STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

LAWRENCE COOK and LYNDA COOK,
husband and wife,

Plaintiffs,

v

File No. 11-8654-CK
HON. PHILIP E. RODGERS, JR.

WESTERN LAND SERVICES, INC., a Michigan Corporation; 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.
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DECISION AND ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

I. FACTS

The Plaintiffs own approximately 140 acres of real property in Antrim County. On July 16, 2010, the Plaintiffs entered into an oil and gas lease ("Lease") with Defendant Western Land Services, Incorporated.[1] The Order for Payment ("OFP"), executed contemporaneously, stated that, subject to inspection and approval of title, Western would pay $98,000 within 90 banking days to the Plaintiffs.[2]

The Defendants proceeded with the title review process, wherein they discovered an existing mortgage on the property dated July 9, 2008.[3] On October 16, 2010, NMEC informed the Plaintiffs that it was unable to approve title for the property and was therefore, declining to approve the Agreement.[4] The Plaintiffs then initiated this litigation, alleging breach of contract and claiming damages of $98,000, plus interest, costs and fees.

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.[5] When there is no genuine issue of material fact the moving party is entitled to judgment as a matter of law.[6] 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.[7] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence

[1] Western Land Services, Incorporated shall hereinafter be referred to as "Western." The other named Defendants in this litigation include O.I.L. Niagaran, L.L.C. (hereinafter "OILN"), 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"). The term "Defendants" collectively refers to Western, OILN, NMEC, Redsky, SLE and Chesapeake.

[2] With regard to this litigation, a subagency was created between Western and OILN, and also between OILN and affiliates of Chesapeake and NMEC. The Lease and OFP were acquired by Western, as an agent of OILN and a subagent of NMEC, the primary beneficiary.

[3] The mortgage was recorded in Antrim County on July 15, 2008.

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

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

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

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

to establish those disputed facts.[8] Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[9] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[10] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[11]

III. ARGUMENTS AND ANALYSIS

The Defendants claim they are entitled to summary disposition because title was never approved and thus, the Lease and OFP are void. Further, while the Plaintiffs asserted seven counts in their 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 Plaintiffs argue that: (1) Western was not an agent of NMEC and only Western had authority to approve or disapprove title; (2) the Lease was binding on execution; (3) Western had a duty to act in good faith; (4) Western had a duty to seek mortgage subordination; and (5) Western did not provide notice of valid title defects during the 90 day review period.

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.[12] 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

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[8] *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).
[9] *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).
[10] MCR 2.116(G)(4); *Maiden*, *supra* at 120.
[11] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[12] *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957).

determination of what powers persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe him to have on the basis of the principal's conduct.[13] Apparent authority to act is to be determined from all the surrounding facts and circumstances.[14] 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.[15] The general rule is that the powers of an agent are prima facie coextensive with the business instructed to his care.[16] An agent's authority as to those with whom he deals is what it reasonably appears to be.[17] 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.[18]

The Plaintiffs assert that NMEC was not Western's principal for the transaction, but do admit having knowledge that Western was acting as OILN's broker or agent. According to the Defendants, NMEC, the principal of the transaction, retained OILN to act as its agent. Further, a subagency was created through Land Services Agreements between Western and OILN. Thus, Western served as a subagent of NMEC due to the two-tier agency arrangement.

The Defendants did not have a duty to disclose to Plaintiffs their multi-tiered agency system. The Plaintiffs' 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. Western, as an agent of OILN and a subagent of NMEC, had authority to contact prospective Lessors and negotiate OGLs, draft, tender and accept OGLs, and draft OFPs. Western did not ultimately make the decision to decline the Agreement, but this fact does not affect the primary requirement that title must be approved prior to payment under the OFP. Pursuant to the above case law, the Court finds there was an agency relationship, with NMEC as principal and Western as agent and/or subagent, therefore, NMEC had authority to disapprove title and privity of contract or lack thereof need not be addressed.

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[13] *Id.*
[14] *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).
[15] *Allstate Inc, Co v Snarski*, 174 Mich App 148, 158; 435 NW2d 408 (1988).
[16] *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934).
[17] *Id.*
[18] Restatement of Agency, 2d § 15.

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.[19] In interpreting a contract, courts give contractual language its plain and ordinary meaning unless otherwise defined.[20] Where a contract can be construed by its term alone, it is the duty of the court to interpret it.[21] When the contractual language is plain and unambiguous, the contract must be enforced according to its terms.[22] 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.[23] When contractual terms are ambiguous or depend upon extrinsic evidence, the question of interpretation should be submitted to the jury.[24] 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.[25]

The Lease and OFP, executed jointly, create 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; approval of any liens, encumbrances, or mortgages, 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…This Order for Payment is subject to a mutually agreeable oil and gas lease form.

Neither the Plaintiffs, nor the Defendants claim ambiguity in the terms of the Agreement, but the Plaintiffs argue that the Lease was effective immediately upon execution, citing *Michigan*

[19] *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005).
[20] *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004).
[21] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003).
[22] *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).
[23] *City of Lansing Mayor v Michigan Pub Service Comm*, 470 Mich 154; 680 NW2d 840 (2004).
[24] *Klapp*, *supra*.
[25] *Boyer v Tucker & Baumgardner Corp*, 143 Mich App 361; 372 NW2d 555 (1985).

