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THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2018 TERM

CASE NO. 2018-0479

EVAN GREENWALD and KELLY GREENWALD

v.

RICHARD KEATING, BARBARA KEATING, ELLEN U. MULLIGAN, BARRY M. UICKER, CHRYSOULA P. UICKER and JILL KEATING

MANDATORY APPEAL PURSUANT TO RULE 7 OF DECISION FROM CARROLL COUNTY SUPERIOR COURT

BRIEF OF APPELLEE JILL KEATING

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QUESTIONS PRESENTED

1. Did the trial court properly find that listing or intending to list the Property for sale on MLS was a condition precedent needed to trigger the Purchase Options granted to the Appellants, Evan and Kelly Greenwald, when it granted summary judgment in the Appellees' favor? (Add. at 16-30; App. at 762-69)[1]
2. Did the trial court properly find the Option to Purchase was unenforceable because it lacked the essential term of price? (Add. at 21; App. at 717-18, 769-70.)
3. Did the trial court properly find that the Purchase Options were not enforceable against Barbara Keating because she was not an owner of the Property?[2] (Add. at 28-29; App. at 175-76.)

[1] Citations to the record are as follows:
"Add." refers to the documents included as an addendum to the Appellants' brief.
"App" refers to the Appellants' Appendices filed contemporaneously with their brief.
"Supp." refers to the documents filed as a Supplemental Appendix to Jill Keating's brief.

[2] Jill Keating has not briefed this issue as the issue does not raise any question as to Jill Keating's liability.

4. The court found that the condition precedent required to trigger the Purchase Options had not occurred, so the trial court granted summary judgment in favor of Appellees Barry and Chrysoula Uicker on the claim for specific performance. Did the trial court correctly grant the Appellees' motion for summary judgment and deny the Appellants' cross-motion for summary judgment on this same issue?[3] (Add. at 35; App. at 116-21.)
5. Did the trial court correctly find that Richard Keating and Jill Keating did not violate the implied covenant of good faith and fair dealing because ruling in the Greenwalds' favor would impose a requirement that is inconsistent with the express covenants of the contract? (Add. at 28-35; App. at 119, 716-17, 768-69.)
6. Did the trial court properly find that there were no disputed material facts and construe the facts and reasonable inferences therefrom in the favor of the nonmoving party? (Add. at 3-11, 38; App. at 167, 425, 707-10, 769.)

STATEMENT OF THE CASE

For Appellee Jill Keating, this is an appeal the Carroll County Superior Court's order granting Jill Keating's and the other Appellees' motions for summary judgment. (Add. at 38.) The Plaintiffs/Appellants, Evan and Kelly Greenwald (hereinafter the "Appellants" or "Greenwalds") also appeal the decision denying their cross-motions for summary judgment

[3] Jill Keating has not briefed this issue as this claim was not made against her.

against the Appellees, but the Appellants never filed a cross-motion for summary judgment as to Jill Keating. (Add. at 2-3, 38.)

On or about January 25, 2017, the Greenwalds filed a complaint against Richard Keating, Barbara Keating, Ellen U. Mulligan, Barry M. Uicker, and Chrysoula P. Uicker. (App. at 1-9.) The claims arose from the sale of Jill and Richard Keating's property on Lake Winnipesaukee to Barry and Chrysoula Uicker, which the Greenwalds contend violated the Purchase Options contained in their lease agreement with the Keatings. (App. at 1-5.) The complaint included claims of specific performance/constructive trust against the Uickers, breach of contract and breach of the covenant of good faith and fair dealing against Richard and Barbara Keating, and tortious interference with contract and violations of RSA 358-A against Ellen Mulligan. (App. at 1-9.) The Greenwalds alleged that the Keatings breached a first option to purchase or right of first refusal that was granted to the Keatings and that the Uickers knew of and acquiesced to that breach. *Id.* The Greenwalds also alleged that Ellen Mulligan interfered with the Greenwalds' right to purchase the Property. *Id.*

Richard Keating and Barbara Keating (hereinafter the "Keatings") filed a motion for summary judgment on February 28, 2017, and the Greenwalds objected. (App. at 10-104.) The Greenwalds filed cross-motion for summary judgment on or about May 26, 2017 against all of the then Defendants, and each of the Defendants objected. (App. at 105-165.) Barry Uicker and Chrysoula Uicker (hereinafter the "Uickers") also filed a cross-motion for summary judgment as to the claims against them with their objection to the Greenwalds' motion for summary judgment. (App. 124-

165.) The Greenwalds objected to the Uickers motion for summary judgment. (App. at 166-332.)

On August 22, 2017, the trial court held a hearing and issued an order denying the Keatings' motion for summary judgment on issues not currently before the Court and the Greenwalds' cross-motion for summary judgment, without prejudice, as to the claims of breach of contract and breach of the implied covenant of good faith and fair dealing and with prejudice as to the claims for specific performance against the Uickers. (App. at 333-53.) The trial court expressly deferred ruling on the issue of whether there the Purchase Options included a condition precedent that had not been met, along with other issues that were raised in the Uickers' objection and cross-motion for summary judgment. *Id.*

On or about September 14, 2017, the Greenwalds filed a motion to amend their complaint to include claims against Jill Keating, which was granted on October 26, 2017.[4] (App. 354-75.) Ellen Mulligan filed a motion for summary judgment on or about November 21, 2017, and the Greenwalds objected. (App. at 376-702.)

Jill Keating was served with the Greenwalds' amended complaint on or about December 11, 2017, nearly a year after the suit was instituted. (App. at 707.) She filed her answer and counterclaim on or about December 29, 2018. (Supp. at 3-17.) Then, Jill Keating filed her own motion for summary judgment, on or about March 30, 2018, and the Greenwalds objected. (App. at 703-72.) On July 20, 2018, following a hearing, the trial court granted all of the pending Defendants/Appellees' motions for

[4] Jill Keating was not yet named as a party, although Plaintiffs obviously were aware of her joint ownership and had made a demand on her pre-suit. (App. at 740.)

summary judgment and denied the Greenwalds' pending motions for summary judgment. (Add. at 38.)

STATEMENT OF THE FACTS

Because this case involves the interpretation of an unambiguous contract, there are few material facts. The trial court properly found the following undisputed facts.

As evidenced by a Warranty Deed recorded at the Belknap County Registry of Deeds on October 8, 1996, Richard Keating and his daughter Jill Keating owned a property located on Mink Island in Gilford, New Hampshire as joint tenants with rights of survivorship. (Add. at 3; App. at 707, 720, 724-25.) A portion of that property was subdivided and sold in 1997, after which time Richard and Jill Keating owned the remaining 2.1 acres and a camp that Richard Keating built thereon (the "Property"). (Add. at 3; App. at 707, 720-721, 744.)

In 2013, Richard Keating and his wife, Barbara Keating (Jill Keating's stepmother), rented the Property during the summer months, including via VRBO listings that they posted for short-term rentals to defray tax expenses. (Add. at 3; App. at 144, 197, 721.)[5] In June 2015, Richard Keating engaged John Goodhue ("Goodhue") of Roche Realty to sell the Property, and the Property was listed for sale, despite Jill Keating being listed as an owner but never signing the listing agreement. (Add. at 3; App. at 721, 731-32.) The listing agreement, which stated it was in effect from June 2, 2015 through November 2, 2015, would authorize Roche

[5] The late Richard Keating, who passed away after suit was filed, and his wife Barbara Keating are sometimes referred to herein collectively as "the Keatings," which term does not include Jill Keating.

Realty to list the Property on MLS and electronic databases. (App. 708, 721, 729, 731.)

During Summer 2015, the Greenwalds approached Barbara and Richard Keating about renting the Property during Summer 2016. (Add. at 4; App. at 67, 229-30.) On August 9, 2015, the Greenwalds and the Keatings met at the Property, after they had also seen that the Property was listed for sale. (Add. at 4; App. at 68, 229-30.) The trial court properly found it was undisputed that Goodhue was also present at the meeting and that he represented Richard Keating, there is a disputed fact as to whether he also represented the Greenwalds. (Add. 4; App. at 68, 230.) That disputed fact is not material to the ruling on summary judgment.

At the meeting, the Greenwalds and Barbara and Richard Keating agreed on terms for the lease of the Property to the Greenwalds from July 1, 2016-August 31, 2016 at a rate of $12,000 per month, although the Property was typically rented for $3,200 per week. (Add. 4; App. at 68, 203, 216.) They also agreed that the Property would be taken off the market and that the Greenwalds would be given a first option to purchase and right of first refusal if the Property was to be relisted on MLS. *Id.* Goodhue and the Greenwalds drafted a lease agreement that was signed by Evan and Kelly Greenwald as "Tenant[s]" and Richard and Barbara Keating as "Landlord[s]" (the "Agreement"). (Add. at 4-5; App. at 15, 72-78, 230, 338[6].)

[6] The Greenwalds specifically incorporated the facts the trial court found in its Order dated August 22, 2017 in their Objection to Jill Keating's Motion for Summary Judgment, so this fact is not disputed. *See* App. at 760.

The Agreement included the following provisions that are the subject of the current dispute:

> 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.[7]
>
> 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.[8]

(Add. at 5; App. at 77, 736.) The Agreement also contained an integration clause in Paragraph 25 that sates: "This Lease shall constitute the entire agreement between the parties. Any proper understanding or representation of any kind preceding the August 9, 2016 [sic] of this Lease is hereby

[7] This Section 18.B. of the Agreement is referred to herein as the Option to Purchase. The Option to Purchase and Right of First Refusal are collectively referred to as the Purchase Options.
[8] This Section 18.C. of the Agreement is referred to herein as the Right of First Refusal. The Option to Purchase and Right of First Refusal are collectively referred to as the Purchase Options.

superseded. This Lease may be modified only by a writing signed by both Landlord and Tenant." (Add. at 5; App. at 78, 738.)

The trial court also took judicial notice of the definition of MLS and stated as follows:

> MLS, which stands for Multiple Listing Service, is a real estate advertising and marketing service company that operates a website, MLS.com, which prospective real estate buyers may utilize to search for real estate available for sale throughout the United States through advertised real estate agents' web sites. MLS.com does not work directly with real estate buyers or sellers and does not allow sellers to directly advertise or "list" real estate on its website. Instead, it requires a seller to contact a licensed real estate agent, who must be a member of the seller's "local area" MLS, to list the seller's real estate on the seller's "local area Multiple Listing Service." MLS.com does not receive commission from any purchases that have resulted from a listing on its website.

(Add. at 5n.2.)(internal citations omitted).

Months after the Agreement had been signed, Richard Keating told Jill Keating about the Agreement with Greenwalds. (Add. at 6; App. at 212, 214, 220, 225.) Jill Keating was glad that the Property had been rented, but she was not happy about the Purchase Options because she did not want to sell the Property and wanted to keep it in the family. (Add. at 6; App. at 214.) Neither the Keatings nor Jill Keating reached out to the Greenwalds to explain that Jill Keating was not interested in selling the Property at that time. (Add. at 6; App. at 69, 214-15.) She did not see the Agreement until September 2016. (App. at 721.)

In Spring 2016, Barry and Chrysoula Uicker (the "Uicker") discussed their desire to buy an island camp on Lake Winipesaukee with

Barry's sister, Ellen Mulligan ("Mulligan"). (Add. at 6; App. at 143-44.) Mulligan was a real estate broker and she heard from friends of the Keatings who she represented that the Keatings may be interested in selling the Property. (Add. at 6; App. at 205, 416, 458.) In mid-May 2016, Milligan called and spoke to Barbara Keating about the Property and explained that Mulligan's brother wanted to see if he could view the Property, but she was not acting as his realtor and was not looking for a commission. (Add. at 7; App. at 205, 416, 459.) Barbara Keating explained that the Property had been leased for the upcoming summer and that they were not sure if they would sell the Property, but she agreed to let the Uickers view the Property. (Add. at 7; App. at 205, 416.)

Mulligan visited the Property with her brother and sister-in-law. (Add. at 7-8; App. at 1st Mulligan Aff. ¶7-8; Mulligan Dep. 89:5-8.) During this visit, but while Mulligan was in another part of the Property, Richard Keating and Barry Uicker discussed the Purchase Rights. (Add. at 8; 417, 467, 666.)

On June 1, 2016, Barry Uicker sent an email to the Keatings which stated: "Thank you for working with us and working out a deal to purchase your property. We are very excited." (*Id.*) On July 1, 2016, when the Greenwalds arrived at the Property at the beginning of their lease term, the Keatings told the Greenwalds that they did not want to sell the Property because they wanted to keep it in the family, and the Keatings never told them otherwise. (Add. at 8-9; App. at 69-70, 79-85, 217-18, 220.)

In early September 2016, the Uickers contacted the Keatings and made a cash offer to purchase the Property, which the Keatings accepted. (Add. at 10; App. at 144-45.) Barry Uicker had read the Agreement in

detail and did not think the Purchase Options were triggered. (*Id*.) Mulligan suggested a real estate attorney look at the Agreement and introduced the Defendants to Jack Bielagus. (Add. at 10-11; 417.) The Keatings, Jill Keating, the Uickers, and Mulligan met with Bielagus, and he recommended that the Greenwalds be presented with the Uickers' offer and be given a chance to purchase the Property. (Add. at 11; App. at 325-26, 417.) Richard Keating declined to do so. (*Id*.) Richard Keating and Jill Keating, by a power of attorney given to her father, sold the Property to the Uickers on September 14 or 15, 2016. (Add. at 11; App. at 144-45, 417-18.) The Greenwalds learned of the Keatings' sale of the Property in November 2016. (Add. 12; App. at 70.) It is undisputed that the Property was never relisted on MLS following the execution of the Agreement. (App. at 709, 721-22, 756.)

Jill Keating had no knowledge that the Property was ever listed on MLS until it had already been removed and never consented to a relisting. (App. at 721.) Appellant Evan Greenwald acknowledged that the Property had never been relisted on MLS in an October 26, 2016 e-mail, saying that the Lease "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…" (App. at 728.)

SUMMARY OF THE ARGUMENT

The unambiguous terms of the Agreement require that in order for the Purchase Options to be triggered, the Keatings (or Richard Keating and Jill Keating) would need to intend to publicly market the Property by re-listing it for sale on MLS. It is undisputed that they never intended to relist the

Properly on MLS and instead sold the Property through a private sale. Therefore, Jill Keating and the other Defendants are entitled to summary judgment as a matter of law on the breach of contract claim.

Further, the implied covenant of good faith and fair dealing cannot expand the terms that the parties contracted for. Because the Greenwalds' are requesting the imposition of an implied covenant that directly contradicts an express term of the contract, it cannot be enforced. Thus, Jill Keating and the other Defendants are entitled to summary judgment as a matter of law on that claim.

Finally, because the Option to Purchase lacked a material term of price it was unenforceable. There are no genuine issues of material fact, and Jill Keating is entitled to summary judgment as a matter of law as to all claims asserted against her. The trial court decision must be affirmed.

STANDARD OF REVIEW

The Plaintiffs have appealed the trial court's grant of the Defendants' motions for summary judgment and denial of the Plaintiffs' cross-motion for summary judgment. Summary judgment is designed to end unnecessary litigation expeditiously, resulting in a saving of time, effort and expense. *See Brown v. John Hancock Mutual Life Insurance Co.*, 131 N.H. 485, 490 (1989); *Tanguay v. Marston*, 127 N.H. 572, 575 (1986). The court has recognized that summary judgment is especially effective in resolving cases alleging a breach of a written contract. *Sabinson v. Trs. Of Dartmouth College*, 160 N.H. 452, 455 (2010).

"Summary judgment shall be rendered forthwith if 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 that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. On appeal of an order of cross-motions for summary judgment, as in this case, the court will "consider 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 exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." *Conant v. O'Meara*, 167 N.H. 644, 648 (2015).The court reviews "the trial court's application of the law to the facts *de novo*. *Sunapee Difference, LLC v. State*, 164 N.H. 778, 789 (2013). The court will affirm the grant of summary judgment if the there are no "genuine issues of material fact, i.e., facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law." *Sabinson*, 160 N.H. at 455.

The interpretation of a contract, such as a lease, including whether a term is unambiguous, is ultimately a question of law for the New Hampshire Supreme Court to decide. *Sherman v. Graciano*, 152 N.H. 119, 121 (2005). Thus, the court's review of a trial court's contract interpretation is *de novo*. *Id.*

ARGUMENT

I. THE UNAMBIGUOUS TERMS OF THE AGREEMENT INCLUDED A CONDITION PRECEDENT THAT THE KEATINGS MUST HAVE INTENDED TO LIST THE PROPERTY FOR SALE ON MLS IN ORDER TO TRIGGER THE PURCHASE OPTIONS.

A. The Agreement contained a condition precedent that required the Keatings to intend to list the Property on MLS in order for the Purchase Options to be triggered.

Jill Keating did not breach the contract with the Greenwalds because under the plain language of the Agreement, the condition precedent necessary to trigger the Purchase Options was not satisfied. While Jill Keating disputes that she is bound by the contract because she was not a party to it, it is unnecessary to resolve that question. Even if she was bound, the trial court properly found that the Purchase Options were not triggered unless there was an intent to relist the Property for sale on MLS. The Option to Purchase stated: "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." (Add. at 5; App. at 77, 736)(emphasis added).[9] The Agreement clearly stated that the Option to Purchase would be triggered if the Landlord planned to relist the Property on MLS. Similarly, the Right of First Refusal stated: "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." *Id.*(emphasis added). Thus, the Right of First Refusal included a condition precedent that the Property be actually listed for sale on MLS prior to the right being triggered.

When interpreting a contract, the intent of the parties will be determined from the plain meaning of the language, unless the contract is

[9] The reference to an intent to "re-list" the Property for sale refers to the fact that the Keatings had previously listed the Property for sale on MLS before entering into the Agreement with the Greenwalds, but the listing was removed. App. at 687-88.

ambiguous. *N.H. Water Res. Council v. Steels Pond Hydro., Inc.*, 151 N.H. 214, 215 (2004). "The words and phrases used by the parties will be assigned their common meaning, and [the Court] will ascertain the intended purpose of the lease based upon the meaning that would be given to it by a reasonable person." *Id.* "The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language." *N.A.P.P. Realty Trust v. CC Enterprises*, 147 N.H. 137, 139 (2001) (quotation omitted). All Parties understood the meaning of the language of the condition precedent and agree that the Property was not listed on MLS. (App. at 143-44, 751-54, 756.) The Greenwalds have failed to expressly assert in their pleadings that the Agreement is ambiguous.

As the trial court noted, Section 18.B. of the Agreement refers to a first option to purchase, which is often equated to a right of first refusal; however, the Agreement contained a separate Section 18.C. that contained a right of first refusal. *See* Add. at 19 (citing *Glick v. Chocorua Forestlands Ltd. P'ship*, 157 N.H. 240, 247 (2008)). Because the Agreement treated the provisions as separate rights triggered under different circumstances, the trial court correctly looked to the language of the provisions rather than the labels used to determine the intent of the parties. *See Glick*, 157 N.H. at 247.

A right to purchase only ripens when condition precedents are satisfied. *See id.* at 249. In *Glick*, a right of first refusal was conditioned on the prior execution of a purchase and sales agreement and was found to be enforceable as an option to purchase once that condition precedent had been satisfied. *Id.* at 249-50. In this case, the Purchase Options would have only ripened if the Landlords intended to re-list the Property on MLS. The

Uickers were introduced to Richard Keating through a third party, and they pursued a private sale of the Property even though it was not being marketed on MLS or any other listing service. (App. at 143-44; 751-54.) The Uickers made an offer after the Keatings told them they were not sure if they would sell the Property ,while the Greenwalds never made an offer. There is no dispute that there was no intent to re-list the Property on MLS. (Add. at 7; App. at 205, 416.) Unlike *Glick,* where the right of first refusal was triggered by the condition precedent of the seller receiving a signed purchase and sales agreement, in this case, the condition precedent of the landlords intenting to relist the Property on MLS did not occur, and, therefore, the Purchase Options were not triggered.

The Greenwalds argue that the intent to sell the Property was enough to trigger the Purchase Options; however, that position ignores the plain language of the Agreement. If the Parties had intended that any intent to sell the Property was enough to trigger the Purchase Options, they could have drafted the contract to provide the same. For instance, the Agreement could have provided that the Greenwalds would have the right to make the first offer to purchase if the owners intended to sell the Property to anyone other than a family member or upon receiving any signed purchase and sales agreement if that was the intention of the Parties.

When parties unambiguously limit occurrences that will trigger a right of first refusal, the court must not expand that right. In *Found. for Seacoast Health v. HCA Health Servs. of N.H.*, a non-profit entity entered into an asset purchase agreement with a private entity that included a right of first refusal to repurchase the assets under certain circumstances. 157 N.H. 487, 489 (2008) (granting summary judgment on a breach of contract

claim but remanding another claim after finding a phrase was ambiguous). The private entity transferred 100% of its LLC membership interest to its parent company and later private investors acquired the stock of the parent. *Id.* at 490. The private entity stated that the leveraged buy-out of the parent did not trigger the right of first refusal, but the non-profit sued the private entity for a breach of contract and a breach of the implied covenant of good faith and fair dealing. *Id.* at 491. The nonprofit argued that the intent of the provision was to reach any transaction in the corporate structure, including parent-level transactions, but the court disagreed, finding that the language unambiguously only applied when either the private entity or the second specifically named entity acted. *Id.* at 492. The language clearly did not extend to other transactions, such as actions carried out by parent companies, because "the plain language of the right of first refusal controls over general principles of law." *Id.* at 494. The court granted the motion for summary judgment in the private entity's favor on this issue. *Id.*

Like *Found. for Seacoast Health*, the language in the Purchase Options are limited. Rather than saying that the Greenwald Plaintiffs had the right of first refusal in any sale or conveyance other than to family members, the parties specifically excluded any sale that did not involve the intent to relist the Property on MLS. It is undisputed that the Uickers were introduced to the Keatings privately and that they pursued the purchase of the Property despite the fact that the Property was not listed for sale. (App. at 143-44, 751-54.) This was a private transaction. The Greenwalds' argument that the reference to listing on MLS was only a reference to how the sellers would obtain offers is not supported because there would be no need to include that language in the contract. Although not decided below

and not relevant to this issue, the Greenwalds' argument that any sale of the Property had to be managed and listed by Goodhue is incorrect. Reading the provision contained in Section 18.C. as a whole, Goodhue was to be the listing agent of any sale from the Keatings to the Greenwalds.

Because the Agreement is unambiguous, and there is no genuine dispute that neither the Keatings nor Jill Keating intended to relist the Property on MLS, the condition precedent was not satisfied. Thus, Jill Keating is entitled to summary judgment as a matter of law.

B. The trial court's ruling does not render the Purchase Options in the Agreement illusory.

An unambiguous condition precedent cannot render an agreement illusory, and there will often be one party that has more control over whether the condition precedent will be satisfied. The Greenwalds rely on caselaw from other jurisdictions to support their argument, but their position is contrary to the law governing contract interpretation in New Hampshire.

Although condition precedents are not favored, New Hampshire Courts do recognize them when the plain language of the contract makes the agreement conditional. *Estate of Kelly*, 130 N.H. 773, 781 (1988). "As a rule of thumb, provisions which commence with words such as 'if,' 'on condition that,' 'subject to' and 'provided' create conditions precedent." *Holden Eng'g & Surveying v. Pembroke Rd. Realty Trust*, 137 N.H. 393, 396 (1993). In this case, the Purchase Options both contain the phrase "[i]n the event that..."(Add. at 5; App. at 77, 736.)(emphasis added). The phrase "in the event that" is plainly the type that creates a condition precedent, and both sections contain conditional language that relates to relisting the

Property on MLS. Thus, because the plain language of the Agreement establishes the existence of a condition precedent, the Court must enforce it

Although the Court will avoid placing a party at the mercy of another or interpreting a contract in a manner that results in harsh or unreasonable results, it will not rewrite an unambiguous contract. In *Holden Eng'g & Surveying*, a company sued its client when the client did not pay for services rendered. 137 N.H. at 395. The defendant argued that obtaining planning board approval was a condition precedent to payment and had not been met, so it was not required to make a payment. *Id.* The court found that the contract was unambiguous, so extrinsic evidence should not have been considered, and that planning board approval was not a condition precedent. *Id.* at 396. The reference to planning board approval was in a different section than the reference to payment, and there was no language connecting the two, although other language required payment at intervals based upon partial completion. *Id.* at 396-97. Finally, the court found that interpreting planning board approval to be a condition precedent would lead to a harsh result because it would cause a third-party to have control over the result, not because one party was at the mercy of another. *See id.* at 397.

Unlike *Holden Eng'g & Surveying*, the condition precedent in this case is repeated in Section 18.B. and 18.C. There is language directly linking the condition of re-listing the Property on MLS as the trigger allowing the Greenwalds to have a right to make an offer to purchase the Property or an offer of first refusal. There is not a harsh result because the Parties could have negotiated for terms that were more favorable to the Greenwalds but did not.

This case is also unlike the cases that the Greenwalds rely on in support of their argument that the condition precedent is void because it renders the Agreement illusory. In *True R.R. v. Ames*, the court found that even if the defendant had failed to appoint an independent appraiser, that requirement was not a material term of the contract. 152 A.3d 324, 340 (Pa. Super. Ct. 2016). The court analyzed whether the appointment of an appraiser that may not have been independent would be a serious enough breach to excuse the other party's performance. *Id.* If the contract was substantially performed, then the breach was not material. *Id.* The court held that the selection of an independent appraiser was not a condition precedent, but that there were three conditions to trigger the option to purchase: (1) the tenant had to not be in breach of the lease; (2) the tenant had to send written notice to exercise the options; and (3) the written notice had to be provided during the period the option was effective. *Id.* at 341. Thus, the court found that the selection of the appraiser was only the mechanism to measure the price once the option had been exercised. *Id.*

Unlike the appraisal provision in *True R.R.*, the requirement for the owners to intend to list the Property on MLS was plainly included in the language stating when the Purchase Options were triggered. In *True R.R.* the time that the option period was open and the method for providing notice were included in the discussion of the triggering the option, but the appointment of the appraiser was discussed in relation to measuring price. *Id.* at 329-30. Like the provisions regarding the time for providing notice of exercising the option on how to do so, the requirement that the sellers intend to list the Property on MLS was written in connection with the exercise of the Purchase Options.

Although the Appellants argue that the relisting on MLS was ministerial in nature, it was not something to be done in connection with the Parities' performance of the contract. The provision requiring the appointment of an independent appraiser is like the provision requiring Goodhue to act as the realtor. It is a term included in the contract for how to perform the rights once the provisions have been triggered, but it is not a condition for triggering them. The same is true for the other cases that the Greenwalds rely on. *See, e.g., Long v. Wayble*, 618 P.2d 22 (Ore. Ct. App. 1980)(finding, after assuming that the terms were ambiguous, that when an agreement stated that "Lessor agrees to give lessee first right of refusal on purchase of this property … at an asking price of $35,000" there was no condition precedent other than the act of offering the property for sale because there was no evidence the parties intended otherwise).

In this case, the Parties did not bargain for purchase options or rights of first refusal that would be implicated on any occasion that the landlords decided to sell. They specifically exempted private sales, where the Property was not to be marketed on MLS, which requires the owners to enter into a listing agreement with a broker (App. at 740). Although the decision of whether or not to list the Property on MLS was solely in control of Richard and Jill Keating, so was the decision of whether to sell the Property at all. "Parties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably." *Moore v. Grau,* 193 A.3d 272, 281 (N.H. 2018)(quoting *Appeal of Silverstein*, 163 N.H. 192, 202 (2012)). The existence of a condition precedent within the control of

the sellers did not render the Agreement illusory because this is the agreement the Greenwalds bargained for. Because it is undisputed that the condition precedent was not triggered, the Defendants are entitled to summary judgment as a matter of law.

C. Because the Agreement is unambiguous it is improper to rely on extrinsic evidence to interpret the contract.

Because the terms of the Agreement are unambiguous, it is improper to consider extrinsic evidence to interpret the intent of the Parties. *N.H. Water Res. Council*, 151 N.H. at 215. Although the Greenwalds have not asserted that the language of the Agreement is ambiguous, they urge the Court to consider evidence outside the plain language of the contract to interpret its meaning. The cases that the Greenwalds rely on for this proposition require the Court to first find that the contract was ambiguous or that there is evidence of a separate, not inconsistent agreement. *See Birch Broad v. Capital Broad. Corp.*, 161 N.H. 192, 197-98 (2010)(considering extrinsic evidence after determining the relevant language was ambiguous); *Spectrum Enters. v. Helm Corp.*, 114 N.H. 773 (1974)(considering extrinsic evidence as to how the parties implemented a contract to determine whether a separate agreement had been made); *Bogosian v. Fine*, 99 N.H. 340, 343 (1955)(considering the parties conduct in interpreting a lease when there were terms that were ambiguous). Even the Greenwalds recognized the unambiguous terms of the Agreement meant that because there was no intent to re-list the Property the Purchase Options were not triggered. (App. at 756.)

Absent ambiguity, parol evidence is only admissible in limited circumstances, such as to prove the existence of terms not in writing.

Lapierre v. Cabral, 122 N.H. 301, 306 (1982). This principal only applies if there is a lack of integration and if parol evidence is admitted to prove the existence of a term that would not be inconsistent with the written agreement. *Id.* In this case, there is an integration clause, which is evidence that there were no terms outside of the writing. Further, unlike *Lapierre*, the Greenwalds are seeking to introduce parol evidence that would provide a contradictory term (the requirement to provide the Greenwalds with the first option to purchase in any sale) with the plain language of the Agreement (requiring the first option to purchase to be offered to the Greenwalds only when the Keatings intended to re-list the Property on MLS). The Greenwalds have not offered any specific reason for the court to consider parol evidence, and it should not.

Jill Keating disputes the Greenwalds' characterization of the Defendants conduct, but that is not material to the determination of whether the Defendants breached the Agreement. Bielagus cautioned that the safest way to proceed was to offer the Property for sale to the Greenwalds, but this was an opinion of one title attorney, whose main goal is to proceed in the manner least likely to result in a lawsuit. The final interpreter of a contract is the New Hampshire Supreme Court, so the Bielagus' opinion is irrelevant to the interpretation of the contract. *Sherman*, 152 N.H. at 121; *see also Logic Assoc. v. Time Share Corp.*, 124 N.H. 565, 572 (1984)(finding that conversations between the parties regarding interpretations of intent at the time of executing the agreement are not controlling when the language of the agreement is plain and unambiguous). Even after consulting with Bielagus, the Parties determined that the Purchase Options had not been triggered.

There are plausible reasons for Jill Keating and Richard Keating to sell the Property for less than the earlier listing price, including that the sale was a cash sale, there were no commissions to pay, and there were no conditions on the sale. But these considerations are not material. Further, the Greenwalds' reliance on discussions they had prior to executing the Agreement is also misplaced. "The parol evidence rule states that when two parties have entered into an agreement and have expressed the agreement in a written contract to which both parties have assented as the complete and accurate integration of the contract, evidence offered at trial, whether parol or otherwise, of previous understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Id.*

The Greenwalds have not argued that the terms of the Agreement were ambiguous, so it is improper to consider extrinsic evidence. The intent of the parties must be determined from the plain language of the contract.

D. **Because the express terms of the contract permitted Jill and Richard Keating to sell the Property in a private sale without triggering the Purchase Options, there was no breach of the implied covenant of good faith and fair dealing.**

Because the Agreement unambiguously limits situations that trigger the Purchase Options, the Greenwalds cannot succeed on their claim for breach of an implied covenant of good faith and fair dealing. New Hampshire recognizes an implied covenant of good faith and fair dealing in every contract, and generally categorizes this implied covenant into three distinct categories: "those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance, which is at issue in the

instant case." *Centronics Corp. v. Genicom Corp.,* 132 N.H. 133, 139 (1989). This implied covenant has been interpreted to "exclud[e] behavior inconsistent with common standards of decency, fairness, and reasonableness, and with the parties' agreed-upon common purposes and justified expectations." *Id.* at 140.

The court will not impose a covenant of good faith and fair dealing that is inconsistent with the express covenants of the contract. *Sunapee Difference, LLC*, 164 N.H. at 796-97 (affirming the grant of summary judgment on a claim for breach of implied covenant of good faith and fair dealing because when the lease permitted the Governor to decline to submit a proposed amendment to the Executive Council, the court would not recognize an implied covenant that conflicted with the express authority). Similarly in this case, because the Agreement unambiguously limits the situations in which the Purchase Options were triggered, the implied covenant of good faith and fair dealing must not be construed to expand the limitations set forth in the express covenants of the Agreement. Even the Greenwald recognized the limitations set forth in the plain terms of the Purchase Options.

The Greenwalds have framed this argument as one for equitable estoppel, but they have not fully briefed that issue and did not raise it below as to Jill Keating. Equitable estoppel requires proving four elements:

> first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Id. at 792-93. Whether the Keatings misrepresented their intentions or lied to the Greenwalds about the desire to sell is disputed, though not material. There is evidence in the record that Jill Keating wished to purchase the Property and wanted to keep it in the family. The Keatings told the Uickers they were not sure if they would sell the Property, but the Uickers made an offer, when the Greenwalds did not. Equitable estoppel cannot be asserted to change a plain term of a contract. No reasonable inference can be made from the record before the court that the Greenwalds were injured as a result of any misrepresentation. If the Keatings did in fact intend to sell to the Uickers all along and told the Greenwalds that rather than saying the family wanted to keep it, there would still be no breach of the Agreement because there was no intent to re-list the Property on MLS.

Because there is no genuine issue of material fact that the implied covenant of good faith and fair dealing cannot expand the plain terms of the express covenants, Jill Keating is entitled to summary judgment as a matter of law. The trial court's ruling should be affirmed.

II. THE OPTION TO PURCHASE WAS INVALID BECAUSE IT LACKED THE MATERIAL TERM OF PRICE.

The trial court correctly found that the Option to Purchase contained in Paragraph 18.B. of the Agreement was void because it lacked the material term of price and contained no method for determining the price. The Statute of Frauds requires all contracts for real estate to be in writing and to contain all of the essential terms of the contract. *MacThompson Realty v. City of Nashua,* 160 N.H. 175, 179 (2010). "An essential [term] of any such agreement is the price and if it is neither stated nor determinable

… the Statute of Frauds bars recovery. *Id.* "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.' Rather, as long as the 'contract prescribes a method which will necessarily result in the determination of the price, that is enough.'" *Id.* (quoting *R.F. Robinson Co. v. Drew,* 83 N.H. 459, 460-61 (1928)).

In *MacThompson Realty*, the plaintiffs argued that a settlement agreement that involved the sale of their property was not effective because the purchase price was not stated, although it did provide that the price would be determined by an appraisal. *Id.* The court found that the agreement did not violate the Statute of Frauds because the purchase price, although not specifically stated, was determinable. *Id.* at 180. Unlike *MacThompson Realty*, the Option to Purchase does not contain any method for determing price. The only reference to price is the statement that: "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. (Add. at 5; App. at 77, 736)(emphasis added). The Option to Purchase actually recognizes that no sales price has been agreed upon. It also fails to set forth a method for determining what the price will be, so it does not satisfy the Statute of Frauds.

The cases that the Greenwalds rely on from other states also differ from the instant provision because they contain methods for determining price within their terms. *See, e.g., SKI, Ltd. v. Mountainside Properties, Inc.*, 114 A.3d 1169, 1171 & 1176 (Vt. 2015)(noting that the contract provided for the ultimate sales price to be determined during performance

when the contract stated that the price would be the market price as determined by the plaintiff's predecessor in interest).

Further, the Greenwalds argument that the doctrine of "part performance" corrects the defect fails because the Greenwalds received the benefit of leasing the Property for the summer in exchange for the rental monies paid to the Keatings. There is no assertion that separate consideration was paid or that the rental payment had been increased due to the Purchase Options. The Greenwalds did not take steps in reliance of an expectation that they would be able to purchase the Property, so there was no part performance.

In *Green v. McLeod*, the evidence showed that the petitioner and defendant orally agreed that the petitioner would purchase land for a set price but did not put the contract in writing. 156 N.H. 724, 725 (2008). The petitioner actually paid for the land, paid property taxes on the land, and the defendant, prior to death, delivered deeds to document the transfer (though they were never completed or recorded). *Id.* The court found the statute of frauds was not satisfied because the price was not in a written instrument but found that the equitable part performance doctrine applied when the petitioner had paid the purchase price and property taxes for more than thirty years. *Id.* at 729-30. Unlike in *Green*, there was no oral agreement with regards to the material term of price, so the Greenwalds could not have partially performed. Nor is there any evidence, disputed or otherwise, to demonstrate that there are grounds for the application of the part performance doctrine in this case.

