

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

JOHN D. and BARBARA O'HAIR, JOHN
DENNIS O'HAIR, RALPH RUGAN III, and
MARILY RUGAN FLOTTE,

Plaintiffs,

v

File No. 11-8645-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 Plaintiffs

William F. Rolinski (P24874)
Co-Counsel for Plaintiffs

Kevin J. Roragen (P56510)
Steven L. Barney (P10465)
Attorneys for Defendants

**ORDER DENYING PLAINTIFFS' MOTION
FOR RECONSIDERATION OR REHEARING PURSUANT TO MCR 2.119(F)(3)**

On January 12, 2012, this Court issued a Decision and Order Granting Defendants' Request for Summary Disposition and Motion to Strike Plaintiffs' Supplemental Brief and Denying Plaintiffs' Partial Motion for Summary Disposition. On February 2, 2012, the Plaintiffs filed a Motion for Reconsideration or Rehearing Pursuant to MCR 2.119(F)(3). The Court having now reviewed all documents submitted by the parties, dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order.

The standard for reviewing motions for reconsideration is codified at MCR 2.119(F), entitled Motions for Rehearing and Reconsideration, and reads in pertinent part, as follows:

(3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The Plaintiffs allege the following:

- (1) There was no privity of contract between Northern Michigan Exploration Company, LLC (“NMEC”) and the Plaintiffs¹;
- (2) The Court incorrectly construed the OGL as an ‘option’;
- (3) The Court incorrectly interpreted the holding in *Harbor Park Market*²;
- (4) The Court failed to recognize the exchange of promises between lessor and lessee is the underlying consideration for the OGL;
- (5) Approval of title pursuant to the OFP is a condition subsequent, not a condition precedent;
- (6) NMEC terminated the OGL based on economics;
- (7) O.I.L. Niagaran, L.L.C. (“OILN”) was obligated to give Plaintiffs notice of claimed title defects within the title review period;
- (8) OILN acted in bad faith and its inaction does not excuse non-payment under the OFP;
- (9) Defendants egregiously thwarted Plaintiffs’ discovery;
- (10) The Court did not address the Plaintiffs’ Reply Brief filed November 11, 2011; and
- (11) The Plaintiffs’ Supplemental Brief was proper.

There was no privity of contract.

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

¹ The Oil and Gas Lease document shall hereinafter be referred to as “OGL” and Order for Payment document shall be referred to as “OFP.” The OGL and OFP jointly executed by the parties shall hereinafter be referred to as the “Agreement.”

² *Harbor Park Market, Inc v Gronda*, 277 Mich App 126; 743 NW2d 585 (2007).

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. *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957). 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 practices, dealing with the agent might rightfully believe him to have on the basis of the principal's conduct. *Id.* Apparent authority to act is to be determined from all the surrounding facts and circumstances. *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).

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. *Allstate Inc, Co v Snarski*, 174 Mich App 148, 158; 435 NW2d 408 (1988). The general rule is that the powers of an agent are prima facie coextensive with the business instructed to his care. *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934). An agent's authority as to those with whom he deals is what it reasonably appears to be. *Id.* 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. Restatement of Agency, 2d § 15.

According to the Defendants, NMEC, as principal, retained OILN to act as a leasing agent. As an agent, OILN had authority to contact prospective Lessors and negotiate OGLs, draft, tender and accept OGLs, check title on prospective lease tracts, perform title curative work and draft OFPs. Pursuant to the above case law, the Court finds there was a clear agency relationship between NMEC and OILN and therefore, privity of contract or lack thereof need not be addressed. The Court does not find that a palpable error has been demonstrated.

The Court incorrectly construed the OGL.

The Plaintiffs' assertion that this Court's Order transforms the Agreement into an 'option' is without merit. The language of the Agreement was plain and unambiguous, therefore, the Court found it should be enforced according to its terms. *Burkhardt v Bailey*, 260

Mich App 636, 656; 680 NW2d 453 (2004). The Court does not find that a palpable error has been demonstrated.

The Court incorrectly interpreted *Harbor Park Market*.

In *Harbor Park Market*, the Court held that language limiting the scope and discretion of the reviewing party could be included in a contract, but absent such language, the contract must be accepted and enforced as written. *Harbor Park Market, supra*. Further, one party's understanding of what was intended by the language is irrelevant to determining what the language actually says. *Id.* A court may not construe an unambiguous contract to add obligations not negotiated into the contract by the parties. *Rose v Rose*, 289 Mich App 45; 795 NW2d 611 (2010); *Holmes v Holmes*, 281 Mich App 575; 760 NW2d 300 (2008). Here, the parties did not include language limiting the scope and discretion of Defendants in approving or disapproving title, therefore, based on the clear language of the Agreement the Defendants retained complete discretion to reject or approve title. The Court does not find that a palpable error has been demonstrated.

The Court failed to recognize the exchange of promises as consideration.

The 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 Mich 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 Mich*, 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 according to its terms. *Burkhardt, supra.* The Plaintiffs' assertion that the exchange of promises between the parties serve as the underlying consideration is not corroborated by the plain language of the Agreement and the Court does not find that a palpable error has been demonstrated.

Approval of title was a condition subsequent.

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. *Harbor Park Market, supra*. 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, the bonus payment, or ‘performance,’ could not occur until the ‘event’ of title inspection and approval by Defendants transpired. The Court does not find that a palpable error has been demonstrated.

NMEC terminated the OGL based on economics.

The Plaintiffs’ economic argument is irrelevant and immaterial. The Agreement does not require that a title defect exist in order for Defendants to decide not to approve title, nor does the Agreement contain any language pertaining to acceptable and/or unacceptable reasons to disapprove title. Thus, Defendants reasons for disapproving title are inconsequential and the Court does not find that a palpable error has been demonstrated.

OILN was obligated to give Plaintiffs notice of claimed title defects.

Under the plain language of the Agreement, 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. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005); *Rose, supra*; *Holmes, supra*. 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 Leases had been rejected. The Court will not impose a duty on the Defendants that was not originally contemplated by the parties to the Agreement. The Court does not find that a palpable error has been demonstrated.

OILN acted in bad faith.

Michigan does not recognize a cause of action for breach of the implied duty of good faith and fair dealing. *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1; 730 NW2d 29 (2006).³ Under Michigan law, the implied covenant of good faith cannot override an express provision in a contract. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299; 520 NW2d 640 (1994). 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. *Jacobson v BH Assoc Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2001 (Docket No. 222945). The Court does not find that a palpable error has been demonstrated.

³ 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).

Defendants egregiously thwarted Plaintiffs' discovery.

The Plaintiffs' Motion for Partial Summary Disposition was brought pursuant to MCR 2.116(C)(10) and 2.116(C)(9) and asserted that no material issues of fact existed. The Court based its Decision and Order, pertaining to summary disposition, on the clear and unambiguous language of the contract. The Plaintiffs' concerns regarding discovery of electronically stored information were: (1) not relevant to the issues subject to summary disposition and (2) addressed by the Court at separate hearings on October 10, 2011 and December 12, 2011. The Court does not find that a palpable error has been demonstrated.

The Court did not address the Plaintiffs' Reply Brief.

Oral arguments on the Plaintiffs' Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10) and 2.116(C)(9) were scheduled for and heard on November 14, 2011. The Plaintiffs' Reply Brief was not filed with the Court until November 14, 2011. Therefore, the Court finds that the Plaintiffs' Reply Brief was not an authorized pleading and the Court was not required to address said brief. The Court does not find that a palpable error has been demonstrated.

The Plaintiffs' Supplemental Brief was proper.

The Court properly struck the Plaintiffs' Supplemental Brief, pursuant to MCR 2.115(B), because it was not timely filed and referenced exhibits immaterial to the Motion for Partial Summary Disposition. The Court does not find that a palpable error has been demonstrated.

For the reasons stated herein, the Court finds that the motion presents the same issues previously ruled on, either expressly or by reasonable implication. The Court does not find that a palpable error has been demonstrated and that a different disposition of the motion must result from the correction of an error. MCR 2.119(F)(3). Therefore, the Plaintiffs' Motion for Reconsideration is denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge