STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

MUSKEGON DEVELOPMENT COMPANY a Michigan corporation, SHADR, LLC, a Michigan limited liability company, and STEPHEN H. ANDERSON,

Plaintiffs,

v

File No. 11-8634-CK
HON. PHILIP E. RODGERS, JR.

CHESAPEAKE ENERGY CORPORATION, an Oklahoma Corporation, NORTHERN MICHIGAN EXPLORATION COMPANY, LLC, a Michigan limited liability company, CHESAPEAKE EXPLORATION, LLC, an Oklahoma limited liability company, and O.I.L. NIAGARAN, L.L.C., a Michigan limited liability company,

Defendants.
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SUPPLEMENT TO DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. FACTUAL HISTORY

The Plaintiffs own 13,169.97 net mineral acres below the Cabot Head Shale formation in Antrim County, Michigan. Approximately 7,100 of those net mineral acres involve leases with private landowners, while the remaining acreage is leased from the State of Michigan. In 2010,

the Plaintiffs entered into negotiations regarding the sale of Plaintiffs' interests in the geological formations lying below the top of the Cabot Head Shale formation (hereinafter "Leasehold Interests"). On June 10, 2010, Plaintiffs and Purchaser/Defendant O.I.L. Niagaran, L.L.C. (hereinafter "OILN") signed a Leasehold Purchase and Sale Agreement (hereinafter "Agreement"), with OILN agreeing to purchase the Leasehold Interests for $1,750 per net mineral acre. The Plaintiffs were to retain a 20% overriding royalty interest in the Leasehold Interests and the option to participate with Defendants as co-working interest owners up to 10% of the working interest.[1]

The Agreement also provided for two separate closings: "Closing I" involving the State of Michigan leases and "Closing II" involving the private land leases. The Agreement mandated that both Closing I and Closing II must occur on or before August 2, 2010. Closing I occurred on July 8, 2010 and is not part of this litigation. Additionally, pursuant to the Agreement, OILN paid to Plaintiffs a non-refundable deposit of $2 million. Half of this deposit was to be credited against the purchase price for Closing I and the remaining half was to be credited against the purchase price for Closing II.

Plaintiff and OILN executed an Amendment to the Agreement on July 30, 2010, which extended the date for Closing II until October 29, 2010. A Second Amendment to the Agreement was executed on September 9, 2010 and extended the time for the purchaser to review title to the private land leases until October 1, 2010.

As of October 25, 2010, the final net acreage to be sold was 7,100.81 mineral acres. On October 28, 2010, OILN notified Plaintiffs it would not close on the remaining Leasehold Interests. Further, OILN acknowledged that Plaintiffs were entitled to retain the $1 million non-refundable deposit as liquidated damages, but that OILN shall have no further obligation under the Agreement.

Plaintiffs filed their Complaint on March 15, 2011, seeking specific performance of the Agreement and damages in addition or in the alternative, and claiming that liquidated damages are not the sole and exclusive remedy in this case. On May 18, 2011, Defendants filed a Motion

[1] OILN is the only Defendant who signed the Agreement as Purchaser, however, Plaintiffs contend that Chesapeake Energy Corporation (hereinafter "Chesapeake Corp"), Northern Michigan Exploration Company, LLC (hereinafter "NMEC") and Chesapeake Exploration, LLC (hereinafter "Chesapeake LLC") are liable based on guaranties, agency and contract principles and other facts and applicable law. Therefore, the term "Defendants" shall collectively refer to OILN, Chesapeake Corp, NMEC and Chesapeake LLC.

for Summary Disposition in Lieu of Answer, arguing that the parties agreed to liquidated damages as the remedy in the event of non-performance by the Purchaser, with a specific performance remedy only available to the Purchaser upon Sellers/Plaintiffs' default.

On October 7, 2011, the Court issued a Decision and Order Denying the Defendants' Motion for Summary Disposition. Subsequently, at a Status Conference, held November 8, 2011, the parties requested that the Court clarify whether the Plaintiffs elected the liquidated damages remedy by failing to tender back the $1 million deposit for Closing II. Therefore, the Court now issues this Supplement to the Decision and Order Denying the Defendants' Motion for Summary Disposition.

II. ARGUMENTS

In their Motion for Summary Disposition, the Defendants argue that even if the Plaintiffs have a specific performance remedy, the Plaintiffs failed to tender back the $1 million deposit for Closing II and have therefore elected the liquidated damages remedy. The Defendants cite *Schmidt v Stepek* in support of their claim. *Schmidt v Stepek*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2007 (Docket No. 274967).

