STATE OF NEW HAMPSHIRE
SUPREME COURT
Docket No. 2018-0479

EVAN GREENWALD and KELLY GREENWALD
v.
RICHARD KEATING, BARBARA KEATING, ELLEN MULLIGAN, BARRY UICKER, CHRYSOULA UICKER, and JILL KEATING

Rule 7 Mandatory Appeal
From the Carrol County Superior Court
BRIEF OF ELLEN MULLIGAN

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QUESTIONS PRESENTED

1. Whether the trial court correctly found that the language in the Lease Agreements unambiguously conditioned the Option to Purchase on the Keatings' intent to re-list the Mink Island Property on MLS and conditioned the Right of First Refusal on the Keatings' re-listing the Mink Island Property on MLS?
2. Whether the trial court correctly relied solely upon the unambiguous terms of the Purchase Options, and did not consider parol evidence which would have contradicted the unambiguous terms?
3. Whether the trial court correctly held that the Purchase Options are not rendered illusory by the MLS re-listing condition?
4. Whether the trial court correctly held that the Option to Purchase was unenforceable for lack of a purchase price?
5. Whether the trial court correctly held that Ms. Mulligan could not have tortiously interfered or violated the Consumer Protection Act?
6. Whether the trial court correctly applied the summary judgment standard?

STATEMENT OF THE CASE

On January 25, 2017, Evan and Kelly Greenwald (collectively, "Appellants" or "Greenwalds") filed a complaint against Richard[1] and Barbara Keatings ("Keatings"), Barry and Chrysoula Uicker ("Uickers"), and Ellen Mulligan (collectively, "Appellees" or "Defendants"). Appellants brought five counts: Count I – Specific Performance (against the Uickers); Count II – Breach of Contract (against the Keatings); Count III – Breach of Covenant of Good Faith and Fair Dealing (against the Keatings); Count IV – Tortious Interference with Contract (against Ms. Mulligan); and Count V – Violation of RSA 358-A (against Ms. Mulligan). Jill Keating was added as a defendant in November of 2017.

Appellants' claims were based on the sale of property by the Keatings to the Uickers in 2016. Appellants claim that the sale was in violation of certain purchase options granted to them in a lease agreement between them and the Keatings. Appellants' claims against Ms. Mulligan were related to her alleged participation in the sale of the property, although these claims too were ultimately dependent on the lease agreement having been breached.

Ms. Mulligan timely denied Appellants' allegations and raised affirmative defenses. (Sup. pp. 0001-0008)

The parties exchanged motions for summary judgment through most of 2017 and 2018. In her pleadings, Ms. Mulligan argued that the condition precedent for the purchase options had not been triggered, and that she did

[1] Richard Keating passed away soon after the complaint was filed.

not tortiously interfere with the Appellants' purchase options or act in violation of RSA 358-A.

On July 24, 2017, the trial court granted summary judgment to all Defendants on all counts, finding that the condition precedent required under the lease agreement did not occur, and that the Defendants therefor had not breached the lease agreement. The trial court did not reach other arguments raised by Ms. Mulligan in her motion for summary judgment.

On August 14, 2018, Appellants filed their Notice of Mandatory Appeal. The Court accepted their appeal on September 13, 2018.

STATEMENT OF THE FACTS

Prior to September 15, 2016, Richard Keating and his daughter Jill Keating owned property on Mink Island (the "Mink Island Property"). Appellants' Appendix at 391-92. From June 2, 2015 through November 2, 2015, the Mink Island Property was listed for sale with Roche Realty. *Id.* at 394-95. On August 9, 2015, Richard Keating and his wife Barbara Keating entered into a Residential House Lease Agreement ("Lease Agreement") with Appellants to rent the Mink Island Property to Appellants from July 1 through August 31 of 2016 for lease payments totaling $24,000. *Id.* at 397-402. Section 18 of the Lease Agreement provides the following:

> 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. ("Option to Purchase")
>
> 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. ("Right of First Refusal") (collectively, with the Option to Purchase, the "Purchase Options")

Id. at 400.

The Lease Agreement also contained the following integration clause at 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 [sic] is hereby superseded. This Lease may be modified only by a writing signed by both Landlord and Tenant.

Id. at 402.

After November 2, 2015, the Keatings never re-listed the Mink Island Property for sale on MLS or with any real estate broker. *See id.* at 404-07.

In mid-May of 2016, Ms. Mulligan spoke with Barbara Keating and said that she heard through clients of hers – Joe and Nina Turner – that the Keatings might be selling the Mink Island Property. *Id.* at 416, ¶ 5. Ms. Mulligan stated that if the Keatings were selling the Mink Island Property, she had a brother who might be interested in purchasing property in the area. *Id.* Ms. Mulligan explained to Barbara Keating that, even though she was a Coldwell Banker broker working out of the Center Harbor office, she wasn't interested in getting a commission or acting as a realtor, but that she just wanted to help her brother. *Id.* Barbara Keating replied that they weren't sure whether they were interested in selling the Mink Island Property, and that it was leased for the upcoming summer, but that Barry Uicker could come see the Mink Island Property. *Id.* at ¶ 6.

On or about May 16, 2016, Ms. Mulligan went with Barry and Chrysoula Uicker to the Mink Island Property, because she is always interested in viewing island property. *Id.* at 417, ¶ 7. There she met Richard and Barbara Keating for the first time. *Id.* Ms. Mulligan and the

Uickers spent about an hour at the island, and no one mentioned the Purchase Options in Ms. Mulligan's presence. *Id.* at ¶ 8. Richard and Barbara Keating restated that they had a tenant staying at the Property for the summer and they didn't know what they wanted to do. *Id.*

In early September 2016, Barry Uicker told Ms. Mulligan that the Uickers had reached an agreement with the Keatings. *Id.* at ¶ 9. He expressed some concern about a right of first refusal. *Id.* Since Ms. Mulligan is not a lawyer, she told him that she didn't know what it meant and offered to call Jack Beilagus, who is a local attorney with whom she does a lot of work. *Id.*

On September 6th, Ms. Mulligan went to a meeting at Accurate Title in Meredith, NH. *Id.* at ¶ 10. When she arrived late, the Keatings, including Jill Keating, and the Uickers were already meeting with Attorney Beilagus. *Id.* Richard Keating and Barry Uicker did most of the talking with Attorney Beilagus. *Id.* According to Ms. Mulligan, Attorney Beilagus stated that the Purchase Options were ambiguous, and likely required the Property to be listed for sale before the tenant had any rights. *Id.* He also discussed the effect of Jill's failure to sign the Lease Agreement. Richard Keating stated that he would never sell the Mink Island Property to the Greenwalds. *Id.* At the conclusion of the meeting, the Keatings and Barry Uicker decided that Attorney Beilagus would draw up the purchase and sales agreement. *Id.*

On September 9, 2016, the purchase and sales agreement was executed by the Uickers and Richard and Jill Keating ("P&S Agreement"). *Id.* at 409-11. Also on September 9th, Jill Keating executed a power of attorney that would authorize Richard Keating to sign a deed on her behalf.

Id. at 421. Ms. Mulligan was asked to notarize the power of attorney and did so on September 9th. *Id.* at 417, ¶ 11.

The sale of the Mink Island Property closed on September 15, 2016. *Id.* at 413-15. Ms. Mulligan attended the closing on September 15th, which was held at Coldwell Banker's Laconia office. *Id.* at 418, ¶ 12. Title companies, including Accurate Title, frequently use offices at Coldwell Banker in Laconia for closings, since the Belknap County Registry of Deeds no longer allows closings at the registry. *Id.*

At no time during the negotiation and closing of the sale of the Mink Island Property did Ms. Mulligan act as a real estate broker for the Uickers or the Keatings. *Id.* at ¶ 13. She did not list the Mink Island Property for the Keatings. *Id.* She did not show the Property to the Uickers. *Id.* She did not negotiate any of the terms of the purchase and sales agreement, including the price. *Id.* She did not bill for or receive any commission. *Id.* She did not in any way act as an agent for either the Keatings or the Uickers. *Id.* This understanding of the events is shared by Coldwell Banker, her employer. *Id.* at 423.

If Ms. Mulligan had been acting as a real estate broker for the sale of the Mink Island Property in the ordinary course of her business, she would have entered into a written agreement with the Uickers and/or the Keatings. *Id.* at 418, ¶ 14. She would have participated in negotiations, including regarding price. *Id.* She would have drafted the purchase and sales agreement. *Id.* She would have been working as an agent of Coldwell Banker, who would have prepared an invoice for her services. *Id.* She did none of these things. *Id.*

On October 23, 2016, Appellant Evan Greenwald, in an email to Attorney Carter, conceded that the language in the Lease Agreement unambiguous conditioned the Purchase Options on the re-listing, or intent to re-list, the Mink Island Property on MLS: "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 . . . ." Appellants' Appendix, Vol. 2 at 690-92.

SUMMARY OF THE ARGUMENT

This case is unique in its simplicity, as it allows for the application of straightforward and established principles of law to an uncomplicated set of facts. Appellants and the Keatings entered into the Lease Agreement. The Lease Agreement granted certain Purchase Options to the Appellants. The Purchase Options were unambiguously conditioned on the Keatings' intent to re-list the Mink Island Property on MLS – in the case of the Right of First Offer – and their re-listing of the Mink Island Property on MLS – in the case of the Right of First Refusal.

Appellants have never before disputed that the language creating the Purchase Options is unambiguous, and they have not explicitly done so in their brief. Despite the undisputed lack of ambiguity, Appellants urge this Court to improperly consider evidence other than the plain and unambiguous language of the Lease Agreement to determine the parties' intent as to the Purchase Options. As the Court knows, the law in New Hampshire is clear that absent ambiguity, courts are to look only to the contractual language in determining the parties' intent. Accordingly, the bulk of Appellants' brief can be ignored, as it argues for positions that are incompatible with the undisputed fact that the language creating the Purchase Options unambiguously conditioned them on the Mink Island Property being re-listed in MLS, or the Keatings' intent that it be re-listed.

Appellants venture to other jurisdictions in search of support of their argument that construing the Purchase Options in the manner in which the parties intended – including Evan Greenwald who participated in the Lease Agreement's drafting – renders the Purchase Options "illusory." As explained herein, the cases Appellants cite in support of this argument are

easily distinguished from, and inapplicable to, the facts of the matter at hand. Appellants cannot avoid the inescapable fact that they contracted for Purchase Options that included specific conditions precedent, conditions that they knew and understood to be within the Keatings' control.

As the trial court correctly held, Appellants' claims against Ms. Mulligan for tortious interference with contractual relations and violation of the Consumer Protection Act were predicated entirely on Appellants' argument below that the Keatings breached the Lease Agreement by not honoring the Purchase Options. Because the conditions precedent to the Purchase Options never came to be, the Keatings' sale of the Mink Island Property to the Uickers did not breach the Lease Agreement. Absent any breach of the Lease Agreement, the claims against Ms. Mulligan fail.

Furthermore, as explained herein, even if the Keatings had breached the Lease Agreement, Ms. Mulligan's limited participation in the sale of the Mink Island Property does not rise to the level sufficient to constitute either tortious interference or a violation of the Consumer Protection Act. The trial court never reached Ms. Mulligan's arguments regarding these claims, having first determined that the claims fail for lack of any breach of the Lease Agreements. In the event the Court reverses the trial court's holding as to the existence of a breach, the case would then need to be remanded to the trial court for further consideration of the claims against Ms. Mulligan.

Finally, Appellants are critical of the trial court's review of the evidence presented on summary judgment below, and argue that the court misapplied the summary judgment standard. It is clear from the trial court's decision that it correctly applied the standard of review and properly weighed the evidence in determining that no breach of the Lease

Agreement occurred. All Appellants can point to in support of their argument are supposed findings on factual issues that are irrelevant to the question of whether the Lease Agreement was breached.

For the reasons stated herein, the Court should affirm the trial court's grant of summary judgment for the Appellees and denial of summary judgment for Appellants. In addition to the arguments presented herein, Ms. Mulligan also adopts the arguments presented in the briefs filed by co-Appellees Barbara Keating, Jill Keating, and Barry and Chrysoula Uicker.

