuine issues of material fact related to Diamondback's payment obligations under the contract and to the parties' intent when they negotiated the

[1]Gloria R. A. Evans, an original plaintiff in this suit, died on January 4, 2018. The trial court dismissed Gloria as a plaintiff; named Michael Scott Evans, independent co-executor and Rose Elaine Evans Shock, independent co-executrix of the Estate of Gloria A. Evans, deceased as additional plaintiffs; and ordered that this case proceed in their names and the names of the other plaintiffs. *See* TEX. R. CIV. P. 151.

contract. In their final issue, Appellants argue that the trial court erred when it refused to enforce a contractual lien on Diamondback's leasehold interest. We affirm the trial court's order.

Background

In 2010, Evans Resources owned the mineral interest estate, and Evans I, Evans I Development, Gloria, and Jonathan (collectively, the Owners) owned the surface estate of the Land. A portion of the surface had been used for a residential development, for Gloria's and Jonathan's houses, and for vineyards.

On November 3, 2010, Evans Resources signed a "Paid Up Oil and Gas Lease" in which it conveyed the right to produce oil and gas from the Land to Bluestem. Bluestem agreed to drill three wells on the Land within eighteen months and, if those wells were "commercial wells," to drill four additional wells. Bluestem also agreed that its right to use the surface of the Land was limited to the rights expressly granted in a November 3, 2010 Surface Agreement between Bluestem and the Owners. The Surface Agreement (1) limited Bluestem's operations to a section of the Land that was not occupied by the residential development or by Gloria's and Jonathan's houses and (2) required Bluestem to obtain the Owners' approval of Bluestem's operations on the Land and to comply with certain specifications for those operations.

In the Surface Agreement, Bluestem and the Owners acknowledged that they had agreed to the locations of the first seven wells to be drilled on the Land. "[P]rior to commencing drilling operations on each of [the] seven (7) locations," Bluestem was required to pay the Owners "Location Damages" of $20,000. The Location Damages were deemed to be "full non-refundable payment for the right to use the Land for drilling locations, roads to said locations, flowlines, buried electric line, heater treaters, [and] tank batteries" used in connection with the well. For any wells

drilled after the first seven, Bluestem was required to obtain the Owners' consent as to the location of the wells "prior to their commencement" and to pay the Owners "in advance" Location Damages of $20,000 for each well.

Bluestem and the Owners also agreed that, except for Location Damages, damages for any other operations on the Land would be "payable" in accordance with a schedule attached to the Surface Agreement. The damages set out in the schedule related to physical damage to the Land from power poles and anchors, a right of way, roads, leaks, fire, or pipelines. Bluestem and the Owners agreed as to the amount of damages that Bluestem would be required to pay for each activity.

"Each payment" that the Owners were entitled to receive under the Surface Agreement was "due and payable" within thirty days after Bluestem "first utilize[d] any of said Land for a purpose requiring such a payment to Owners or because of damage to Owners' land." The Owners were granted a lien on Bluestem's interest in the Land if Bluestem failed to make a required payment within thirty days of its receipt of the Owners' "statement."

On May 16, 2014, Evans Resources and Bluestem signed an amendment of the Lease to allow Bluestem to pool and combine the Land with other property "for the drilling and producing of extended length horizontal wells." That same day, Bluestem and the Owners signed a Third Amendment of the Surface Agreement[2] in which the Owners granted Bluestem the right to drill and produce "Offset Section Wells" from four "Approved Horizontal Well Pads or AHWPs" on the Land. Bluestem and the Owners acknowledged that they had agreed to the "general

[2]The first two amendments to the Surface Agreement related to the extension of the date by which Bluestem was required to bury pipelines and electrical lines on the Land and to the construction of a road on the Land and are not relevant to this appeal.

location" of the four AHWPs "to be constructed on the Land" and would agree on the "exact configuration" of each six-acre AHWP on or before May 16, 2015.

"[F]or each AHWP constructed on the Land," Bluestem was required to pay the Owners "in advance" Location Damages of $500,000. The Location Damages were "for the right to use the Land for drilling and other operation locations, roads to said locations, flowlines, buried electric lines, heater treaters, tank batteries and pits, and any other operations conducted in connection with" an AHWP. The parties specifically agreed that:

> Notwithstanding anything herein to the contrary, the $500,000.00 per AHWP payment shall be full and complete satisfaction for any and all Location Damages related to any well drilled (or any other operation conducted) from such AHWP -- there shall be no additional Location Damages due for any individual well drilled (or other operation) from an AHWP.

The Owners also granted Bluestem the right to expand the central tank battery facility on the Land by one acre to accommodate "additional tankage, production handling and other equipment." Bluestem was required "to pay an aggregate sum of Fifty Thousand Dollars ($50,000) to the Owners as Location Damages for the expansion."

The parties agreed that the Surface Agreement remained in full force and effect unless it was specifically modified or amended by the Third Amendment. However, in the event of a conflict between the Third Amendment and the Surface Agreement, "the terms, conditions, obligations, covenants and requirements" of the Third Amendment would prevail.

Bluestem decided to sell its interest in the Land to Diamondback and, as required by the Lease and the Surface Agreement, requested that Appellants approve the assignment. Appellants initially imposed a number of conditions for their consent, including that Location Damages for two AHWPs be paid by January 1,

2015. According to Jonathan, the conditions were "in part to make sure both Bluestem and Diamondback understood that we were to be paid for the purchase of the rights to the AHWPs, whether drilling proceeded or not, and to add more specific due dates for payment than were specified in the original Surface Agreement." After Bluestem and Diamondback assured Appellants that Diamondback would immediately start the process to drill horizontal wells from the AHWPs on the Land, Appellants consented to the assignment to Diamondback "without conditioning [their] consent on more specific payment due dates before the end of 2014 for two of the four AHWPs."

In May 2015, Diamondback surveyed the locations for the four AHWPs and physically staked the dimensions of three of the AHWPs. Diamondback and the Owners then signed a Configuration Agreement in which they agreed to the location of the four AHWPs. Diamondback has not constructed any of the AHWPs and has refused to pay Location Damages of $500,000 for each AHWP.

Appellants sued Diamondback; requested a declaration that Location Damages for each AHWP were due and owing; asserted claims for breach of contract based on a number of acts by Diamondback, including its refusal to pay AHWP Location Damages; and requested the judicial foreclosure of a contractual lien on Diamondback's interest in the Land. Diamondback filed a motion for partial summary judgment on Appellants' request for declaratory relief, claim for breach of contract claim based on the failure to pay AHWP Location Damages, and request for judicial foreclosure of a contractual lien. Diamondback asserted that it was entitled to summary judgment because it did not owe Location Damages for any AHWP that had not been constructed and, because it did not owe Location Damages, the request for foreclosure failed as a matter of law.

Appellants responded that the issue is whether the Owners are entitled to be paid for the right to use the Land for drilling and operations conducted in connection with an AHWP. Appellants argued that the Third Amendment did not have a provision that governed when AHWP Location Damages would be paid, but the Surface Agreement provided that the payments were due within thirty days of when the Land was utilized or damaged. Appellants asserted that Diamondback utilized the Land when the locations for the AHWPs were surveyed and marked and that the designation of the exact configuration of the four AHWPs reduced the value of the Land. Appellants also argued that the trial court could consider evidence of the negotiation of the Third Amendment to ascertain the true intent of the parties.

The trial court granted Diamondback's motion for partial summary judgment. At the parties' joint request, the trial court severed Appellants' claim for breach of contract based on Diamondback's failure to pay AHWP Location Damages from Appellants' remaining claims, and the summary judgment as to the breach of contract claim became final. Appellants filed this appeal from the severed action.

Analysis

We review a trial court's grant of summary judgment de novo. *Hillis v. McCall*, No. 18-1065, 2020 WL 1233348, at *2 (Tex. Mar. 13, 2020). A traditional summary judgment is proper only if the movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.*; *see also* TEX. R. CIV. P. 166a(c). In our review of a trial court's grant of summary judgment, "we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Hillis*, 2020 WL 1233348, at *2 (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

Diamondback moved for summary judgment on Appellants' breach of contract claim on the sole ground that the Surface Agreement and the Third Amendment did not require Diamondback to pay AHWP Location Damages until an AHWP was constructed. Appellants advanced a different interpretation of the contractual provisions, asserted that Diamondback was required to pay AHWP Location Damages under the Surface Agreement and Third Amendment, and urged the trial court to consider extrinsic evidence of the parties' negotiations when it ascertained the parties' intent. When it granted summary judgment in favor of Diamondback, the trial court necessarily agreed with Diamondback's interpretation of the parties' agreement.

In their first four issues, Appellants argue that the trial court erred when it granted summary judgment because Diamondback failed to meet its burden to establish that it was entitled to judgment as a matter of law and because it improperly construed the parties' contract to contain a condition precedent, failed to harmonize all provisions of the parties' contract, and improperly found a condition precedent in the contract when there was a reasonable interpretation of the contract that avoided a forfeiture by Appellants. These four issues require that we construe the parties' agreement as to the payment of Location Damages.

"[P]erhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract." *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 740 (Tex. 2020). "[A]bsent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019). Therefore, when we construe a contract, our primary objective "is to give effect to the written expression of the parties' intent." *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019).

To ascertain the parties' intent, we look to the language of the parties' agreement. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). "Objective manifestations of intent control, not 'what one side or the other alleges they intended to say but did not.'" *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763–64 (Tex. 2018) (footnote omitted) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)).

We "presume parties intend what the words of their contract say" and interpret the language of a contract according to its "plain, ordinary, and generally accepted meaning" unless the contract directs otherwise. *Id.* at 764 (first quoting *Gilbert Tex. Constr.*, 327 S.W.3d at 126; then quoting *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)). Because "[c]ontext is important," we consider the entire writing in an effort to harmonize and give effect to all of the provisions of the contract so that none are rendered meaningless. *Exxon Mobil Corp. v. Ins. Co. of State*, 568 S.W.3d 650, 657 (Tex. 2019). No one phrase, sentence, or section of the agreement should be isolated from its setting and considered apart from the other contractual provisions. *Pathfinder Oil & Gas*, 574 S.W.3d at 889.

We may also consider the objectively determinable facts and circumstances surrounding a contract's execution to aid in our interpretation of the contract's language. *URI*, 543 S.W.3d at 757–58, 764. But the surrounding facts and circumstances cannot be used to "augment, alter, or contradict the terms of an unambiguous contract." *Id.* at 758. We may neither rewrite the parties' contract nor add to or subtract from the contract's language. *Id.* at 770 (citing *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 242 (Tex. 2016)).

"We construe contracts under a de novo standard of review." *Barrow-Shaver Res.*, 590 S.W.3d at 479. If a contract's language "can be given a certain or definite legal meaning or interpretation, then the contract is not ambiguous, and we will

construe it as a matter of law." *Id.* However, if there are two or more reasonable interpretations of the contract, the contract is ambiguous and there is a fact issue as to the parties' intent. *Id.* Summary judgment is not the proper vehicle to resolve disputes about an ambiguous contract. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015).

We turn first to whether the parties' agreement, as reflected in the Surface Agreement, the Third Amendment, the Lease, and the amendment to the Lease, unambiguously sets out when Location Damages are due and payable.[3] In the Surface Agreement, Diamondback and the Owners acknowledged that they had agreed to the locations at which seven vertical wells would be drilled on the Land. Diamondback was required to obtain the Owners' consent for the location of any additional wells. Diamondback was not required to pay Location Damages when the Surface Agreement was signed or when the Owners consented to the location of a well. Rather, Diamondback was required to pay Location Damages "prior to commencing drilling operations" on each of the first seven wells and "in advance" on each subsequent well.

The Surface Agreement did not define "commencement" or "commencing of drilling operations." However, the Lease[4] provided that "commence a well," "commencement of a well," "commence actual drilling operations," and "commencement of actual drilling operations" were deemed to have occurred "at

[3]As noted above, these documents were signed by Bluestem and Appellants. However, because Bluestem assigned its rights under these documents to Diamondback, we will refer to Diamondback in our discussion of the parties' agreement.

[4]The Lease was signed on the same day as the Surface Agreement and specifically provided that the Surface Agreement governed Diamondback's rights under the Lease to use the surface of the Land for the purpose of developing oil and gas. "It is 'well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent.'" *City of Houston v. Williams*, 353 S.W.3d 128, 137 (Tex. 2011) (quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000)). Therefore, we may look to the Lease to ascertain the parties' agreement. *See Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 727 (Tex. 2020); *Williams*, 353 S.W.3d at 137.

such time as there has been erected on the leased premises at the location for the well, a derrick, a rig and machinery capable of drilling to a depth of 10,000 feet below the surface, the well has been 'spudded-in' and the machinery for drilling is rotating under power."

When we harmonize all provisions of the Surface Agreement, it is clear that the parties unambiguously agreed that (1) Diamondback was required to pay Location Damages for a vertical well "prior to commencing drilling operations" or "in advance," (2) drilling operations were commenced through the erection of equipment capable of drilling the well, (3) the "purpose requiring payment" of Location Damages was the commencement of drilling operations, and (4) Location Damages were "due and payable" within thirty days of when Diamondback "first utilize[d]" the Land to commence drilling operations.

In the Third Amendment, the parties expanded the definition of damages to include Location Damages for the four AHWPs and for the expanded tank battery facility. The parties subjected these two categories of Location Damages to separate payment provisions. As to the expanded tank battery facility, Diamondback was simply required to pay $50,000 for Location Damages. The parties did not link this payment to any activity by Diamondback on the Land.

However, the parties treated Location Damages for the AHWPs in a similar manner as Location Damages for a vertical well. Diamondback and the Owners agreed on the general location for the four AHWPs "to be constructed on the Land." They also agreed that each AHWP would be limited to six acres in size and that the "exact configuration" of the AHWPs would "be mutually agreed upon" by the Owners and Diamondback on or before May 16, 2015. Diamondback was not required to pay Location Damages for each AHWP when the Third Amendment was executed or when the parties agreed on the exact configuration of the AHWPs.

Rather, "for each AHWP constructed on the Land," Diamondback was required to pay, "in advance," Location Damages of $500,000. Therefore, the "purpose requiring payment" of AHWP Location Damages was the "construction" of an AHWP. AHWP Location Damages were "due and payable" within thirty days of when Diamondback first utilized the land for the construction of an AHWP.

The term "constructed" is not defined in the Surface Agreement, the Third Amendment, the Lease, or the amendment to the Lease. When a contract does not define a term, we may consult dictionaries to discern the common meaning of the term. *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011). The common, ordinary meaning of the term "construct" is "to make or form by combining or arranging parts or elements." *Construct*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004). Therefore, Diamondback was not required to pay Location Damages for an AHWP until Diamondback moved the necessary parts or elements of the AHWP onto the Land. This interpretation of the parties' agreement is consistent with the parties' expressed intent that AHWP Location Damages compensated the Owners for any damage "related to any well drilled (or any other operation conducted from)" the AHWP. An AHWP would have to be constructed before there could be any damage to the Land from a well drilled from the AHWP or from any operation conducted from the AHWP.

Appellants contend that an interpretation of the Surface Agreement and the Third Amendment that requires that Diamondback begin construction of an AHWP before it must pay Location Damages improperly creates a condition precedent and results in a forfeiture of Appellants' rights under the contract. "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) (citing *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex.

1976)); *see also In re Estate of Tatum*, 580 S.W.3d 489, 493 (Tex. App.—Eastland 2019, pet. denied). It may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. *Dillon v. Lintz*, 582 S.W.2d 394, 395 (Tex. 1979). In contrast, a covenant is "an agreement to act or refrain from acting in a certain way." *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010).

We determine whether a contractual provision is a condition precedent or a covenant through an examination of the entire contract to determine the parties' intent. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990); *see also Solar Applications*, 327 S.W.3d at 109. "Our goal is to determine whether the parties intended that the right or responsibility at issue be conditional." *Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 136 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

When we conduct our review, we consider that, "[b]ecause of their harshness in operation, conditions are not favorites of the law." *Criswell*, 792 S.W.2d at 948. "[F]orfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible." *Id.*; *see also Great W. Drilling, Ltd. v. Pathfinder Oil & Gas, Inc.*, No. 11-14-00206-CV, 2020 WL 373096, at *8 (Tex. App.—Eastland Jan. 23, 2020, pet. filed) (mem. op.). "Thus, if the language of the contract is susceptible to a non-condition precedent interpretation, we accept that construction and construe the language as a mere covenant." *Arbor Windsor Court*, 463 S.W.3d at 136–37; *see also Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987) ("Courts will not declare a forfeiture unless they are compelled to do so by language which can be construed in no other way.").

Contract terms that use conditional language such as "if," "provided that," "on condition that," or similar conditional phrases reflect the parties' intent to create a

condition precedent. *Criswell*, 792 S.W.2d at 948. The absence of such language is at least some indication that a provision should be construed as a covenant. *Id.* ("While there is no requirement that such phrases be utilized, their absence is probative of the parties[']intention that a promise be made, rather than a condition imposed.").

The Third Amendment does not use conditional language that would indicate that the parties intended to create a condition precedent. Rather, the parties agreed that Diamondback was required to pay Location Damages for an AHWP in advance of the construction of the AHWP. Further, the parties' agreement as to when Diamondback was required to pay AHWP Location Damages does not result in a forfeiture of the Owners' rights under the contract. Instead, as the parties agreed, the Owners are entitled to receive Location Damages in advance of Diamondback's construction of an AHWP on the Land. The Location Damages are "due and payable" within thirty days of when Diamondback first utilizes the Land for the construction of the AHWP.

We hold that the trial court did not err when it determined that Diamondback was not required to pay Location Damages for an AHWP until it utilized the Land for the purpose of the construction of the AHWP. We overrule Appellants' first four issues.

In their fifth issue, Appellants argue that summary judgment was improper because there is a genuine issue of material fact as to whether Diamondback (1) utilized the Land when it surveyed and marked the locations for the AHWPs or (2) damaged the Land because the designation of the exact configuration of the AHWPs reduced the value of the Land.

As to Appellants' second argument, the Third Amendment provided that the Location Damages compensated the Owners for the use of the Land for drilling and

related operations. The parties specifically agreed that "there shall be no additional Location Damages due for any individual well drilled (or other operation) from an AHWP." Although the Owners agreed to be fully compensated for damage to the Land from an AHWP by the $500,000 in Location Damages, they did not require Diamondback to pay Location Damages when the Third Amendment was signed or when the parties agreed on the exact configuration of the AHWPs. Rather, as set out above, the parties agreed that Diamondback would pay Location Damages in advance of when it began construction of an AHWP on the Land. The Owners' assertion that Diamondback was required to pay Location Damages at the time that the exact configuration of the AHWPs was surveyed and marked reads a provision into the parties' agreement that its unambiguous language does not support. *See Murphy Expl. & Prod. Co.—USA v. Adams*, 560 S.W.3d 105, 106, 113 (Tex. 2018).

There is also no genuine issue of material fact related to whether Diamondback utilized the Land for the purpose of construction of an AHWP. The term "utilize" is not defined in the Surface Agreement, the Third Amendment, the Lease, or the amendment to the Lease. However, the common meaning of the term is "to make use of: turn to practical use or account." *Utilize*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY. Diamondback, therefore, must pay Location Damages in advance of when it "makes use of" or "turns to practical use" the Land for purposes of the construction of an AHWP.

It is undisputed that the purpose of the survey was to establish the exact configuration of the AHWPs as required by the Third Amendment. Neither the survey nor the corresponding stakes that marked the exact configuration of the AHWPs were parts or elements of the AHWPs. Therefore, Diamondback's decision to survey the land and mark the proposed configuration of the AHWPs did not constitute the utilization of the Land for the construction of an AHWP.

We hold that there is no genuine issue of material fact as to whether Diamondback utilized or damaged the Land when it surveyed and marked the exact configuration of the AHWPs. We overrule Appellants' fifth issue.

In their sixth issue, Appellants argue that evidence of the parties' negotiation of the Third Amendment creates a material issue of fact as to whether the parties intended that Location Damages would not be due and payable until an AHWP was constructed. Appellants specifically rely on Jonathan's affidavit in which he states that Bluestem and Diamondback represented that the AHWPs would be built and that the parties never contemplated that the AHWPs would not be built.

As reflected by Location Damages for the expanded tank battery facility, the parties knew how to provide for the payment of Location Damages that were not linked to any conduct by Diamondback on the Land. But the parties did not agree that Diamondback was required to pay AHWP Location Damages when the Third Amendment was executed. They also did not agree that Diamondback was required to pay Location Damages when the parties agreed on the exact configuration of the AHWPs. The parties did not even agree that Diamondback was required to construct the AHWPs by any specific date. Rather, the parties unambiguously agreed that Diamondback was required to pay Location Damages for an AHWP in advance of construction of the AHWP. Because the Third Amendment is not ambiguous as to when Diamondback was required to pay AHWP Location Damages, we may not rely on extrinsic evidence of the parties' negotiations to rewrite the parties' contract. *See TRO-X, L.P. v. Anadarko Petroleum Co.*, 548 S.W.3d 458, 462 (Tex. 2018); *URI*, 543 S.W.3d at 757–58, 764. We overrule Appellants' sixth issue.

In their seventh issue, Appellants asserts that the trial court erred when it refused to enforce Appellants' contractual lien on Diamondback's interest in the Land. However, the trial court did not sever Appellants' request for judicial

foreclosure from the original case. Accordingly, the trial court's grant of summary judgment on Appellants' claim for judicial foreclosure is not properly before us. We overrule Appellants' seventh issue.

This Court's Ruling

We affirm the trial court's order.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

May 29, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[5]

Willson, J., not participating.

[5]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.