In *Schmidt*, the parties entered into a written agreement for the sale of plaintiffs' house to defendants and defendants tendered $10,000 in earnest money. *Id*. The contract held that, in the event defendants failed to proceed with the purchase, the plaintiffs were entitled to retain the earnest money as liquidated damages or seek specific performance of the contract. *Id*. After defendants declined to proceed with the purchase, the plaintiffs deposited the earnest money into their own bank account. *Id*. Thereafter, the plaintiffs announced their intention to complete the sale and scheduled a closing where they would apply the $10,000 earnest money as a credit toward the defendants purchase price. *Id*.

The court found that the plaintiffs were not entitled to specific performance because they elected the liquidated damages remedy by cashing the defendants' check and converting the funds to their own use. *Id*.

Here, the Defendants argue that Plaintiffs retention of the Closing II deposit constitutes an unequivocal act, as a result of which, Plaintiffs have elected the remedy of liquidated damages.

Plaintiffs dispute the Defendants' claim, asserting they have taken no affirmative or unequivocal actions subsequent to the Defendants' breach that would indicate they intended to accept liquidated damages as their remedy. Furthermore, Plaintiffs argue that, after receiving Defendants' October 28, 2010 letter stating they were entitled to keep the deposit as liquidated damages for failure to close, the Plaintiffs continued to actively pursue closing by appearing at the Defendants' offices the next day "ready, willing and able to consummate the closing and sign the agreed assignment documents transferring the property at issue…in exchange for payment of the balance of the purchase price."[2] Plaintiffs also note that the only action they have taken since the breach with regard to the remaining deposit has been to segregate it in a separate bank account for purposes of clarity and convenience.

III. ANALYSIS

In *DeMellow v McNamara*, the court held that the vendor's sole remedy when a prospective purchaser declined to proceed was to retain the deposit as liquidated damages. *DeMello v McNamara*, 178 Mich App 618; 444 NW2d 149 (1989). The court found that the parties' agreement was an option, not a binding contract of sale for which a court could declare specific performance, therefore, the sole remedy was retention of the deposit as liquidated damages. *Id*.

An option to purchase land is not a contract of purchase, but a mere offer, acceptance of which must be in compliance with the proposed terms as to both the proposed offer and time specified. *Le Baron Homes v Pontiac Housing Fund*, 319 Mich 310; 29 NW2d 704 (1947). An agreement is an option and not binding when it provides that if land titles are not acceptable, money and deeds shall be returned to the respective parties. *Deane v Rex Oil & Gas Co*, 325; 39 NW2d 204 (1949).

The Agreement in this case states, "Both of the Closings are mandatory. This Agreement is the irrevocable obligation by Seller to sell and OILN to purchase the Leasehold Interests." Leasehold Purchase and Sale Agreement ¶ 6. Paragraph 6 further clarifies the procedure and period for curing identified title issues, providing that the Seller has 30 days from the date of receiving notification of title defect to cure. This paragraph additionally states, "OILN

[2] Plaintiffs' Response to Defendants' Motion for Summary Disposition in Lieu of Answer, pages 5-6, dated June 3, 2011.

acknowledges that any title objections with respect to the Leasehold Interests or portions of the Leasehold Interests for which OILN has failed to provide Seller written notice on or before expiration of the respective Review Periods, shall be deemed, for all purposes, irrevocably waived by OILN." *Id*.

In this case, the Agreement was not an option, but instead a binding contract of sale. Thus, *DeMellow* holds that the Plaintiffs are not exclusively limited to retaining the deposit as their remedy for the Defendants' default. *DeMellow*, *supra*.

With regard to treatment of the deposit, after the Agreement was signed on June 10, 2010, the Defendants promptly wired the nonrefundable deposit of $2 million to the Plaintiffs. The Plaintiffs placed the funds in a bank account, as the Agreement did not require the money be placed in escrow nor did it dictate any restrictions with regard to the funds. As stated in the Agreement, $1 million was applied toward the purchase price paid at Closing I on July 8, 2010.

The doctrine of election of remedies applies only when two or more inconsistent remedies are available and the plaintiff has actually chosen and pursued one to the exclusion of others. *Jim-Bob Inc v Mehling*, 178 Mich App 71; 443 NW2d 451 (1981). The essential conditions or elements of election of remedies are: the existence of two or more remedies; the inconsistency between such remedies; and the choice of one of them. *Riverview Coop Inc v First Nat'l Bank & Trust Co of Michigan*, 417 Mich 307; 337 NW2d 225 (1983).

The doctrine cannot apply unless there are, in fact, two or more available remedies so that there is something between which to elect, and an error in pursuing a remedy that was never obtainable does not amount to an election. *Viaene v Mikel*, 349 Mich 533; 84 NW2d 765 (1957; *Hansen v Pere Marquette R Co*, 267 Mich 224; 255 NW 192 (1934); *Walraven v Martin*, 123 Mich App 342; 333 NW2d 569 (1983). Acceptance of an offer, and similarly election of a remedy, may be implied from the acts and circumstances of the parties. See generally *Ludowici-Celadon Co v McKinley*, 307 Mich 149; 11 NW2d 839 (1943). The doctrine of election of remedies is based on a deliberate choice of position between alternative rights. *Ielmini v Bessemer Nat'l Bank*, 298 Mich 59; 298 NW 404 (1941); *Riverview Coop, supra*; 337 NW2d 225 (1983); *HG Vogel Co v Original Cabinet Corp*, 252 Mich 129; 233 NW 200 (1930). It implies some decisive action indicative of a choice and an election to pursue a particular theory or course of action without recourse to an existent and known alternative. *Hickey v Mahon's*

Estate, 290 Mich 193; 287 NW 430 (1939). Mere silence may not, under ordinary circumstances at least, be construed as indicating consent or acceptance, but under circumstances involving affirmative acts may properly be regarded as evidencing such consent or acceptance. *Wilkenson v Lanternman*, 314 Mich 568; 22 NW2d 827 (1946). To make an election, one must by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent remedies. *Hickey*, *supra* at 197.

A plaintiff may simultaneously pursue all of its remedies against parties' defendant so long as the plaintiff has not made an election of remedies and is not awarded double recovery. Once an election is made, however, a party is thereafter barred from asserting any inconsistent remedy. *Walraven v Martin*, 123 Mich App 342; 333 NW2d 569 (1983).

Schmidt is distinguishable from this case, and the Court finds Defendants' reliance on *Schmidt* to be misplaced. *Schmidt*, *supra*. In *Schmidt*, the deposit was to be placed in escrow pending the sale, however, the sellers placed the earnest money in their own bank account ***after*** receiving notice the buyers no longer wished to complete the purchase.[3] *Id*. The *Schmidt* court concluded that this constituted an unequivocal act confirming election of the liquidated damages remedy. *Id*. at 2.

Here, in contrast, there was no requirement that the deposit be placed in escrow, nor other restrictions on its safeguarding, the deposit was received four months prior to the breach and since, the Plaintiffs have actually segregated the deposit in a separate account for purposes of clarity and convenience, pending the outcome of this litigation.

After receiving notice of the breach, the Plaintiffs still appeared on the scheduled closing date and demanded to complete the closing rather than accept the liquidated damages. Plaintiffs initially instituted litigation on November 15, 2010, less than month after the Agreement was breached, seeking specific performance. When Plaintiffs re-filed the instant litigation in March of 2011, they again sought other remedies, including specific performance and damages.

In addition, there is no provision in the Agreement which requires the Plaintiffs to return, refund or "tender back" the deposit in the event of a breach.

The Defendants posit that placing the Closing II deposit in a separate bank account controlled by the Plaintiffs is a retention of the deposit within the meaning of ¶ 3 and that failure

[3] Emphasis added.

to return the $1 million deposit is the unequivocal act that confirms their election of the liquidated damages remedy. Nevertheless, as noted above, there was no provision in the Agreement requiring the Plaintiffs to "tender back" the deposit in the event of a breach and 'inaction' may not be construed as indicating a party's consent or acceptance. *Wilkenson*, *supra*. To make an election, the law requires a decisive act indicating one's choice of remedy. *Hickey*, *supra* at 197. Therefore, failure of the Plaintiffs to return the deposit upon breach does not constitute an election to accept the liquidated damages remedy.

The Plaintiffs have clearly indicated through their actions and communications with the Defendants that they wish to pursue alternative remedies, including specific performance and damages, rather than accepting the deposit as liquidated damages. The Plaintiffs have not actually chosen and pursued one remedy to the exclusion of other remedies, therefore, they have not bound themselves to pursuing a particular remedy.

IV. CONCLUSION

For the reasons stated herein, the Defendants are not entitled to summary disposition, pursuant to MCR 2.116(C)(10), and their Motion for Summary Disposition In Lieu Of Answer is denied. This Court holds as a matter of law that the Agreement was not an option, but a binding contract of sale and that Plaintiffs are not limited to retaining the deposit as their sole remedy. Further, the Plaintiffs have not elected a liquidated damages remedy.

This Decision and Order does not resolve all issues and does not close the case.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge