STATE OF MICHIGAN

COURT OF APPEALS

CLAUDE MCMANUS and VALERIE MCMANUS-ZOERHOF, Plaintiffs-Appellants, v KEVIN X. TOLER, Defendant-Appellee.	UNPUBLISHED July 1, 2008 No. 274407 Kent Circuit Court LC No. 05-002677

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment entered in favor of defendant. This lawsuit involves the issues of whether plaintiff Claude McManus (McManus), as seller, and defendant Kevin X. Toler (Toler), as purchaser, had a contract for the sale of an American Express Financial Advisors, Inc. (AEFA) franchise and whether Toler and plaintiff Valerie McManus-Zoerhof (McManus-Zoerhof), the second or joint vendee under the purported contract contingent on her obtaining various advisor licenses, thereafter operated the franchise as a partnership, entitling McManus-Zoerhof to an accounting and damages on dissolution. Additionally, assuming that a valid contract to sell the franchise existed, there is an issue regarding an alleged breach of the contract that entails the underlying question of whether McManus-Zoerhof had obtained all of the necessary licenses to own and operate the AEFA franchise, thereby satisfying the contingency aspect of the contract and cementing an equal interest in the franchise with Toler. This question requires a determination regarding the validity and enforceability of a subsequent contract "addendum" concerning examinations and deadlines that was executed by McManus-Zoerhof and Toler. The trial court, following a bench trial, concluded that the parties had entered into a contract to convey the AEFA franchise and that Toler and McManus-Zoerhof had entered into a subsequent binding agreement or addendum setting deadlines for McManus-Zoerhof to take and pass licensing examinations related to offering financial services and products. Further, the court found that McManus-Zoerhof failed to satisfy those licensing deadlines; therefore, she never held or acquired an actual partnership or joint interest in the franchise and there could be no breach of contract or breach of any asserted partnership duties. We affirm.

I. Background

Beginning in 1994, McManus worked as a financial advisor for AEFA, and he subsequently became an owner and operator of an AEFA franchise. The franchise provided a wide range of financial services and products. McManus employed his daughter, McManus-Zoerhof, and Toler in the business. McManus had an extensive client list and managed millions of dollars in assets. He also provided compensable services to other agents after being designated as an Office of Supervisory Jurisdiction (OSJ) by AEFA.[1] In 2002, AEFA offered McManus the position of field vice-president; however, under AEFA rules, he would have to divest himself of any ownership interest in the franchise in order to accept and hold the position. There was evidence that McManus, who wished to accept the position of field vice-president, wanted to sell his AEFA franchise to McManus-Zoerhof. But McManus-Zoerhof did not possess various licenses that AEFA required before a person could be eligible to own and operate an AEFA franchise; Toler, on the other hand, was a fully licensed and registered financial advisor and met the AEFA licensing requirements by the time of the purported sale. The parties had several discussions on how to proceed, and it was generally agreed that McManus would sell the AEFA franchise to Toler, but with McManus-Zoerhof also acquiring a contingent joint ownership interest in the franchise, which contingency would come to fruition upon McManus-Zoerhof obtaining the required licenses as demanded by AEFA.

Ken Dykman, a group vice-president for AEFA who had been dealing with McManus in regard to the open position of field vice-president, needed to have McManus convey the franchise by September 3, 2002, because McManus had accepted the vice-president's position and was slated to start in that capacity on September 4, 2002. McManus prepared and sent a handwritten memorandum, signed by each of the parties, to Dykman on September 3, 2002, which provided:

> Effective 9/4/02[,] I am transferring/selling my practice and OSJ to Kevin Toler and jointly/subsequently with Valerie McManus[-Zoerhof] (upon completion of her licenses)[.] Sum of $300,000.00[.]

On the strength of the memorandum, AEFA proceeded to effectuate the divestiture of McManus's interest in the franchise and the transfer of the business to Toler, which encompassed divestiture and transfer of the client list and the OSJ. McManus immediately began working as a field vice-president for AEFA, and Toler and McManus-Zoerhof operated the AEFA franchise; Toler as the principal agent and owner and McManus-Zoerhof as the business office manager. Dykman testified that, while cursory, he viewed the memorandum as a valid buy-sell agreement. The evidence indicated that AEFA did not require the use of any particular buy-sell form or document to complete a successful transfer, and the AEFA succession planning manual did not contain any unsatisfied mandates with respect to the franchise transfer.[2]

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[1] An OSJ supervises other financial advisors with regard to ensuring compliance with state, federal, and AEFA rules and regulations.

