STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0479

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

BRIEF OF DEFENDANTS/APPELLEES BARRY AND CHRYSOULA UICKER

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QUESTIONS PRESENTED FOR REVIEW

I. Appellant and Realtor drafted the Lease Agreement on August 9, 2015 and provided the operative and plain language contained within paragraph 18 (A-C) of the Agreement entitled "Lease Renewal and Purchase Option" indicating in the event the landlord intends to re-list the property for sale, the landlord agrees to give tenant the first option to purchase property prior to or after conclusion of the lease, and prior to being listed on the MLS. The act of listing the property is an essential term of the Agreement which the Appellants agreed to when they drafted and executed the contract and the operative conditions and plain language contained in the Agreement is clear and unambiguous which Appellant did not claim was ambiguous. **Did the Court properly grant summary judgment for Appellee Uickers where it found the language in the Lease Agreement was clear and unambiguous and limited its analysis to the plain language in the Lease Agreement without the aid of parol evidence?** [Notice of Decision; July 20, 2018, Order on Pending Motions for Summary Judgment, Supplement ("Sup. pp. 1-38")].

II. The Lease Agreement drafted by Appellant and Realtor included two purchase options: a first option to purchase the property, and if they did not exercise that right, a right of first refusal. Certain triggering events [condition precedents] included in the Agreement had to be met and occur before Appellants could exercise their purchase options which included a first option to purchase if in the event Appellees intended to re-list the property and a right of first refusal

if Appellees intended to list the property for sale on the MLS. **Did the Court properly grant summary judgment for Appellee Uickers where it found according to the clear and unambiguous language of the Lease Agreement the two triggering events did not occur therefore the Court found the language of the Agreement created a condition precedent?** [Notice of Decision; July 20, 2018, Order on Pending Motions for Summary Judgment, Supplement ("Sup. pp. 1-38")].

III. The Agreement indicated that if one of the purchase options were triggered, and if a sale price is agreed upon during or after the term of the lease, the Appellee Keatings agree to apply one month's rent, as specified in the lease, toward the purchase price of the property. The purchase option was based on an independent offer by the Greenwalds', did not bind the parties, and was silent as to an essential term: the purchase price and/or reliable method in determining the price. **Did the Court properly grant summary judgment for Appellee Uickers where it found the Agreement did not provide language that prescribed a reliable method in determining the sale price and was therefore unenforceable for lack of an essential term?** [Notice of Decision; July 20, 2018, Order on Pending Motions for Summary Judgment, Supplement ("Sup. pp. 1-38")].

STATEMENT OF THE CASE AND FACTS

Appellees Richard Keating ("R. Keating") and Jill Keating ("J. Keating") [father and daughter] owned a camp on Mink Island on Lake Winnipesaukee. (Sup. pp. 39-40). In the summer of 2013 the Keatings began listing the camp on the website Vacation Rental by Owner ("VRBO") which is a site for rentals for the purpose of renting in part to offset the taxes. (Sup. p. 44). The Keatings typically rented it for the months of July and August and used the rental income to pay the taxes. (Sup. p. 45).

In August of 2015, R. Keating received a phone call from Appellant Evan Greenwald ("Greenwald") who stated he had seen the camp listed on VRBO and was interested in renting it the following summer and would like to see it and also mentioned that a Realtor had shown him a few island properties and he might be interested in buying it. (Sup. p. 68). A short time later the Keatings received a phone call from the Realtor who stated he would be coming over with Greenwald to view the property. Id. Since the property was listed for rent on VRBO, Keatings and the Realtor agreed that no commission could be expected on the rental part of any agreement reached. Id. Greenwald and the Realtor visited the island on August 9, 2015 and Greenwald indicated he was very interested in renting for the following summer and was also interested in the possibility of renting to own or renting with a first refusal option. Id.

Greenwald and the Realtor returned to the property later that same day with a Lease Agreement they both drafted for the Keatings to sign

which is not a fact in dispute. (Id., Sup. p. 75, 93, 95, and Hearing on Motion for Summary Judgment; 5/17/2018. Page 60. (H. Tr. p. 60")). The Agreement purportedly granted the Greenwalds the right of occupancy and use of the Keating island property for a two-month period running July 1, 2016 through August 31, 2016. (Sup. p. 96). Section 18 (A), (B), and (C) of the Agreement contained the following:

> 18A: "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." Id.
>
> 18 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." Id.
>
> 18 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 waving their right to first refusal." Id.

The Agreement also contained an integration clause in Section 25:

> "This Lease shall constitute the entire agreement between the parties. Any prior understanding or representation of any kind preceding the August 9, 2015 of this Lease is hereby superseded. This Lease may be modified only by a writing signed by both Landlord and Tenant." Id. at 100.

The limiting language contained within the Lease Agreement which Appellant drafted with the Realtor specifically lists the conditions/triggers in which Appellants can exercise a first option to purchase the property or first right of refusal. Id. The operative language is if the Keatings *intend to re-list* the property and prior to being *listed* on MLS the Greenwalds have a first option to purchase the property or if the property is *listed* for sale on MLS the Greenwalds have a right of first refusal to purchase the property. The language contained within the Lease Agreement did not preclude a private sale if the property was not listed. (H. Tr. pp. 60-63).

In or around July of 2015, Appellees Barry and Chrysoula Uicker ("Uickers") decided to look for an island camp property on Lake Winnipesaukee closer to their residence in Gilford, New Hampshire. (Sup. pp. 120-122). At the time the Uickers commenced a search for prospective island properties they owned a camp at 65 Cow Island, Tuftonboro, New Hampshire. Id. During this timeframe the Uickers developed an interest in the purchase of a camp on Pine Island on Lake Winnipesaukee in Meredith, New Hampshire. Id. The Uickers submitted an offer (purchase and sales agreement) contingent on financing because at the time their cash was tied up in the Cow Island camp. Id. Their offer was rejected, and an all cash buyer was accepted by the Seller for the Pine Island property. Id.

During the following spring of 2016 the Uickers informed Appellee Ellen Mulligan ("Mulligan"), sister of Barry Uicker, an Associate Real Estate Broker at Coldwell Banker of their desire to purchase an island camp property closer to their mainland home in Gilford. (Sup. pp. 120, 126). The Uikers became aware through information provided by a Joseph

Turner, a neighbor and friend of Appellee Keatings ("Keatings") that their camp on Mink Island might be coming up for sale. (Sup. p. 121). The Uickers did an internet search on the Keatings camp on Mink Island and found the property on the VRBO website which did not list the property for sale. Id.

During the timeframe of the end of May or beginning of June 2016, the Keatings received a phone call from Mulligan indicating that through mutual friends, the Turners, she heard there was a possibility they might be selling their property. (Sup. pp. 68-69). Mulligan was interested in it for her brother and was not asking as a real estate agent and only as a friend and wondered if they could visit the property. (Id., Sup. p. 52). The Keatings indicated it was off the market and rented for the summer and was uncertain about selling it, but they were welcome to take a look at it. Id. The Keatings allowed the Uickers to visit their camp to look it over. Id., (Sup. p. 53).

One week prior to Appellant Greenwalds tenancy for July 1, 2016 through August 31, 2016, the Keatings informed the Greenwalds and the Realtor they were no longer willing to sell the property. (Sup. p. 62, 135). The Keatings island property was never relisted nor was the property placed with MLS therefore the activating events needed to trigger Appellants first option to purchase or right of first refusal did not materialize. (Sup. p. 99). The language contained within the Lease Agreement which was drafted by Appellants and the Realtor who worked with them did not preclude a private sale if the Keatings did not intend to list it on the MLS. Id. This did not prevent the Keatings from negotiating

or communicating with the Uickers or any other party through a private sale without the aid of being listed.

Appellee J. Keating, who owned the island with her father R. Keating did not want to sell the island and was starting to work on getting the family together to see how they could either purchase it from R. Keatings or come up with a plan to keep it in the family. (Sup. p. 61). R. Keating and his wife Barbara Keating were trying to keep the property for their kids. (Sup. p. 62). The Uickers told the Keatings to call them if they decided to sell as they would like to make an offer to purchase the camp. (Sup. p 121). The Keatings agreed it would be best to wait and reconnect once the renters (Appellants/Greenwalds) lease period was up and they had a determination from J. Keating to see if she was able to come up with a plan to keep the camp in the family. (Sup. p. 65).

The Uickers received no indication from the Keatings at this time that their camp would be for sale, so the Uickers continued to look at other island camps and during this period they decided to sell their own Cow Island camp. (Sup. p. 121). In the beginning of September 2016, the Uickers contacted the Keatings to inform them their Cow island camp was under agreement and expressed their desire to purchase their Mink Island camp. Id. The Keatings agreed to discuss the possibility of the sale; therefore, the Uickers met with the family which for the first time included Jill Keating who was at the camp on vacation from Florida. Id.

At this time, the Uickers had the opportunity to read the Greenwald Lease Agreement in detail. (Sup. p. 122). The Uickers observed a couple of matters which they deemed material: the lease term was over, the Keatings

camp had not been re-listed for sale nor had the property been placed with MLS thus triggering the written grant of option to purchase to the Greenwalds. Id. Because of the limiting language in the Lease Agreement which did not preclude a private sale as the property was never relisted or placed in MLS before the transfer to the Uickers, the Uickers, through private sale and not though a realtor made an offer to purchase the Keating camp directly to Richard and Jill Keating, the owners who accepted under a purchase and sales agreement. Id. Thereafter, on September 14, 2016 the Uickers received a deed and closed the purchase. Id.

On October 23, 2016 prior to filing suit and prior to being represented by Attorney Carter, Greenwald sent an email to Attorney Carter with a subject line: "Can you help us determine if there is sufficient basis for a breach of contract claim for damages?" (Sup. pp. 150-151). At the beginning of the 5th paragraph, Greenwald, referring to the language in the Lease Agreement he drafted with the Realtor indicated;

> "My read on this: my lease purchase contract for first option to buy and right of first refusal has narrow language in it, regrettably, which talks about if the Keatings 'relist' or intend to 'relist' the property for sale that we have first option to buy. Technically, they didn't relist the property on MLS, although the fact that a realtor was involved, who already had a buyer, precluded their relisting the property." Id. at 151.

Greenwald admits the language is narrow and that the property was not relisted which was required yet incorrectly claims that since a relator [Appellee Mulligan] was involved, who already had a buyer [Appellee Uicker] precluded their relisting the property. Mulligan is the sister of

Barry Uicker. (Sup. p. 120). At no time was a realtor involved in this transaction as indicated by the testimony of Barbara Keating, under oath during her deposition wherein she stated; "Ellen said she was looking for property for her brother and she would be coming, she would like to set up a time they could come and look at it and she was coming as a friend not as a realtor, " and further testified, "Barry came to us through Ellen, she was not working as a broker in this instance." (Sup. pp. 52, 64). Further, Richard Keating indicated:

> "Received a call from Ellen Mulligan stating that through a mutual friend she had heard there was a possibility we might be selling the property. She was interested in it for her brother and was not asking as a real estate agent only as a friend and wondered if they could come and look at it." (Sup. p. 68).

Mulligan, during her deposition under oath indicated: "I wasn't interested in getting a commission or acting as a Realtor, I just wanted to help my brother" and "I wasn't going to be a party to the transaction, all I wanted to do was introduce them." (Sup. pp. 129-130).

Despite knowing the language in the Lease Agreement was narrow and allowed for a private sale and not having any evidence that a Realtor was involved in the sale of the Mink Island property to the Uickers the Greenwalds, on January 26, 2017 filed a Complaint for Specific Performance against the Uickers and sought damages for breach of contract and breach of implied covenant of good faith and fair dealing against the Keatings and tortious interference with a contract and violation of the New Hampshire's Consumer protection Act (:CPA") against Mulligan and on October 26, 2017 added Jill Keating to their claim of breach of contract and breach of implied covenant of good faith and fair dealing.

The Court held on hearing on pending motions on June 30, 2017 and on May 17, 2018 addressing the motions for summary judgment. (Sup. pp. 1-38). The Court Granted the Uickers Cross Motion for Summary Judgment on Count I (Specific Performance). Id. This Appeal followed.

SUMMARY OF THE ARGUMENT

The Court correctly granted the Uickers Cross Motion for Summary Judgment when it found the clear and unambiguous language contained within the lease Agreement drafted by the Realtor and the Greenwalds and agreed to by the Keatings indicated if the Keatings *intended* to relist the property or actually listed the property on the ML*S,* the Greenwalds would have an option to purchase it. The language was very specific, it required the act of relisting which would then necessitate a specific named relator to manage the sale as the listing agent. The Keatings chose not to relist the property thus a listing agent was not needed as the Keatings chose to sell the island property to the Uickers through a private sale which was not precluded by the clear and unambiguous language contained within the Agreement. Appellants did not claim the Agreement was ambiguous and the Court correctly limited its analysis to the plain language in the Lease Agreement without the aid of parol evidence which was not necessary to determine the intent of the parties in order to purchase the island property.

The Lease Agreement contained events which needed to take place before the Greenwald's could exercise their option to purchase the island property; condition precedents. The parties do not dispute that the plain language in Paragraph 18B of the Agreement requires some kind of

condition needs to be met in order for the Greenwalds to exercise those rights. Both parties agree that the language indicates and specifies; "In the event that landlord [Keatings] *intends to re-list* the property for sale … and prior to *being listed* on the MLS" were conditions that had to be met prior to the Greenwalds having an option to purchase the property. By intending to relist the property the Keatings would publicly seek an offer from third parties as made clear by the language "[i]n the event the Landlord intends to re-list for sale." The Greenwalds however have now attempted to expand the language and meaning to include "intent to sell, soliciting offers, and entertaining an offer from a particular buyer solicited or otherwise." The condition precedents/triggering events contained within the clear and unambiguous language of the Agreement did not occur therefore the Court correctly granted the Uickers Cross Motion for Summary Judgment.

The Agreement contained the condition precedents and even if the purchase options were triggered by the Keatings; intent to relist or actually listing on the MLS, the purchase options were unenforceable for lack of an essential terms, the sale price. The language provided within the Agreement indicated – "[i]f the sale price is agreed upon during or after the term of this lease" does not set forth or indicate a readily determinable method to reach a purchase price. Further, the language does not appear to bind either the Keatings or the Greenwalds to the sale if a purchase price was not agreed upon. The Agreement was unenforceable for lack of an essential term; the sale price and against the Statute of Frauds therefore, the Court correctly granted the Uickers Cross Motion for Summary Judgment.

ARGUMENT

I. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR APPELLEE UICKERS WHERE IT FOUND THE LANGUAGE IN THE LEASE AGREEMENT WAS CLEAR AND UNAMBIGUOUS AND THEREFORE LIMITED ITS ANALYSIS TO THE PLAIN LANGUAGE IN THE LEASE AGREEMENT WITHOUT THE AID OF PAROL EVIDENCE.

Appellant Greenwald ("Greenwald"), after viewing Appellee R. Keatings, ("R. Keating") island property on VRBO visited the island property with a Realtor on August 9, 2015. During the visit, Greenwald indicated he was very interested in renting for the following summer and was also interested in the possibility of renting to own or renting with a first refusal option. Greenwald and the Realtor retuned later that day to the island property with a Lease Agreement they had drafted. (Sup. pp. 96-100). Specifically, the Agreement contained narrow language regarding a first option to purchase which indicated that in the event the Keatings intended to re-list the property for sale [the property had been on the market and was taken off the market with the Greenwalds lease Agreement]. The Keatings agreed to give the Greenwald's a first option to purchase the property prior to being listed on the MLS. (Sup. p. 99). Once the property was listed for sale on the MLS, the Keatings would be seeking an offer publicly from a third party. If the Greenwald's were still interested in the property after being listed for sale on the MLS, the Greenwalds, within four (4) days could exercise a right of first refusal. Id. Both parties agreed that if the property was relisted the sale would be managed by the Realtor. Id. These were the conditions the Greenwalds drafted into the Agreement and

the Keatings agreed to which were to occur prior to being offered to the public.

The narrow and limiting language the Greenwalds and the Realtor drafted in the Lease Agreement and the Keatings agreed to was clear and unambiguous. The language in paragraph 18 (B) (C) specifically lists/describes the conditions/triggers which need to occur prior to the Greenwalds ability to exercise a first option to purchase the property or first right of refusal. (Sup. p. 99). If the Keatings intended to relist the property to the public or place it on the MLS the Greenwalds options were triggered and the sale would be managed by a specific Realtor. Prior to the Greenwalds tenancy for July 1, 2016 through August 31, 2016 the Keatings informed the Greenwalds they did not intend to sell the property to them and they did not relist the property or place it on the MLS. (Sup. pp. 62, 135). The limiting and narrow language of the Agreement was clear and unambiguous and allowed for a private sale. On September 14, 2016 the Keatings sold the island property to the Uickers in a private sale. (Sup. p. 122).

The court, in its analysis and decision indicated the one argument central to all of the summary judgment motions and objections centered on whether the language of paragraph 18B in the Agreement required the Keatings to [re]list their island property for sale in order to trigger the Greenwalds' purchase rights. (Sup. p. 16). In Behrens v. S.P. Const. Co., 153 N.H. 498, 503 (2006) the Court held, "The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide, and we review a trial court's interpretation of a

contract *de novo*." "When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Id. Further, "It is axiomatic that we give an agreement the meaning intended by the parties when they wrote it and absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement." Id. An appellate court hearing a case *de novo* may refer to the lower court's record to determine the facts but will rule on the evidence and matters of law without deferring to that court's findings.

In applying New Hampshire caselaw, "If the Agreement's language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean. Birch Broad., Inc. v. Capital Broad. Corp., 161 N.H. 192, 196 (2010). The trial court correctly found that although the Greenwalds point to some facts relating to events prior to and after the formation of the contract, they do not expressly argue that the provisions relating to their purchase rights are ambiguous nor do they point to any clauses within the Agreement on which the parties could reasonably differ as to their meaning. (Sup. p. 16 decision). The Greenwalds however, during oral argument attempted to add different meanings, interpretation and substitution of different words to the Agreement which contradicts and differs from the plain meaning of the terms of the contract. (Hearing on Motion for Summary Judgment Hearing Transcript, May 17, 2018, pages 31-36, ("H. Tr. pp. 31-36").

The Court: All right. I just want to be sure I understand because you've used phrases. You've said that paragraph 18(B) needs to be read as intent to sell and then said, well, that also means soliciting offers from the general public, and then that also means entertaining an offer from a particular buyer, solicited or otherwise. Id. at 35.

The plain language in the Agreement drafted by the Greenwalds which the Keatings agreed with was *intent to relist*. The court correctly found that upon review of the entire Agreement that the provisions relating to the Greenwalds' purchase rights provided no basis for the parties to differ as to their meaning. (Sup. p. 17). The clear language provides the Greenwalds with the option to purchase the property by their own offer before the Keatings publicly seek an offer from third parties, as made clear by the language "[i]n the event the landlord intend to re-list the property for sale, "prior to the property being listed on the MLS, "and "[i]f a sale price is agreed upon." (Sup. p. 20). The act of [re]listing the property was not a ministerial function; it was an essential term of the Agreement to which the Greenwalds agreed when they executed the Agreement. Id. at 25.

Further, also incorporated within the plain language of the Agreement and agreed to by the parties is that a specific Realtor, John Goodhue, as listing agent would manage the sale if the property were listed. (Sup. p. 99). The plain meaning of the language indicates the parties agreed to use a specific listing agent for any sale if the property were relisted. The property was not relisted thus allowing for a private sale without the need for the listing agent or a realtor.

The Greenwalds have attempted to offer events prior to and after the execution of the Lease Agreement. The first step in determining whether parol evidence is admissible is to consider whether the writing is a total integration and completely expresses the agreement of the parties. Lapierre v. Cabral, 122 N.H. 301, 306 (1982). Contained within the Lease Agreement in paragraph 25 entitled: Entire Agreement, both the Greenwalds and the Keatings agreed that;

> "This lease shall constitute the entire agreement between the parties. Any prior understanding or representation of any kind preceding the August 9, 2015 of this lease is hereby superseded. This lease may be modified only by a writing signed by both landlord (Keatings) and Tenant (Greenwald)." (Sup. p. 100).

"An integration clause is evidence that parties intended a writing to be a total integration." Behrens v. S.P. Const. Co., 153 N.H. 498, 504 (2006). Absent ambiguity in the Agreement admission of parol evidence is not justified. "The plain meaning rule prohibits the admission of parol evidence 'that would contradict the plain meaning of the terms of the contract,' and 'absent ambiguity, extrinsic evidence is not admissible to show intent not in writing.'" Lapierre v. Cabral, 122 N.H. 301, 305 (1982). This case does not involve an assertion by the Greenwalds of ambiguity. As the trial court correctly found, Greenwalds do not expressly argue that the provisions relating to their purchase rights are ambiguous nor do they point to any clauses within the Agreement on which the parties could reasonably differ as to their meaning. (Sup. p. 17). Further, as indicated in Greenwald's email dated October 23, 2016 prior to filing suit, Greenwald admits:

> "my lease purchase contract for first option to buy and right of first refusal has narrow language in it, regrettably, which talks about if the Keatings 'relist' or intend to 'relist' the property for sale that we have first option to buy. Technically, they didn't relist the property on MLS…" (Sup. pp. 150-151).

Greenwald cannot now claim the language in the Lease Agreement drafted with the Realtor was ambiguous where Greenwald admits the language is clear and narrow and cannot now attempt to alter and contradict the plain meaning and intent of the Agreement with parol evidence.

In support of this position, Greenwald, in the email dated October 23, 2016 indicated the "Agreement had narrow language in it, 'first option to buy' and 'right of first refusal' has narrow language in it, regrettably, which talks about if the Keatings '*relist*' or *intend to 'relist'* the property for sale that we have first option to buy. Technically, they didn't relist the property on MLS." (Sup. p. 151). The Greenwalds agree the language in the Agreement refers to the intent to relist therefore, there is no issue of material fact in disoute and the Uickers are entitled to judgment as a matter of law. Horse Pond Fish & Game Club, Inc. v. Cormier, 133 N.H. 648, 653 (1990). The plain language of the Agreement was the intent to relist the property for sale, not the Keatings intent to sell the property and as such the condition which triggered the Greenwalds' option to purchase the property did not transpire. The Uickers purchase of the property through private sale was valid.

The trial court correctly granted summary judgment for the Uickers after considering all the evidence in light most favorable to the Greenwalds where it found the language in the Lease Agreement was clear and

unambiguous and limited its analysis to the plain language of the Agreement without the aid of parol evidence and a *de novo* review will bear that out.

II. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR APPELLEE UICKERS WHERE IT FOUND ACCORDING TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE LEASE AGREEMENT THE TWO TRIGGERING EVENTS DID NOT OCCUR THEREFORE THE COURT FOUND THE LANGUAGE OF THE AGREEMENT CREATED A CONDITION PRECEDENT.

Drafted within the Lease Agreement are events which must take place before the Greenwald's can exercise their right to purchase the island property. The Greenwald's and the Realtor specifically chose and the Keatings agreed to incorporate these certain events within the Lease Agreement that was signed on August 9, 2015. The parties do not dispute that the plain language in Paragraph 18B requires some kind of condition to be met in order for the Greenwalds to exercise those rights. (Sup. pp. 18-19). The operative language within paragraph 18B referencing the conditions are the Keatings intent to *relist* the property or the actual act of *relisting the property on MLS*. (Sup. p. 99). The parties do not disagree that those are the words/phrases contained within Agreement. The conditions are that unless the Keatings intend to relist the property or actually list the property on MLS, the Greenwalds right to purchase the property will not vest and the Realtor, John Goodhue will not manage the sale. The Greenwalds position, despite agreeing to the plain and unambiguous meaning in the Agreement, argue that the conditions that need to be met are

the Keatings intent to sell the property notwithstanding the plain language in the Agreement of the intent to relist, not the intent to sell.

Applying New Hampshire caselaw, "Conditions precedents … are those facts and events, occurring subsequently to the making of a valid contract, that must … occur before there is a right to … performance." Estate of Kelly, 130 N.H. 781 (1988). "As a general rule, condition precedents are not favored, and [the Court] will not so construe such conditions unless required by the plain language in the agreement." Id. However, conditions in contracts will be construed in accordance with their ordinary meaning. Id. Applied to the case at hand, the parties agreed to the language of intent to relist or relist on MLS. This provision in the Agreement created a condition and in the absence of anything in the Agreement to show that such was not the intent of the parties coupled with the signal words that alert the parties. "In the event," indicated that a promise is not to be performed except under the condition that the Keatings intent to relist the property or the property is relisted on the MLS. Id. The condition precedents, by its own term makes the Agreement conditional upon intent to relist or actually relisting the property on MLS. Id. *In the event* the Keatings intend to relist the property or the Keatings actually relist the property on MLS, Realtor John Goodhue will manage the sale to the Greenwalds. The Keatings did not relist the property, therefore the conditions were not triggered. The Greenwalds acknowledged they knew prior to their arrival at the property to start the lease term on July 1, 2016 their purchase options to the property would not be triggered. (Sup. p. 135, H. Tr. p. 65).

Further, the plain meaning of the language in paragraph 18B plainly envisions the intent of relisting the property, not the intent of selling the property. "It has long been the practice in New Hampshire to focus on the intent of the parties as manifested in the language of the entire contract, in defining the parties' respective right." Glick v. Chocurua Forestlands Ltd. P'ship, 157 N.H. 240, 247 (2008). The Greenwalds have not pointed to any provision in the Agreement to indicate that such conditions "intent to relist and actually relisting the property on the MLS" was not the intention of the parties. Estate of Kelly, 130 N.H. 781 (1988). The unambiguous language used by the parties in the Agreement defines the parties' respective rights. See Glick, 157 N.H. at 247. Ultimately, the interpretation of a contract is a question of law which will be reviewed *de novo*. The trial court correctly granted summary Judgment for the Uickers where it found that according to the clear and unambiguous language of the Lease Agreement the two triggering events; the intent to relist and actually relisting on MLS, did not occur thus the language of the Agreement created a condition precedent. The Uickers purchase of the property through private sale was valid and the court's grant of summary judgment for the Uickers is supported by the facts and New Hampshire caselaw.

III. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT WHERE IT FOUND THE AGREEMENT DID NOT PROVIDE LANGUAGE THAT PRESCRIBED A RELIABLE METHOD IN DETERMINING THE SALE PRICE OF THE PROPERTY AND WAS THEREFORE UNENFORCEABLE FOR LACK OF THIS ESSENTIAL TERM.

Drafted within the Agreement which again the Greenwald's and the Realtor specifically chose and the Keatings agreed to indicate that "if" the options to purchase were triggered and "if" a sales price is agreed upon during or after the term of the lease, the Keatings agree to apply one month's rent, as specified in the lease, toward the purchase price of the property. (Sup. p. 99). The parties do not dispute that nowhere in the Agreement is a purchase price listed. The conjunction "if" implies a condition on which something depends often involving doubt or uncertainty. www.dictionary.com/browse/if. The provision in the Agreement does not indicate how, as the Greenwalds' assert in their Brief, that "the provision is only to provide the Greenwalds with a fair opportunity to make an acceptable offer or before the property was offered to anyone else" which contradicts the clear language indicating intent to re-list the property. Additionally, missing is an essential term, the purchase price, and the method utilized to determine what the price is in order to be considered as an acceptable offer. Doubt and uncertainty permeate paragraph 18B of the Agreement which does not fix a price to purchase the property nor does it appear to bind the Keatings to the sale if they did not agree upon a price offered by the Greenwalds.

Applying New Hampshire caselaw, "The statute of frauds provides: 'No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person authorized by him in writing.'" Greene v. McLeod, 156 N.H. 724, 727 (2008). "Its purpose is to 'promote certainty and to protect from fraud and perjuries in land transactions.'" Id. "To satisfy the statute of frauds, 'the writing must

express the essential terms of the contract.'" Id. "These terms include: the purchase price, the identities of the parties, and a description of the real estate in question." Id. Here, as in McLeod, the Agreement, signed by the parties did not indicate the purchase price, an essential term of a contract for the sale of land in New Hampshire. Further, to allow parol evidence to supply the missing essential term; the purchase price would circumvent the purpose of the Statute of Frauds. Id. If the price is neither stated nor determinable … the Statute of Fraud bars recovery. MacThompson Realty, Inc. v. City of Nashua, 160 N.H. 175, 179 (2010).

"Although price is an essential term of an agreement, 'that does not mean that the contract itself must fix the price or that the price may not be implied.'" MacThompson Realty, Inc. v. City of Nashua, 160 N.H. 175, 179 (2010). In New Hampshire, "As long as the 'contract prescribes a method which will necessarily result in determination of the price, that is enough.'" Id. In MacThompson, the Court held the purchase price of the property was readily determinable from the settlement agreement because it provided that the price of the property would be set by an appraisal. Id. Presently, the purchase price of the Keatings property was not readily determinable by any method as the language in paragraph 18B of the Agreement only indicates, "if a sales price is agreed upon" which is not readily determinable of what the purchase price is or how it would be determined. (Sup. p. 99). The Agreement does not prescribe any method in which to determine the sales price of the property and absence of a specific sales price, an essential term or method violates the Statute of Frauds.

Ultimately the Court reviews the trial court's legal ruling regarding the statute of frauds, *de novo*. MacThompson Realty, Inc. v. City of Nashua, 160 N.H. 175, 179 (2010). In reviewing the Agreement, it is apparent that an essential term of the Agreement is not stated nor is it determinable by the clear language in the Agreement. The Statute of Frauds bars recovery and as such the Agreement to purchase the property is unenforceable for lack of an essential term. The trial court correctly granted summary judgment for Appellees where it found the Agreement lacked an essential term; purchase price and did not provide language that prescribed a reliable method in determining the sale price of the property which is an essential term of an agreement to sell land and thus violates the Statute of Frauds.

CONCLUSION

The Trial Court correctly applied New Hampshire caselaw when it Granted the Uickers Cross Motion for Summary Judgment for specific Performance against the Greenwalds who did not plead the Agreement was ambiguous and found the language in the Agreement was clear and unambiguous and limited its analysis to the plain language without the aid of parol evidence, and further found the two triggering events [condition precedents] did not occur, and lastly, found the Agreement did not provide language that prescribed a reliable method in determining the sale price and was therefore unenforceable for lack of an essential term. For all the forgoing reasons, the Trial Court's decision should be upheld.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellees, Barry and Chrysoula Uicker requests 15 minutes for oral argument to be presented by Samantha M. Jewett, Esq.

S. CT. RULE 16(3)(i)

A copy of the decision below to be reviewed/upheld.

Respectfully submitted,

BARRY AND CHRYSOULA UICKER

By their Attorneys,

December 18, 2018

/s/ *Samantha M. Jewett*_______________________

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