STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

JOHN D. TALBOTT,

Plaintiff,

v

File No. 11-8669-CK
HON. PHILIP E. RODGERS, JR.

OIL NIAGARAN LLC, a Michigan limited liability company; NORTHERN MICHIGAN EXPLORATION COMPANY, LLC, a Michigan limited liability company; REDSKY LAND, LLC, an Oklahoma limited liability company; SILVER LAKE ENERGY, LLC, a Michigan limited liability company; and CHESAPEAKE ENERGY CORP., an Oklahoma corporation,

Defendants.
_____/

Susan Hlywa Topp (P46230)
Attorney for Plaintiff

Chester Kasiborski (P15728)
Co-Counsel for Plaintiff

Jeffrey S. Theuer (P44161)
Kevin J. Roragen (P56510)
Sara L. Cunningham (P61465)
Attorneys for Defendants

Jesse R. Pierce (P75134)
Co-Counsel for Defendants

Steven L. Barney (P10465)
Gretchen L. Olsen (P36619)
Co-Counsel for Defendants

DECISION AND ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

I. FACTS

The Plaintiff owns approximately 103 acres of real property in Custer Township, Antrim County, Michigan.[1] On July 28, 2010, the Plaintiff entered into an oil and gas lease ("Lease") with Defendant O.I.L. Niagaran, L.L.C.[2] The Order for Payment ("OFP"), executed contemporaneously, stated that, subject to inspection and approval of title, Lessee would pay $106,000 within 90 banking days to the Plaintiff.[3] The Lease and OFP both named OILN as the "Lessee."

On October 4, 2010, NMEC informed the Plaintiff that, due to an existing mortgage on the subject property, it was declining to approve title and consequently the entire Agreement.[4] [5] The Plaintiff then initiated this litigation, alleging breach of contract and claiming damages of $106,000, plus interest, litigation expenses, emotional distress and "loss of surgery time."

After reviewing the parties' arguments, the Court now issues this written decision and order granting the Defendants' Motion for Summary Disposition.

II. STANDARD OF REVIEW

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim.[6] When there is no genuine issue of material fact the moving party is entitled to judgment as a matter of law.[7] Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[8] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence

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[1] The Plaintiff owns approximately 103 surface/mineral acres, while Tamora M. Talbott, Plaintiff's former spouse, owns approximately 2.5 surface/mineral acres of the 106 acres that are the subject of this litigation.

[2] O.I.L. Niagaran, L.L.C. shall hereinafter be referred to as "OILN." The other named Defendants in this litigation include, Northern Michigan Exploration Company, L.L.C. (hereinafter "NMEC"), Redsky Land, LLC (hereinafter "Redsky"), Silver Lake Energy, LLC (hereinafter "SLE") and Chesapeake Energy Corporation (hereinafter "Chesapeake Energy"). The term "Defendants" collectively refers to OILN, NMEC, Redsky, SLE and Chesapeake Energy.

[3] The Lease and OFP were acquired by OILN on behalf of NMEC, pursuant to the Land Services Agreement dated May 1, 2010. *Infra*, at FN 22.

[4] "Agreement" hereinafter refers to the Lease and OFP jointly executed by the parties.

[5] On December 13, 2002, Plaintiff secured his debt to Northwestern Mortgage Company by executing a mortgage in the amount of $73,500. The mortgage was recorded in Antrim County on December 26, 2002.

[6] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[7] *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

[8] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

to establish those disputed facts.[9] Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[10] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[11] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[12]

III. ARGUMENTS AND ANALYSIS

The Defendants claim they are entitled to summary disposition because title was never approved and thus, the Agreement is void. Further, while the Plaintiff asserted seven counts in his First Amended Complaint, the Defendants argue that this Court need only interpret the contract between the parties because the remaining counts are dependent upon whether the Defendants properly declined to approve the Agreement.

Conversely, the Plaintiff argues that: (1) OILN was not an agent of NMEC and only OILN had authority to approve or disapprove title; (2) the Lease was binding on execution; (3) the mortgage was not a defect; and (4) Defendants had a duty to act in good faith.

A. AGENCY

Whenever a principal, by statements or conduct, places an agent in a position where the agent appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as basis for determining rights and liabilities.[13] The measure of authority consists of those powers which the principal has thus caused or permitted the agent to seem to possess, whether the agent had actual authority being immaterial if his conduct was within the apparent scope of his powers; the question involved is no longer what authority was actually given or was intended by the parties to the agency agreement, but resolves itself instead into the determination of what powers persons of reasonable prudence, ordinarily familiar with business

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[9] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[10] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher, supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).
[11] MCR 2.116(G)(4); *Maiden, supra* at 120.
[12] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[13] *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957).

practices, dealing with the agent might rightfully believe him to have on the basis of the principal's conduct.[14] Apparent authority to act is to be determined from all the surrounding facts and circumstances.[15] Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business.[16] The general rule is that the powers of an agent are prima facie coextensive with the business instructed to his care.[17] An agent's authority as to those with whom he deals is what it reasonably appears to be.[18] Under Restatement of Agency, an agency relationship may arise if there is a manifestation by the principal that the agent may act on his account.[19]

Chesapeake Energy is a holding company and NMEC and Chesapeake Exploration, L.L.C. ("Chesapeake Exploration") are both wholly-owned subsidiaries of Chesapeake Energy.[20] On May 4, 2010, Chesapeake Exploration and OILN executed a Joint Lease Acquisition Agreement ("JLAA"), wherein OILN agreed to perform services and duties customarily associated with acquiring land for oil and gas exploration "**for the benefit of Chesapeake or its designated entity.**"[21] Exhibit A of the JLAA was a Land Services Agreement ("LSA") between NMEC and OILN.[22] The LSA notes that OILN was to act as an independent contractor and was not an employee of NMEC.[23] However, the LSA further specifies that:

> In the event that [sic] services provided by [OILN] include the *acquisition of oil, gas or mineral leases*, minerals, royalties, rights-of-way, seismic permits, *options to acquire any of the foregoing* or interest in other real or personal property for the account of [NMEC], **[OILN] shall act as an agent on behalf of [NMEC]** within the authority and for the purposes specified in the Work Order.[24]

In addition, the Guaranty, executed on behalf of Chesapeake Energy, clearly states that OILN "shall act as an **undisclosed agent** of [NMEC and/or Chesapeake Exploration] in connection with (i) certain agreements for purchasing oil and gas interests from existing

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[14] *Id*.
[15] *Moreschini v Regional Broadcasters of Mich Inc*, 373 Mich 496, 498; 129 NW2d 859 (1964); *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 271; 288 NW2d 613 (1979).
[16] *Allstate Inc Co v Snarski*, 174 Mich App 148, 158; 435 NW2d 408 (1988).
[17] *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934).
[18] *Id*.
[19] Restatement of Agency, 2d § 15.
[20] Guaranty, dated May 20, 2010.
[21] Joint Lease Acquisition Agreement, dated May 4, 2010. (Emphasis added.)
[22] Land Services Agreement, dated May 1, 2010.
[23] *Id*. at Article II, ¶A.
[24] *Id*. at Article II, ¶C. (Emphasis added.)

operators and/or leasehold working interest owners; and (ii) open mineral interest leases; and (iii) land services agreements with contract broker parties, all as an **undisclosed agent**."[25]

Finally, on August 31, 2010, Chesapeake Exploration, Chesapeake Energy, NMEC and OILN executed an Amendment to Joint Lease Acquisition Agreement, Land Services Agreement, General Services Agreement, and Guaranty ("Amendment").[26] The Amendment held that, pursuant to the prior Agreements between the parties, OILN had been and currently was acting in the capacity of an agent of Chesapeake Exploration and/or NMEC.[27] Under the section entitled, Acknowledgment of Agency, Chesapeake Exploration, Chesapeake Energy and NMEC recognize that, subsequent to April 28, 2010, OILN acted as an agent with respect to actions and services performed relating to or involving the acquisition of oil and gas leases.[28] Furthermore:

> [The] oil and gas leases, various types of contracts, letter agreements, purchase and sale agreements, letters of intent and other documents and agreements, executed or unexecuted, consummated or unconsummated or finalized or unfinalized, and closing and funding of any of the foregoing…were pursued and/or entered into by [OILN], on behalf of and at the request, direction and instructions of and as agent for [Chesapeake Exploration] and/or NMEC.[29]

Plaintiff argues that, pursuant to the LSA, the relationship between OILN and NMEC limited OILN to acting at all times as an independent contractor. Since (1) OILN never assigned the parties' Lease to NMEC and (2) OILN was an independent contractor under the LSA, the Plaintiff claims that NMEC lacked authority to disapprove title.

There is no dispute that the LSA stipulates OILN shall act as an independent contractor. However, the LSA notes elsewhere that "OILN shall act as an agent on behalf of NMEC" and

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[25] *Supra*, at FN 20. (Emphasis added). The LSA also firmly establishes the importance of confidentiality and non-disclosure by the parties, stating:

> [A]ll work-related information, title information, areas of interest, maps, letters, memoranda, and other information provided by [NMEC], and all other materials, plans, and negotiations with third parties concerning the services requested of [OILN] under any Work Order are proprietary to [NMEC] and shall be held strictly confidential.

[26] The JLAA, LSA, Guaranty and Amendment shall collectively be referred to as the "Contract."

[27] Amendment to Joint Lease Acquisition Agreement, Land Services Agreement, General Services Agreement, and Guaranty, dated August 31, 2010.

[28] *Id*. at ¶2. (This paragraph indicates that the services and actions performed, by OILN on behalf of Chesapeake Energy, Chesapeake Exploration and NMEC, included, but were not limited to, the acquisition of oil and gas leases.)

[29] *Id*.

the Guaranty labels OILN an "undisclosed agent" for Chesapeake Exploration and NMEC.[30] Additionally, the Amendment specifically states that OILN was and had acted as an agent of Chesapeake Exploration and NMEC.[31] This evidence presents a discrepancy in what role OILN was to serve. Due to this inconsistency, the Court believes it necessary and prudent to analyze the parties' relationships and interactions before determining the type of relationship that existed between the parties.

No specific factor of control is conclusive when differentiating between the principal-agent relationship and that of an independent contractor, but the extent or degree of control, as determined by the nature of the work, manner of performance as an entity in itself or as permitting performance by third parties, and terms of payment and right to discharge, is determinative.[32] The difference between an independent contractor and a mere agent is not determined solely by the retention of a certain kind or degree of supervision by the employer, but is to be determined by the contract as a whole, by its spirit and essence, and not by the phraseology of a single sentence or paragraph.[33] Generally, the key in determining whether one is an employee/agent or an independent contractor turns on the right to control.[34] It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent.[35]

Notwithstanding the Amendment, which plainly states that OILN was and had been acting as an agent on behalf of NMEC, Chesapeake Exploration and Chesapeake Energy, NMEC retained significant control over OILN's actions and maintained the right to intervene in the services provided by OILN.[36] Significantly, OILN was directed to obtain and provide a land

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[30] *Supra*, at FNs 20 and 24.
[31] *Supra*, at FN 26.
[32] *Stevenson v Antrim Iron Co*, 287 Mich 418; 283 NW 632 (1939).
[33] *Id*. at 423 citing *Foster v City of Chicago*, 96 Ill App 4 (1900).
[34] *Id.* at 427.
[35] *Id*.
[36] The following are excerpts from the LSA signifying the type and level of control maintained by NMEC: "[s]ervices provided by [OILN] pursuant to this contract shall be performed according to the specifications of [NMEC]," "[NMEC] shall approve in advance the form of all leases and acquisition agreements," "Any Work Order, and additional or further services provided in connection therewith, may be canceled by [NMEC] without cause at any time," all documents produced pursuant to the LSA were "the exclusive property of [and] proprietary to [NMEC]." See generally, *Lasky v Realty Dev Co LLC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 27, 2006 (Docket No. 258125).

services agreement, approved to NMEC, from each employee or subcontractor hired by OILN.[37] All funds advanced to OILN in connection with the LSA were to be held for the benefit of NMEC and disbursed only in the manner and amounts approved by NMEC.[38] Further, OILN was to provide a monthly written account for all trust funds and NMEC had authority to audit any and all records, books and invoices pertaining to payments made out of the trust funds.[39]

Not only did NMEC supervise the services and actions of OILN, it retained control of integral business aspects of the entity. Looking at the Contract as a whole it appears that, while the parties attempted to characterize OILN as an independent contractor, the "spirit and essence" of the Contract was to establish an agency relationship. Therefore, the Court finds that NMEC acted as the principal with regard to the acquisition of the Agreement and the subsequent rejection of title.

Furthermore, the Defendants did not have a duty to disclose to Plaintiff their multi-tiered agency system. The business and agency affiliations between the Defendants were intended to remain confidential and the Plaintiff's lack of knowledge of the various agency relationships between the Defendants does not serve to invalidate said relationships, nor nullify the scope and authority provided by the principals.[40] OILN, acting on behalf of NMEC, had authority to contact prospective Lessors and negotiate OGLs, draft, tender and accept OGLs, and draft OFPs. Pursuant to the above case law, the Court finds there was an agency relationship, with NMEC as principal and OILN as agent, thus, NMEC had authority to disapprove title. OILN, as Lessee, did not ultimately make the decision to decline the Agreement, however, this fact does not affect the primary requirement that title must be approved prior to payment under the OFP.

B. ENFORCEABILITY

The primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties and the law presumes that the contracting parties' intent is embodied in the actual words used in the contract itself.[41] In interpreting a contract, courts give contractual

[37] LSA, Article VI, ¶D.
[38] *Id*. at Article V, ¶A.
[39] *Id*. at ¶A-B.
[40] *Supra*, at FN 25.
[41] *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005).

language its plain and ordinary meaning unless otherwise defined.[42] Where a contract can be construed by its term alone, it is the duty of the court to interpret it.[43] When the contractual language is plain and unambiguous, the contract must be enforced according to its terms.[44] A contract is ambiguous when two provisions irreconcilably conflict with each other or when a term is equally susceptible to more than a single meaning.[45] When contractual terms are ambiguous or depend upon extrinsic evidence, the question of interpretation should be submitted to the jury.[46] Case law holds that an oil and gas lease should be read not only according to its words, but in connection with purpose of its clauses.[47]

The Lease and OFP, executed jointly, created the contract between the parties. The Lease ¶ 17, includes a merger clause which states, "The entire agreement between Lessor and Lessee is embodied herein and in the associated Order of Payment (if any), which supersede all prior negotiations, representations, agreements and understandings of the parties pertaining to the subject matter hereof." The OFP reads:

> Lessee shall, subject to its inspection and approval of title, make payment to Lessor as indicated herein by check within 90 banking days of Lessee's receipt of this Order for Payment and the executed Oil and Gas Lease associated herewith.

Neither the Plaintiff, nor the Defendants claim ambiguity in the terms of the Agreement, but the Plaintiff argues that the Lease was effective immediately upon execution, citing *Michigan Consolidated Gas Co v Muzeck*.[48] Plaintiff claims that OILN's inspection and approval of title is a condition subsequent to the Lease and a condition precedent to the OFP.

A "condition precedent" in a contract is a fact or event that the parties intend must take place before there is a right to performance.[49] When a contract contains a condition precedent, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event.[50] If the condition is not satisfied, there is no cause of action for a

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[42] *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004).
[43] *Klapp v United Ins Group Agency Inc*, 468 Mich 459; 663 NW2d 447 (2003).
[44] *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).
[45] *City of Lansing Mayor v Michigan Pub Service Comm*, 470 Mich 154; 680 NW2d 840 (2004).
[46] *Klapp*, *supra*.
[47] *Boyer v Tucker & Baumgardner Corp*, 143 Mich App 361; 372 NW2d 555 (1985).
[48] *Michigan Consolidated Gas Co v Muzeck*, 4 Mich App 502; 145 NW2d 266 (1966).
[49] *Harbor Park Market, Inc v Gronda*, 277 Mich App 126; 743 NW2d 585 (2007).
[50] *Id*.

failure to perform the contract.[51] Under Michigan law, a party waives a condition precedent only if it is under an affirmative duty to cause the condition precedent to come to pass.[52] A party must prevent the condition precedent in a contract from occurring by either taking some affirmative action, or by refusing to take action required under the contract, before a court will find a waiver of a condition precedent.[53]

In *Harbor Park Market*, the agreement between the parties stated that the defendants' acceptance of the plaintiff's offer to sell was *subject to* their attorney's review and approval of the agreement.[54] The plaintiff argued that the defendants, as purchasers, interfered with the condition precedent by withholding approval and were, therefore, liable under the sale agreement.

The court rejected the plaintiff's construction, noting that nothing in the contract affirmatively required the deciding party to approve the deal.[55] The court held that because there was no limitation on what aspects of the agreement were subject to the attorney's approval, the attorney was authorized to review and approve, or disapprove, any part of the contract or the entire contract as a whole.[56] Since the parties failed to include an express limitation in the language of the condition precedent that restricted the attorney's approval authority, the court held they would not judicially impose one.[57] The court noted that language limiting the scope of the attorney's approval could have been included by the parties, but was not, therefore, the contract language giving complete discretion to approve or disprove the agreement for whatever reason was clear and unambiguous and must be accepted and enforced as written.[58] The court further stated:

> In light of the clear and unambiguous language of the contract, we cannot consider what [the Plaintiff's] understanding was regarding the scope of the condition. One reason for this conclusion is that the parties' disagreement regarding the meaning of contract language does not, by itself create an

[51] *Id*.
[52] *Warner v DSM Pharma Chemicals North America Inc*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued December 27, 2011 (Docket No. 10-1350).
[53] *Harbor Park Market, supra*.
[54] *Id*. at 132-133. (Emphasis added.)
[55] *Id*.
[56] *Id*. at 133.
[57] *Id*. citing *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197; 476 NW2d 392 (1991).
[58] *Harbor Park Market, supra* at 133.

> ambiguity.[59] Additionally, because we have already concluded that the language of the condition is unambiguous, one party's understanding of what was intended by the language is irrelevant to determining what the language actually says.[60] [61]

Here, payment was to be made to Plaintiff, *subject to inspection and approval of title*. Pursuant to case law, oil and gas documents should be read not only according to their words, but in connection with purpose of its clauses.[62] While the Lease does not specifically include the same "inspection and approval language," the Lease and OFP were to be construed together as the entire Agreement and thus, the stated condition precedent in the OFP was similarly applicable to the Lease. This Court finds that the "subject to" language included in the OFP, and merged into the Lease, serves as a condition precedent in this case. A "condition precedent" in a contract is a fact or event that the parties intend must take place before there is a right to performance.[63] According to the Agreement, payment was to be made to Plaintiff *subject to* inspection and approval of title. The Agreement language clearly indicates a condition precedent; therefore, payment, or 'performance,' could not occur until the 'event' of title inspection and approval by Defendants transpired.

C. TITLE DEFECTS

Plaintiff contends that Defendants improperly relied on the outstanding mortgage as a reason to disapprove title. Plaintiff further claims that OILN was aware of the mortgage prior to taking the Lease and OFP and suggests that prior knowledge of the mortgage estopps Defendants from later citing the mortgage as a title defect.[64]

According to Plaintiff, OILN admits it knew that mortgage subordinations were required on leases with mortgages and that mortgages were considered defects by NMEC *prior to taking Plaintiff's Lease*. However, Michael Couturier, an agent of OILN, sub-agent of NMEC and the landman who drafted the Agreement, avers that he was never told not to take leases when there

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[59] *Gortney v Norfolk & WR Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).
[60] *Id.*
[61] *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 604-605; 576 NW2d 392 (1997).
[62] *Boyer, supra.*
[63] *Harbor Park Market, supra.*
[64] See Plaintiff's Response to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), ["mortgage was not 'discovered' by Defendants when title was examined. Rather, Defendants knew Plaintiff had a mortgage prior to taking the 2010 OGL as Oil Energy had taken a prior lease from Plaintiff in 2004 and had identified the mortgage at that time]; [at the time of the prior 2004 shallow lease, Couturier was acting as a landman for OIL Energy and no defects were raised concerning the Plaintiff's mortgage"]; ["In this case, OILN knew about the mortgage prior to taking the OGL"].

was a mortgage on the property.[65] Furthermore, he was never asked to collect mortgage information from a lessor when taking a lease and did not consider reviewing title for defects part of his duties.[66] With regard to Plaintiff's property, Couturier claims he was unaware of the mortgage when he took the Lease and that his title review was limited to confirming ownership of the subject property had not changed.[67] Only after the Agreement was signed by Plaintiff does it appear that a title review of the property was performed.

OILN's legal counsel performed a title review, whereupon the outstanding mortgage and an unreleased oil and gas lease were discovered.[68] Defendants had "sole and unfettered discretion" to determine what constituted a title defect.[69] Upon confirmation that Plaintiff's property was encumbered by a mortgage, pursuant to company policy, the Defendants found title to be defective and declined to accept the Agreement.[70]

A marketable title is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it.[71] To meet the standard of marketability, title must be unencumbered.[72] An encumbrance is anything that constitutes a burden on property title, such as a right of way, a

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[65] Michael Couturier deposition, June 27, 2012; page 37, lines 16-24.

[66] *Id*. ["I knew nothing of the mortgages. I didn't look for mortgages. I just went from the last shallow lease I took from them, made sure they still owned it, and went out and took another lease. I didn't look at mortgages. I didn't look at easements. I didn't look at anything else."] [Q: "So you had no involvement, in any way, shape or form, in title defects for the deep-rights leases or reviewing title for the deep-rights leases after they were taken; is that correct?" A: "That is absolutely correct."]

[67] *Id*. at page 93, lines 19-25. Couturier also stated he and Plaintiff never discussed the existence of the mortgage and he was only made aware of the lien after NMEC failed to approve title. ["He brought up the mortgage, which I'd never heard before".]

[68] Ownership Report, dated September 15, 2010. ["There is an Oil and Gas Lease between Vincent J Famularo and Lorraine E Famularo, husband and wife, as Lessor and Eason Oil Company dated March 5, 1970 and recorded April 20, 1970 in Liber 179, Page 67. Subsequently Eason Oil Company assigned their interest in the above referenced lease to Sonat Exploration Company on January 18, 1985 and recorded in Liber 293, Page 688. A diligent search of the public records in Antrim County was completed and no release was found of record. Prior to any drilling operations a release of lease should be obtained."]

[69] Leasehold Purchase and Sale Agreement, dated April 28, 2010. [Chesapeake Exploration, as a subsidiary of Chesapeake Energy and co-principal of OILN "shall have the right to examine lease terms, title and any other contract related terms to which the Acreage may be subject, with all of these terms being acceptable to [Defendants] prior to the Closing as defined below, using reasonable, industry standard business judgment. Should title on certain leases or portions of leases be identified by [Defendants] as defective…the leases may be held out of closing subject to [Defendants'] **sole and unfettered discretion**."] (Emphasis added.)

[70] Email from Henry Hood to David McGuire, dated November 3, 2010.

[71] Shade, *Petroleum Land Titles: Title Examination & Title Opinion*, 46 Baylor L. Rev. 1007 (1994).

[72] *Id.*

condition that may work a forfeiture of the estate, a right to remove timber or a dower interest.[73] A mortgage is a lien on real estate securing payment or performance of an obligation and constitutes an encumbrance.[74] When a mortgage is no longer a lien or encumbrance, it must be discharged.[75] While the Agreement does not contemplate or require marketable title, title may be regarded as "unmarketable" if a reasonably careful and prudent person, familiar with the facts, would refuse to accept title in the ordinary course of business.[76] Title does not actually need to be bad to render it unmarketable, there only needs to be a doubt or uncertainty as might reasonably form the basis of litigation.[77] Defects to title also include, but are not limited to, lack of ownership, mortgages, uncertain boundaries, easements, attachment of property, tax liens, sale of property to another, miscellaneous acts or omissions of vendors, judgments against seller, limiting restrictions, fraud, forgery, defective deeds, capacity of parties, clerical errors, unreleased oil and gas leases and name discrepancies.[78]

Marketable title is based on objective standard for purposes of title examination.[79] However:

> [T]itle approval requires a different standard. Marketable title merely establishes the basis for rendering title opinions, not the type of title which must exist before accepting a lease or drilling a well. The degree of risk considered acceptable varies with the examination's purpose and the company management's business judgment…Company management then makes the business decision of whether to accept title. That decision is usually based on the more practical standard of business risk, rather than marketability.[80]

Companies, when contemplating title acceptance, apply a subjective standard. Whether title is "marketable" is not the sole factor considered before accepting an oil and gas lease.[81]

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[73] *Madhaven v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981).
[74] *McKeighan v Citizens Comm & Sav Bank*, 302 Mich 666; 5 NW2d 524 (1942); *In re William H. Van Duzer*, 390 Mich 571; 231 NW2d 167 (1973).
[75] MCL § 565.41.
[76] *Deane v Rex Oil & Gas Co*, 325 Mich 625; 39 NW2d 204 (1949).
[77] *Id*.
[78] See generally 13 ALR4 927 §3-7; *Shade, supra*.
[79] *Supra*, at FN 21.
[80] *Id*.
[81] *Id*.

Here, objectively "marketable title" was not guaranteed approval. Instead, the plain language of the Agreement permitted Defendants to subjectively assess title history before finding title defective.

Again, the Court believes the holding in *Harbor Park Market* is applicable here. There, the court held that the parties failed to include an express limitation in the language of the condition precedent that restricted approval authority, therefore, the contract language giving complete discretion to approve or disprove the agreement for whatever reason was clear and unambiguous and must be accepted and enforced as written.[82] Furthermore, the court held that misunderstanding regarding the scope of the condition precedent was irrelevant because the contract language was clear and unambiguous.[83]

It is undisputed that the mortgage had not been discharged prior to title review, at which point the Defendants determined that the mortgage was a lien and encumbrance on title. The condition precedent set forth in the OFP established that the Agreement was subject to "approval of title" without further elaboration. The parties' Agreement did not include any express limitation language restricting approval authority, which provided the Defendants complete discretion to approve or reject title for whatever reason and eliminated any ability for Plaintiff to claim wrongful rejection.

The Defendants concluded that the mortgage was an encumbrance which prevented the approval of title and caused them to terminate the Agreement. There is nothing in the contract that *requires* the Defendants to approve title to the property and the Defendants are under no affirmative duty to cause the condition precedent to be satisfied, thus, subsequently triggering payment pursuant to the OFP.[84]

Furthermore, Plaintiff acknowledges that NMEC considered mortgages to be defects or clouds on title. While a subordination may have cured Plaintiff's title, Defendants were under no obligation to seek a subordination according to the Agreement. Therefore, on its face title was defective.[85]

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[82] *Harbor Park Market, surpa* at 133.
[83] *Id*.
[84] *Id*.
[85] According to the Ownership Report, no release for the Farmularo oil and gas lease was found. Neither Plaintiff, nor Defendants discuss this unreleased lease in their briefs, therefore, the Court will not address it as an alternative title defect.

D. GOOD FAITH

Michigan does not recognize a cause of action for breach of the implied duty of good faith and fair dealing.[86] Under Michigan law, the implied covenant of good faith cannot override an express provision in a contract.[87] Where a contract expressly grants a party complete discretion with respect to particular matters, the covenant of good faith will not be imposed to restrict the exercise of that discretion and thereby override the contract.[88] A condition precedent creates no right or duty in and of itself, but is only a limiting and modifying factor and if the condition precedent does not occur, the parties to the contract are excused from performance.[89]

The Agreement expressly required title review and approval by the Defendants as a condition precedent to performance. There is an implied duty of good faith and fair dealing in the performance and enforcement of contractual obligations, however, here, the Defendants' only contractual duties to Plaintiff were part of the contract and would only arise subsequent to satisfaction of the condition precedent.[90] Title was not approved due to the mortgage and the Agreement was terminated as expressly authorized under the OFP. Therefore, there was no implied duty that the Defendants act in good faith.[91]

Furthermore, the Plaintiff alleges that the Lease imposes an affirmative duty on Defendants to seek a subordination of the mortgage.[92] The terms of the Agreement grant rights and impose duties only if title is approved and the Agreement becomes effective. Paragraph 13 is discretionary and permits Defendants the option of seeking a subordination of the mortgage or paying the same, but it does not impose a duty upon the Defendants to do so.

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[86] *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1; 730 NW2d 29 (2006). See also *Fodale v Waste Mgt of Mich Inc*, 271 Mich App 11; 718 NW2d 827 (2006); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463; 666 NW2d 271 (2003); *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194; 480 NW2d 910 (1991); *Dahlman v Oakland Univ*, 172 Mich App 502; 432 NW2d 304 (1988).

[87] *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299; 520 NW2d 640 (1994).

[88] *Jacobson v BH Assoc Ltd Partnership*, unpublished opinion per curium of the Court of Appeals, issued June 29, 2001 (Docket No. 222945).

[89] *Id*.

[90] *Terra Energy Ltd v White Pine Enterprises, LLC*, unpublished opinion per curiam of the Court of Appeals, issued December 3, 2002 (Docket No. 231429); *Flynn v Korneffel*, 451 Mich 186; 547 NW2d 249 (1996).

[91] The prudent operator standard is only applicable to operations under an existing, effective lease. *Compton v Fisher-McCall Inc*, 298 Mich 648; 299 NW 750 (1941). Because no operations occurred, the prudent operator standard is inapplicable here.

[92] Lease ¶13.

Lastly, Plaintiff argues that summary disposition cannot be granted because a genuine issue of material fact exists regarding *the reason* Defendants failed to approve title, claiming that the Agreement was declined for economic and other reasons wholly unrelated to title.[93] According to evidence obtained during discovery, Plaintiff alleges that the parties' Agreement was declined because of poor economics and that "title defects were merely an excuse in an attempt to justify the action."

Unfortunately, the Agreement does not contemplate proper and improper reasons for declining title. Defendants retained complete discretion in determining if title was defective. Consequently, title could be found defective for a multitude of reasons, including an unreleased mortgage. The OFP language is plain and unambiguous, and thus, the Agreement must be enforced according to its terms. Plaintiff's title was found defective due to the unreleased mortgage, which permitted Defendants to decline the Agreement.

IV. CONCLUSION

For the reasons stated herein, the Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is granted. This is a final Order and resolves all remaining Counts in this case.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

[93] Plaintiff states that facts show "there is a genuine issue of fact about whether NMEC rejected the Plaintiff's OGL due to the existence of an unreleased mortgage or whether it rejected it for some impermissible reason unrelated to title such as buyer's remorse caused by reduced estimates about the presence of minerals or other economic factors."