UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

VICTORIA OF NORTHWEST FLORIDA, INC., CASE NO. 00-41572-PNS3

Debtor. Chapter 11

MZ VENTURES OF NORTHWEST FLORIDA, L.L.C.,

Plaintiff,

v. ADV. PROC. NO. 03-80024

VICTORIA OF NORTHWEST FLORIDA, INC., et al.,

Defendants.

ORDER ON COMPLAINT

Scott A. Remmington, Counsel for MZ Ventures of Northwest Florida, Inc.
Lisa S. Minshew, Counsel for Victoria of Northwest Florida, Inc. and the Youngs
Gregory D. Smith, Counsel for H.L.O.T. Family Limited Partnership

This matter is before the Court on the Plaintiff's complaint and first amended complaint against Victoria of Northwest Florida, Inc. for specific performance (Count I), breach of contract (Count II), breach of implied covenant of good faith and fair dealing (Count III), and fraudulent transfer (Count IV) against Tom and Millie Young. The Court entered a judgment in favor of the Plaintiff on the Defendant's counterclaim for slander of title on August 14, 2008. After due consideration of the pleadings, briefs, testimony, evidence and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

The Plaintiff, MZ Ventures of Northwest Florida, L.L.C. ("MZV"), filed this adversary

proceeding with a single count for specific performance of a contract to convey real property, commonly referred to by the parties as "Partridge Hills", on or about May 14, 2003. On June 13, 2003, the Defendant, Victoria of Northwest Florida, Inc. ("Victoria"), then represented by another attorney, filed an answer and counterclaims for damages for MZV's failure to timely close the contract and for injunctive relief for MZV's breach of duty related to another real estate transaction referred to as the "Sequoia commercial parcel".[1] After conducting discovery and filing motions for summary judgment, the parties reached a settlement agreement on or about August 12, 2004, and the Court approved an amended settlement agreement on October 7, 2004.

In January 2005, MZV filed a motion to enforce the settlement when a notice of lis pendens hampered Victoria's ability to sell the Partridge Hills property to a third party. After a year of renewed negotiation, the Court entered a consent order dismissing this adversary on February 14, 2006, but retained jurisdiction to enforce the settlement or resolve disputes between the parties. In June 2006, the third party buyer for Partridge Hills terminated its agreement to purchase the property, and the parties' settlement was once again derailed.

MZV filed a motion to reopen this adversary proceeding, asking that the settlement agreement be enforced or unwound, in January 2007. Victoria countered with a motion to refer the matter to mediation, and the matter was referred to mediation in February 2007. The mediation failed to settle the matter, and Victoria filed its own motion to enforce the settlement on April 19, 2007. After almost a year of pleadings and hearings related to the motion to enforce the settlement, the Court granted MZV's motion to partially unwind the settlement on February

[1]Victoria did not address these counterclaims in its pretrial documents and did not present evidence to support the counterclaims at trial; therefore, the Court will deny the relief sought in the June 13, 2003 counterclaims.

28, 2008 and the parties began to take discovery for the adversary proceeding.

On February 18, 2008 MZV filed the first amended complaint, which included specific performance (Count I), breach of contract (Count II), breach of implied covenant of good faith and fair dealing (Count III) against Victoria, and fraudulent transfer (Count IV) against Tom and Millie Young. Victoria answered the complaint and filed a counterclaim for slander of title. MZV moved to dismiss Victoria's counterclaim for slander of title, and the Court denied the motion in April 2008. On June 9, 2008, MZV filed a motion for partial summary judgment as to Victoria's count for slander of title, and the Court granted the motion on August 14, 2008.

After several continuances due to scheduling conflicts and poor health of Defendant Tom Young, the matter came on for trial on June 11 and 12, 2009. During his opening statement, counsel for MZV informed the Court that a mortgage placed on the Partridge Hills property, which was the subject of MZV's Court IV for fraudulent transfer, had been satisfied just prior to the trial. After the parties' closing arguments, counsel for MZV stipulated that satisfaction of the mortgage lien eliminated the damage element of Court IV, and the Court dismissed Count IV-fraudulent transfer with prejudice.

FINDINGS OF FACT

In December 2001, Tom Young of Victoria entered negotiations with Gary McMichael of Camp Walton Yacht Club Developers, LLC [2] to sell a 55 acre parcel located in Crestview, Florida and commonly known as Partridge Hills. Fred McLaughlin, a real estate consultant with experience in subdivision development and land acquisition, assisted with the negotiations.

[2]Camp Walton assigned its interest in the purchase agreement to the Plaintiff, MZV, on or about April 1, 2002.

Victoria was a chapter 11 debtor in possession at the time of the transaction, and therefore, the contract required the approval of the bankruptcy court. On December 18, 2001, McMichael and Young signed the Partridge Hills Purchase and Sell Agreement ("the purchase agreement"), a four page contract outlining the parties' agreement. (Plaintiff Ex. 66) The purchase price for the parcel was $274,000.00.

Paragraph 1 of the purchase agreement required the purchaser to complete all its obligations under the contract "on or before December 21, 2001, ten days of the effective date of this contract." The closing was to be on or before December 31, 2001, with an exception that the closing date could be extended to obtain bankruptcy court approval. The contract did not contain a "time is of the essence" clause. Paragraph 2A required the purchaser to make a $5,000 earnest money deposit to be held in escrow by the law firm of Clark, Partington, Hart and Hart, P.A. ("Clark Partington"). Paragraph 6 stated that in addition to the $274,000 purchase price, Victoria would receive an amount equal to 50% of all net profits, as defined by the agreement. Paragraph 7 stated that consummation of the sale was conditioned on and subject to approval of the contract by the seller's attorney and the bankruptcy court. On the last page of the agreement, below his signature line, Tom Young wrote by hand the following language: "Subject to Mike Meade attorney and approval of LLC & Contract". The purchase agreement was contingent on the parties agreeing to the terms of an operating agreement for developing Partridge Hills and dividing the net profits.[3] The bankruptcy court approved the sale of Partridge Hills on December

[3] The evidence shows that the parties contemplated some type of agreement for the development of Partridge Hills that would have to be approved by Mike Mead. The drafts submitted are titled "development agreement"; "joint venture agreement"; "LLC operating agreement"; and "operating agreement." See Plaintiff Ex. 6, 13, 14 and 15. The Court uses the term "operating agreement" to distinguish the agreement that had to be approved by Mike Mead

21, 2001. The parties extended the date for closing to January 31, 2002 by placing their initials on a copy of the first page of the purchase agreement with December 31, 2001 crossed out and "January 31, 2002" written in. (Plaintiff Ex. 7) Young maintains that no consideration was given for the extension. McMichael testified that the extension was agreed upon because of the holidays and travel by both parties.

Prior to and after signing the purchase agreement, Gary McMichael and Fred McLaughlin worked to draft an operating agreement acceptable to Tom Young. McLaughlin testified that at least four drafts of joint venture agreements and operating agreements were presented to Young, who indicated that he would submit the drafts to his attorney, Michael Mead. The drafts submitted at trial did not have exact dates, and at least two did not identify Partridge Hills as the property concerned in the operating agreements.[4] McLaughlin stated that Young was concerned with maintaining some authority over the development of Partridge Hills. McLaughlin testified that Young said that he had given Mead an operating agreement prepared by Richard Colbert, an attorney at Clarke Partington who had prepared such agreements for Gary McMichael, but Young never executed the agreement. Neither McLaughlin or McMichael submitted the draft operating agreements directly to Michael Mead.

McLaughlin testified that Young indicated that he wanted more money for the Partridge Hills parcel because the rising real estate market made the property more valuable and because the terms of a settlement with Okaloosa County provided free sewage installation, which would

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from the December 18, 2001 purchase agreement. There was no evidence of the formation of an LLC or of Mead approving an LLC.

[4]The draft operating agreements sometimes refer to the Partridge Hills development as "Cobia Hills", but they are referring to the same development.

significantly reduce the development costs for Partridge Hills. However, the Okaloosa County settlement did not occur until 2006. McLaughlin testified that he was involved with subsequent offers in 2006 for the Partridge Hills property in the range of $3.3 to $3.8 million. McLaughlin says the property could no longer bring such an offer due to current market conditions.

Gary McMichael, as principal of MZV, looked at several properties involving Tom Young or Victoria, including the Partridge Hills parcel, the Sequoia/Solimar property, and the Antioch Road/Clay Pit property. The Sequoia/Solimar property deal was completed in February 2002. The agreement was similar to the purchase agreement related to the Partridge Hills property, calling for 50% of net profits to be paid to Victoria and an operating agreement. McMichael testified that he and Young never entered into an operating agreement regarding the Sequoia/Solimar property, but the deal closed without objection from Young.

McMichael testified that Young reviewed the draft operating agreements for Partridge Hills, noted some changes, and indicated that he would send them to Mead for final approval. According to McMichael, Young scheduled three appointments to finalize the terms of the operating agreement before January 31, 2002, but failed to come to the meetings. McMichael noted Young's failure to appear at the meetings and his refusal to discuss the operating agreement in a letter dated January 31, 2002 to Young's bankruptcy attorney, Mark Freund. (Plaintiff Ex. 17) The Partridge Hills agreement did not close on January 31, 2002.

McMichael testified that he was prepared to close the deal, but Young failed to cooperate. McMichael stated that Young wanted an additional $150,000 to close the deal for Partridge Hills. In a letter dated February 6, 2002, McMichael informed Freund that Young had asked for $150,000 "outside of our contract", and that McMichael intended to enforce the agreement with

Victoria. (Plaintiff Ex. 18) McMichael testified that Young sent him a faxed document dated February 22, 2002 reading "To whom it may concern: I hereby release Tom L. Young, Victoria of Northwest Florida, Inc. from all contracts to Purchase Partridge Hills Property" with a signature line for Camp Walton (MZV's assignor). (Plaintiff Ex. 19).

In the spring of 2002, MZV also sought to purchase the Antioch Road/Clay Pit property from Young Land Company, Inc., an entity formed by Tom Young's children, but not including Tom or Millie Young. Tom Young acted as agent for Young Land Company in negotiating the Antioch Road/Clay Pit property deal. A March 9, 2002 letter from MZV addressed to Tom and Millie Young, Victoria and Young Land Company listed the following properties that MZV wanted to purchase or develop: Antioch Road Property, Partridge Hills, and Sparkling Waters. (Plaintiff Ex. 22). In March 2002, MZV entered into a purchase agreement with Young Land Company to purchase the Antioch Road/Clay Pit property for $550,000. The earnest money deposit was listed as $200,000, but McMichael testified that it was later reduced to $50,000. MZV presented check 1423 from MZV to Young Land Company and Tom Young for $50,000 dated April 3, 2002. (Plaintiff Ex. 29). McMichael testified that the check was not accepted by Young Land Company and the deal was not completed. He said the check was supposed to be credited toward the earnest money deposit for the Partridge Hills property. McMichael said the $50,000 earnest money deposit was listed in one of the drafts for the operating agreement that Young received but did not execute.

McMichael testified that Tom Young came to him for additional funds in mid-April 2002. McMichael gave him a check 1453 for $8,000 and later check 1454 for $7,000. (Plaintiff Ex. 62, ex. 6 and 7). At Young's request, these checks were make payable to M&T

Construction, an entity owned by Tom and Millie Young, and each check had "EMD" written in the memo line. Two letters dated April 15, 2002 and April 16, 2002 from MZV to Tom Young and MT Young Land Company identify the two checks as earnest money deposit for the purchase of Partridge Hills, and state that the acceptance of the checks "acknowledges that the time frame for closing will be indefinite until the operating agreement is agreed upon and executed . . ." (Plaintiff Exhibit 62, ex. 4 and 5). McMichael testified that his assistant, Carol VanBuren, typed these letters and delivered them to Tom Young when he came to get the checks. Mrs. VanBuren also testified by deposition that she typed the letters and gave them to Mr. Young when he received the checks. McMichael testified it was his understanding that these payments extended the time to close on the purchase agreement for Partridge Hills while the parties worked on an operating agreement that would be acceptable to Mead. Tom Young denied receiving the letters and agreeing to an indefinite time period for closing on Partridge Hills. He testified that the $8,000 and $7,000 checks were part of the $200,000 earnest money deposit for the Antioch Road/Clay Pit transaction.

The development agreement between Victoria and Young Land Company related to the Antioch Road/Clay Pit property contained a hand-written reference to check 1453 for $8,000 and check 1453 for $7,000 along with the words "Balance $135,000 Earnest Money". (Plaintiff Ex. 23). The development agreement is dated April 3, 2002, and two checks are dated April 15 and 16, 2002. McMichael testified that the hand-written reference is not on his copy of the development agreement, and was added after he signed the agreement. (Plaintiff Ex. 28). McMichael said Young told him in February or March 2002 that he would not close without additional money, and Young never mentioned the lack of an operating agreement as the reason

for not closing on Partridge Hills.

McMichael never contacted Colbert, MZV's attorney who prepared the proposed development agreement for the Antioch Road/Clay Pit development, to submit an operating agreement and never set up a closing for the Partridge Hills property. He also never tendered the $274,000 purchase price for Partridge Hills. McMichael could not confirm that the operating agreement attached to the amended complaint was the final agreement, and had previously identified a draft of the Partridge Hills operating agreement as a draft of the Sequoia/Solimar operating agreement in his deposition. McMichael believes he tendered the $5,000 earnest money deposit to Clarke Partington, but he had no cancelled check or other documentation to show the earnest money deposit was paid. Richard Colbert, an attorney formerly with Clarke Partington who also represented MZV, testified that neither he nor his firm received the $5,000 payment. McMichael testified that his damages were 50% of the net profits from the sale of the Partridge Hills lots, but he had not hired an accountant to calculate what the amount might be.

McMichael testified that if the Partridge Hills deal had closed in January 2002, the lots could have been developed within 14 -18 months. He prepared a construction budget, which he shared with Young and McLaughlin in January 2002. The budget showed total development costs of $660,000 for Partridge Hills. Young did not agree with the figures, thinking they were too high.

McMichael testified that he was never told that the Partridge Hills transaction had to be completed within two weeks or that there was any urgency in completing the deal. However, Fred McLaughlin mainly dealt with Tom Young in negotiating the purchase agreement. McMichael testified that during the negotiations on the operating agreement, Tom Young wanted

some control in the operation and management of the Partridge Hills development and kept making changes to the operating agreement to assume more control. There was no written agreement to extend the time to close on Partridge Hills after January 31, 2002.

Tom Young testified that he was not a member of Young Land Company in 2001, but he had a power of attorney from his daughter Kimberly Smith. He acknowledged that Victoria entered into the Partridge Hills purchase agreement with MZV in December 2001, but claimed the December 31, 2001 deadline was not extended. Young testified that he needed the $274,000 from the Partridge Hills sale to pay a $300,000 debt to PLW, Inc. by February 15, 2002. However, the motion to approve the Partridge Hills sale filed with the bankruptcy court indicated that $230,000 from the sale would be paid to Vanguard Bank and Trust and $5,000 to Okaloosa County.

Young testified that he sent the $50,000 earnest money deposit from MZV for the Antioch Road/Clay Pit deal to his daughter, Kimberly Smith, who was the managing partner of Young Land Company. In his deposition of September 8, 2003, Young testified that he sent the check to Kimberly Smith and she kept it. At trial, he testified that his daughter gave the check back to him because he needed it to pay debts. The check was payable to Young Land Company and Tom Young. By deposition, Smith testified that she did not deposit the check from MZV and sent it back to her father because it had his name on it. The check had an endorsement for "Kim Smith", but Smith testified that she did not endorse the check. Young testified that he had a power of attorney from Kimberly Smith. Young was a debtor in bankruptcy in 2002, but the $50,000 was not listed in the periodic monthly reports for April 2002.

Young testified at trial that the two checks for $8,000 and $7,000 dated April 15 and 16,

2002 were intended as earnest money deposits for the Antioch/Clay Pit deal with Young Land Company. In his September 2003 deposition, Young testified that he sent the checks to his daughter Kimberly Smith and she suggested that they be sent to another daughter who needed the money at the time. At trial, Young testified that M&T Construction kept the funds when MZV was not able to close the deal for Antioch Road/Clay Pit. Young testified that the Partridge Hills deal did not close because the parties could not agree on an operating agreement. In his September 2003 deposition, Young testified that the only reason the deal did not close was because MZV could not come up with the money for the deal by December 31, 2001.

Young testified that he never received the $5,000 earnest money deposit from MZV for the Partridge Hills sale. He sent the $50,000 earnest money deposit related to the Antioch Road/Clay Pit property to his daughter, Kimberly Smith, and she told him he could have it. Young stated he felt he had the right to use the $50,000 since MZV was unable to close on the Antioch Road/Clay Pit property. Young testified that he never received letters with the $8,000 and $7,000 checks; it was a farce that never happened. He never agreed to apply the $50,000, $8,000 or $7,000 to an earnest money deposit for Partridge Hills. The purchase agreement for Partridge Hills was dead by February 2002. His attorney Mark Freund told McMichael that the contract was dead. McMichael tried to initiate another contract to buy Partridge Hills, but after February 2, 2002, Victoria never agreed to sell Partridge Hills to MZV and did not sign a contract to sell the property. It was important to sell the property quickly because Young had debts that had to paid in his bankruptcy proceeding and Victoria's bankruptcy proceeding. He never agreed to leave the offer to sell open indefinitely. Young had problems dealing with MZV on a smaller project, and was concerned about MZV's ability to develop a parcel as large as Partridge Hills.

Young had confidence when Fred McLaughlin was involved in the project, but McLaughlin left the project to work for D.L. Horton. Young said he did not tell McMichael that he would forward the operating agreements to Mike Mead; he did not think that Mead would approve the draft agreements. Young testified that MZV never made an attempt to close the Partridge Hills agreement until a year later (2003) in bankruptcy court.

