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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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 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

[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.

are not the sole and exclusive remedy in this case. On May 18, 2011, Defendants filed a Motion for Summary Disposition in Lieu of Answer.

Defendants contend 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.

The Defendants' Motion for Summary Disposition was heard on June 13, 2011, and the Court took the motion under advisement. The Court now issues this written decision and order denying 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 and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). 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. MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts. *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). Conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury. *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). The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(4); *Maiden*, *supra* at 120. If the opposing party fails to present documentary evidence establishing the existence of a material

factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

III. ARGUMENTS

The Defendants argue that the Agreement contained a liquidated damages clause outlining the parties' stipulated remedy in the event one or both closings did not occur and that this liquidated damages provision controls this case. The liquidated damages clause is contained in Paragraph 3 of the Agreement and states as follows:

> Within three (3) business days after the execution of this Agreement by all parties, OILN shall wire transfer to Muskegon a nonrefundable deposit of Two Million Dollars ($2,000,000.00) (the "Deposit"). One-half of the Deposit shall be credited against the portion of the purchase price that is due to Seller from OILN for Closing 1 and one-half of the Deposit shall be credited against that portion of the purchase price that is due to the Seller from OILN for Closing 2. In the event that OILN fails to close on the Leasehold Interests as Closing 1 and Closing 2, both as hereinafter defined, and pay for all of the Leasehold Interests, except for any part of the Leasehold Interests not having Acceptable Title as determined by OILN, and Seller is not in breach of this Agreement, Seller may retain the Deposit as liquidated damages, with OILN having no further obligation under this Agreement.

Further, Defendants maintain that specific performance as a remedy was only available to the Purchaser in the event of the Sellers' default. Paragraph 7 of the Agreement details the Purchaser's remedy, in part, as follows:

> If Closing 1 and Closing 2 and the subsequent closing related to the curing of title that is not Acceptable Title do not occur as a result of Seller's failure to perform, OILN shall be entitled to immediate judicial relief in the form of specific performance. Conversely, if Closing 1 and Closing 2 do not occur as a result of OILN's failure to perform, and Seller is not in breach of this Agreement, Seller shall be entitled to the remedy described above.[2]

Defendants argue in the hypothetical that, even if the specific performance remedy were available to the Plaintiffs, the Plaintiffs are barred from seeking such because they elected the liquidated damages remedy by failing to return the $1 million deposit.

The Plaintiffs contend that, under the clear and unambiguous terms of the contract, they are not limited to liquidated damages as their sole and exclusive remedy because the liquidated

[2] The "remedy described above" refers to the liquidated damages remedy outlined in Paragraph 3 of the Agreement.

damages remedy is permissive and not mandatory under Paragraph 3 of the Agreement. Plaintiffs further argue that the language of Paragraph 7 of the Agreement does not make the liquidated damages remedy mandatory.

IV. ANALYSIS

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. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005). In interpreting a contract, courts give contractual language its plain and ordinary meaning unless otherwise defined. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004).

Where a contract can be construed by its term alone, it is the duty of the court to interpret it. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003). When the contractual language is plain and unambiguous, the contract must be enforced by its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

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. *City of Lansing Mayor v Michigan Pub Service Comm*, 470 Mich 154; 680 NW2d 840 (2004). When contractual terms are ambiguous or depend upon extrinsic evidence information, the question of interpretation should be submitted to the jury.[3] *Klapp*, *supra*.

Courts determine a contract's meaning within the four corners of the document. As a written contractual document, the provisions are to be interpreted according to well recognized principles of contract interpretation. To give meaning to provisions, courts interpret the chosen words as they are ordinarily and commonly used. If this can be done, it is unnecessary to resort to parole evidence and the court makes its determination simply in accordance with the document itself.

[3] Extrinsic evidence is admissible to determine the parties' intent when a contract is ambiguous. *Spindler v Wiegand*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 294853). It is also admissible to prove the existence of a latent ambiguity. *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010). However, Michigan appellate courts have long recognized that disagreements between parties do not create an ambiguity where there is none. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 133; 743 NW2d 585 (2007); *Gortney v Norfolk & Western Ry Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).

The intention of the parties as to the mandatory or directory nature of a particular provision is determined primarily by the language.[4] Words or phrases which are generally regarded as making a provision mandatory include "shall" and "must." *Id*. at FN 4. Use of the mandatory term "shall" normally creates a binding obligation on one or multiple parties. *Id*. A provision couched in permissive terms is commonly regarded as directory or discretionary. *Id*. The use of the word "may" is generally permissive, meaning the action spoken of is optional or discretionary. *Id*. Where a document contains both the words "may" and "shall," it is presumed that the drafters intended to distinguish between them, "shall" being construed as mandatory and "may" as permissive. *Id*.

In some cases the view has been taken that a remedy provided in a contract is exclusive of other possible remedies only where the language in the contract clearly indicates an intent to make the remedy exclusive. 84 ALR2d 322. The courts, using varying language, have ruled that the granting of one remedy by express contract is not an exclusion of others which the law annexes to the contract, unless they are so inconsistent with each other as plainly to imply such exclusion; and that a party may pursue any remedy which the law affords in addition to the remedy provided by the contract, unless the contract declares the remedy to be exclusive. *Id*. Absent clear contract language to the contrary, the non-breaching party to a contract will not be limited in his or her choice of remedies.[5]

Parties are free to include limiting language (i.e. "sole remedy," "exclusive remedy," "only remedy," "restricted to," etc.) in their contracts. Here, the parties chose to use limiting language for certain provisions, language that mandated certain actions, while using permissive language elsewhere. In addition to using "shall" and "may" throughout the Agreement, the parties explicitly stated that "the Closings are ***mandatory***," and it "is the ***irrevocable obligation*** by Seller to sell."[6] These terms are specific and unambiguous. It is clear that the parties are familiar with legal contracts and understand the implications of using certain terms and language. With regard to this Agreement, it is unmistakable that the parties intended "shall" to

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[4] *See generally* 73 Am Jur 2d, Statutes, § 13. (While this section specifically discusses statutory language, contractual language is interpreted in the same manner according to well established principles of contract law and case law. Therefore, § 13 assists in understanding and distinguishing the terms "shall" and "may" as they pertain to contractual provisions.)

[5] *Spindler*, *supra* at FN 3.

[6] Emphasis added.

mean an action was mandatory, required and binding. Further, the parties undoubtedly intended "may" to mean an action is permissive, optional and discretionary. Therefore, pursuant to Paragraph 3 of the Agreement, which states "Seller ***may*** retain the Deposit as liquidated damages," retention of the Deposit by the Plaintiffs was optional and not their sole remedy.[7] Furthermore, the language that "Seller shall be entitled to the remedy [of liquidated damages] described above," merely dictates that the Sellers are guaranteed the ability to exercise the option of retaining the deposit.[8] "Shall" refers to the Sellers' irrevocable option to retain the deposit; it does not mean that liquidated damages are the exclusive remedy.

Parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which might result in the event of a breach of the agreement and such a stipulation is enforceable if the amount stipulated is reasonable with relation to the possible injury suffered. *Curran v Williams*, 352 Mich 278; 89 NW2d 602 (1958). However, a stipulation in regard to liquidated damages does not preclude a suit for specific performance unless it appears from the whole contract that it was the intention of the parties that right to pay the stipulated sum or perform the contract should be optional. *Milner Hotels v Ehrman*, 307 Mich 347; 11 NW2d 914 (1943). A stipulation for the payment of a certain sum on vendee's failure to perform, which is in reality a penalty, is no obstacle to a suit for specific performance by the vendor. *Hendrick v Firke*, 169 Mich 549; 135 NW 319 (1912).

Specific performance is not a matter of right, but a grace resting within the sound discretion of the court. *Shannon v Gull Lake Ass'n*, 11 Mich App 644; 162 NW2d 111 (1968); *Collins v Collins*, 348 Mich 320; 83 NW2d 213 (1957); *Chambers v Livermore*, 15 Mich 381 (1867); *Kennedy v Brady*, 43 Mich App 760; 204 NW2d 779 (1972). The grant of specific performance depends on the peculiar circumstances of each case, although a legal right to damages for breach of contract may exist. *Derosia v Austin*, 115 Mich App 647; 321 NW2d 760 (1982); *Zenko v Boucher*, 60 Mich App 699; 233 NW2d 30 (1975); *Nedelman v Meininger*, 24 Mich App 64; 180 NW2d 37 (1970); *Domas v Rossi*, 52 Mich App 311; 217 NW2d 75 (1974); *Linsell v Halicki*, 240 Mich 483; 215 NW 315 (1927); *Lingemann v Naoumson*, 237 Mich 557; 212 NW 955 (1927). Specific performance is to be granted only where a clear case

[7] Emphasis added.
[8] Agreement, Paragraph 7.

for equitable relief is established and is to be exercised according to the settled principles of equity as applied to the individual circumstances of each case. *Blackwell v Keys*, 353 Mich 212; 91 NW2d 190 (1958); *Hellman v Standard*, 340 Mich 343; 65 NW2d 725 (1954); *Waller v Lieberman,* 214 Mich 428; 183 NW 235 (1921); *Friedman v Winshall*, 343 Mich 647; 73 NW2d 248 (1955).

Specific performance will be denied unless there is both mutuality of obligation and of remedy. *Grade v Loafman*, 314 Mich 364; 22 NW2d 746 (1946); *Gannon v Standsfield*, 216 Mich 440; 185 NW 705 (1921); *Voorhies v Frisbie*, 25 Mich 476 (1872). Whether a buyer or seller brings an action for specific performance, the petitioner must demonstrate the ability and willingness to complete his side of the bargain. Hunter, *Modern Law of Contracts* (New York: Warren, Gorham & Lamont, 2011) §13.4. The doctrine of specific performance holds that if a buyer is entitled to such a remedy, the seller should expect no less. *Id*. The mere fact that the remedy of specific performance is not available to one party is not itself sufficient reason for refusing it to the other party. *Gaval v Wojtowycz,* 13 Mich App 504; 164 NW2d 724 (1968); *M & D Robinson Co v Dunitz,* 12 Mich App 5; 162 NW2d 318 (1968).

The ground for specific performance is that recovery of damages at law is not a complete remedy. *Lamar v Detroit Apartments Corp*, 237 Mich 206; 211 NW 643 (1927). Specific performance cannot be granted if there is a remedy at law which is complete and adequate. *Kefgen v Coates*, 365 Mich 56; 111 NW2d 813 (1961); *Rex Oil & Gas Co v Busk*, 335 Mich 368; 56 NW2d 221 (1953); *Ressler v O'Malley*, 328 Mich 331; 43 NW2d 874 (1950); *Laker v Soverinsky*, 318 Mich 100; 27 NW2d 600 (1947); *Webster v Gray*, 37 Mich 37 (1877). The existence of a remedy at law does not preclude relief by specific performance if the legal remedy is inadequate, such as where specific performance will remedy the breach of contract more adequately than damages. *Oreland Equipment Co v Copco Steel & Engineering Corp*, 310 Mich 6; 16 NW2d 646 (1944); *Bird v Hall*, 30 Mich 374 (1874); *Diamond Lumber Co v Anderson*, 216 Mich 71; 184 NW 597 (1921); *Peer v Kean*, 14 Mich 354 (1866); *Ruegsegger v Bangor Twp Relief Drain*, 127 Mich App 28; 338 NW2d 410 (1983). Specific performance of a contract for a sale of land will not be denied because there is an adequate remedy at law. *Janiszewski v Shank*, 230 Mich 189; 202 NW 949 (1925). Sellers have supported their claim for specific performance by arguing that proof of the value of the land,

subject to the contract, can never be accurate because each parcel of land is unique. *Hunter*, *supra*.

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 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.*

As of September 30, 2010, the final day of Review Period II, Defendants had not notified Plaintiffs of any title defects that would result in the original 7,069.73 mineral acres being "held out" of Closing II.[9] Review Period II expired on October 1, 2010, pursuant to the Second Amendment. After further discussions between the parties, an agreement was reached

[9] See Leasehold Purchase and Sale Agreement ¶ 6.

determining a final net acreage of 7,100.81 mineral acres as subject to the Agreement and Closing II.[10]

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 and the Court has the discretion to declare specific performance as a remedy. *DeMellow*, *supra*.

V. 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.

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

Dated: _____

[10] Leslie Irish acted as an agent for Defendants during the parties' discussions establishing the final net acreage .