ARGUMENT

I. THE PRIVATE, UNLISTED SALE OF THE MINK ISLAND PROPERTY TO THE UICKERS DID NOT TRIGGER THE PURCHASE OPTIONS.

As the trial court's order makes clear, the Appellants' claims against Ms. Mulligan are entirely dependent on whether the Purchase Options in the Lease Agreement were triggered and whether the Keatings breached the Lease Agreement by failing to honor the Purchase Options. Because the trial court found that the Keatings did not breach the Lease Agreement, it necessarily concluded that Ms. Mulligan did not tortiously interfere with the Lease Agreement. Appellants' Addendum at 36. Similarly, because the Purchase Options were never triggered, the trial court properly held that Ms. Mulligan did not violate the Consumer Protection Act. *Id.* at 37. Accordingly, the majority of argument contained herein will be dedicated to the trial court's analysis of the Purchase Options.

A. The Purchase Options were unambiguously conditioned on the Keatings' intention to market the Mink Island Property by re-listing it on MLS.

Appellants baldly assert that listing the Mink Island Property for sale on MLS was not a condition precedent to the triggering of the Purchase Options. Appellants' Brief at 17-20. However, this argument flies in the face of the clear and unambiguous language in the Lease Agreement that conditioned the Greenwalds' Purchase Options on the property first being re-listed in MLS:

> 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**. . . .

> C. In the event 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. . . .

Appellants' Appendix, Vol. 1 at 54.[2]

New Hampshire law is clear on the interpretation of a contract. "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." *Birch Broad. v. Capitol Broad. Corp.*, 161 N.H. 192, 196 (2010). "Absent fraud, duress, mutual mistake, or ambiguity, we must restrict our search for the parties' intent to the words of the contract." *Appeal of Reid* 143 N.H. 246, 249.

The trial court properly concluded that the unambiguous language of the Lease Agreement conditioned the Purchase Options on the Keatings intention to re-list the property on MLS – in the case of the right of first offer – and their actual listing of the property on MLS – in the case of the right of first refusal. Appellants' Addendum at 28. The language makes clear that the Greenwalds only had an Option to Purchase if the Keatings **intended** to **re-list** the Mink Island Property on MLS. As for the Right of First Refusal, it was only triggered if the Mink Island Property was **re-listed on MLS**. Appellants attempt at various points to draw conclusions

[2] The reference in 18B to "re-listing" the property for sale refers to the fact that the Keatings had previously had the property listed for sale before entering into the Lease Agreement with the Greenwalds, but had taken it off. Appellants' Appendix at 687-88.

about the mechanisms of the Purchase Options from the different labels they ascribe to them, such as "right of first refusal." However, as the trial court noted in its order, "the court looks to the language of the [Lease] Agreement, rather than the common understanding of the labels 'first option to buy' and 'right of first refusal,' to determine the intent of the parties' use of these terms." Appellants' Addendum at 20, citing *Glick v. Chocorua Forestlands Ltd. P'ship*, 157 N.H. 240, 247 (2008) ("the practical reality" of labels such as "'right of first refusal' . . . do not always mirror the economic reality of the instruments involved" requiring the court to "focus upon the intent of the parties, as manifested in the language of the entire contract, in defining the parties' respective rights" (emphasis in original)).

Simply put, the plain and unambiguous language did not preclude a private sale to a third party that did not involve the Mink Island Property being re-listed on MLS. Moreover, the plain and unambiguous language also did not require the Keatings to provide notice to the Greenwalds of such sale. To argue otherwise is to simply add language to the Lease Agreement where none exists.

B. Because the language creating the Purchase Options is unambiguous, the trial court was not permitted to consider parol evidence of the parties' intent.

1. The intent of the parties is clear from the Lease Agreement.

"Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract." *Birch Broad. v. Capitol Broad. Corp.*, 161 N.H. at 196. "[W]e will reverse the determination of a fact finder where, although the terms of the agreement

are unambiguous, the fact finder has improperly relied on extrinsic evidence in reach a determination contrary to the unambiguous language of the agreement." *Appeal of Reid* at 249.

Appellants cannot escape the plain and unambiguous meaning of the language in the Lease Agreement. The intent that is clearly conveyed by the plain language of the Lease Agreement is that the Purchase Options were only triggered if the Keatings intended to list the property for sale, or did relist the property for sale, on MLS.[3] The specific inclusion of "re-list" and "MLS" in the Lease Agreement cannot be ignored. "[W]e must assume that the words used were used advisedly and for the purpose of conveying some meaning." *McGinley v. John Hancock Mut. Life Ins. Co.*, 88 N.H. 108 (1936). "Words are only to be ignored or regarded as surplusage when to do otherwise would be either to render the document insensible or else to produce a result obviously at variance with its clear intention or purpose." *Id.*

Giving the words "re-list" and "MLS" their obvious and clear effect would not render the Lease Agreement "insensible" or "obviously at variance with its clear intention or purpose." There are certainly reasons why parties would limit the rights only to be triggered by listing in MLS, including providing the tenant an advantage in the open market while still preserving for the owners the right to sell if approached by a buyer. Such

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[3] Plaintiff Evan Greenwald conceded as much in his email to Attorney Carter: "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 . . . ." Appellants' Appendix, Vol. 2 at 690-92.

an approach would also, depending upon tenant's response, provide seller with an early response to marketability of the property and the listing price.

Furthermore, MLS listing is not some little thing to be added or removed from an agreement on a whim, nor was it some ministerial function. It is a formal process that requires the execution of a listing agreement and the furnishing of extensive information about the property to be disclosed to prospective buyers. *See* Appellants' Appendix, Vol. 2 at 662-63.

If the parties to the Lease Agreement had wanted the Purchase Options to be broader, and to be triggered by the Keatings' mere intention to sell the property or to offer the property for sale, without the requirement that it be listed on MLS, they could have done so. As cannot be stated too often, Appellants were parties to the Lease Agreement and involved in the drafting of the Purchase Options. They cannot now seek to retrospectively rewrite the Purchase Options simply because they are unhappy with the terms they negotiated.

The inescapable fact remains that the Purchase Options were clearly only triggered in the event of the Keatings' intention to re-list the property with MLS and their actual listing of the property with MLS. Appellants can point to no evidence that the Keatings ever intended to re-list the property for sale, or did list the property for sale, with MLS, and the trial court correctly granted summary judgment to the appellees.

2. Parol evidence cannot be admitted to contradict the plain meaning of the Purchase Options.

Appellants do not dispute, and have never disputed, that the language of the Lease Agreement is unambiguous. *See, generally,*

Appellants' Appendix. While parol evidence may be admissible to show independent or collateral agreements, it is not admissible to contradict the unambiguous terms of a contract. Nevertheless, Appellants insist on making arguments before the trial court and before this Court based on parol evidence of the parties' intent and their actions both before and after the execution of the Lease Agreement. Appellants' argument is especially surprising in light of Mr. Greenwald's email where he admits that the Purchase Options only apply if the Keatings listed the Mink Island Property for sale on MLS.

To support their position, Appellants have relied on various cases which are inapposite or easily distinguished form the matter at hand. Appellants cite two cases – *Birch Broad. v. Capitol Broad.*, 161 N.H. 192, 197 (2010) and *Bogosian v. Fine*, 99 N.H. 340, 342 (1955) – for the proposition that this Court may look to the parties' subsequent actions to determine their intent as expressed in the language of the Lease Agreement. Appellants' brief fails to note that in both of those cases, this Court first made the determination that the contractual language at issue was ambiguous. *Birch Broad.*, 161 N.H. at 198 ("We conclude, therefore, that the language is ambiguous."); *Bogosian*, 99 N.H. at 342 ("Under the circumstances the extent of the demised area was not so free from ambiguity as to preclude evidence of the parties' conduct under the lease."). Rather than support Appellants' position that the Court can refer to the parties' conduct after the signing of the Lease Agreement to interpret its unambiguous language, they instead confirm the long-standing rule in New Hampshire that "[a]bsent ambiguity, … the parties' intent will be

determined from the plain meaning of the language used in the contract." *Birch Broad.*, 161 N.H. at 196.

Appellants also cite *Spectrum Enterprises v. Helm*, 114 N.H. 773, 776 (1974) for the proposition that "since extrinsic evidence of the circumstances surrounding the contract are essential to its interpretation, evidence of the parties' conduct in performance of the contract is admissible." However, Appellants fail to note that the *Spectrum* court, relying upon parol evidence, determined that there was a separate agreement between the parties with regarding to the leasing of a basement, and there was not part of the lease agreement in question. As such, Spectrum does not assist Appellants since Appellants admit that the Lease Agreement is the only agreement between the parties.

Appellants' final attempt to find support for their position is the decision in *Lapierre v. Cabral*, 122 N.H. 301, 307 (1982), which they cite for the proposition that "parol evidence is admissible as proof of a condition precedent." In that case, the Court relied on an 1857 decision in applying a narrow exception to the parol evidence rule that apparently allows for the introduction of parol evidence to prove the existence of a condition precedent where the contract is otherwise unambiguous and totally integrated. *Lapierre*, 122 N.H. at 306-07. This decision is factually distinguishable from the matter at hand. In *Lapierre*, the Court allowed parol evidence to be introduced to prove the existence of a financing condition that was not included in the fully integrated contract, and which was not otherwise inconsistent with the contract. *Id.* at 305-08. In contrast, Appellants here are pointing to evidence outside the four corners of the Lease Agreement in an attempt to **disprove** the MLS re-listing condition of

the Purchase Options. The narrow exception available for proving a condition precedent that is no included in the contract is not applicable to this case, and *Lapierre* provides no support for Appellants' position.

C. The Purchase Options are not rendered illusory by the MLS re-listing condition.

As they did below, Appellants again make an argument that imposing the condition on the Purchase Options that the Keatings must first list, or intend to list, the Mink Island Property on MLS somehow renders the Purchase Options illusory. Appellants are unsatisfied with the conditions included in the Lease Agreement that they themselves drafted and are now looking to have this Court adopt a rule that would fundamentally change contract drafting in New Hampshire. To say that the imposition of a condition that is entirely within one party's control renders a contract illusory would potentially call entire contractual devices into question. The Purchase Options themselves – without any additional conditions – are conditional rights whereby one party entirely controls whether the condition is met. A right of first offer is conditioned on the selling party manifesting an intent to sell the property, a condition over which the seller has sole control. Similarly, a right of first refusal is conditioned on the seller listing the property and receiving a purchase offer; the decision to list the property for sale is to solely within the seller's control. The Purchase Options at issue here are no more illusory than any other right of first offer or refusal.

The cases cited by Appellants in support of their argument are all from other jurisdictions and are all easily distinguishable from the facts of this case. Appellants cite *Lockwood v. Wolf*, 629 F.2d 603, 610 (9th Cir.

1980) for the proposition that "courts disfavor conditions precedent and have not construed stipulations as conditions unless required to do so by unambiguous language." In *Lockwood*, the defendant argued that language in the contract that contemplated a division of sale proceeds established the sale of the property as a condition precedent to its obligation to pay. The Court stated: "The 'contemplation' of payment from a specific source does not unambiguously establish sale as a condition precedent, especially since Wolf can control the occurrence or non-occurrence of that event." 629 F.2d at 610. Here, the language in the agreement does not merely imply a condition precedent. The Lease Agreement specifically states that the Purchase Options would be triggered "in the event that" the Keatings intended to re-list, or did re-list, The Mink Island Property for sale on MLS. This is an unambiguous condition precedent, unlike the purported condition precedent in *Lockwood*.

Appellants provide the case of *True R.R. v. Ames*, 152 A.3d 324, 341 (Pa. Super. Ct. 2016) as a supposed example of a court rejecting a party's attempt to characterize a contract term as a condition precedent to a purchase right. The actual opinion makes clear that the court's rejection of this characterization was based largely on the construction of the contract. The court lists three conditions precedent that were mentioned in the actual provision for the purchase right, and then explains why the selection of an independent appraiser to determine the purchase price – which was elsewhere in the contract in the provision regarding the purchase price, not in the provision for the purchase right – was not a condition precedent to the actual purchase right. 152 A.3d at 341. As previously stated, the condition that the Keatings intend to list, or do list, The Mink Island

Property for sale on MLS is a clear and unambiguous condition precedent located within the language creating the Purchase Options. There can be no doubt that they are meant as conditions precedent to the Purchase Options.

Appellants' also rely on *Long v. Wayble*, 618 P.2d 22 (Or. Ct. App. 1980) to provide an example of a court purportedly rejecting a party's attempt to characterize a contract term as a condition precedent to a purchase right. However, the decision in *Long* is not incompatible with the trial court's holding that the Keatings' intent to relist, or their actual relisting of, The Mink Island Property was a condition precedent to the Purchase Options. In *Long*, the lease agreement in question included the following language creating a right of first refusal: "Lessor agrees to give lessee first right of refusal on purchase of this property ... at an asking price of $35,000." *Long*, 618 P.2d at 24. The lessor eventually listed the property for sale for $49,900 and refused to accept the lessee's offer to purchase the property for $35,000. *Id.* The lessor argued that his listing the property for $35,000 was a condition precedent to the lessee's right of first refusal. *Id.*, 618 P.2d at 25. The Oregon Court of Appeals found that the language creating the right of first refusal was ambiguous and there was no evidence of the parties' intent that the right be conditioned on the property being offered at a specific price. *Id.* On the contrary, here the language of the Purchase Options unambiguously imposes relisting on MLS, or the intent to do so, as a condition precedent. The decision is *Long* is therefore inapplicable here.

Appellants have failed to cite any New Hampshire case law supporting their argument that the Purchase Options were illusory, and the cases they do cite are all distinguishable and inapplicable.

D. The Option to Purchase was unenforceable for lack of a purchase price.

The trial court correctly concluded that the Option to Purchase was unenforceable in the first instance because it failed to include an essential term: the purchase price. "[P]rice is an essential term" of an agreement to sell land. *MacThompson Realty, Inc. v. City of Nashua*, 160 N.H. 175, 179 (2010). Although an agreement does not need to include a fixed price, it still must "prescribe[] a method which will necessarily result in the determination of the price." *Id.* The trial court properly found that the relevant language in the Option to Purchase – "[i]f the sale price is agreed upon during or after the term of this lease" – did not set forth a "readily determinable" method to reach a purchase price. Appellants' Addendum at 21. Appellants have provided no persuasive authority in support of their position that the language of the Lease Agreement was sufficiently specific to overcome the requirement of a purchase price. They simply cannot avoid the fact that the Lease Agreement fails to provide a method by which a sale price would be determined. The trial court's conclusion that the Option to Purchase was unenforceable was correct for the reasons set forth in its order. *Id.*

II. MS. MULLIGAN DID NOT TORTIOUSLY INTERFERE WITH THE OPTION RIGHTS THROUGH HER LIMITED ROLE IN THE PRIVATE SALE OF THE MINK ISLAND PROPERTY TO THE UICKERS.

The trial court correctly found that Ms. Mulligan's limited participation in the sale of the Mink Island Property did not tortiously interfere with the Purchase Options because the Purchase Options were never triggered and therefore the Keatings never breached the Lease

Agreement. Appellants' Addendum at 36. Appellants' claim for tortious interference fails because they cannot prove that Ms. Mulligan "wrongfully induced [the Keatings] to breach [their] agreement with the [Greenwalds]." *Montrone v. Maxfield*, 122 N.H. 724, 726 (1989).

Furthermore, even if the Court finds that the Purchase Options were triggered by the sale of the Mink Island Property to the Uickers – despite the unambiguous language in the Lease Agreement conditioning the Purchase Options on the Mink Island Property being re-listed on MLS – Ms. Mulligan's limited participation in the sale does not constitute tortious interference with the Purchase Options. Ms. Mulligan did not have knowledge of any economic relationship because she reasonably believed – based on the plain and unambiguous language of the Lease Agreement – that the Purchase Options had not been triggered. Furthermore, none of the affirmative acts taken by Ms. Mulligan in the relevant series of events is sufficient – either individually or collectively – to meet the standard of tortious interference with contractual relations. Ms. Mulligan incorporates and relies upon her previous briefing on this issue. Appellants' Appendix, Vol. 2 at 381-84, 653-58.

III. MS. MULLIGAN'S LIMITED PARTICIPATION IN THE SALE OF THE MINK ISLAND PROPERTY DID NOT VIOLATE THE CONSUMER PROTECTION ACT.

The trial court correctly found that Ms. Mulligan's limited participation in the sale of the Mink Island Property did not violate the Consumer Protection Act ("CPA") because the Purchase Options were never triggered. Appellants' Addendum at 37.

Furthermore, even if the Court finds that the Purchase Options were triggered by the sale of the Mink Island Property to the Uickers – despite the unambiguous language in the Lease Agreement conditioning the Purchase Options on the Mink Island Property being re-listed on MLS – Ms. Mulligan's limited participation in the sale does not rise to the level of rascality sufficient to constitute a violation of the CPA. *See State v. Sideris*, 157 N.H. 258, 263 (2008) (setting forth the rascality test for conduct not specifically listed in the CPA). Additionally, Ms. Mulligan was not engaged in trade or commerce in connection with her role in the sale of the Mink Island Property, since she was not involved in the sale of the Mink Island Property in her capacity as a real estate broker, and the sale of the Mink Island Property did not occur in the ordinary course of her business. *See Snierson v. Scruton*, 145 N.H. 73, 81 (2000) ("A seller of real estate cannot be held liable under the Consumer Protection Act for conduct related to an isolated transaction that was not conducted in the ordinary course of business."). Ms. Mulligan incorporates and relies upon her previous briefing on this issue. Appellants' Appendix, Vol. 2 at 384-87, 658-60.

IV. THE TRIAL COURT DID NOT MISAPPLY THE SUMMARY JUDGMENT STANDARD.

Appellants contend that the trial court failed to "consider the evidence, and the inferences to be drawn from it, in the light most favorable to [Appellants]." However, Appellants cite only one example in support of this contention, and the example they cite is of a factual finding that has no relevance to the trial court's ultimate conclusion regarding the triggering of the Purchase Options.

Appellants devote almost an entire page of their brief to examining the trial court's apparent finding that "the Uickers did not, in May 2016, reach an agreement with the Keatings to purchase Mink Island." Appellants' Brief at 32. What Appellants fail to understand is that, to the extent the trial court made such a finding, the finding had no relevance to the trial court's ultimate conclusion that the Purchase Options had not been triggered because the Keatings never listed, or intended to list, the Mink Island Property on MLS. The trial court's grant of summary judgment for Defendants was based on three simple facts: 1) the unambiguous language of the Lease Agreement which conditioned the Purchase Options on the Keatings' re-listing of the Mink Island Property on MLS, or their intent to do so; 2) the lack of the Keatings' intent to re-list the Mink Island Property on MLS; and 3) the fact that the Mink Island Property was not re-listed on MLS. Whether the Uickers and the Keatings had come to an agreement for the sale of the Mink Island Property in June 2016 is immaterial to the question of whether the Purchase Options were triggered.

V. CONCLUSION

For the foregoing reasons, Ms. Mulligan respectfully request that this Court affirm the Superior Court's decision granting summary judgment for Ms. Mulligan and her co-Appellees and denying summary judgment for Appellants.

VI. REQUEST FOR ORAL ARGUMENT

Ms. Mulligan requests oral argument of not less than fifteen minutes. Karyn P. Forbes will argue for Ms. Mulligan.

Respectfully submitted,

ELLEN MULLIGAN

By her attorneys,
SHAHEEN & GORDON, P.A.

Date: December 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the within Brief to Christopher H. M. Carter and Jamie S. Myers, attorneys for Appellant, R. James Steiner, attorney for Richard and Barbara Keating, William Philpot, Jr. and Samantha M. Jewett, attorneys for Barry and Chrysoula Uicker, and to Douglas J. Miller and Katherine E. Hedges, attorneys for Jill Keating.

Dated: December 19, 2018

/s/ Karyn P. Forbes
Karyn P. Forbes, Esq.

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