Consolidated Gas Co v Muzeck.[26] Plaintiffs claim that Western'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.[27] 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.[28] If the condition is not satisfied, there is no cause of action for a failure to perform the contract.[29] 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.[30] 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.[31]

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.[32] 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.[33] 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.[34] 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.[35] 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

[26] *Michigan Consolidated Gas Co v Muzeck*, 4 Mich App 502; 145 NW2d 266 (1966).
[27] *Harbor Park Market, Inc v Gronda*, 277 Mich App 126; 743 NW2d 585 (2007).
[28] *Id*.
[29] *Id*.
[30] *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).
[31] *Harbor Park Market, supra*.
[32] *Id*. at 132-133. Emphasis added.
[33] *Id*.
[34] *Id*. at 133.
[35] *Id*. citing *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197; 476 NW2d 392 (1991).

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.[36] 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 ambiguity.[37] 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.[38] [39]

Here, payment was to be made to Plaintiffs, *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.[40] 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.[41] According to the Agreement, payment was to be made to Plaintiffs *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.

GOOD FAITH

Michigan does not recognize a cause of action for breach of the implied duty of good faith and fair dealing.[42] Under Michigan law, the implied covenant of good faith cannot override an

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[36] *Harbor Park Market, supra* at 133.
[37] *Gortney v Norfolk & WR Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).
[38] *Id*. at FN 3.
[39] *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 604-605; 576 NW2d 392 (1997).
[40] *Boyer, supra.*
[41] *Harbor Park Market, supra.*
[42] *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1; 730 NW2d 29 (2006). See also *Fodale v Waste Management 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).

express provision in a contract.[43] 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.[44] 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.[45]

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 Plaintiffs were part of the contract and would only arise subsequent to satisfaction of the condition precedent.[46] Title was not approved due to the encumbrance and the Agreement was terminated as expressly authorized under the OFP. Therefore, there was no implied duty that the Defendants act in good faith.[47]

Furthermore, the Plaintiffs allege that Lease, ¶13, imposes an affirmative duty on Defendants to seek a subordination of the mortgage. 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.

REASONABLE REJECTION

Defendants claim they properly rejected the Agreement because there was an encumbrance on Plaintiffs' title. Conversely, Plaintiffs claim that the encumbrance was not a valid title defect.

An encumbrance is anything that constitutes a burden on property title, such as a right of way, a condition that may work a forfeiture of the estate, a right to remove timber or a dower

[43] *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299; 520 NW2d 640 (1994).
[44] *Jacobson v BH Assoc Ltd Partnership*, unpublished opinion per curium of the Court of Appeals, issued June 29, 2001 (Docket No. 222945).
[45] *Id.*
[46] *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).
[47] Plaintiffs incorrectly assert that the prudent operator standard applies to Defendants' review of title under the OFP. 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 standard is inapplicable here.

interest.[48] A mortgage is a lien on real estate securing payment or performance of an obligation and constitutes an encumbrance.[49] When a mortgage is no longer a lien or encumbrance, it must be discharged.[50] 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.[51] 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.[52]

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.[53] Furthermore, the court held that misunderstanding regarding the scope of the condition precedent was irrelevant because the contract language was clear and unambiguous.[54]

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 Plaintiffs 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

[48] *Madhaven v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981).
[49] *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).
[50] MCL § 565.41.
[51] *Deane v Rex Oil & Gas Co*, 325 Mich 625; 39 NW2d 204 (1949).
[52] *Id*.
[53] *Harbor Park Market, surpa* at 133.
[54] *Id*.

affirmative duty to cause the condition precedent to be satisfied, thus, subsequently triggering payment pursuant to the OFP.[55]

NOTICE

According to the Agreement, Defendants had "90 banking days [after] Lessee's receipt of [the] Order for Payment and the executed Oil and Gas Lease" to inspect and approve title, approve any liens, encumbrances or mortgages and make payment to the Plaintiffs, or alternatively, to disprove title and reject the Agreement. Under the plain language, there is no specific requirement that Defendants provide the Plaintiffs with notice, written or otherwise, of disapproval of title and courts shall not construe an unambiguous contract to add obligations not negotiated into the contract by the parties.[56]

Paragraph 13 of the Lease states that the "Lessor hereby warrants and agrees to defend the title to said land…[and] agrees to execute affidavits, ratifications, amendments, permits and other instrument as may be necessary to carry out the purpose of this lease." The Plaintiffs suggest that ¶ 13 *obligates* the Defendants to provide notice of objections to title and ensures the Plaintiffs an opportunity to cure defects. The Court disagrees and finds that this unambiguous language clearly indicates that the Plaintiffs are obligated to cure defects upon notice and request of the Defendants, but does not provide the Plaintiffs with a guaranteed contractual right to cure title defects.

In *Deane*, the seller sought specific performance of a purchase agreement for the sale of land.[57] The purchase agreement included language that would "allow the purchaser fifteen days to secure abstracts, tax searches, and approve the title."[58] The court found that the agreement contained no stipulation that failure to object to title during the option period would operate as an acceptance of the title.[59] Thus, the court held that the purchaser could reject the contemplated purchase if he did not find title to be "merchantable and acceptable" without making the objection known to the vendor within the option period.[60]

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[55] *Id.*
[56] *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005); *Rose v Rose*, 289 Mich App 45; 795 NW2d 611 (2010); *Holmes v Holmes*, 281 Mich App 275; 760 NW2d 300 (2008).
[57] *Deane*, *supra*.
[58] *Id.* at 628.
[59] *Id.* at 631.
[60] *Id.*

Pursuant to the holding in *Deane*, the Agreement in this case does not require notice that title was disapproved be provided to the Plaintiffs, nor does it provide for a waiver of defects. Based on the clear and unambiguous language of the Agreement, Defendants were not required to provide notice to the Plaintiffs that title was unacceptable and the Agreement had been rejected.

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 issues in this case.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge