STATE OF NEW HAMPSHIRE

SUPREME COURT

Evan and Kelly Greenwald
PLAINTIFFS/APPELLANTS

v.

Richard and Barbara Keating
Ellen U. Mulligan
Barry M and Chrysoula P. Uicker, and
Jill Keating
DEFENDANTS/APPELLEES

RULE 7 NOTICE OF APPEAL FROM CARROLL COUNTY SUPERIOR COURT

Docket No. 2018-0479

BRIEF OF BARBARA KEATING

R. James Steiner, Esq.
N.H. Bar #4143

Steiner Law Offices, PLLC
30 Oakmont Drive
PO Box 3722
Concord, NH 03302-3722
(603) 345-6440
jim@jimsteinerlaw.com

R. James Steiner will present oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other Jurisdictions

QUESTIONS PRESENTED

I. Whether the trial court properly granted summary judgment in favor of defendants as to paragraph 18 B based on the explicit language in the purchase options in the lease agreement containing conditions precedent that were never met, and the lack of an essential price term.

II. Whether the trial court properly granted summary judgment regarding the terms in paragraph 18 C concerning the right of first refusal where the property was never relisted, as required.

III. Whether the trial court concluded properly that Barbara Keating could not be held liable under the contractual theories presented by Plaintiffs no differently than either Richard or Jill Keating could be held liable.

STATEMENT OF FACTS

The facts are accurately stated in the trial court order. Simplified, however, there is no material fact in dispute that the lease agreement (the "Agreement") in issue includes the conditions specified in the Agreement at paragraph 18. Appendix to Plaintiffs' Brief (App.) at 54. Realtor Mr. Goodhue and the Greenwalds drafted the Agreement. App. at 51; App. at 338 (court 08/22/2017 order finding as undisputed fact that both Goodhue and the Greenwalds drafted the lease agreement). They then brought the Agreement back to Richard and Barbara Keating and the parties signed the Agreement. App. at 15 (B Keating Aff para. 3); App. at 73 (Greenwald Aff); App. at 230 (Barbara Keating deposition ("B. Keating depo."), 171:2-172:5). While the Agreement contained a purchase option, it failed to include either a price term or a method for calculating same. App. at 54 (Agreement); Addendum to Plaintiffs' Brief ("Add.") at 21 (trial court order). No party contests there existed no relisting on MLS prior to the sale to the Uickers. *Id.* at 26.

In 1996, Richard Keating and his daughter, Jill Keating purchased the property in issue on Mink Island in Gilford, New Hampshire (the "Property") as joint tenants with rights of survivorship. App. at 720 (Jill Keating Affidavit, para. 2). After a portion of the property was subdivided

and sold in 1997, the Keatings co-owned the remaining 2.1 acres, on which Richard Keating built a camp. *Id.*

Beginning in 2013, Richard Keating and his second wife, Barbara Keating, began renting the property during the summer months "to help offset taxes." App. at 197 (B. Keating depo., 39:21-40:8; 41:1-19), and App. at 190 (B. Keating depo., 10:7-15); App. at 721 (Jill Keating aff., para. 4:). On June 1, 2015, Richard Keating engaged John Goodhue of Roche Realty to list the property for sale and signed a listing agreement. App. at 212 (Xavier Aff., paras. 2, 5); App. at 721 (J. Keating aff. para. 3). Although the property disclosure already on file at Roche Realty at the time the Agreement was drafted by Mr. Goodhue and the Greenwalds correctly noted Richard Keating and Jill Keating as co-owners, App. at 86 (Xavier Aff., paras. 5-7), it is undisputed that Jill Keating never signed the listing for the Property. *Id.* at 86, para. 9; App. at 103 (J. Keating aff. para. 5).

Roche Realty listed the property for sale at a purchase price of $849,900. App. at 86 (Xavier Aff., para. 4); App. at 68 (Greenwald Aff. para. 5); App. at 229-30 (B Keating dep.168:4-5, 170:3-6). On June 15, 2015, Richard Keating directed Roche Realty to increase the purchase price to $899,000. App. at 86 (Xavier Aff., para. 4); App. at 68 (Greenwald Aff. para. 5).

During the summer of 2015, the Greenwald were searching for an island property on Lake Winnipesaukee to rent the following summer and potentially purchase. App. at 67 (Greenwald Aff. para. 2). The Greenwalds had previously owned a summer home on Mink Island and knew that the Keatings had a house on the island that they offered for rent. *Id.*, para. 3). In August 2015, Evan Greenwald called the Keatings to inquire about leasing the property for the summer of 2016. App. at 67 (Greenwald Aff. para. 4). Mr. Greenwald spoke with Barbara Keating, who told him the property was available for rent the summer of 2016. *Id.;* App. at 229 (B. Keating depo at 167:8-168:5). She also informed him that the property was listed for sale. App. at 229-30 (B. Keating Dep. 167:8-168:5, 170:3-6). Richard and Barbara Keating, and the Greenwalds, then arranged to meet at the Property the following weekend. App. at 67 (Greenwald Aff., para. 4); App. at 229-30 (B. Keating Depo. At 167:8-23; 170:12-15).

On August 9, 2015, the Greenwalds, Richard and Barbara Keating, and John Goodhue, the Roche Realty agent, met at the Property. App. at 67 (Greenwald Aff., para. 4); App. at 230 (B Keating Depo. At 171:5-16). During this meeting, the Keatings and the Greenwalds discussed the terms

later contained in the Agreement. App. at 68 (Greenwald, para. 7); App. at 216 (B Keating Dep. 116:1-117:8).

The Greenwalds and Mr. Goodue left the Property and drafted the Agreement. App. at 15 (B. Keating aff. para. 3); App. at 338; App. at 230 (B. Keating depo. 172:22-23). They then returned, with the Agreement, and Evan and Kelly Greenwald signed the Agreement as "Tenant[s]" and Richard and Barbara Keating as "Landlord[s]." App. at 15 (B Keating Aff. para. 3); App. at 73 (Greenwald Aff); App. at 230 (B Keating depo. 171:2-172:5). Paragraph 18 of the Agreement is entitled "LEASE RENEWAL AND PURCHASE OPTION," and incorporates the terms described above to take the Property off the market, App. at 51-56, and to lease it to the Greenwalds. The Agreement states in pertinent part as follows:

> 18. Lease Renewal and Purchase Option
>
> A. If property remains for lease in the summer of 2017, tenants shall be given first option to renew lease for July 1-August 31, at the established 2016 lease rate.
>
> B. In the event that Landlord intends to re-list property for sale, Landlord agrees to give tenant first option to purchase property prior to or after conclusion of the lease, and prior to property being listed on MLS. If a sale price is agreed upon during or after the term of this lease, landlord agrees to apply one month's rent, as specified in this lease, toward the purchase price of the

> property. It is agreed that any sale shall be managed by John Goodhue, realtor, as listing agent.
>
> C. In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS, but tenant maintains an interest in the future purchase of the property as presented in writing by the tenant to the landlord, landlord agrees to offer tenant legal right of first refusal to purchase the property. Tenant shall have 4 business days upon presentation of another signed purchase and sales agreement to respond in writing, either exercising or waiving their right to first refusal.

Id. No other part of the Agreement contains language relating to the first option to buy or right of first refusal. *Id.* However, the Agreement contains an integration clause in paragraph 25, stating:

> This Lease shall constitute the entire agreement between the parties. Any prior understanding or representation of any kind preceding the August 9, 2015 [sic] of this Lease is hereby superseded. This Lease may be modified only by a writing signed by both Landlord and Tenant.

Id. The Agreement called for the Greenwalds to make a $2,000 security deposit, which they paid when they signed the Agreement, and an additional $4,000 payment "on or around January 1, 2016," which would both be applied toward the first month's rent. App. at 73 (Greenwald Aff., Ex. 1, para 4.). At the meeting, no one disclosed Jill Keating's ownership interest in the property to the Greenwalds. App. at 68 (Greenwald Aff. para. 8.).

Richard Keating informed Jill Keating of the Agreement with the Greenwalds in November once Richard and Barbara had returned to Florida. App. at 214, 220 and 225 (B Keating Depo. 107:21-108:24, 130:20-131:7, 152:14-17). Barbara testified that Jill Keating "was happy about the rental" but was not "happy about the right of first refusal" because she did not want to sell the property and was working on "some plan to keep it in the family." App. at 214 (B Keating Dep. 109:1-10). Although Jill Keating did not want to sell the property, neither the Keatings nor Jill Keating informed the Greenwalds at that time. App. at 214-15 (B. Keating Depo. 109:21-110:4; App. at 69 Greenwald aff. para. 10.

In July 2015, the Uickers decided to look for an island camp property on Lake Winnipesaukee. App. at 143 (Uicker aff. para 2). At the time, the Uickers owned an island camp on Cow Island in Tuftonboro but wanted to find an island camp property closer to their residence in Gilford. *Id.* They were interested in purchasing a camp on Pine Island in Meredith and had submitted an offer contingent on financing to purchase it. *Id.* para. 3. The Uickers' offer was ultimately rejected when the seller decided to sell to an "all cash" buyer. *Id.*

Sometime in the spring of 2016, the Uickers told Mulligan, who is Barry Uicker's sister, that they wished to purchase an island camp on Lake Winnipesaukee. App. at 143 (Uicker aff. para. 4). Mulligan was a real estate broker affiliated with Coldwell Banker's Center Harbor office. App. at 416 (Mulligan aff. para. 4). At that time she represented the Turners, who were friends with the Keatings, in selling their island property on Mark Island. App. at 205 (B. Keating Dep. 72:5-12); App. at 458 (Mulligan Dep. 53:11-12). From the Turners, Mulligan learned that the Keatings might be considering selling their property on Mink Island. App. at 205 (B Keating depo 72:16-18); App. at 458 (Mulligan depo 53:15-17).

Sometime in mid-May 2016, Mulligan called the Keatings to inquire about the property and spoke with Barbara Keating. App. at 416 ((Mull aff. para 5); App. at 459 (Mulligan depo 54:17-19); App. at 205 (B Keating Dep 72:5-10). Ms. Mulligan explained that although she was a realtor for the Turners, she was calling on behalf of her brother, and wanted to set up a time for the Uickers to look at the property. App. at 205 (B Keating dep. 73;20-24). Ms. Mulligan also explained that she was not interested in getting a commission or acting as a realtor and only wanted to help her brother. App. at 416 (Mull. Aff. para. 5).

Barbara Keating told Ms. Mulligan that the Keatings were not sure whether they were interested in selling the property and informed her that it was leased for the upcoming summer. App. at 416 (Mull aff. para. 6). However, Barbara Keating agreed to invite the Uickers and Mulligan to visit the property as a "kind of a favor," testifying at her deposition that "we never knew what was going to happen in life." App. at 205 (B Keating depo 73:15-18). According to Barbara Keating, Mulligan said she would join the Uickers on the view of the property but said she was coming "as a friend, not as a realtor." App. at 205 (B Keating Dep. 73:22-25).

On or about May 16, 2016, the Uickers and Mulligan visited the Property. App. at 144 (Uicker aff. para. 5). Mulligan met Barbara and Richard Keating for the first time during this May 2016 visit. App. at 417 (Mulligan aff. para. 7). Barbara and Richard Keating again mentioned that they had a tenant staying there for the summer and that they did not know what they wanted to do with the property. App. at 417 (Mulligan aff. para. 7). During the visit Richard Keating mentioned to Barry Uicker the purchase rights set forth in the Agreement with the Greenwalds. App. at 666 (Uicker aff. para. 6.).

According to an email sent on June 1, 2016, from Barry Uicker to the Keatings, he requested that the Keatings send the Uickers a copy of the entire Agreement so that they could discuss it with the "title company," assess the "commitment to the other party or John Goodhue, and formulate a procedure to avoid "legal trouble." App. at 496 (Mulligan dep. Ex. 1 at 004). In the email, he also stated, "Thank you for working with us and working out a deal to purchase your property. We are very excited." *Id.*

Chrysoula Uicker learned through talking with the Keatings that the property was leased until the end of August 2016 and that they still had not listed the property for sale and did not intend to do so. App. at 144 (Uicker aff. para 7).

On July 1, 2016, when the Greenwalds arrived at the property to begin their lease term, the Keatings informed the Greenwalds that they were not going to sell the property because they had decided to keep it in the family. App. at 69 (Greenwald aff. para. 10); App. at 217 (B Keating Dep. 120:17-23, 121:2-8). The Keatings told the Greenwalds that they had discussed the Agreement with their children over Thanksgiving and their children had objected to the sale of the property. App. at 69 (Greenwald Aff. para. 10); App. at 721 (Jill Keating aff., para. 4). The

Keatings further explained that one of their sons had received a promotion and would therefore be able to afford the cost of maintaining the Property. App. at 96 (Greenwald aff. para. 10; App. at 190 (B Keating dep., lines 10-16). Barbara Keating testified that she was still hoping that the children would "end up" with the property so she did not think it was necessary to share with the Greenwalds their discussions with the Uickers. App. at 218 (B Keating dep. 122:3-5, 122:21-123:1).

Through July and August 2016, the Keatings continued to address retaining the Property within the family and told the Greenwalds that they planned to keep the property in the family. App. at 218 (B Keating depo. 122:17-23). On July 19, 2016, when the Greenwalds sent Barbara Keating a text message to confirm the receipt of their August 2016 rental payment, they expressed their continued interest in purchasing the property, stating "Love the island. Wish your kids weren't interested in it. . . Any chance you or they would want to sell the back half of your land to reduce their tax burden[?]" App. at 70 (Greenwald aff. para. 13, ex 2 (ellipsis in orig)); App. at 218 (B Keating Dep 123:11-24). Barbara Keating replied on July 23, 2016, the day she received the check, declining the offer to sell the back half of the property, stating that

"[t]here is really no building lot as our land is 2.3 acres," and added, "[a]lso, having privacy is lovely." App. 70 (Greenwald aff. para. 13, Ex. 2); App. at 218 (B Keating Dep. 124:6-17).

On July 12, 2016, the Uickers listed their Cow Island property for sale because they believed having cash available for any island purchase would make them more attractive buyers. App. at 144 (Uicker aff para. 8). According to Barry Uicker, the decision to sell their Cow Island property was not based on the prospect of purchasing the Keatings' property, as they did not know if the Keatings would decide to keep the property or agree to a particular purchase price." *Id.*

In early September 2016, the Uickers contacted the Keatings and informed them that the Cow Island camp was under a purchase and sales agreement and again expressed a desire to purchase the Keatings' property. App. at 144 (Uicker aff. para. 9). The Uickers met with the Keatings and Jill Keating at the property to discuss the potential purchase. *Id.* At this time, Barry Uicker read the Agreement in detail and believed that the Greenwalds' first option to purchase had never been triggered because the Keatings had not relisted the property at all, and certainly not with MLS. *Id.* At that point, the Uickers decided to

make an offer of $750,000 in cash to purchase the Property. App. at 145 (Uicker aff.). Richard and Jill Keating accepted the offer. *Id.*

On September 6, 2016, Barbara, Richard and Jill Keating, as well as the Uickers, and Ms. Mulligan, met with Jack Bielagus, a local real estate attorney who worked for Accurate Title in Meredith, NH. App. at 417 (Mulligan aff. para. 9).

On September 14 or 15, 2016, the Uickers, Richard and Jill Keating closed on the sale of the Property at Coldwell Banker in Laconia. App. at 144 (Uicker aff. para. 9); App. at 417 (Mulligan aff. para. 12).

In November 2016, the Greenwalds learned that the Keatings sold the property to the Uickers. App. at 70 (Greenwald aff. para. 14). The Greenwalds then sued the defendants, later amending to add Jill Keating as a defendant.

STATEMENT OF THE CASE

As to the Keatings, the Greenwalds filed their action making a claim for breach of contract against Richard and Barbara Keating. App. at 1, 6 (Complaint, count II). They also alleged a claim of breach of the implied covenant of good faith and fair dealing against Richard and Barbara Keating. App. at 7 (Complaint Count III). They later amended

to add Jill Keating as a party. App. at 371-73 (Amended Complaint, Count II and III (October 26, 2017)). Richard and Barbara Keating filed for summary judgment. App. at 10. The Greenwalds objected and then cross-moved for summary judgment against the Keatings and the Uickers. App. at 23, 105. By pleading filed June 23, 2017, the Uickers objected to the motion for summary judgment filed by the Greenwalds, and cross-moved for summary judgment against the Greenwalds. App. at 124. Barbara Keating timely objected to the cross-motion for summary judgment on June 29, 2017. App. at 146

In the pleadings filed by the Uickers and Barbara Keating, both parties argued that the Agreement failed to provide a valid purchase option or right of first refusal because conditions precedent set forth in Paragraph 18 (b) and 18 (c) had not been met. App. at 124, 146.

On June 30, 2017, the Greenwalds filed a reply in support of their summary judgment motions pending against the Uickers and Barbara Keating. App. at 157. By pleading dated June 28, 2017, the Greenwalds filed their objection to the Uickers' cross-motion for summary judgment. App. at 166.

The court then considered, firstly, whether the Agreement contained a condition precedent which had not been met. Secondly, the court considered

whether the Keatings breached the implied covenant of good faith and fair dealing during the formation of the Agreement by failing to disclose Jill Keating's ownership interest in the Property. App. at 352. Jill Keating then moved for summary judgment against the Greenwalds, App. at 703, to which the Greenwalds objected. App. at 760. At a May 17, 2018 hearing, Barbara Keating orally moved to join in Jill Keating's summary judgment motion. App. at 15. The court granted that request. *Id.*

From a consideration of the pleadings, affidavits, depositions and record in the case, the court granted summary judgment to all defendants. This appeal followed.

SUMMARY OF THE ARGUMENT

The court properly granted summary judgment because "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show[ed] that there is no genuine issue as to any material fact and the moving party [was] entitled to judgment as a matter of law. RSA 498:8-a, III (2010); *Sabinson v. Trs. Of Dartmouth College*, 160 N.H. 452, 455 (2010). This is true recognizing that with cross motions for summary judgment, as exist in this case "[t]he court is charged with considering 'the evidence in the light most favorable to each party in its capacity as the

nonmoving party and, if no genuine issue of material fact exits, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law.'" *City of Concord v. State*, 164 N.H. 130, 133 (2012) (quotation omitted).

The court analyzed the two purchase right terms in the Agreement. There is no dispute about the language of the terms.

Terms in the Agreement beginning with "on condition that," among other trigger words, create conditions precedent." *Holden Eng'g & Surveying, Inc. v. Pembroke Rd. Realty Tr.*, 137 N.H. 393, 395-96 (1993). The court recognized that conditions precedent are not generally favored, but, under the law, where the "plain language of the agreement" requires it the court will enforce conditions precedent included by parties. *Estate of Kelly*, 130 N.H. 773, 781 (1988). The court found that paragraph 18 B contained a condition precedent. The language "[i]n the event that" signaled that it required the Landlord to "intend[] to re-list [the] property for sale. . . ." App. at 54. The term "in the event that" defined the condition precedent. *Id.* In order to argue for enforcement of the term from paragraph 18 B, the Greenwalds sought to rewrite paragraph 18 B.

In this Agreement, the option to purchase occurred only if the Keatings intended, among other terms, "[i]f a sale price is agreed upon." *Id.* The court

properly concluded that the lack of a price term rendered paragraph 18 B of the Agreement void. Petitioner's Brief at 21 (trial court order).

"'Price is an essential term' of an agreement to sell land." *MacThompson Realty, Inc. v. City of Nashua*, 160 N.H. 175, 179 (2010). This Agreement lacked a fixed price, and lacked a "prescribe[] method which will necessarily result in the determination of the price." *Id.*

The language "[i]f the sale price is agreed upon during or after the term of this lease" failed to establish a "readily determinable" way to establish a purchase price. *Id.* at 21. The Agreement failed to demonstrate a term "readily determinable" for purposes of price. *See King v. Dalton Motors, Inc.*, 109 N.W. 2d 51, 53-54 (Minn. 1961) (noting that where a price was subject to negotiation and "to be agreeable between the parties at the time of the sale" failed to provide a standard to determine a price). The lack of a price term rendered the Agreement, paragraph 18 B void.

The court noted that paragraph 18 C conditioned its terms based on the terms of paragraph 18 B not being met. Petitioner's Brief at 22 (trial court order). Paragraph 18 C provides in pertinent part as follows:

> In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS . . . .

Add., at 05 (trial court order). Paragraph 18 C terms made it clear that a listing had to occur prior to any right of first refusal existed. *Id.* The right of first refusal term anticipated that the Keatings would list the property with MLS through Mr. Goodhue. *Id. at 05.* That condition never occurred.

The court properly considered the *Holden* case in considering the Agreement terms, *Holden*, 137 N.H. at 397, noting the principle that an Agreement will be interpreted "where possible, [to] avoid construing a contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other," *Id.* The terms in *Holden*, however, did not create a condition precedent. *Id.* at 395-96 (no "signal words" that create condition precedent contained in *Holden* agreement). Contrasted with the *Holden* case, this Agreement "contain[ed] clear language, both in the conditional signifiers and in reading the contract as a whole, that the Agreement requires the Keatings to intend to relist the property to trigger the first option to purchase and list the property to trigger the right of first refusal." Add. at 26 (trial court order).

The court properly rejected the Greenwalds' reliance on *Long v. Wayble*, 618 P.2d 22 (Or. Ct. App. 1980). The court noted that, like the *Holden* case, the court in the *Long* case found no condition precedent. *Id.* at 25.

Likewise, the court rejected the argument from the Greenwalds that the conditions precedent term rendered the Agreement illusory. *Id.* at 27. As noted by the court, a right of first refusal, by its terms "always give[s] control to the property owner because the right only becomes ripe if the owner decides to sell the property to a willing buyer." *Id.*; *see also Scott v. Fry*, 261 N.W.2d 179 (Iowa Ct. App. 1977) (a lease first option to buy conditioned on a lessor's desire to sell).

As to the Agreement, Barbara Keating testified that she did not know why she had been listed by the Greenwalds and Mr. Goodhue to sign it other than she was Richard's wife. App. at 224, 230 (B. Keating Depo. 149: 16-22, 172:22-23). The Greenwalds and Mr. Goodhue showed up after having drafted the Agreement and it listed Richard and Barbara as signatories. *Id.*

The court correctly concluded that neither Jill nor Richard nor Barbara could be held liable as a matter of law under the breach of contract

theory. Add. at 29 (trial court order). The purchase option failed because it lacked an essential purchase term. *See infra.* The right of first refusal failed because of the condition precedent requiring the act of the Keatings "listing the property for sale during or after the Greenwalds' lease term." Add. at 29 (trial court order).

For the same reasons, there exists no liability under the breach of implied covenant of good faith and fair dealing theory. The Greenwalds assert there has been a breach of the implied covenant of good faith and fair dealing because of the limitation of discretion in contractual performance and during the contract formation. Add. at 31-32 (trial court order).

The court noted the narrow focus of the theory imputing liability based on limitation of discretion in contractual performance. *Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619, 624 (2009). The Greenwalds argue a breach of the implied covenant of good faith and fair dealing based on the failure by the Keatings to notify the Greenwalds about the sale to the Uickers. The Greenwalds claim this as a misrepresentation of the Keatings' intention not to sell the property, and concealed the sale in order to prevent them from exercising their right of first refusal. Add. at 32 (trial court order).

The Greenwalds' position sought to change the terms of the Agreement. *Id.* It sought to add conditions that did not exist. *Id.* The court noted it must first consider the contract terms and may not "recognize an implied covenant inconsistent with that authority." *Sunapee Difference, LLC v. State*, 164 N.H. 778, 797 (2013).

An implied covenant is conditioned by the language in the Agreement. *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 284 (1992) ("implied covenants are qualified and restrained by any express covenants of a more limited character."). No term of the Agreement required notice to be given to the Greenwalds concerning any prospective private sale where the Keatings did not list the property for sale.

Barbara Keating adopts and incorporates the Briefs of the co-defendants as if restated herein.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AS TO PARAGRAPH 18 B BASED ON THE EXPLICIT LANGUAGE IN THE PURCHASE OPTIONS IN THE LEASE AGREEMENT CONTAINING CONDITIONS PRECEDENT THAT WERE NEVER MET, AND THE LACK OF AN ESSENTIAL PRICE TERM.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. RSA 498:8-a, III (2010); *Sabinson*, 160 N.H. at 455.

As stated by the trial court, "[t]he court is charged with considering 'the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exits, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law.'" *City of Concord*, 164 N.H. at 133 (quotation omitted).

The dispute regarding the Agreement centered on the purchase rights contained in paragraph 18. Add., at 17 (trial court order on summary judgment). The first purchase right concerned the

"first option to purchase the property" and, secondly, "a right of first refusal." *Id.* The parties agreed that these were the terms governing the relationship between the parties. *Id.*

As the trial court first noted, "[c]onditions in contracts are construed in accordance with their ordinary meaning." *Estate of Kelly*, 130 N.H. at 781. "A proviso in a contract creates a condition, in the absence of anything in the contract to show that such was not the intention of the parties." *Id.*

As the supreme court stated, in the case of *International Business Machines Corp. v. Khoury*, 170 N.H. 492 (2017):

> In determining the actual understanding and intent of the parties, the trier of fact should consider the objective meaning of the expressed contract terms." *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178, 663 A.2d 1335 (1995). " The intent of the parties is determined by an objective standard, and not by actual mental assent." *Id.* (quotation omitted). " An objective standard places a reasonable person in the position of the parties, and interprets [contractual terms] according to what a reasonable person would expect [them] to mean under the circumstances." *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 502, 904 A.2d 676 (2006). " [U]ndisclosed meanings and intentions are immaterial in arriving at the existence of a contract between the parties." *Simonds*, 141 N.H. at 744, 693 A.2d 69 (quotation omitted).

Id. at 501.

The trial court correctly addressed that "provisions which commence with words such as 'if,' 'on condition that,' 'subject to' and 'provided' create conditions precedent." *Holden Eng'g & Surveying, Inc.*, 137 N.H. at 395-96. While conditions precedent are not generally favored, nonetheless, where the "plain language of the agreement" requires it the court will enforce conditions precedent included by parties. *Estate of Kelly*, 130 N.H. at 781.

A. <u>Paragraph 18 B Contained a Valid Condition Precedent</u>

First, the trial court addressed the condition precedent contained in paragraph 18 B. The court noted that paragraph 18 B states, in relevant part as follows:

> In the event that Landlord intends to re-list property for sale, Landlord agrees to give tenant first option to purchase property prior to or after conclusion of the lease, and prior to property being listed on MLS.

App. at 54. The Agreement, at paragraph 18 B, goes on to explicitly provide that any sale would be managed by Mr. Goodhue, the realtor, as the listing agent. *Id.* Mr. Goodhue had been the listing agent when the Greenwalds first identified the property to lease because the property had been listed, at that time, on MLS for sale. As a condition of the Agreement the parties agreed it

would be removed from the MLS listing during the lease term. App. at 68 (Greenwald Aff. para. 7); App. at 51 (quiet enjoyment).

Because the Agreement, at paragraph 18 B, used the term "[i]n the event that" *Holden*, 137 N.H. at 395-96 it contained a condition precedent. *Id.* The term "in the event that" is a term defining a condition precedent. *Id.* The trial court accurately noted that where such a condition precedent is used in a clause in an Agreement, as it is included in the Agreement in issue, it means "that the rest of the sentence is not binding if the specific event does not occur." Petitioner's Brief, at 18 (trial court order).

Moreover, the trial court correctly noted that the Greenwalds sought, through their argument, an interpretation that required rewriting the terms of paragraph 18 B. of the Agreement in order to massage those terms to fit the Argument they advanced. *Id.* at 18-19.

The court found further support for the condition precedent terms and when considering paragraph 18 C of the Agreement as it impacts paragraph 18 B. Paragraph 18 C, likewise, begins with the condition "[i]n the event that." Petitioner's brief at 19 (trial court order). Paragraph 18 C. provides, likewise, in pertinent part as follows:

> In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS . . . .

Greenwald Aff. ex. 1 para 18 C. The trial court noted that the terms of 18B and 18C, read together, and taken as a whole, as they must be, explain further the condition precedent set forth in paragraph 18 B because the Agreement states clearly and unambiguously that if the tenant failed to exercise a first option to purchase, and the Keatings then listed the property for sale on MLS, then the terms in paragraph 18C might apply. *Appeal of New Hampshire Div. of State Police*, 160 N.H. 588, 591 (2010) (intent of contract "is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases."). As noted by the court, "according to the unambiguous language, the Greenwalds' right of first refusal is not triggered if the Keatings did not list the property for sale." Add. at 19 (trial court order).

In this Agreement, the option to purchase would occur only if the Keatings intended to "re-list [the] property for sale," "prior to [the] property being listed on MLS," and "[i]f a sale price is agreed upon." *Id.* Dispositive of the analysis regarding the terms of paragraph 18 B was the lack of any

price term or any method upon which to calculate a price term. *Id.*

B. Paragraph 18 B Is Void as a Purchase Option for Lack of a Price Term

The lack of a price term rendered paragraph 18 B of the Agreement void. Petitioner's Brief at 21 (trial court order). The court noted that "'price is an essential term' of an agreement to sell land." *MacThompson Realty, Inc.*, 160 N.H. at 179. Where an agreement lacks a fixed price, to be enforceable, it must "prescribe[] a method which will necessarily result in the determination of the price." *Id.* (noting appraisal would set a purchase price). This Agreement contains no provision for setting a price as part of paragraph 18 B. The language "[i]f the sale price is agreed upon during or after the term of this lease" failed to establish a "readily determinable" way to establish a purchase price. *Id.* at 21. The Agreement failed to demonstrate a term "readily determinable" for purposes of price. *See King*, 109 N.W. 2d at 53-54 (noting that where a price was subject to negotiation and "to be agreeable between the parties at the time of the sale" failed to provide a standard to determine a price). The court correctly ruled that paragraph 18 B failed due to the lack of an essential term, as to price, that was

required. Add. at 21 (trial court order).

Reliance on *Green v. McLeod*, 156 N.H. 724, 728 (2008) by the Greenwalds offers no support. The unique facts in the *Green* case that made it appropriate to take it outside the statute of frauds concerned an original purchase agreement price, payment on that agreement, and thirty years of payment of property taxes in reliance on the purchase. *Green*, 156 N.H. at 730. Those property tax payments were "not readily explainable on any other ground." *Id.* Therefore, part performance taking it outside the statute of frauds was appropriate. As the supreme court stated, in the *Green* case, addressing the sum total of factors necessary to take a transaction outside the statute of frauds:

> While payment of monetary amounts in consideration of an oral contract may be insufficient in-and-of-itself to invoke part performance, *see Lemire v. Haley*, 91 N.H. 357, 358-59, 19 A.2d 436 (1941), such payment can become sufficient where additional factors make it equitable to enforce the contract, such as where the purchaser makes improvements to the disputed property, *see Sawin v. Carr*, 114 N.H. 462, 466-67, 323 A.2d 924 (1974), pays the property taxes, *cf. Jolley v. Clay*, 103 Idaho 171, 646 P.2d 413, 419 (1982), or takes possession of the disputed property, *see id.; McKenzie v. Rumph*, 171 Ark. 791, 286 S.W. 1022, 1023 (1926); *Bradley v. Loveday*, 98 Conn. 315, 119 A. 147, 149 (1922).

Green, 156 N.H. at 729. None of those factors exist here. First, there existed no purchase price, which even the cases taking claims outside the

statute of frauds generally rely upon as part of any agreement. *Green*, 156 N.H. at 725 ($5,000 purchase price paid). Secondly, the Greenwalds received the benefit of their lease agreement and paid nothing more than required for the lease term.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT REGARDING THE RIGHT OF FIRST REFUSAL AS TO PARAGRAPH 18 C WHERE THE PROPERTY WAS NEVER RELISTED, AS REQUIRED.

The court noted that paragraph 18 C conditioned its terms based on the terms of paragraph 18 B not being met. Add. at 22 (trial court order). Paragraph 18 C provides in pertinent part as follows:

> In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS . . . .

Add. at 05 (trial court order). The court noted that paragraphs 18 B and 18 C meant that the Keatings would seek offers from the public "by listing the property for sale" before the Greenwalds right of first refusal could occur. *Id.* The terms made clear that a listing had to occur prior to any right of first refusal blossoming as part of the contract term. *Id.* Neither the "listing agent" term nor the argument that listing with MLS amounts to a "ministerial" term contained, as argued by the Greenwalds,

any legal support to change the contract terms. Add. at 24 (trial court order). The right of first refusal term anticipated that the Keatings would list the property with MLS, through Mr. Goodhue. *Id. at 05*. That condition never occurred.

The court properly considered the *Holden* case in considering the Agreement terms, *Holden*, 137 N.H. at 397, noting the principle that an Agreement will be interpreted "where possible, [to] avoid construing a contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other," *Id.* The court noted that the supreme court, in *Holden* specifically found that the terms in *Holden* did not create a condition precedent, unlike the terms in issue in this Agreement. *Id.* at 395-96 (no "signal words" that create condition precedent contained in *Holden* agreement). Contrasted with the *Holden* case, the court properly noted the terms in this Agreement "contains clear language, both in the conditional signifiers and in reading the contract as a whole, that the Agreement requires the Keatings to intend to relist the property to trigger the first option to purchase and list the property to trigger the right of first refusal." Add. at 26 (trial court order). The trial court applied the *Holden* case law noting that

while the court has an obligation, "where possible" to avoid a harsh or unreasonable result, or where it "places one part at the mercy of the other," *id.* (emphasis in original), "the court may not do so here where the clear intent was to create these conditions precedent." *Id.*

The trial court analyzed the argument presented by the Greenwalds purporting to rely on a decision of the Oregon Court of Appeals. *Long*, 618 P.2d at 25. The court noted that, like the *Holden* case, the court in the *Long* case found no condition precedent. *Id.* at 25. The trial court correctly noted that given the existence of conditions precedent, neither the *Holden* case nor the Oregon Court of Appeals case of *Long* offered support to the Greenwalds. Add. at 27 (trial court order).

Likewise, the court rejected the argument from the Greenwalds that the conditions precedent term rendered the Agreement illusory. *Id.* at 27. As noted by the court, a right of first refusal, by its terms "always give[s] control to the property owner because the right only becomes ripe if the owner decides to sell the property to a willing buyer." *Id.*; *see also Scott*, 261 N.W.2d at 180 (a lease first option to buy conditioned on a lessor's desire to sell).

The court noted that in order to succeed with their breach of contract theory, the Greenwalds sought to ignore the conditions precedent they included within the Agreement. *Id.* at 29. Any right of first refusal was conditioned upon listing the property for sale; it is undisputed the Keatings did not relist the property for sale at all and not with MLS at all. *Id.* at 29.

III. THE TRIAL COURT CONCLUDED PROPERLY THAT BARBARA KEATING COULD NOT BE HELD LIABLE UNDER THE CONTRACTUAL THEORIES PRESENTED BY PLAINTIFFS NO DIFFERENTLY THAN EITHER RICHARD OR JILL KEATING COULD BE HELD LIABLE.

As to the Agreement, Barbara testified that she did not know why she had been listed by the Greenwalds and Mr. Goodhue to sign it other than she was Richard's wife. App. at 224 (B. Keating Depo. 149: 16-22). The Greenwalds and Mr. Goodhue showed up after having drafted the Agreement and it listed Richard and Barbara as signatories. *Id.*

The court correctly concluded that neither Jill nor Richard nor Barbara could be held liable as a matter of law under the breach of contract theory. Add. at 29 (trial court order). The purchase option failed because it lacked an essential purchase term. *See supra.* The right of first refusal failed because of the condition precedent requiring the act of the Keatings

"listing the property for sale during or after the Greenwalds' lease term." Add. at 29 (trial court order). It is undisputed that the Keatings did not list the property for sale. *Id.* As a result, the condition precedent did not get triggered. The Keatings concluded a private sale to the Uickers outside the terms contained in the Agreement. *Id.*

Similarly, despite the Greenwalds position on the issue, there exists no equitable estoppel theory applicable to enforcing the Agreement terms. Equitable estoppel requires the following elements:

> (1) A representations or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the 33other party should act upon it; and (5) the other party must have been induced to act upon it to its prejudice.

Hawthorn Tr. v. Maine Sav. Bank, 136 N.H. 533, 537-38 (1992). No facts support a conclusion the Keatings misrepresented their intent from the beginning. The undisputed facts show just the opposite. The facts demonstrate that the Keatings, throughout the lease period, hoped their family would purchase the property. App. at 214 (B Keating Dep. 109:1-10); App. at 217 (B Keating Dep. 120:17-23, 121:2-8); App. at 218 (B Keating dep. 122:3-5, 122:21-123:1). Ultimately, the Keating

children could not purchase the property and the Keatings entertained a private cash offer. There occurred no misrepresentation. *Hawthorn Tr.*, 136 N.H. at 537-38. There exist no facts suggesting the Keatings made any misrepresentation to induce the Greenwalds to act. *Id.*

Moreover, as noted by the trial court, the integration clause superseded any prior discussions the Greenwalds attempt to rely on in pursuing their estoppel theory. Add. at 30 (court order), citing Agreement, para. 25. *Id.*

For the same reasons, there exists no liability under the breach of implied covenant of good faith and fair dealing theory. The Greenwalds assert there has been a breach of the implied covenant of good faith and fair dealing because of the limitation of discretion in contractual performance and during the contract formation. Brief at 31-32 court order.

The court noted the narrow focus of the theory imputing liability based on limitation of discretion in contractual performance. *Livingston*, 158 N.H. at 624. The Greenwalds argue a breach of the implied covenant of good faith and fair dealing based on the failure by the Keatings to notify the Greenwalds about the sale to the Uickers. The Greenwalds claim this as a misrepresentation of the Keatings' intention

not to sell the property, and concealed the sale in order to prevent them from exercising their right of first refusal. Add. at 32 (court order). The Greenwalds' position sought to change the terms of the Agreement. *Id.* It sought to add conditions that did not exist. *Id.* The court noted it must first consider the contract terms and may not "recognize an implied covenant inconsistent with that authority." *Sunapee Difference, LLC*, 164 N.H. at 797. An implied covenant is conditioned by the language in the Agreement. *Great Lakes Aircraft Co., Inc.*, 135 N.H. at 284 ("implied covenants are qualified and restrained by any express covenants of a more limited character."). No term of the Agreement required notice to be given to the Greenwalds concerning any prospective private sale where the Keatings did not list the property for sale. As noted by the trial court, to find otherwise would impose "an obligation that contradicts the express terms of the Agreement" conditioning the right of first refusal "only on . . . listing the property for sale." Add. at 33 (trial court order).

The overall Agreement terms provided specific authority under specifically defined terms for the Greenwalds if the Property was relisted

on MLS for sale and the Keatings received a third party offer. App. at 54. It is undisputed this never occurred.

Separately, the Greenwalds argued that the Keatings' failure to disclose Jill Keating as an owner breached the implied covenant of good faith and fair dealing. The Greenwalds, however, could not point to any evidence of the Keatings attempting to induce the Greenwalds to enter into the Agreement lacking such notice, nor any justifiable reliance by the Greenwalds as a result of entering into the Agreement.

The Greenwalds had to demonstrate a misrepresentation made to induce the Greenwalds to act. *Bursey v. Clement*, 118 N.H. 412, 414 (1978). They further had to demonstrate that such misrepresentation was material to the decision to enter into the Agreement. *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133, 139 (1989). The Greenwalds failed to articulate any facts in dispute demonstrating it was material that Barbara Keating signed the Agreement, along with Richard, in lieu of Jill Keating. Brief, at 35.

Barbara Keating adopts and incorporates the Briefs of the co-defendants as if restated herein.

CONCLUSION

The trial court properly found no material facts in dispute and that the Keatings were entitled to judgment on the breach of contract and breach of implied covenant of good faith and fair dealing as a matter of law. This court should affirm the decision of the trial court.

REQUEST FOR ORAL ARGUMENT

Barbara Keating requests 15 minutes for oral argument. Oral argument to be delivered by R. James Steiner, Esq.

Respectfully Submitted,

By and Through Her Attorneys,
Steiner Law Office, PLLC
30 Oakmont Dr.
P.O. Box 3722
Concord, NH 03302-3722

Date: 12/16/18

By: R. James Steiner

R. James Steiner, Esq.
N.H. Bar No. 4143

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief has been forwarded to all counsel of record via electronic filing.

R. James Steiner

R. James Steiner, Esq.