Because there was no agreement on the material term of price and no method for determining a price, the Statute of Frauds was not satisfied.

Therefore, the Option to Purchase is not an enforceable contract term, and this court must affirm the trial court's granting of the motion for summary judgment on these grounds.

III. NEITHER THE KEATINGS NOR JILL KEATING BREACHED THE AGREEMENT SO THE GREENWALDS ARE NOT ENTITLED TO SUMMARY JUDGMENT.

The Greenwalds do not assert that the terms of the Agreement are ambiguous, but instead ask the Court to improperly consider extrinsic evidence in interpreting the Agreement. The plain terms of the Agreement state that the Purchase Options are only triggered in the event that the Keatings intended to re-list the Property for sale on MLS. The Greenwalds' assertion that any intent to sell the Property triggers the Purchase Options plainly contradicts this language, and such an interpretation would result in disregarding the express terms of the Agreement.

Even assuming arguendo that the trial court's granting of summary judgments in the Defendants' favor was erroneous and required reversal, the Greenwalds would not be entitled to summary judgment in their favor as to Jill Keating. First, the Greenwalds never filed a motion for summary judgment against Jill Keating. Second, there would still be a number of disputed material facts at issue, including: whether the Greenwalds would have in fact offered to purchase the property under the same terms offered by the Uickers if they were provided notice (where for over a year they failed to make any offer on the Property) and whether Jill Keating was aware of the Agreement at a material time and can be bound by the Agreement. Therefore, even if the trial court's order on summary judgment

is reversed, the Greenwalds are not entitled to summary judgment as to Jill Keating.

IV. THE GREENWALDS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM FOR SPECIFIC PERFORMANCE AGAINST THE UICKERS.

The Greenwalds have not asserted a claim for specific performance against Jill Keating, so she has not fully briefed this issue. Because the trial court properly found that there is no dispute that the Keatings did not intend to re-list the Property on MLS, it follows that the Purchase Options were not triggered. Therefore, because the Purchase Options were invalid, the Uickers' purchase of the Property did not violate the Agreement, and the trial court's issuance of summary judgment in the Uickers' favor must be affirmed.

V. THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT IN BARBARA KEATINGS' FAVOR SHOULD BE AFFIRMED.

Because this issue does not raise a question as to the liability of Jill Keating, she has not fully briefed this issue. Because it is undisputed that neither the Keatings nor Jill Keating intended to list or relist the Property for sale on MLS, the trial court's grant of summary judgment in the Defendant Barbara Keating's favor must be affirmed.

VI. THE TRIAL COURT PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD.

The trial court properly reviewed the material evidence before the court and made pertinent reasonable inferences in the light most favorable to the non-moving party. There are, however, no material facts in dispute.

The material facts are the language contained in the written agreement and whether or not Jill Keating and/or the Keatings intended to re-list the Property for sale on MLS. It is undisputed that they did not. It is also undisputed that the Uickers did not see the Property listed for sale and were instead introduced through Mulligan and were parties to a private sale. Otherwise, the issues are primarily issues of law, and the trial court properly applied the material facts to the law.

For instance, the Greenwalds complain of an inference made as to when the Keatings and Uickers made an agreement for the purchase and sale of the Property. Certainly, there is no evidence that Jill Keating, one of the owners of the Property as evidenced by public records, reached an agreement with the Uickers in May or June 2016. Thus, the trial court's finding that an agreement was reached in September 2016 is reasonable, even taking the inferences in the light most favorable to the Greenwalds. But this fact is not material. *See Sabinson*, 160 N.H. at 461("Even assuming the truth of [the Appellants'] allegations, none of the factual disputes that [they] highlight[] are "material" to the primary issues in this case, which are: (1) the nature and existence of a contract between [the parties]; and (2) whether the Defendants breached that agreement.") As such, even if the trial court erred in making the disputed inferences, it was a harmless error.

CONCLUSION

The trial court properly found that the Purchase Options contained a condition precedent that limited the Greenwalds' rights to make an offer for purchase a decision to re-list the Property for sale on MLS. It is undisputed that the condition precedent was never met because Richard Keating and Jill Keating entered into a private sale of the Property without any relisting

on MLS. Thus, where the Agreement expressly allowed private sales without implicating the Purchase Options, there was also no breach of the implied covenant of good faith and fair dealing. The trial court properly made reasonable inferences in the favor of the non-moving party in conducting this analysis.

Further, the Option to Purchase was invalid because it lacked a material term of price. Therefore, Jill Keating, and the other Defendants, are entitled to summary judgment as a matter of law.

REQUEST FOR ORAL ARGUMENT

Respondent Jill Keating respectfully requests oral argument before the full Court. Oral argument will be made by Douglas J. Miller, Esquire.

Respectfully submitted,
JILL KEATING

By and through her attorneys,
HAGE HODES, P.A.

Dated: December 19, 2018 By: */s/ Douglas J. Miller*

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CERTIFICATE OF SERVICE

I, Douglas J. Miller, certify that on this date a copy of this brief is being or has been served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving all counsel of record that are registered e-filers through the court's electronic filing system.

/s/ Douglas J. Miller
Douglas J. Miller, Esq.