[2] AEFA policies and documents regarding a franchise sale or transfer speak of suggestions and recommendations, not requirements.

Although the parties conducted themselves in a manner that reflected an accomplished transfer of the AEFA franchise, the parties did continue to negotiate specifics regarding the conveyance. In April 2003, the parties all agreed on a ten-year payment plan on the $300,000 debt obligation arising out of the franchise transfer, with application of a seven-percent (7%) interest rate. Thereafter, the parties proceeded in a manner consistent with this agreement.

By September 2003, McManus-Zoerhof had only passed one of the various licensing examinations that she needed to complete. Issues concerning McManus-Zoerhof taking and passing the licensing exams and regarding office expenditures and operations had been a source of friction between Toler and McManus-Zoerhof from the beginning. There were discussions between Toler and McManus-Zoerhof about separating in some form or fashion from early on in the arrangement. In response to Toler's demands with regard to licensing, McManus-Zoerhof drafted an agreement in late September 2003, signed by both herself and Toler, but not McManus, that set forth as follows:

> [McManus-Zoerhof] will complete Series 66, 24 & L/A/H by 12/31/03. She will have 11 paid days off for studying. She will have 10 days to study for the [Series] 9 & 10 to be completed by 3/30/04.
>
> If [McManus-Zoerhof] fails to complete both, there will not be a partnership between her and Kevin Toler.

McManus-Zoerhof failed to take the Series 9 & 10 licensing examination by March 30, 2004, nor had she done so by the time of trial. A February 2004 email supposedly sent from Toler's email account to McManus-Zoerhof suggested that she could take a Series 53 licensing examination instead of the Series 9 & 10 examination for the time being and that she could take the Series 9 & 10 examination at a later date. Toler vehemently denied sending the email or ever expressing such a position, while McManus-Zoerhof testified in a manner consistent with the email.[3] Noting that McManus-Zoerhof had access to Toler's email account, that she had previously sent emails from his account, and that Toler had not signed the email, the trial court, making a credibility determination, essentially gave no weight to the purported email and the testimony by McManus-Zoerhof on the matter. The court also indicated that the email did not state that McManus-Zoerhof was relieved from taking the Series 9 & 10 examination.

At the end of March 2004, McManus-Zoerhof was appointed an OSJ by AEFA, and Toler transferred the franchise's OSJ and all of its clients-advisors to McManus-Zoerhof. In June of 2004, Toler and McManus-Zoerhof terminated their business relationship, with Toler taking his office furnishings, computer, and files. Toler still held the regular brokerage client list and continued conducting business from another location. He also continued to make payments to McManus on the debt obligation arising from the sale of the business. McManus-Zoerhof similarly made regular payments to McManus. As indicated by the trial court, Toler and McManus-Zoerhof were, for all intents and purposes, operating two separate businesses from

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[3] McManus-Zoerhof took and passed the Series 53 examination on March 9, 2004, instead of complying with the 2003 addendum-agreement.

what was once a single AEFA franchise. In May 2005, McManus resigned his position as an AEFA field vice-president after being given the choice between being fired and resigning. McManus then became, once again, an AEFA franchise owner, and he engaged in soliciting clients away from Toler, which persons were on the client list previously sold to Toler by McManus. Because of McManus's actions, AEFA refused his request to be appointed an OSJ.

The trial court prepared a written opinion that included exhaustive findings of fact. The court ruled that the September 3, 2002, memorandum constituted a valid contract, containing the necessary essential terms for contract formation, that McManus-Zoerhof could not own or operate an AEFA franchise at that time because of her licensing issues, that the franchise had to be transferred in its entirety to Toler given the need for McManus to fully divest himself of the franchise in order to become a field vice-president, and that AEFA treated the memorandum as a valid buy-sell agreement, approving the transfer of the client list and OSJ to Toler. The court also found that Toler had not breached the contract addendum entered into between Toler and McManus-Zoerhof in September 2003 regarding deadlines to take and pass the various licensing examinations. Additionally, the trial court concluded that McManus had no ownership interest in the franchise as of September 4, 2002, and thus had no standing to challenge the September 2003 contract addendum executed by Toler and McManus-Zoerhof. Next, the court stated that Toler was under no obligation to make McManus-Zoerhof his partner because of her failure to comply with the September 2003 addendum-agreement. The trial court ruled that neither McManus nor McManus-Zoerhof had a valid cause of action against Toler. Finally, the court noted that Toler and McManus-Zoerhof had divided the original franchise into two separate components (regular client list and OSJ) in a manner that was consistent with the wishes of McManus-Zoerhof as expressed as early as October 2002.

II. Analysis

A. Overview of Plaintiffs' Appellate Arguments

Plaintiffs argue that the trial court erred when it concluded that a contract existed between the parties for the sale of the AEFA franchise. According to plaintiffs, there was no contract because, although the parties contemplated executing a formal, complete agreement expressing all of the essential terms, they never executed any formal agreement. Plaintiffs further contend that the document found by the trial court to constitute a contract, the September 2002 memorandum, did not contain all of the essential terms necessary to form a binding contract.

Plaintiffs also maintain that the trial court erred in concluding that Toler and McManus-Zoerhof never operated the franchise as a partnership, which, had the court properly recognized the formation of a partnership, would have entitled McManus-Zoerhof to damages and an accounting.

Next, plaintiffs argue that, assuming that a valid contract to transfer the franchise existed, McManus-Zoerhof obtained all of the licenses necessary to own and operate an AEFA franchise, thereby satisfying the contingency found in the memorandum dated September 3, 2002. Accordingly, she had cemented a partnership or joint ownership interest and Toler breached the contract by taking the client files and operating the business separate and apart from McManus-Zoerhof. With respect to the subsequent agreement entered into between only Toler and McManus-Zoerhof in September 2003 relative to examinations and deadlines, which

examinations differ slightly from those required by AEFA,[4] plaintiffs contend that the agreement was not binding and was irrelevant because McManus had not joined the others in accepting and signing the agreement.

B. Standards of Review

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, equitable decisions are reviewed de novo, and the underlying factual findings made by the trial court in support of its equitable rulings are subject to the clearly erroneous standard of review. *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006). Whether the facts presented to the trial court resulted in the creation of a contract is an issue of law that is reviewed de novo on appeal. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). "The determination of whether a partnership exists is a question of fact and so the clearly erroneous standard . . . applies." *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Questions of law, in general, are reviewed de novo. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006).

C. Discussion

We begin by addressing plaintiffs' argument that the trial court erred in finding that a contract for the sale of the AEFA franchise existed. The requisite elements of a valid contract are (1) parties competent to enter into a contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Contract formation requires an offer and acceptance, and unless the acceptance is unambiguous and in strict conformance with the offer, no contract

[4] Plaintiffs' position is that a Series 9 & 10 license had not been required by AEFA to own a franchise and that the Series 53 license obtained by McManus-Zoerhof is equal to or better than a Series 9 & 10 license and was sufficient. The evidence reflects that a Series 53 license would be sufficient in an office with a smaller number of agents or advisors and that a Series 9 & 10 license would be needed to cover a larger office having more than a set number of advisors. However, the Series 9 & 10 license could also, like the Series 53 license, cover a smaller office, but the Series 53 license would be inadequate for a larger office. Thus, the Series 9 & 10 examination and license is more extensive than the Series 53 examination and license. The trial testimony indicates that Toler and McManus-Zoerhof decided on requiring the Series 9 & 10 license in the 2003 addendum because they contemplated growing the office, even though a Series 53 license would have been sufficient at the time.

has been formed. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006); *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Kloian, supra* at 453, citing *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). The actual mental processes of the contracting parties are irrelevant when construing the contractual terms. *Burkhardt, supra* at 656. In *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992), this Court recited the following contract formation principles:

> It is hornbook law that a valid contract requires a "meeting of the minds" on all the essential terms.
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> "In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind."
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> "Meeting of the minds" is a figure of speech for mutual assent.
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> An offer is a unilateral declaration of intention, and is not a contract. A contract is made when both parties have executed or accepted it, and not before. A counter proposition is not an acceptance. Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract.
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> A mere expression of intention does not make a binding contract:
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> "The burden is on plaintiffs to show the existence of the contract sought to be enforced, and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the court cannot make a contract for the parties when none exists." [Citations omitted.]

If a contract contains essential terms, but details regarding performance are missing, "the law will supply the missing details by construction." *First Pub Corp v Parfet*, 246 Mich App 182, 189; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003). When such terms as the time for performance or payment are missing, a court will presume reasonable terms unless the parties have expressed a contrary intention. *Kojaian v Ernst*, 177 Mich App 727, 731; 442 NW2d 286 (1989).

The record clearly indicates that all of the parties, along with AEFA, were determined to effectuate a contract for the sale of the franchise in a timely manner such that McManus could begin employment as a field vice-president. And it is readily apparent that all of the parties, and most certainly plaintiffs, as well as AEFA, proceeded and conducted themselves as if the franchise had been sold following the execution and delivery of the memorandum dated

September 3, 2002.[5] The memorandum established that the franchise was being transferred or sold for $300,000 to Toler and McManus-Zoerhof jointly; however, the interest acquired by McManus-Zoerhof was contingent in nature based on licensing requirements and was subject to the possibility that it might not vest if the licenses were not obtained. Based on the circumstances surrounding the sale and the parties' discussions,[6] the entire interest in the franchise needed to be sold to obtain the requisite divestiture; therefore, a present conveyance to Toler of a one-hundred percent (100%) interest in the franchise was necessarily contemplated by the parties, which interest would be reduced to fifty percent (50%) on satisfaction of the licensing contingency. The language in the 2002 memorandum does not suggest that the agreement merely constituted preliminary negotiations or a letter of intent; it reflects a done deal.[7] We reject plaintiffs' argument that McManus was under the belief that he could sell the franchise to McManus-Zoerhof and that she could temporarily operate under Toler's licenses. The trial court found to the contrary, and we shall not second guess the court's credibility assessments. MCR 2.613(C). Further, plaintiffs' position is inconsistent with the weight of the evidence, the surrounding circumstances of the transaction, the conduct of the parties, and the memorandum itself, which expressly indicates that McManus-Zoerhof's interest would be obtained "subsequently" and "upon completion of her licenses." An ownership interest could not be passed to McManus-Zoerhof at the time under AEFA rules, as well as federal rules and regulations.[8] McManus's subjective mental beliefs or processes to the contrary are irrelevant. *Burkhardt, supra* at 656.

We acknowledge that terms of payment on the $300,000 sales price had apparently not been agreed upon by September 3, 2002, and it is true that negotiations continued after that date to hammer out some details. The trial court was correct when it observed that reasonable presumptions on missing, nonessential terms can be employed to fill in contractual holes, but it is not even necessary to characterize payment terms missing from the memorandum as essential or nonessential because, ultimately, the parties came to an agreement on a ten-year payment plan and application of a seven-percent (7%) rate of interest. The parties thereafter acted in accord with this agreement.[9] Accordingly, assuming that the memorandum did not constitute a formal

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[5] Even absent an express contract, a contract can be gathered by implication or proper deduction from the conduct of the parties, the language used or the things done by the parties, or other pertinent circumstances attending a transaction. *Miller v Stevens*, 224 Mich 626, 632; 195 NW 481 (1923); see also *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 639-640; 473 NW2d 268 (1991).

[6] A written instrument can be open to explanation by extrinsic or parol evidence when the instrument is expressed in short and incomplete terms, when the instrument is fairly susceptible of two constructions, or when the language of the instrument is vague, uncertain, obscure, or ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003).

[7] Interestingly, McManus testified that he sought damages because business was lost under Toler's direction. This testimony essentially represented a concession that Toler was controlling and operating the AEFA franchise and not McManus.

[8] McManus-Zoerhof herself testified that she could not own the franchise absent the licensing.

[9] McManus-Zoerhof and McManus's accountant both indicated that Toler was the owner of the
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binding contract, the parties eventually reached an agreement on all of the essential terms and were then contractually bound.[10] Plaintiffs' argument that additional terms needed to be addressed, e.g., an agreement on non-competition, is rejected as the terms were not essential to the formation of a binding contract. Plaintiffs maintain that there was no contract formation even after the payment terms were reached, where the parties intended the execution of a formal written agreement, and where Toler continued to complain about the lack of a formal written agreement long afterwards. Generally speaking, oral or verbal contracts can be formed and enforced just like written contracts, *Strom-Johnson Constr Co v Riverview Furniture Store*, 227 Mich 55, 67; 198 NW 714 (1924), and plaintiffs do not present any statute of frauds arguments. Taking into consideration the September 3, 2002, memorandum, the conduct of the parties, AEFA's recognition of a valid franchise transfer and acceptance of Toler as the new owner, the subsequent agreement on payment terms, and the totality of the circumstances, we conclude that a contract for the sale of the AEFA franchise existed.[11] There was mutual assent, or a meeting of the minds, on terms essential to the creation of a contract to transfer the AEFA franchise.[12] Indeed, under the facts presented and the history of the case, it seems a bit strained to even contend that there was no contract.[13]

Plaintiffs next argue that the evidence was conclusive that Toler and McManus-Zoerhof operated the franchise as a partnership under Michigan's Uniform Partnership Act, MCL 449.1 *et seq.*, thereby entitling McManus-Zoerhof to an accounting and damages. Pursuant to MCL 449.6(1), "[a] partnership is an association of 2 or more persons . . . to carry on as co-owners a business for profit[.]" In *Byker v Mannes*, 465 Mich 637, 653; 641 NW2d 210 (2002), our

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franchise in 2003.

[10] To the extent that the 2002 memorandum did not include terms describing the nature of the required examinations, nor provide for accompanying deadlines, those matters were resolved in the September 2003 addendum-agreement executed by Toler and McManus-Zoerhof. Moreover, it is quite clear that the 2002 memorandum contemplated the successful completion of the licensing examinations needed to satisfy AEFA's requirements for franchise ownership.

[11] As noted by this Court in *J W Knapp Co v Sinas*, 19 Mich App 427, 431; 172 NW2d 867 (1969), "In an appropriate case an agreement may be enforced as a contract even though incomplete or indefinite in the expression of some terms, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance."

[12] Plaintiffs assert that the failure of the licensing contingency, assuming for the sake of argument that it was not satisfied, negates the existence of a contract to sell the franchise. We find the argument to be misplaced. There is no valid legal theory to support this proposition. The failure of the contingency, as modified or clarified in the 2003 addendum, merely eliminated McManus-Zoerhof's contingent interest in the business; it did not render Toler's rights under the contract null and void or somehow retroactively negate the existence of a contract.

[13] We again note that rules and procedures set up by AEFA did not mandate any certain steps or forms that had to be utilized in transferring the business. They merely constituted suggestions and recommendations. Therefore, we reject plaintiffs' argument that there was no contract because the 2002 memorandum did not comply with AEFA transfer or buy-sell requirements.

Supreme Court stated that "the intent to create a partnership is not required if the acts and conduct of the parties otherwise evidence that the parties carried on as co-owners a business for profit." The *Byker* Court further explained that, "[p]ursuant to MCL 449.6(1), in ascertaining the existence of a partnership, the proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership." *Id.* "The sharing of gross returns does not of itself establish a partnership." MCL 449.7(3). If a person receives a share of the profits generated by a business, it is prima facie evidence that he or she is a partner in the business, but the inference does not arise when such profits were received in payment as "wages of an employee." MCL 449.7(4)(b).

Here, it is evident that a future partnership was envisioned, intended, and was the ultimate goal, but it could only be realized on McManus-Zoerhof obtaining the necessary licenses. Toler and McManus-Zoerhof did not carry on as co-owners of the AEFA franchise; rather, McManus-Zoerhof carried on as an employee who received wages as the office manager and Toler alone carried on as the owner and operator.[14] Indeed, McManus-Zoerhof could not have been a co-owner of the AEFA franchise during the relevant time period because of her licensing deficiencies. Furthermore, the test to determine whether a partnership exists entails examination of the acts and conduct of the parties in relation to the business, absent an express agreement. *Byker*, *supra* at 652. And Toler and McManus-Zoerhof reached an express agreement, which was reduced to a writing, that specifically provided that "there will not be a partnership" unless McManus-Zoerhof completes the licensing process, and she failed to satisfy that commitment. There was no partnership by operation of law.

Next, plaintiffs argue that, assuming that a valid contract to transfer the franchise existed, McManus-Zoerhof obtained all of the licenses necessary to own and operate an AEFA franchise, thereby satisfying the contingency in the memorandum dated September 3, 2002. Accordingly, she had cemented a partnership or joint ownership interest and Toler breached the contract by taking the client files and operating the business separate and apart from McManus-Zoerhof.

The memorandum dated September 3, 2002, did not shed any light regarding the nature of the licenses that McManus-Zoerhof had to acquire, nor were any deadlines enunciated. It is clear, however, from the surrounding circumstances and the discussions between the parties and AEFA that McManus-Zoerhof needed to obtain the licenses required by AEFA for franchise ownership. To the extent that said requirements differed from the subsequent agreement or addendum entered into between Toler and McManus-Zoerhof in September 2003, the most recent agreement, i.e., the addendum, controlled the contractual obligations and the parameters of the licensing contingency. The language covering licensing examinations and deadlines contained in the September 2003 agreement between Toler and McManus-Zoerhof can be viewed as either an alteration or addition to the original September 2002 memorandum, or a clarification of the memorandum, or all of the above. Regardless of how the 2003 addendum-agreement is characterized, it became the last word and binding obligation, for both parties,

[14] AEFA and federal rules and regulations would not have allowed McManus-Zoerhof to directly share in any commissions absent the proper licensing.

relative to matters of licensing and the creation of a partnership, or lack thereof, that arose from the licensing contingency in the 2002 memorandum.

Plaintiffs argue that the subsequent agreement or addendum was not binding because McManus had not joined the others in accepting or signing the agreement. This argument lacks merit because it does not recognize the legal significance of the rights and obligations created by the 2002 memorandum and subsequent agreement regarding payment terms. McManus-Zoerhof obtained the right to an equal partnership interest in the AEFA franchise should she obtain the necessary licenses and became burdened with the obligation to pay her father for the interest, as did Toler. McManus obtained the right to payment for the franchise and became burdened with the obligation to transfer his ownership interest in the franchise. The 2003 addendum-agreement between Toler and McManus-Zoerhof did not change or affect any obligations owed by McManus as he already completed the transfer of his entire interest, nor did it interfere with McManus's right or ability to receive payment.[15] McManus no longer had a protected interest in the subject matter of the contract aside from the right to be paid. It was McManus-Zoerhof's and Toler's rights and obligations that were affected by the 2003 addendum, and they were entitled to exercise their freedom to contract and modify, clarify, or add to the 2002 memorandum. There is no evidence of any express agreement by the parties that McManus had to sign off on new or subsequent agreements in regard to the licensing contingency. Participation and approval by McManus was not required with respect to the 2003 addendum-agreement. If McManus alone sought, through litigation, to rescind or vacate the 2003 addendum or to force his participation in contractual negotiations and the need for his authorization, he would lack standing to sue. See *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007).

Because the 2003 addendum-agreement between Toler and McManus-Zoerhof was binding, making, for the most part, any licensing requirement or contingency that existed under the 2002 memorandum irrelevant,[16] because we give deference to the trial court's fact-finding and assessment of credibility relative to the court's rejection of the purported email from Toler to McManus-Zoerhof that supposedly modified the 2003 addendum, and because McManus-Zoerhof failed to satisfy her obligations under the 2003 addendum, Toler did not breach any

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[15] Had the contract for sale of the business only passed a fifty-percent interest to Toler and a contingent fifty-percent interest to McManus-Zoerhof, leaving the possibility that the contingent interest could revert to McManus on failure of the contingency, McManus would have been a necessary party to any addendum and Toler could not have contracted in a manner to modify obligations owed by McManus-Zoerhof to McManus. But Toler actually and necessarily obtained a one-hundred-percent interest, and it was Toler, not McManus, who would become obligated to give McManus-Zoerhof a fifty-percent share of the business on satisfaction of the contingency. Except as to payment, McManus was simply no longer in the picture after being fully divested of his interest.

[16] From the perspective of AEFA rules and regulations, we do recognize that it would have been problematic had Toler and McManus-Zoerhof entered into an agreement that did not require the taking and passing of examinations mandated by AEFA before an ownership interest could be acquired.

contract or partnership duties when he retained client files and lists and began operating the business separate and apart from McManus-Zoerhof.[17]

III. Conclusion

In sum, there existed a contract for the transfer of the AEFA franchise, Toler and McManus-Zoerhof did not operate a partnership, the 2003 addendum-agreement between Toler and McManus-Zoerhof was controlling with respect to licensing requirements and the ownership contingency, McManus-Zoerhof failed to meet her obligations under that 2003 addendum, and thus Toler did not breach any contract or partnership duties.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy

[17] On this matter, we cannot help but mention that McManus-Zoerhof, having not complied with the 2003 addendum, still walked away from her relationship with Toler with all of the franchise's OSJ business, which, technically, Toler could have prohibited. As stated by Toler, he essentially gave her half the business and they share in paying the balance on the amount owed to McManus. As recognized by the trial court, this greatly undermines any claim for breach of contract, breach of partnership duties, and the damages request made by McManus-Zoerhof. The situation is akin or comparable to an accord and satisfaction.