Young negotiated with H.L.O.T. for the Partridge Hills parcel, but the deal was different, calling for finished lots. Young has developed Partridge Hills himself, and has cleared the land, installed water lines, cable, electric, drainage, sewage and 90% of the roads are cut in. He has spent approximately $1 million. He has the following cost estimates: clearing 20 acres- $50,000; grade and fill- $$85,000; water pipes- $150,000; hydrants- $60-70,000; concrete/catch basins- $85,000; electricity and cable- $40,000; sewer- $500,000[5]; engineering- $70,000; taxes- $200,000; maintenance and supervision- $150,000; interest- $150,000. Young believes the work is 80% finished. The project has passed state inspection, but still needs clay and curbing.

Young testified that Victoria never agreed to revive the old agreement for Partridge Hills with MZV with the funds from the Antioch Road/Clay Pit deal. Victoria was never asked to attend a closing for the Partridge Hills deal with MZV. Young stated he did not remember faxing the release to MZV on February 22, 2002; but in his deposition Young said he notified McMichael by fax that there would be no other contract.

In November 2005, Tom and Millie Young took out a $750,000 commercial loan from First City Bank, which was secured by placing the $750,000 in a certificate of deposit to First City Bank and by taking a mortgage on the Partridge Hills property. Richard Manley, Senior

[5]Young testified on cross-examination that he did not pay $500,000 for sewer.

Vice President of First City Bank, testified that the primary security for the loan was the certificate of deposit, and the mortgage was taken in an abundance of caution. The mortgage was not required for the loan. The mortgage named Victoria as the mortgagee and did not mention any other security. It contained a covenant not to transfer and due on sale clause. The mortgage was satisfied on or about June 9, 2009. Manley testified that the Youngs could not have withdrawn the funds from the certificate of deposit without repaying the loan first.

Michael Mead is an attorney representing clients in real estate development and mortgages. He has represented Tom Young and the real estate companies with which Young is associated for 20-25 years. Young had a practice of asking Mead to review potential real estate transactions, and entering into these transactions subject to Mead's approval of the contracts. Mead was familiar with the Partridge Hills property, but he was not involved in the proposed sale to MZV. He did not receive or review any draft operating agreements related to the Partridge Hills deal. He first saw the Partridge Hills purchase agreement incidental to a bankruptcy hearing in April 2003. Mead was aware of the Sequoia/Solimar transaction but he did not approve the terms of the agreement. Mead worked with Richard Colbert, who represented MZV, on the purchase agreements and proposed operating agreements for both the Sequoia/Solimar deal and the Antioch Road/Clay Pit deal. Typically, he and Colbert worked out the agreements attorney to attorney and then submitted them to their clients. Mead never heard from Colbert about the Partridge Hills project, and he never conducted a closing for the project. When reviewing operating agreements, joint venture agreements and development agreements for Tom Young, Mead looked to who had control of the check book, safeguards for controlling spending, and whether the parties were treated equally. He stated he would not have approved an

agreement that did not give Tom Young some control over the spending and development of the property. Mead interpreted the handwritten language on the Partridge Hills purchase agreement to require that an LLC be established and that he, Mead, have to approve it and the contract. After reviewing the Partridge Hills purchase agreement, Mead testified that an LLC or operating agreement would not have been required to execute the agreement and close the deal; there were other ways to secure and divide profits. Mead was listed as the seller for the Sequoia/Solimar property; he testified that he was on the title as trustee or strawman with no beneficial interest. A quitclaim deed was issued back to Victoria in March 2002, while Victoria was a debtor in the bankruptcy court but Mead stated that he was not sure of when Victoria was a debtor in bankruptcy. In March 2007, Mead also prepared a deed transferring the Partridge Hills property from Victoria to a revocable trust which named Tom Young as Trustee. He did not do the title work for the transfer but he did order it done. Mead did not recall contacting First City Bank, which held a mortgage with a due on sale clause, about the transfer. Mead had prepared the mortgage and security agreement for First City Bank. Mead testified that he had no independent recollection of the matter, and he did not know why Young placed the Partridge Hills property in a trust.

Richard M. Colbert was an attorney with Clarke Partington from May 1987 to November 2005. He represented Camp Walton and MZV in the 2002 negotiations with Young Land Company for the Antioch Road/Clay Pit property. He created a draft development agreement for MZV and Young Land Company. The draft in evidence was marked with underlines and handwritten notes. (Plaintiff ex. 28) The parties executed the agreement even with the handwritten notes and underlining. The purchase price was $550,000 with a $50,000 earnest

money deposit. There is no mention of the $200,000 earnest money deposit as in the contract for sale.[6] Young's copy of the development agreement had additional writing referencing to checks for $8,000 and $7,000. (Plaintiff Ex. 23). Colbert testified that he had never seen the additional writing. Colbert stated that the Antioch Road/Clay Pit transaction did not close because the seller did not have authority to transfer title. Kimberly Smith never heard from the other general partners of Young Land Company and therefore had no authority to sell the property. Colbert was also involved with the Sequoia/Solimar transaction, which did not require a separate operating or development agreement. Neither Colbert nor his firm received the $5,000 earnest money deposit required by the Partridge Hills agreement. He does not know why the Partridge Hills deal never closed because he was not closely involved with it. He did not prepare an operating agreement or an LLC for the deal, and therefore never sent such documents for Mead's approval.

Gary Neal, a plumbing contractor who has worked for Gary McMichael and Tom Young, testified that he spoke with Gary McMichael about the Victoria-MZV deal for Partridge Hills after February 2002. Neal stated that McMichael said the original contract had expired and MZV was in litigation over the property. Neal testified that McMichael knew that Neal was working on Partridge Hills and warned him to be sure and get paid for his work or end up with a lien on the project. McMichael was trying to wait until Young finished the improvements on Partridge Hills. McMichael told Neal that he knew that the deadline had expired for the contract.

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[6]MZV entrusted a check for the $200,000 earnest money deposit to Clarke Partington, and asked the firm not to deposit the check until further notice from MZV. Colbert said his assistant deposited the check by mistake and it was returned for insufficient funds; in a previous deposition, Clarke testified that MZV either withdrew the funds or did not deposit the funds and the check was returned for insufficient funds.

In July 2003, Victoria entered into a purchase agreement with the H.L.O.T. Family Limited Partnership for 128 unfinished lots of the Partridge Hills property for $18,000 per lot, or $2.3 million. Edwin Henry, President of H.L.O.T., testified that Young did not mention the litigation with MZV over Partridge Hills prior to entering into the purchase agreement with H.L.O.T., and Henry was surprised to hear about the litigation in an August 5, 2003 letter from Young, which sought to void the July 2003 purchase agreement. H.L.O.T. later filed suit against Victoria regarding Partridge Hills and filed a lis pendens on the property.

CONCLUSIONS OF LAW

MZV alleges that Victoria breached the December 18, 2001 purchase agreement by failing to convey the Partridge Hills property, and breached its duty to deal in good faith through the actions of Victoria's president, Tom Young, by failing to submit the proposed operating agreements to his attorney for approval. Victoria maintains that the contract failed because MZV failed to pay the $5,000 earnest money deposit and because Victoria's attorney, Mike Mead, did not approve the operating agreement, which was a condition precedent required by the purchase contract.

Before the Court can determine if a contract has been breached, it must first determine if a contract exists. Florida law requires three elements for the formation of a contract: (1) an offer; (2) acceptance; (3) consideration. *Pezold Air Charters v. Phoenix Corp.*, 192 F.R.D. 721 (M.D. Fla. 2000), citing *Air Prods. & Chems., Inc. v. The Louisiana Land & Explorations Co.*, 806 F.2d 1524, 1529 (11th Cir. 1986). The only disputed element of the present contract is consideration. Victoria asserts that the $5,000 earnest money deposit was not paid before or after January 31, 2002, and thus the contract failed due to lack of consideration. Victoria

submitted case law holding that the failure to timely pay an earnest money deposit is a material breach of the express terms of a contract, discharging the seller of its obligations under the contract. *Nacoochee v. Pickett*, 948 So.2d 26 (Fla. 1st DCA 2006). MZV submitted case law holding that the consideration for a real estate contract is the buyer's promise to pay, not the earnest money deposit, and failure to pay an earnest money deposit does not cause the contract to fail due to lack of consideration. *Peterson Homes Inc. v. Johnson,* 691 So.2d 563 (Fla. 5th DCA 1981).

McMichael testified that he believed that the $5,000 was paid prior to the expiration date of the contract, but he presented no cancelled check or receipt at trial. MZV's own attorney, Richard Colbert of Clarke Partington, testified that his firm did not receive the $5,000 earnest money deposit. Young also testified that MZV did not pay the $5,000 earnest money deposit. The evidence leads the Court to conclude that MZV did not pay the $5,000 earnest money deposit. While this failure to pay the earnest money deposit by itself may not have caused the contract to fail for lack of consideration, it was a material element of the purchase agreement that was not satisfied before January 31, 2002.

Another element of the agreement is the condition precedent requiring Mike Mead's approval of an LLC and the operating agreement for Partridge Hills. A condition precedent "calls for the performance of some act, or the happening of some event after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend." *In re Harrell,* 351 B.R. 221, 242 (Bankr. M.D. Fla. 2006) (quoting *Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3rd Dist.Ct.App. 1961). "Approval of an agreement by a third party constitutes a condition precedent. Where provisions of a contract require approval of that contract by a third

party, the obligations under such contract do not mature until after the approval has been given and no contract is fully formed." *Id*. at 242 (citing *Southern Internet Sys.,* 856 So.2d at 1128).

Mead testified that Young often included the "subject to approval" provision in real estate contracts, and he typically reviewed real estate transactions for Young. MZV introduced several drafts of the operating agreement for Partridge Hills with handwritten notations for questions and changes. McMichael and McLaughlin testified that Young reviewed these drafts with them and made the notations. They also testified that Young was concerned about having some control over the development of Partridge Hills, and Mike Mead testified that this was a key consideration when he reviewed operating or development agreements for Tom Young. Although McMichael and McLaughlin testified that Young considered the various drafts of the operating agreement, neither could identify the one draft that the parties settled upon to be submitted to Mead. The Court does not doubt the veracity of these witnesses, but their testimony does not identify the exact terms of the final agreement. McMichael's January 31, 2002 and February 6, 2002 letters to Mr. Freund acknowledge that the parties have not reached the final terms of an operating agreement. Even McMichael's letter to Young and M&T Construction in April 2002 states that the closing time for the Partridge Hills deal would be indefinitely suspended until the operating agreement was agreed upon and executed. Under Florida law, both parties must give their actual assent to the exact same terms to form a valid contract. *In re Harrell*, 351 B.R. 221, 243 n. 10 (Bankr. M.D. Fla. 2006). It appears from the evidence that Young still had concerns regarding the control of the development of Partridge Hills and therefore, the parties had not agreed to the precise terms of the operating agreement by the January 31, 2002 closing date. As a result, there was no operating agreement to be submitted to

Mike Mead for approval, nor was there any evidence that an LLC was formed, much less approved by Mead.

MZV asserts that Tom Young waived the condition precedent because he did not submit the operating agreement to Mead. While Young may have represented that he would submit the draft operating agreement to Mead, the purchase agreement did not require Young to submit the operating agreement to Mead; it required Mead to approve the agreement. See *Southern Internet Sys., Inc. v. Pritula*, 856 So.2d 1125, 1129 (Fla. 4th DCA 2003) (A condition precedent required the defendant's board to approve contract; court rejected plaintiff's argument that the defendant waived the condition precedent by failing to submit the contract to its board.) The evidence shows that Tom Young was not MZV's only access to Mike Mead. During December 2001 and January 2002, MZV was dealing with Victoria for the Solimar/Sequoia property and with Young Land Company for the Antioch Road/Clay Pit property. Mike Mead represented Victoria and Richard Colbert represented MZV for these transactions. Both attorneys testified that they dealt attorney to attorney when negotiating these deals. MZV could have submitted the draft operating agreement for Partridge Hills directly to Mike Mead, or through Richard Colbert. McMichael's January 31, 2002 letter to Freund indicates that he was aware of the deadline for closing and that he was running out of time to close the Partridge Hills deal. Based on the evidence, the Court finds that the condition precedent was not met because the parties could not agree on the terms of the operating agreement and Victoria did not waive the condition precedent by failing to submit the drafts to Mike Mead.

The final element of the purchase agreement that the parties failed to meet was the January 31, 2002 closing deadline. MZV argues that Victoria waived the closing deadline based

on Young's refusal meet to discuss the operating agreement, but there is no evidence of such a waiver. The closing date was important enough to the parties to document the extension to January 31, 2002 in writing. The purchase agreement required the parties to close in a very short time, and the bankruptcy court order approving the sale required closing by January 31, 2002. Even without a "time is of the essence" clause, MZV was well aware that the January 31, 2002 was a firm date. Gary Neal's testimony also illustrates that McMichael was aware that the December 18, 2001 agreement had expired in January 2002. For these reasons, the Court finds that the purchase agreement terminated as of January 31, 2002 because these material elements of the contract were not met.

The complaint before the Court is the breach of the December 18, 2001 purchase agreement by Victoria. However, the post January 31, 2002 dealings between MZV and Tom Young made up the bulk of the trial testimony. MZV stated that the case comes down to the credibility of the witnesses, and whether the Court believes Gary McMichael's version of events or Tom Young's version. There is evidence that MZV was still pursuing negotiations to purchase Partridge Hills from Victoria in March and April 2002, long after the December 18, 2002 contract expired. McMichael testified that Tom Young represented that the $50,000 check to Young Land Company and the two checks to M&T Construction totaling $15,000 would be applied as an earnest money deposit toward the purchase of Partridge Hills. At the outset, the Court will state that Tom Young's testimony is not credible. The many times that he contradicted his previous deposition testimony, and the testimony of his daughter, Kimberly Smith, regarding the $50,000 earnest money deposit for the Antioch Road/Clay Pit property as well as the two different versions of the Antioch Road/Clay Pit development agreement make it

very difficult to believe any of his sworn statements. Mr. McMichael's testimony was credible, but the Court finds his attention to the legal requirements for the transfer of real property to be very casual for a man of his business experience, especially for a business person who has dealt with Tom Young on previous occasions.

In an effort to revive the terms of the December 18, 2001 purchase agreement for Partridge Hills, MZV asserts that Tom Young made an April 2002 oral agreement to accept the $50,000 earnest money deposit from the failed Antioch Road/ Clay Pit deal with Young Land Company along with two additional checks for $8,000 and $7,000 (made payable to M&T Construction) as an earnest money deposit for the Partridge Hills property. According to McMichael, the agreement is memorialized in the April 15 and 16 letters from MZV to Tom Young and MT Land Company, which state that Young's acceptance of the $8,000 and $7,000 checks acknowledges that the funds are for an earnest money deposit for Partridge Hills and the time frame for closing on the property would be indefinite depending on when an operating agreement can be finalized.

The Statute of Frauds requires an enforceable real estate contract to be embodied in a written memorandum, signed by the party against whom enforcement is sought. *Socarras v. Claughton Hotels, Inc.,* 374 So.2d 1057, 1059 (Fla. 3rd DCA 1993). The April 15 and 16, 2002 letters that were given to Young along with the $8,000 and $7,000 checks state that Young's acceptance of the checks "acknowledges [his] acceptance of this EMD for the purchase of Partridge Hills." Young did not sign the letters in his individual capacity or in his capacity of Victoria's president. The letters are addressed to Tom Young and MT Young Land Company, not Victoria, the entity that owned the Partridge Hills property. The checks were made payable

to M&T Construction, not Victoria. McMichael testified that the $50,000 was referenced in one of the operating agreement drafts, but the document was not executed by MZV or Victoria. MZV presented no evidence that Victoria received these funds or benefitted from them. Victoria is the defendant for the specific performance, breach of contract and breach of implied warranty count of MZV's amended complaint, not Tom Young and not M&T Construction.

MZV maintains that Young was acting as president of Victoria when he accepted the funds from MZV, and therefore Victoria can be liable for his actions. The evidence shows that during April 2002, Young also was dealing with MZV as the agent of Young Land Company for the Antioch Road/Clay Pit property. Tom Young was also the president of M&T Construction. Again, the letters and the checks relied upon by MZV refer to MT Land Company and M&T Construction. There are no documents signed by Tom Young in his capacity as the president of Victoria to bind Victoria to this agreement. There is no writing to indicate that Tom Young, on behalf of Victoria, accepted the $50,000 check from MZV to Young Land Company as an earnest money deposit for Partridge Hills. Without a writing signed by Young as president of Victoria, the Court cannot find that the December 18, 2001 agreement extended or was revived by the April 2002 transaction. The evidence shows that Young took $50,000 intended for an earnest money deposit for the Anitioch Road/Clay Pit property from MZV and used it for his own benefit. It also shows that Tom Young took the two checks equaling $15,000 and deposited them with M&T Construction or used the funds himself. Neither Young nor M&T Construction was sued for the $65,000 in this action.

Having found that the December 18, 2001 contract terminated on or before January 31, 2002, and that the April 2002 letters and the payment of $65,000 to Tom Young and M&T

Construction did not extend or revive the contract, the Court must find that there was no enforceable contract between MZV and Victoria. Without a contract, there can be no breach of contract, no specific performance and no breach of the implied warranty of good faith and fair dealing. Based on the foregoing, the Court finds that the relief sought in MZV's amended complaint for specific performance (Count I), breach of contract (Count II), breach of implied covenant of good faith and fair dealing (Count III) is due to be denied. Victoria's 2003 counterclaim is also due to be denied. It is hereby

ORDERED that the relief sought in MZ Ventures of Northwest Florida, L.L.C. 's first amended complaint for specific performance (Count I), breach of contract (Count II), and breach of implied covenant of good faith and fair dealing (Count III) is **DENIED**, and a judgment in favor of the Defendant, Victoria of Northwest Florida, Inc., and against the Defendant, MZ Ventures of Northwest Florida, L.L.C. , shall be entered; and it is further

ORDERED that the relief sought in Victoria's June 13, 2003 countercomplaint counts I and II is **DENIED** and a judgment shall be entered in favor of the Plaintiff, MZ Ventures of Northwest Florida, L.L.C. , and against the Defendant, Victoria of Northwest Florida, Inc; and it is further

ORDERED that MZ Ventures of Northwest Florida, L.L.C. 's first amended complaint for fraudulent transfer (Count IV) against Tom and Millie Young is **DISMISSED** with prejudice.

Dated: July 31, 2009

William S. Shulman

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE