STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0479

Evan and Kelly Greenwald

v.

Richard and Barbara Keating
Ellen U. Mulligan
Barry M. and Chrysoula P. Uicker
Jill Keating

BRIEF OF APPELLANTS EVAN AND KELLY GREENWALD

November 19, 2018

EVAN AND KELLY GREENWALD

By their attorneys

Christopher H.M. Carter, Esq. (Bar #12452)
Jamie S. Myers, Esq. (Bar #266227)
Hinckley, Allen & Snyder, LLP
650 Elm Street, Suite 500
Manchester, NH 03101
Tel: (603) 225-4334

ORAL ARGUMENT BY:
Christopher H.M. Carter, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

QUESTIONS PRESENTED

1. Whether the trial court (Ignatius, J.) erred in granting summary judgment for Appellees on the ground that Appellants Evan and Kelly Greenwald's purchase option and first refusal rights under a lease-purchase agreement (the "Agreement") with Appellees Richard and Barbara Keating were not triggered by the Keatings' sale of the subject property to Appellees Barry and Chrysoula Uicker, where the Agreement granted the Greenwalds a first option to purchase the property before the Keatings re-listed it for sale, as well as a right of first refusal to match any subsequent offer, but the Keatings – while claiming, falsely, they did not intend to sell the property – sold the property to the Uickers without a listing or notice to the Greenwalds. Add. at 16-30; App. at 762-69.[1]

2. Whether the trial court erred in holding that the Greenwalds' purchase option was unenforceable because the Agreement did not designate a purchase price, where the option provision required the Keatings to grant the Greenwalds the first offer, but did not require the Keatings to accept that offer. Add. at 21; App. at 769-72.

3. Whether the trial court erred in holding that because Richard Keating and his daughter, Jill Keating,[2] owned Mink Island, the Agreement was not enforceable against Barbara Keating, even though Barbara Keating claimed to have owned the property and executed the Agreement as an owner. Add. at 28-29; App. at 175-76.

4. Whether the trial court erred in granting summary judgment to the Uickers on the Greenwalds' claim for specific performance (and in denying summary judgment to the

[1] Citations in this Brief are as follows:
- "Add.": Addendum to this Brief, containing the trial court's July 20, 2018 Order being appealed;
- "App.": Appellants' Appendix; and

[2] For clarity, references to "the Keatings" mean Richard and Barbara Keating only; Jill Keating is referenced separately as "Jill Keating."

Greenwalds on the same claim), where the Uickers conceded that they purchased the property despite knowing of the Greenwalds' option and first refusal rights under the Agreement. Add. at 35; App. at 116-21.

5. Whether the trial court erred in granting summary to Richard Keating and Jill Keating on the Greenwalds' claims for breach of contract and breach of the implied covenant of good faith and fair dealing (and in denying summary judgment to the Greenwalds on the same claims), where the evidence was undisputed that the Keatings did not honor the Greenwalds' option and first refusal rights, and instead falsely alleged that they were not going to sell the property and then completed the sale to the Uickers without granting the Greenwalds the opportunity to exercise their purchase rights. Add. at 28-35; App. at 119, 768-69.

6. Whether the trial court, in granting Appellees' motions for summary judgment, erred as a matter of law by failing to construe the evidence in the light most favorable to the Greenwalds. Add. at 3-11, 38; App. at 167, 425, 769.

STATEMENT OF THE CASE

In January 2017, the Greenwalds filed a complaint alleging that Appellees had orchestrated a scheme to circumvent the Greenwalds' option and first refusal rights under the Agreement for the purchase property owned by Richard Keating and Jill Keating on Mink Island, Lake Winnipesaukee (hereinafter "Mink Island" or the "Property"). The complaint asserted claims against the Keatings for breach of contract and breach of the implied covenant of good faith and fair dealing (Counts II and III); against the Uickers for specific performance (Count I); and against Ellen Mulligan – the Uickers' real estate broker and Barry Uicker's sister – for tortious interference with contract and violation of RSA 358-A (Counts IV and V). App. at 1, 6-

9. The Greenwalds later amended their complaint to join Jill Keating as a defendant under Counts II and III. App. at 354, 375.

Appellees moved for summary judgment on multiple grounds.[3] First, Appellees argued the Agreement was unenforceable because it had not been signed by Jill Keating. App. at 10, 13, 20, 128. Second, they argued that an intent by the Keatings to re-list the Property on MLS (Multiple Listing Service) was a condition precedent to the exercise of the Greenwalds' purchase option and first refusal rights, and that this condition was not met because the Keatings sold the property to the Uickers without re-listing it. App. at 130, 381, 713. Third, Ellen Mulligan argued she did not act in her capacity as a real estate broker when she assisted the Uickers in purchasing the Property, and, therefore, was not liable under RSA 358-A. App. at 384. Finally, Jill Keating argued that because the Agreement did not specify a price to be paid by the Greenwalds if they executed their purchase option, the option was unenforceable. App. at 717.

The Greenwalds objected to Appellees' summary judgment motions and cross-moved for summary judgment on Counts I-IV. App. at 23, 105, 166, 424, 760.

In an order issued on August 22, 2017, the trial court held that the Agreement "was valid and enforceable, notwithstanding the absence of Jill Keating's knowledge or assent at the time the Agreement was executed." Add. at 13. The trial court reasoned that Jill Keating had, through a power of attorney, granted Richard Keating the authority to honor the Agreement and sell the Property to the Greenwalds. App. at 348. The trial court deferred ruling on the other issues raised in the summary judgment motions. App. at 352.

[3] Richard Keating died in February 2017. In June 2017, the trial court ordered the appointment of a representative for Richard Keating in this litigation. App. at 773. Despite Appellants' requests that the trial court enforce this order, a representative had not been appointed by the time the trial court issued its July 20, 2018 summary judgment order.

On July 20, 2018, the trial court issued a second order that granted summary judgment to Appellees on all claims, and denied the Greenwalds' motions for summary judgment. Add. at 38. The trial court's decision turned on its determination that an intent by the Keatings to re-list the Property for sale on MLS, rather than an intent to sell the Property, was a condition precedent to the exercise the Greenwalds' purchase option. The trial court concluded that because the Keatings did not re-list the Property on MLS, the condition precedent was not met. Add. at 18. Alternatively, the trial court held that the option provision was unenforceable because it did not specify a purchase price. Add. at 21. Next, the trial court held that because the Keatings did not re-list Mink Island, the Greenwalds' separate first refusal rights were not triggered, either. Add. at 22. Finally, the trial court held that Barbara Keating could not be liable for breach of the Agreement because she did not own the Property. Add. at 28.

Based on these rulings, the court granted summary judgment for the Uickers on Count I, for the Keatings and Jill Keating on Counts II and III, and for Mulligan on Counts IV and V. Add. at 38.

STATEMENT OF THE FACTS

This case arises from Appellees' wrongful scheme to defeat the Greenwalds' option and first refusal rights. The relevant facts were largely undisputed. In brief, the Keatings entered into the Agreement, by which they agreed to lease Mink Island – which was then listed for sale – to the Greenwalds for the following summer. The Keatings also agreed to take the Property off the market, and they granted the Greenwalds a purchase option and right of first refusal in the event they again decided to sell the Property. If the Greenwalds purchased the Property, half the summer rent ($12,000) would be applied to the purchase price.

After executing the Agreement, the Keatings decided, without informing the Greenwalds, that they would not sell Mink Island to the Greenwalds. Then, weeks before the lease term began, the Keatings agreed to sell the Property to the Uickers, who were fully aware of the Greenwalds' option and first refusal rights. The Keatings recognized their conduct violated the Agreement because, at the start of the lease term, they falsely represented to the Greenwalds that instead of selling the Property, they were going to keep it in their family. Immediately after the Greenwalds' lease ended, the Keatings sold the Property to Uickers. Although a title attorney warned the sale could be deemed "fraudulent" and expose Appellees to liability to the Greenwalds, Richard Keating declared he did not care if the Greenwalds sued him as there was "No Way in Hell" he would sell to them.

A. <u>The Property</u>

In October 1996, Richard Keating and his daughter, Jill Keating, purchased the Property. App. at 45. Thereafter, Richard Keating and his second wife, Barbara, lived on Mink Island during the summer months.

In 2013, the Keatings, with Jill Keating's consent, began leasing Mink Island through a website called "Vacation Rental By Owner ("VRBO"). App. at 197. In the VRBO listing, Barbara Keating identified herself as the "owner" of the Property. App. at 213, 304-06. Separately, the Keatings began efforts to sell Mink Island so they could purchase another island property less costly to maintain. App. at 196, 203. On June 1, 2015, Richard Keating engaged a local realtor, John Goodhue, to list Mink Island for sale at a price of $850,000. App. at 48-49. On June 15, 2016, Richard Keating directed Goodhue to increase the listing price to $899,000. App. at 90.

B. The Lease-Purchase Agreement

The Property was still listed for sale when, in August 2015, the Greenwalds saw the Keatings' rental listing on VRBO. The Greenwalds were looking for an island property to rent the following summer and potentially purchase. Evan Greenwald telephoned Barbara Keating to inquire about renting and possibly purchasing the Property. App. at 304-06. Barbara Keating arranged to meet the Greenwalds at the Property on August 9, 2015. At approximately the same time, Dr. Greenwald saw a sales listing for the Property, and he telephoned John Goodhue. Goodhue explained that he was the Keatings' broker and arranged to accompany the Keatings when they met with the Greenwalds. App. at 68.

At the August 9 meeting, the Keatings held themselves out as the owners of the Property, and did not disclose any interest held by Jill Keating. App. at 215. The Keatings agreed to lease the Property to the Greenwalds for July and August 2016 at a rate of $12,000 per month; take the Property off the market and provide the Greenwalds notice and a first purchase option before again offering it for sale; provide the Greenwalds with a right of first refusal if they received a purchase offer from a third party; and apply one month's rent ($12,000) toward the purchase price if the Greenwalds exercised their purchase rights. Finally, the Keatings agreed that "any sale" would be managed on their behalf by John Goodhue. App. at 68.

Richard and Barbara Keating, and the Greenwalds, executed the Agreement, which Goodhue helped prepare. App. at 51-56. The Greenwalds' option and first refusal rights are set forth in Paragraph 18 of the Agreement, as follows:

> *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 terms of this lease, landlord agrees to apply one month's rent, as specified in this lease, toward the purchase price of the property. It is agreed that any sale shall be managed by John Goodhue, realtor, as listing agent.*

> *C. In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS, but tenant maintains an interest in the future purchase of the property as represented in writing by the tenant to the landlord, landlord agrees to offer tenant the 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 of first refusal.*

App. at 54 (emphasis in original).

The reference in Paragraph 18 to re-listing the Property related directly to the fact that the Property was listed for sale, and the Keatings agreed to take Mink Island off the market so it would be available for the Greenwalds the following summer. App. at 54.

The Agreement called for a $2,000 security deposit at signing, which the Greenwalds paid, as well as an additional payment of $4,000 "on or around January 1, 2016," which the Greenwalds also paid. App. at 51, 68.

In November 2015, after the Keatings returned to their home in Florida, they discussed the Agreement with Jill Keating. App. at 206-07, 214. Jill Keating was "happy" about renting the Property to the Greenwalds but objected to the Greenwalds having a purchase option, purportedly because she wanted to purchase the Property herself. App. at 214. However, the Keatings did not inform the Greenwalds that they would not be permitted to exercise their purchase option or first refusal rights, or otherwise propose that the Agreement be amended or rescinded. App. at 214-15. Instead, the Keatings demanded compliance with the Agreement's terms, for example by contacting the Greenwalds in early January 2016 when they had not yet received the $4,000 additional lease payment. App. at 216.

C. The Keatings' Misrepresentations Regarding the Sale of Mink Island

At the start of the rental term, the Keatings informed the Greenwalds they were not going to sell Mink Island because they purportedly had decided to keep the Property for their children.

App. at 218. This was false. One month earlier, the Keatings had reached an agreement to sell Mink Island to the Uickers. App. at 409-411.

In May 2016, Ellen Mulligan telephoned Barbara Keating to discuss the Uickers' interest in purchasing Mink Island. App. at 205, 416. The Uickers already owned a cottage on Cow Island (Lake Winnipesaukee), and had engaged Mulligan to help them locate and purchase a different property closer to their year-round home in Gilford. App. at 459-60.

On May 16, 2016, Mulligan and the Uickers met with the Keatings at Mink Island. The Keatings and Uickers discussed the Uickers' interest in purchasing the Property, and the fact that the Keatings had already granted option and first refusal rights to the Greenwalds. App. at 205, 417. This is recounted in a May 20, 2016 email that Barry Uicker sent the Keatings, which stated:

> It was great to meet you both on Monday [May 16, 2016]. … If we can work out a fair price, we would be interested in a purchase (we understand the right of refusal commitment to the other party).

App. at 493-94 (emphasis added).

By June 1, 2016, the Uickers had "worked out" a deal to buy Mink Island from the Keatings. Barry Uicker confirmed the agreement in a June 1 email to the Keatings. He did not disclose the purchase price, but stated: "Thank you for meeting with us and working out a deal to purchase your property. We are very excited." App. at 495. Barry Uicker also asked the Keatings to "send us a copy" of the entire Agreement, so that the Uickers could discuss it with a "title company," assess the Keatings' "commitment" to Greenwalds and John Goodhue, and formulate a procedure to avoid "legal trouble." App. at 495. That same day, Barbara Keating faxed the Uickers a complete copy of the Agreement. App. at 496.

Two weeks after agreeing to sell Mink Island to the Uickers, the Keatings signed a P&S agreement to purchase another island property on Whortleberry Island (Lake Winnipesaukee), and later paid for the purchase with proceeds from the sale of Mink Island. App. at 198, 317-23. The Uickers, in turn, listed their Cow Island property for sale on July 11, 2016, and later used proceeds from the sale of that property to purchase Mink Island. App. at 477-78 (Mulligan Depo. at 126).

D. Closing On the Sale to the Uickers

In July and August 2016, while the Greenwalds were staying at Mink Island, the Keatings maintained the ruse that they were not going to sell Mink Island so they could keep the Property for their children. App. at 218. For example, on July 19, 2016, in a text message to Barbara Keating, the Greenwalds stated: "Love the island. Wish your kids weren't interested in it … any chance you or they would want to sell the back half of your land to reduce their tax burden?" When Barbara Keating replied on July 23, 2016, she did not disclose the planned sale to the Uickers, and instead stated: "Received your check today. Thank you. There is really no building lot … Also, having privacy is lovely." App. at 298-303.

Immediately after the Greenwalds' lease ended, the Keatings moved ahead with the sale to the Uickers. On September 6, 2016, the Keatings, Jill Keating, the Uickers, and Ellen Mulligan convened for a meeting with Attorney John Bielagus, who owned the title company (Accurate Title) that Mulligan engaged on the Uickers' behalf. During the meeting, Appellees discussed whether to ignore the Greenwalds' option and first refusal rights. Attorney Bielagus warned of the legal consequences of taking that course. App. at 325-26. The Uickers suggested "maybe they should move forward and give the Right of First Refusal so that they don't have a

problem." App. at 255. Richard Keating refused. As recounted in a file memo that Attorney Bielagus prepared after the meeting:

> I advised that the Tenants, the Greenwald [sic] may have a 'Right of First Refusal'
> …
> I explored the possibility of providing the tenant with a signed agreement to purchase from the Uickers & Keatings and provide the 4 days notice. However, Mr. Keating emphatically declared that "No Way in Hell" would he sell it to the Greenwalds. Its [sic] his property and he can sell it to whomever he wants. Discussion as to if he doesn't want to give notice to the Greenwalds and they find out about the transfer they may sue him for specific performance or damages. Mr. K was not concerned, he said "let him sue me
> …
> Indicated I could not guarantee any results for the transaction, that it would be up to the Greenwalds to bring an action against the parties. Difficult to assess damages, although the court could find fraudulent transfer.

App. at 325-26 (emphasis added). According to the memo, the group discussed possible defenses to the enforcement of the Agreement, including the fact that the property had not been re-listed on MLS, but recognized "Jill has decided to sell the property and the intent [of the Agreement] was to give tenant a [right of first refusal]." App. at 326.

A few days after the meeting, Attorney Bielagus emailed the Uickers and Mulligan and stated, in similar fashion: "We discuss[ed] the effect of the 'summer tenant's right of first refusal' and the Keatings have taken the position that they will not sell to them under any circumstances and have no fear of litigation. I would suggest an indemnity from them." App. at 328.

On September 9, 2016, the Uickers, Richard Keating, and Jill Keating executed a P&S agreement for the Uickers to purchase Mink Island for $750,000, which was $149,000 less than the prior listing price of $899,000. App. at 330-32. That same day, Jill Keating executed a power of attorney to appoint Richard Keating as her attorney in fact to enter into any sales agreements or contracts "for the transfer and sale of" the Property. App. at 20, 58.

On September 15, 2016, the Uickers closed on the purchase of Mink Island. App. at 63. They paid the purchase price with proceeds from the sale of Cow Island, which occurred earlier that same day. Five days later on September 21, the Keatings purchased Whortleberry Island, using proceeds from the sale of Mink Island. App. at 198, 277-78.

In November 2016, the Greenwalds learned of the Keatings' sale to the Uickers. App. at 70. After the Keatings, the Uickers, and Mulligan did not respond to the Greenwalds' demand that they honor the Greenwalds purchase rights, the underlying litigation ensued.

BRIEF ANSWER

1. The trial court erred in holding that an intent to "re-list" Mink Island on MLS, rather than an intent to sell the Property, was a "condition precedent" to triggering the Greenwalds' purchase rights. Listing on MLS was a ministerial act that was subject to the Keatings' complete control. The trial court's ruling legitimized Appellees' bad faith scheme and defeated the clear intent the Agreement, which was to give the Greenwalds an opportunity to purchase Mink Island if and when the Keatings decided to sell the Property to a third party.

2. The trial court erred in holding that the Greenwalds' purchase option was unenforceable because the Agreement did not specify an option price. The Agreement entitled the Greenwalds to notice and an opportunity to present a purchase offer before the Keatings entertained offers from others, but it did not require the Keatings to accept the Greenwalds' offer. Instead, if the Keatings rejected the Greenwalds' offer and then signed a P&S agreement with another buyer, under the separate first refusal provision the Keatings were to provide the Greenwalds with an opportunity to match that offer.

3. The trial court erred in holding that the Agreement was not enforceable against Barbara Keating, where Barbara Keating claimed to have owned the Property and executed the Agreement as an owner.

4. The trial court erred in granting summary judgment to the Uickers on the Greenwalds' claim for specific performance (and in denying the Greenwalds the same), where the Uickers conceded they purchased the Property despite knowing of the Greenwalds' option and first refusal rights under the Agreement.

5. The trial court erred in granting summary judgment to the Keatings and Jill Keating (and denying summary judgment to the Greenwalds) on the Greenwalds' contract claims, where it was undisputed that the Keatings and Jill Keating breached the Agreement by disregarding the Greenwalds' option and first refusal rights.

6. In awarding summary judgment to Appellees, the trial court erred by failing to construe the facts, and all inferences reasonably drawn from them, in the light most favorable to the Greenwalds. The trial court repeatedly accepted Appellees' allegations on disputed issues of material fact, while ignoring contrary evidence showing that those allegations were not credible.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a trial court's summary judgment ruling, this Court should "consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Exeter Hosp. v. Steadfast Ins., 170 N.H. 170, 173 (2017). Where the trial court has ruled on cross-motions for summary judgment, this Court should apply the same standard "to each party in its capacity as the non-moving party." Langevin v. Travco

Ins., 170 N.H. 660 (2018). The trial court's application of the law to the facts is reviewed de novo. Id.

II. THE KEATINGS' INTENT TO SELL TRIGGERED THE GREENWALDS' PURCHASE RIGHTS

A. The Trial Court Erred In Treating an Intent to List On MLS As a Condition Precedent

When interpreting a contract, courts focus on "the intent of the parties, as manifested in the language of the entire contract, in defining the parties' respective rights." Glick v. Chocorua Forestlands, 157 N.H. 240, 247 (2008). The contract language should be given "its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated." Id. at 248. Further, courts should, "where possible, avoid construing a contract in a manner that leads to harsh or unreasonable results or places one party at the mercy of the other." Holden Eng'g v. Pembroke Rd. Realty, 137 N.H. 393, 395-96 (1993).

Although Paragraph 18B of the Agreement describes the option right as a "first option to purchase," the right granted is in substance a "right of first offer." Other courts have held that a "right of first offer gives the grantee of that right the right to buy property before it is offered to sale to third parties." Kelly v. Ammex, 256 P.3d 1255, 1256 (Wash. Ct. App. 2011). By comparison, a right of first refusal "gives the grantee the right to meet an offer made by a third party, before the landowner is free to sell the property to that third party." Id. Both rights are triggered when "the owner decide[s] to sell," but the triggering decision for the right of first refusal requires that the owner have an offer from a third party, while the triggering decision for the right of first offer means only that the "owner decides to offer the property for sale without first receiving an offer from a third party." SKI, Ltd. v. Mountainside Properties, 114 A.3d 1169, 1174-75 (Vt. 2015).

The Keatings breached the right of first offer in Paragraph 18B by negotiating the sale of the Property with a third party, the Uickers, before offering it to the Greenwalds. The Keatings then breached the right of first refusal in Paragraph 18C by concealing the P&S with the Uickers to prevent the Greenwalds from meeting the Uickers' offer.

In holding that an "intent to re-list" Mink Island on MLS, not "an intent to sell" the Property, was the condition precedent to the Greenwalds' purchase option, the trial court concluded: "the option to purchase cannot be triggered by the Keatings' intent to sell because the Keatings must have an acceptable offer to intend to sell the property." This proposition (which was not argued by any of the Appellees below) lacks merit.

The trial court cited Roy v. George W. Greene, Inc., 533 N.E.3d 1323, 1325 (Mass. 1989), for the proposition that "[a]n owner cannot truly elect to sell until he has an opportunity to do so, that is, until he has received a bona fide and enforceable offer to purchase." (Emphasis added.) The trial court's reliance on Roy is misplaced. Roy concerned a right of first refusal, not a right of first offer. Id. 69-70. The Roy Court held that a tenant's refusal of a landlord's offer to sell to the tenant did not constitute an exercise of the tenant's first refusal rights, but those rights would arise when the landlord had an enforceable offer from a third party. Id. Roy is inapplicable to Paragraph 18B of the Agreement, which provides for a right of first offer, not a right of first refusal. These rights are triggered under different circumstances. Under Paragraph 18C, the Greenwalds' first refusal rights are triggered by the "presentation of another signed purchase and sales agreement." This is the sort of offer contemplated by Roy. By comparison, Paragraph 18B provides that the Greenwalds' purchase option is triggered by an intent to "re-list" the Property. An intent to list obviously encompasses an intent to sell, as a party would not list a property for sale unless or until the party formed an intent to sell. No basis exists to

conclude that an "intent to sell," for the purposes of the Greenwalds' purchase option rights, requires an existing offer. See Concert Radio v. GAF Corp., 532 N.E.2d 1280, 1281 (N.Y. Ct. App. 1988) (affirming that a mere offer to sell, rather than an affirmative decision to sell, evidenced an intent to sell which triggered purchase option).

Neither the trial court, nor Appellants, identified any reason why a third-party sale without an MSL listing should impact the Greenwalds' purchase rights any less than a sale following an MLS listing. The language of the Agreement, as well as the parties' conduct (discussed below), confirms that the intended trigger of the Greenwalds' purchase option was the Keatings' intent to sell Mink Island to a third party. An MLS listing was not a "condition precedent," but merely a mechanism for the Keatings to elicit purchase offers. Cf. Sammons Enterprises v. Manley, 540 S.W.2d 751, 756 (Tex. Civ. App. 1976) (excusing the non-occurrence of an appraisal mechanism, a condition precedent, because the appraisal "was not the object of the contract, but [was] only incidental to arriving at the fair market value of the 'put' price"). A listing also would have ensured the Greenwalds received notice of any sales effort, and deter the kind of scheme employed by Appellees here.

The following hypothetical underscores the error in the trial court's ruling. Suppose that instead of selling Mink Island to the Uickers through Mulligan, the Keatings had decided to sell the Property through a listing service other than MLS, through printed advertisements in newspapers, or some other means. Under these circumstances, Appellees could not credibly argue that the Greenwalds' option rights were not triggered. The method by which the Keatings solicited offers had no effect on either the Keatings' or the Greenwalds' rights under the Agreement.

Restricting the Greenwalds' purchase option to circumstances where the Keatings decided to sell the Property through MLS would be nonsensical. Reference in Paragraph 18B to an MLS listing merely described the anticipated way for the Keatings to obtain purchase offers. It was not a restriction on the Greenwalds' option rights. Again, neither the trial court nor Appellees advanced any reason as to why an intent to list on MLS should control the exercise of the Greenwalds' option. Additionally, because the Agreement unambiguously required any sale to be managed and listed by John Goodhue, it implicitly prohibited a private sale.

B. The Trial Court's Ruling Unreasonably Renders the Agreement Illusory

The trial court's ruling is contrary to well-established rule disfavoring the use of conditions precedent to limit or excuse a party's performance, particularly where, as here, the occurrence or non-occurrence of the event at issue is solely within the control of the party seeking to avoid its contractual obligations.

Purchase options in leases "are normally inserted for the benefit of the lessee and should be interpreted in light of this purpose." Powertest v. Evans, 665 F. Supp. 134, 138 (D. Conn. 1986); Long v. Wayble, 618 P.2d 22 (Ore. Ct. App. 1980). Consequently, courts disfavor conditions precedent, and "have not construed stipulations as conditions unless required to do so by unambiguous language." Lockwood v. Wolf, 629 F.2d 603, 610 (9th Cir. 1980); Shovel Transfer & Storage v. Pa. Liquor Control Bd., 739 A.2d 133, 139 (Pa. 1999) (contract provision should not be treated as a condition precedent "unless that clearly appears to be the intention of the parties"); Prager's v. Bullitt, 463 P.2d 217, 222 (Wash. 1969) (same); Southland v. Emerald Oil, 789 F.2d 1441, 1444 (9th Cir.1986) (same).

Courts "are especially loath to find a condition precedent when the alleged condition is peculiarly within the control of one of the contracting parties." Lockwood, 629 F.2d at 610;

Home Savings v. Tappan, 403 F.2d 201, 203 (5th Cir. 1968) (same). Thus, courts will not treat a contract term as a condition precedent where to do so would "make the contract illusory." Shakey's, Inc. v. Covalt, 704 F.2d 426, 434 (9th Cir.1983); see also Southland, 789 F.2d at 1443–44 (a "contract will not be construed so as to place one party at the mercy of another … [p]reference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory"); Crellin Tech. v. Equipmentlease Corp., 18 F.3d 1, 8 (1st Cir. 1994) ("It is well settled law that, when the promised act is conditional on the occurrence of a future event within the control of the promisor, the promise is illusory.").

Under similar facts, courts have rejected efforts to defeat a lessee's option or first refusal rights by characterizing a contract term as a condition precedent. For example, in True R.R. v. Ames, 152 A.3d 324, 341 (Pa. Super. Ct. 2016), the purchase option in a lease stated that if the tenant sought to exercise its option rights, it was required to appoint an "independent appraiser" to determine the purchase price. The landlord argued that the tenant's selection of an independent appraiser was "a condition precedent" to the landlord's obligation to sell the property" to the tenant, such that tenant's failure to comply with the condition invalidated the exercise of the option. The trial court rejected this argument and, on appeal, the True R.R. Court affirmed, holding that the "selection of an appraiser was merely the mechanism by which the sales price was determined," and was "one step to determine the fair market value at which [the tenant] was to purchase the leased premises." Id. at 341.

Similarly, in Long v. Wayble, 618 P.2d at 24, the parties' agreement provided, "Lessor agrees to give lessee first right of refusal on purchase of this property . . . at an asking price of $35,000." The lessor argued that under this clause, offering the property for $35,000 was a condition precedent to the lessee's ability to exercise its first refusal right, and that lessee's first

refusal right was not triggered if the lessor offered to sell the property for an amount greater than $35,000. The Long court rejected this argument, holding that the lessor's construction was unreasonable "since, by offering the property for $36,000, the [lessor] could circumvent entirely [lessee's] right to purchase, thereby rendering the provision illusory." Id.; see also Home Savings, 403 F.2d at 203 (where contract provision called for bank to disburse loan funds to subcontractor "on closing" of bank's loan to contractor, the term "on closing" merely prescribed the time for payment, and was not a condition precedent to the obligation to pay); Southland, 789 F.2d at 1443–44 (gasoline station lease provided that in return for lessor allowing lessee to install new equipment, title to equipment "shall pass to lessor upon installation thereof free from all liens and encumbrances"; court declined to interpret provision to mean that title to the equipment would not pass to lessor until the equipment was free of all liens and encumbrances, since to do so would render the promise illusory.

Similarly, conditioning the Greenwalds' option on the Keatings' decision to sell via MLS, a decision solely within the Keatings' control, allowed the Keatings alone to circumvent the Greenwalds' rights simply by opting to sell without an MLS listing, thus rendering the promise illusory.

C. Appellees Demonstrated Through Their Conduct That They Understood the Greenwalds' Purchase Rights Were Triggered

When interpreting a contract, courts may properly consider the parties' actions after the execution of the contract in order to determine the parties' intent. See Birch Broad. v. Capitol Broad., 161 N.H. 192, 197 (2010). Indeed, "[t]here is no surer way to find out what the parties meant, than to see what they have done." Bogosian v. Fine, 99 N.H. 340, 342 (1955); Spectrum Enterprises v. Helm, 114 N.H. 773, 776 (1974) (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); See also Lapierre v. Cabral, 122 N.H. 301, 307 (1982) (holding that parol evidence is admissible as "proof of a condition precedent").

Here, Appellees' conduct shows plainly that the Keatings fully understood that their decision to sell Mink Island triggered the Greenwalds' option rights. Because of that understanding, the Keatings alleged falsely that they were not going to sell Mink Island, concealed their agreement to sell to the Uickers, and waited until after the Greenwalds' lease term ended to consummate that sale.

Further, it is apparent from the September 6, 2016 meeting with Attorney Bielagus that the Keatings understood the Greenwalds' purchase rights had been triggered. During the meeting, Attorney Bielagus advised that the option and first refusal provisions in the Agreement reflected the parties' intent that a decision to sell Mink Island triggered the Greenwalds' first refusal rights, whether or not the property was listed on MLS. Attorney Bielagus cautioned against proceeding in violation of the Greenwalds' option and first refusal rights. Richard Keating reportedly did not disagree that the Greenwalds' rights were implicated, but alleged he refused to sell to the Greenwalds, and was "not concerned" about being sued for specific performance or damages. Thus, it was the Keatings' unfounded animus for the Greenwalds, not a bona fide misunderstanding about a condition precedent, that drove the Keatings' conduct. Indeed, there is no plausible reason, apart from personal animus against the Greenwalds, that the Keatings would sell to the Uickers for $149,000 less than the earlier listing price.

The Greenwalds also understood that the Keatings' decision to sell Mink Island, not a listing on MLS, triggered the Greenwalds' purchase rights. On October 26, 2016, after learning of the sale to the Uickers but before filing suit, Dr. Greenwald emailed John Goodhue and observed: "Technically they didn't re-list the property on MLS, although the fact that a realtor

was involved, who already had a buyer, precluded their re-listing the property. But the spirit and intent of the contract is quite clear, they knowingly breached the contract with malintent." App. at 766.

D. Appellees are Equitably Estopped From Alleging the Greenwalds' Purchase Rights Were Not Triggered

Additionally, Appellees are barred under the doctrine of equitable estoppel from relying on the lack of an MLS listing to prevent the Greenwalds' purchase rights.

In New Hampshire, as in other jurisdictions, every contract contains an implied covenant of good faith and fair dealing. Pursuant to this principle, "a party to a contract cannot escape liability under his obligation on the ground that the other party has failed to perform a condition precedent to the establishment of such liability or to the maintenance of an action upon the contract, where he himself has caused that failure." Shovel Transfer, 739 A.2d at 140; see generally 51 C.J.S., Landlord and Tenant, § 84, p. 644 ("[w]here the lessor prevents the exercise of the option during the time limited, he may not avail himself of his own wrong, and the lessee has a reasonable time to exercise it after the obstacle has been removed").

Thus, where a defendant has, in bad faith, sought to restructure a transaction for the sole purchase of defeating a plaintiff's first refusal rights, the plaintiff's rights will be enforced. See, e.g., Quigley v. Capolongo, 383 N.Y.S.2d 935 aff'd 372 N.E.2d 797 (1976). Examples of "bad faith" conduct include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Kaplan v. Cablevision 671 A.2d 716, 722 (Pa. Super. 1996) (citing Restatement (Second) of Contracts, § 205(d)).

Here, the evidence shows that Appellees employed a bad faith scheme designed to defeat the Greenwalds' option and first refusal rights. As part of this scheme, the Keatings lied to the

Greenwalds about their purported decision not to sell the Property. Next, the Keatings attempted to characterize the transaction as a private sale, and agreed to deal directly with the Uickers' broker, Ellen Mulligan, in order to avoid both the Greenwalds' rights and the commission that was due on "any sale" to John Goodhue. Appellees should not be permitted to assert the lack of an MLS listing as a defense to their bad faith effort to circumvent the Greenwalds' rights under the Agreement.

III. THE AGREEMENT CONTAINS ALL MATERIAL TERMS BECAUSE IT PRESCRIBES A METHOD FOR DETERMINING PRICE

The trial court alternatively ruled that "even if the condition precedent was met, the court finds the first option to purchase is unenforceable for lack of an essential term." Add. at 707. This ruling was in error.

A contract satisfies the statute of frauds if its essential terms are determinable by the contents of the writing. See MacThompson Realty v. City of Nashua, 160 N.H. 175, 179 (2010). In MacThompson, the agreement did not include an explicit purchase price, but it provided that the price of the property would be set by an appraisal. Id. The court held that the agreement satisfied the statute of frauds, reasoning that an essential term may be implied where the agreement "prescribe[d] a method which w[ould] necessarily result in the determination of the price." Id. (quotation omitted); see also R.F. Robinson Co. v. Drew, 83 N.H. 459, 144 A. 67, 69 (1928) ("Whether the owner or others set the price is not important. All that is required is that the contract shall say who shall do it or how it shall be done. Neither the common law nor the statute of frauds makes such an arrangement void or unenforceable").

Indeed, courts interpreting rights of first offer have similarly found that the ultimate sale price may be determined during the course of performance. SKI, Ltd. v. Mountainside Properties, 114 A.3d 1169, 1176 (Vt. 2015); see also Eastbanc, Inc. v. Georgetown Park Assocs.,

940 A.2d 996, 1003 (D.C. 2008) ("enforceability of the agreement comes from the definitive character of the obligation to perform, not a precise description of the ways in which the obligation might be fulfilled."); Polemi v. Wells, 759 P.2d 796, 798 (Colo. App. 1988) (a preemptive right need not have specific terms such as price or time of acceptance).

Here, the first offer provision, Paragraph 18B, addressed the determination of price. It stated that if the Keatings intended to re-list the Property, they had to first give the Greenwalds notice and the opportunity to make a purchase offer. Paragraph 18B does not specify a price, since its purpose is not to require either that Greenwalds offer a particular price, or that the Keatings accept the price offered. Rather, the purpose of this provision is only to provide the Greenwalds with a fair opportunity to make an acceptable offer before the Property was offered to anyone else. Indeed, Paragraph 18 B goes on to state that "if a sales price is agreed upon" during or after the lease term, one month of the Greenwalds' rent could be applied to the purchase price. At that point, under Paragraph 18C, the Keatings could pursue a sale to another party, provided that upon entering into a P&S agreement, they allowed the Greenwalds to match that offer.

Furthermore, equitable considerations weigh against applying the statute of frauds to hold the option provision invalid for lack of a specified price. "Because strict enforcement of the statute [of frauds] can produce frustration on the one hand, and unethical conduct on the other, the law seeks to alleviate the harshness of the statute when some operating facts, such as fraud, part performance or other equitable considerations, are present." Green v. McLeod, 156 N.H. 724, 728 (2008). Under the "part performance doctrine," a contract is excepted from the statute of frauds where applying the statute "would result in fraud or irreparable injury on the purchaser who has performed his part of the agreement." Id. (quotation omitted). The part performance

doctrine considers whether the purchaser's actions are: (1) "in pursuance of the contract and in reasonable reliance thereon, without notice that the defendant has already repudiated the contract"; (2) "such that the remedy of restitution is not reasonably adequate, making it very unjust for the defendant to hide behind the statute"; and (3) one that is in some degree evidential of the existence of a contract and not readily explainable on any other ground." Id. at 729 (quotation omitted) (finding the doctrine of part performance applied to an oral conveyance of real estate where the purchaser paid the purchase price and 30 years of property taxes).

Those factors are present here. The Greenwalds performed their obligations under the Agreement, even as the Keatings had repudiated the Greenwalds' option rights by deciding to sell the Property to the Uickers without notice to the Greenwalds. The Keatings' own efforts to conceal the sale of the Property to the Uickers confirms that the purchase option was intended to be triggered by the Keatings' decision to sell the Property to a third party; if the Keatings did not share this understanding of the Agreement's intent, they would not have lied to the Greenwalds. The Keatings should not be allowed to hide behind the statute of frauds in order to excuse their own fraudulent conduct. Accordingly, the trial court erred in adopting Jill Keating's argument that the Agreement is unenforceable for lack of material price terms, and this holding should be reversed.

IV. THE KEATINGS BREACHED THE CONTRACT

The trial court granted the summary judgment to the Keatings and Jill Keating on Count II based on its conclusion that the Greenwalds' purchase option and first refusal rights were not triggered absent. As established, supra, this conclusion is incorrect. Consequently, the trial court's award of summary judgment to the Keatings and Jill Keating on this claim should be reversed.

Moreover, the trial court's denial of the Greenwalds' motion for summary judgment on the breach of contract claim should be reversed, Richard and Jill Keatings' only defense to this claim was the argument that the Greenwalds' option and first refusal rights were not triggered. The fact that Richard and Jill Keating did not otherwise honor the Greenwalds' contract rights was undisputed.

V. SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO THE GREENWALDS ON THEIR CLAIM FOR SPECIFIC PERFORMANCE

Because the trial court concluded the Greenwalds' purchase rights were not triggered, it granted summary judgment to the Uickers on the Greenwalds' specific performance claims. The ruling was in error because, as shown, the Greenwalds' purchase rights were triggered. Moreover, since the undisputed evidence proved that the Uickers were informed of the Greenwalds' purchase rights, and actually received a copy of the Agreement in June 2016, the trial court should have entered summary judgment for the Greenwalds on the specific performance claim.

In land contracts, including purchase option contracts, plaintiffs are entitled to specific performance unless there is evidence that specific performance is impossible or inequitable. Gosselin v. Archibald, 121 N.H. 1016, 1020 (1981). Where a third party purchases real property with actual or constructive knowledge of another party's existing purchase option right in that property, that third-party purchase cannot extinguish the existing option right by claiming protection under the recording statute, RSA 477:3-a. Smith v. Wedgewood Builders, 134 N.H. 125, 131-32 (1991). The plaintiff may specifically enforce the option right against the third-party purchaser. See id. at 132-33; see also Swanson v. Priest, 95 N.H. 64, 66-67 (1948) (compelling third-party purchaser with actual and constructive notice of plaintiff's prior purchase and sale agreement to convey the property to plaintiff); Greenfield Country Estates Tenants

Ass'n v. Deep, 666 N.E.2d 988, 993-94 (Mass. 1996) (ordering specific performance against third-party buyer with constructive notice of plaintiff's existing purchase option right).

Based on this authority and the undisputed facts, the trial court's order on Count I should be reversed, and remanded for the entry of summary judgment in favor of the Greenwalds on this claim.

VI. BARBARA KEATING IS LIABLE UNDER THE AGREEMENT

The trial court held that Barbara Keating could not be held liable under Counts II or III because she had no ownership interest in the Property. Citing Blouin v. Sanborn, 155 N.H. 704, 706 (2007), the trial court held that the principles of agency would not apply to contract claims because an agent "may only be liable 'for [her] own torts to a third person who is injured.'" Add. at 28. This misstates the law.

Under the principles of agency, "it is well-settled that where an individual acts as an agent for an undisclosed principal, the agent may be sued personally on contracts between the principal and a third party." O'Connor v. Hancock, 135 N.H. 251, 252 (1992) (citing Restatement (Second) of Agency § 186); see also Restatement (Third) of Agency § 6.03 (2006). In effect, the agent is placed in the same legal position as the principal. Id., comment e. "The basis for treating the agent as a party to the contract is the expectation of the third party." Id. § 6.03, comment b.

For example, in O'Connor, 135 N.H. at 251-52, the defendant was the sole owner of a sawmill. Plaintiff purchased bark mulch directly from the defendant, without notice that the defendant was acting as an agent for the sawmill. Id. The plaintiff sued the defendant, not the sawmill, for breach of contract when the mulch was never delivered. Id. The court held that the defendant could be sued as a party to the contract, because the defendant was acting as an agent

to the sawmill, an undisclosed principal. Id. at 252; see also Maine Farmers Exchange v. McGillicuddy, 697 A.2d 1266, 1269 (Me. 1997) (holding the farm manager liable for breach of warranty on a contract for the sale of seed potatoes, entered on behalf of the undisclosed owner of the farm, where buyer had no notice of that the manager was acting as an agent for the farm).

Similarly, Barbara Keating is also liable under the Agreement because she executed the Agreement as an owner of Mink Island, without disclosing Jill Keating's ownership interest or otherwise indicating that she lacked authority to sell or lease the Property. Executing the Agreement was a continuation of Barbara Keating's responsibility for renting the Property, which she had done with Jill Keating's approval for at least two years. Accordingly, Barbara Keating is liable for breach of the Agreement as an undisclosed agent.

The trial court's reliance on Blouin is misplaced. First, the agent in that case was a disclosed agent. Blouin, 155 N.H. at 705-06. Second, Blouin did not hold that agents could not be liable for breach of contract. It only held that agents are subject to tort liability "because an agent's tort liability is not based upon the contractual relationship between the principal and the agent, but upon the common-law obligation that every person must so act . . . not to injure another." Id. at 706. In fact, Blouin affirmed a jury award finding the agent liable for breach of contract. Id. at 706-07. Consequently, the trial court's reliance on Blouin in ruling that Barbara Keating could not be liable under the Agreement was in error.

Moreover, Barbara Keating should be equitably estopped from contesting the enforceability of the Agreement against her. The doctrine of equitable estoppel consists of 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." Prof'l Fire Fighters of Wolfeboro v. Town of Wolfeboro, 164 N.H. 18, 24-25 (2012).

Each of these elements is satisfied here. First, the Barbara Keating held herself out an owner of the Property. Through her words and actions, including identifying herself as the "owner" of the Property in the VRBO listing, and executing the Agreement as an owner, Barbara Keating represented herself as having the authority to lease or sell the Property.

Second, the Greenwalds had no knowledge of Jill Keating's ownership interest, and had no reason to question the Barbara Keating's representations that she owned the Property. When negotiating the terms of the Agreement, neither the Keatings nor their agent, John Goodhue, disclosed Jill Keating's interest in the Property. Barbara Keating gave no indication that she lacked authority to lease or sell the Property, or to enter into that the Agreement.

Third, the Greenwalds relied upon the Barbara Keating's representations to their detriment. They fully complied with the Agreement, with the expectation that if the Keatings offered the Property for sale, they would honor the Greenwalds' purchase option and first refusal rights, and allow the Greenwalds to apply one month's rent toward the purchase price.

Fourth, the evidence demonstrates the Keatings concealed Jill Keating's ownership interest with the intention of inducing the Greenwalds to enter the Agreement. The Keatings then made misstatements to the Greenwalds concerning their alleged decision not to sell the Property, for the purpose of preventing the Greenwalds from exercising the purchase option or first refusal rights. Finally, because they had placed all of their assets in Jill Keating's name, the Keatings proceeded in deliberate disregard for the Greenwalds' contractual rights, and were

unconcerned about the prospect of future litigation, which is demonstrated by their statements at the pre-sale meeting with Attorney Bielagus.

Barbara Keating should not be allowed to benefit from her prior deception by invoking her lack of ownership interest to disclaim liability under the Agreement. See, e.g., Ass'n of Alumni of Dartmouth Coll. v. Trustees of Dartmouth Coll., No. 07-E-289, 2008 WL 693586 (N.H. Superior Ct.) (2008) (finding that, even if a party lacked the authority to enter into a contract, that party would be estopped from denying the validity of such a contract on that basis, by virtue of having received the benefit of the bargain).

Accordingly, Barbara Keating is liable under the Agreement and judgment should be entered for the Greenwalds on these claims.

VII. THE TRIAL COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD

In ruling on Appellees' motions for summary judgment, the trial court was required to "consider the affidavits and other evidence, and all inferences property drawn from them, in the light most favorable to the non-moving party." Rivera v. Liberty Mut. Fire Ins. Co., 163 N.H. 603, 604 (2012). Accordingly, the trial court was required to consider the evidence, and inferences to be drawn from it, in the light most favorable to the Greenwalds. The trial court did not comply with this standard.

In its July 2018 order, the trial court purported to make numerous factual findings that favored Appellees on disputed factual issues, while disregarding contrary evidence submitted by the Greenwalds. For example, the trial court appeared to accept, at face value, Appellees' assertion that the Uickers did not, in May 2016, reach an agreement with the Keatings to purchase Mink Island, and that "[d]uring the summer of 2016, the Uickers continued to look at other property to purchase." Add. at 9. For this finding, the trial court relied on a June 21, 2017

affidavit submitted by Barry Uicker in support of the Uickers' cross-motion for summary judgment. The trial court, however, ignored Barry Uicker's June 1, 2018 email to the Keatings, in which he stated unequivocally that the Uickers and Keatings had "work[ed] out a deal" to purchase Mink Island. App. at 493-495. The trial court also ignored Ellen Mulligan's deposition testimony that she showed the Uickers no other properties after June 1, 2016. Further, the trial court disregarded the fact that Barry Uicker's affidavit had been shown to lack credibility. For example, Barry Uicker represented he did not have "an opportunity" to reach the Agreement until September 2016, when his June 1, 2016 email exchange with Barbara Keating proved that he requested, and was provided, a copy of the Agreement on that date. Moreover, the trial court disregarded the fact that within weeks of June 1, 2016, the Uickers and Keatings entered into separate real estate transactions that involved other island properties and were linked directly to the Uickers' purchase of Mink Island. A fair and reasonable inference from this evidence, when viewed in a light most favorable to the Greenwalds, is that the Keatings and Uickers entered into those transactions because they had reached "a deal" for the Uickers to purchase Mink Island.

Due to the trial court's failure to apply the appropriate standard when making these and other factual finding in its July 2018 Order, those findings should be reversed.

CONCLUSION

For the forgoing reasons, the Greenwalds respectfully request that this Court reverse the trial court's award of summary judgment to Richard Keating, Barbara Keating, and Jill Keating on the Greenwalds' claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and remand for entry of summary judgment in favor of the Greenwalds on the breach of contract claim. The Greenwalds further request that the Court reverse the trial court's award of summary judgment to the Uickers on the Greenwalds' claim for specific

performance and remand for entry of judgment on that claim. Finally, the Greenwalds request that the Court reverse the award of summary judgment to Mulligan on the claims for tortious interference and violation of RSA 358-A.

ORAL ARGUMENT REQUESTED

The Greenwalds request oral argument. Attorney Christopher Carter will argue on their behalf.

Respectfully submitted,

EVAN AND KELLY GREENWALD

By their attorneys,

Dated: November 19, 2018

/s/ *Christopher H.M. Carter*

Christopher H.M. Carter, Esq. (Bar #12452)
Jamie S. Myers, Esq. (Bar #266227)
Hinckley, Allen & Snyder, LLP
650 Elm Street, Suite 500
Manchester, NH 03101
Tel: (603) 225-4334
ccarter@hinckleyallen.com
jmyers@hinckleyallen.com

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to all counsel of record.

/s/ *Christopher H.M. Carter*
Christopher H.M. Carter

#58245708

ADDENDUM TO BRIEF FOR APPELLANTS
EVAN AND KELLY GREENWALD

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Evan & Kelly Greenwald v Richard & Barbara Keating, Ellen U. Mulligan and Barry M. & Chysoula P. Uicker**
Case Number: **212-2017-CV-00008**

Enclosed please find a copy of the court's order of July 20, 2018 relative to:

Order on Pending Motions For Summary Judgment

July 24, 2018

Abigail Albee
Clerk of Court

(406)

C: Christopher H.M. Carter, ESQ; R. James Steiner, ESQ; Karyn P. Forbes, ESQ; William Philpot, Jr., ESQ; Jamie Sue Myers, ESQ; Samantha M. Jewett, ESQ; Katherine Elisabeth Hedges, ESQ; Douglas J. Miller, ESQ

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Evan Greenwald and Kelly Greenwald

v.

Barbara Keating, Ellen U. Mulligan,
Barry M. Uicker, Chrysoula P. Uicker, and Jill Keating

Docket No. 212-2017-CV-00008

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, Evan and Kelly Greenwald ("the Greenwalds"), brought this action seeking damages for breach of contract and breach of the implied covenant of good faith and fair dealing against Richard and Barbara Keating ("the Keatings"), tortious interference with a contract and violation of the New Hampshire's Consumer Protection Act ("CPA") against Ellen U. Mulligan ("Mulligan"), and specific performance against Barry Uicker and Chrysoula Uicker ("the Uickers"). These claims arise from an agreement to lease island property on Lake Winnipesaukee previously owned by Richard Keating and Jill Keating and now owned by the Uickers. By order dated October 26, 2017, the court allowed the Greenwalds to add Jill Keating as a defendant to the Greenwalds' claims of breach of contract and breach of the implied covenant of good faith and fair dealing. (Court index #44.) Jill Keating subsequently filed a counterclaim against the Greenwalds seeking damages for intentional interference with contractual relations and attorney's fees. (Court index #61.)

Currently pending before the court are the Greenwalds' cross-motion for summary judgment against the Keatings and motion for summary judgment against the Uickers, (court index #31), to which the Keatings and Uickers object, (court index #37, 38), the Uicker's cross-

motion for summary judgment against the Greenwalds, (court index #37), Mulligan's motion for summary judgment against the Greenwalds, (court index #52), and Jill Keating's motion for summary judgment against the Greenwalds, (court index #84), all to which the Greenwalds object, (court index #42, 67, 87).[1] The court held a hearing on this matter on June 30, 2017, and May 17, 2018. Based on the parties' arguments, the relevant facts, and the applicable law, the court finds and rules as follows.

FACTUAL BACKGROUND

The record supports the following relevant and undisputed facts. In 1996, Richard Keating and his daughter, Jill Keating, purchased property located on Mink Island in Gilford, New Hampshire ("the property") as joint tenants with the right of survivorship. (J. Keating Aff. ¶ 2, Ex. A, Mar. 28, 2018 (hereinafter "2d J. Keating Aff.").) After a portion of the property was subdivided and sold in 1997, Richard and Jill Keating co-owned the remaining 2.1 acres, on which Richard Keating built a camp. (Id. ¶ 2.)

Beginning in 2013, Richard Keating and his wife, Barbara Keating, began renting the property during the summer months "to help offset taxes." (B. Keating Dep. 39:2–8; 41:1–19.) On June 1, 2015, Richard Keating engaged Roche Realty to list the property for sale and signed a listing agreement. (Xavier Aff. ¶¶ 2, 5, Ex. 2; J. Keating Aff. ¶ 3.) Roche Realty subsequently listed the property for sale with a purchase price of $849,900. (Xavier Aff. ¶ 4, Ex. 2; Greenwald Aff. ¶ 5; B. Keating Dep. 168:4–5, 170:3–6.) On June 15, 2015, Richard Keating directed Roche Realty to increase the purchase price to $899,000. (Xavier Aff. ¶ 4, Ex. 1.)

[1] Also pending before the court are the Greenwalds' motion to dismiss Jill Keating's counterclaims (court index #68), the Greenwalds' motion to amend their complaint (court index #176), and the Greenwalds' motion to revise the case structuring order (court index #74), all to which the defendants object, (court index #70, 77–82). This order only addresses the motions for summary judgment.

During the summer of 2015, the Greenwalds were searching for an island property on Lake Winnipesaukee to rent the following summer and potentially purchase. (Greenwald Aff. ¶ 2.) The Greenwalds had previously owned a summer home on Mink Island and knew that the Keatings had a house on the island that they offered for rent. (Greenwald Aff. ¶ 3.) In August 2015, Evan Greenwald called the Keatings to inquire about leasing the property for the summer of 2016. (Greenwald Aff. ¶ 4.) He spoke to Barbara Keating, who told him that the property was available for rent the summer of 2016. (Greenwald Aff. ¶ 4; see B. Keating Dep. 167:8–20.) She also informed him that the property was listed for sale. (B. Keating Dep. 167:8–168:5, 170:3–6.) The Keatings and the Greenwalds arranged to meet at the property the following weekend. (Greenwald Aff. ¶ 4; B. Keating Dep. 167:8–23, 170:12–15.)

On August 9, 2015, the Greenwalds, the Keatings, and John Goodhue, a Roche Realty agent who represented the Keatings, met at the Property. (Greenwald Aff. ¶ 6; B. Keating Dep. 171:5–16.) During this meeting, the Keatings agreed (1) to lease the property to the Greenwalds from July 1, 2016, through August 31, 2016, at a rate of $12,000 per month, (2) to take the property off the market and provide the Greenwalds with notice and a first option to purchase the property before again offering it for sale, and (3) to permit the Greenwalds to apply one month's rent ($12,000) toward the purchase price. (Greenwald Aff. ¶ 7; see also B. Keating Dep. 116:19–117:8.) The Keatings further agreed that they would provide the Greenwalds with a right of first refusal if they received a purchase offer from a third party. (Greenwald Aff. ¶ 7.)

The same day, Goodhue drafted a lease agreement ("Agreement"), which was subsequently signed by Evan and Kelly Greenwald as "Tenant[s]" and Richard and Barbara Keating as "Landlord[s]." (B. Keating Aff. ¶ 3; Greenwald Aff., Ex. 1; B. Keating Dep. 171:20–

172:5.) Paragraph 18 of the Agreement is entitled "LEASE RENEWAL AND PURCHASE OPTION," and states as follows:

> 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.[2] If a sale price is agreed upon during or after the term of this lease, landlord agrees to apply one month's rent, as specified in this lease, toward the purchase price of the property. It is agreed that any sale shall be managed by John Goodhue, realtor, as listing agent.
>
> C. In the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS, but tenant maintains an interest in the future purchase of the property as presented in writing by the tenant to the landlord, landlord agrees to offer tenant legal right of first refusal to purchase the property. Tenant shall have 4 business days upon presentation of another signed purchase and sales agreement to respond in writing, either exercising or waiving their right to first refusal.

(Greenwald Aff., Ex. 1 ¶ 18 (hereinafter "Agreement").) No other part of the Agreement contains language relating to the first option to buy or right of first refusal. However, the Agreement contains an integration clause in paragraph 25, stating, "This Lease shall constitute the entire agreement between the parties. Any prior understanding or representation of any kind preceding the August 9, 2015 [sic] of this Lease is hereby superseded. This Lease may be modified only by a writing signed by both Landlord and Tenant." (Id.) The Agreement called for the Greenwalds to make a $2,000 security deposit, which they paid when they signed the Agreement, and an additional $4,000 payment "on or around January 1, 2016," which would

[2] 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. (Hedges Aff., Ex. 3.) 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. (Id.) 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." (Id.) MLS.com does not receive commission for any purchases that have resulted from a listing on its website. (Id.)

both be applied toward the first month's rent. (Greenwald Aff., Ex. 1 ¶ 4.) At the meeting, no one disclosed Jill Keating's ownership interest in the property to the Greenwalds. (Id. ¶ 8.)

According to Barbara Keating's deposition testimony, Richard Keating informed Jill Keating of the Agreement with the Greenwalds. (B. Keating Dep. 107:21–108:24, 130:20–131:7; 152:14–17.) She testified that Jill Keating "was happy about the rental" but was not "happy about the right of first refusal" because she did not want to sell the property and was working on "some plan to keep it in the family." (B. Keating Dep. 109:1–10.) Although Jill Keating did not want to sell the property, neither the Keatings nor Jill Keating informed the Greenwalds at that time. (See B. Keating Dep. 109:21–110:4; see also Greenwald Aff. ¶ 10.)

In July 2015, the Uickers decided to look for an island camp property on Lake Winnipesaukee. (Uicker Aff. ¶ 2, June 21, 2017 (hereinafter "1st Uicker Aff.").) At the time, the Uickers owned an island camp on Cow Island in Tuftonboro but wanted to find an island camp property closer to their residence in Gilford. (Id.) They were interested in purchasing a camp on Pine Island in Meredith and had submitted an offer contingent on financing to purchase it. (Id. ¶ 3.) John Goodhue was the listing agent for the seller of the property. (Id.) The Uickers' offer was ultimately rejected when the seller decided to sell to an "all cash" buyer. (Id.) The Uickers thereafter continued to look for island properties. (Id. ¶ 4.)

Sometime in the spring of 2016, but prior to May, the Uickers told Mulligan, who is Barry Uicker's sister, that they wished to purchase an island camp on Lake Winnipesaukee. (1st Uicker Aff. ¶ 4.) Mulligan was a real estate broker affiliated with Coldwell Banker's Center Harbor office, (Mulligan Aff. ¶ 4, Nov. 21, 2017 (hereinafter "1st Mulligan Aff.")), and at the time represented the Turners, who were friends with the Keatings, in selling their island property on Mark Island. (B. Keating Dep. 72:5–12; Mulligan Dep. 53:11–12.) The Turners informed

Mulligan that the Keatings might have been considering selling their property on Mink Island. (B. Keating Dep. 72:16–18; Mulligan Dep. 53:15–17.) Mulligan shared this information with Barry Uicker and told him she would try to find out more. (Mulligan Dep. 54:1–3, 54:7–13.) Barry Uicker subsequently conducted an internet search of the property but did not see any listings for it. (1st Uicker Aff. ¶ 5.)

Sometime in mid-May 2016, Mulligan called the Keatings to inquire about the property and spoke with Barbara Keating. (1st Mulligan Aff. ¶ 5; Mulligan Dep. 54:17–19; B. Keating Dep. 72:5–10.) She explained that she was a realtor for the Turners, was calling on behalf of her brother, and wanted to set up a time for the Uickers to look at the property. (B. Keating Dep. 73:20–24.) She also explained that she was not interested in getting a commission or acting as a realtor and only wanted to help her brother. (1st Mulligan Aff. ¶ 5.) Barbara Keating told Mulligan that she and Richard Keating were not sure whether they were interested in selling the property and informed her that it was leased for the upcoming summer. (1st Mulligan Aff. ¶ 6.) However, Barbara Keating agreed to have the Uickers and Mulligan to visit the property as a "kind of a favor," testifying at her deposition that "we never knew what was going to happen in life." (B. Keating Dep. 73:15–18.) According to Barbara Keating, Mulligan said she would join the Uickers on the view of the property but said she was coming "as a friend, not as a realtor." (B. Keating Dep. 73:22–25.)

On or about May 16, 2016, the Uickers and Mulligan visited the Property. (1st Mulligan Aff. ¶ 2; Uicker Aff. ¶ 5, Feb. 15, 2018 (hereinafter "2d Uicker Aff.").) According to Mulligan, she attended the viewing because she was "always interested in viewing island property." (1st Mulligan Aff. ¶ 7.) There, she met the Keatings for the first time. (Id.) The Uickers and Mulligan spent about an hour on the island. (Id. ¶ 8; Mulligan Dep. 89:5–8.) The Keatings

again mentioned that they had a tenant staying there for the summer and did not know what they wanted to do with the property. (Id.)

As the Keatings, the Uickers, and Mulligan walked around the property, they split into two or three groups to view and discuss different aspects of the property. (2d Uicker Aff. ¶ 5.) At one point, Mulligan went up into a treehouse by herself. (Mulligan Dep. 89:16–17.) During their visit, Richard Keating mentioned to Barry Uicker the purchase rights set forth in the Agreement with the Greenwalds. (Id. ¶ 6.) Mulligan was not present during this conversation. (2d Uicker Aff. ¶ 5; 1st Mulligan Aff. ¶ 8.)

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

According to Barry Uicker's affidavit, Chrysoula Uicker learned through talking with the Keatings that the property was leased until the end of August 2016 and that they still had not listed the property for sale and did not intend to do so. (1st Uicker Aff. ¶ 7.) On June 14, 2016, the Keatings executed a purchase and sales agreement to purchase property on Whortleberry Island. (Greenwalds' Obj. Uickers' Cross-Mot. Summ. J., P&S Agreement.)

On July 1, 2016, when the Greenwalds arrived at the property to begin their lease term, the Keatings informed the Greenwalds that they were not going to sell the property because they had decided to keep it in the family. (Greenwald Aff. ¶ 10; B. Keating Dep. 120:17–23, 121:2–8.) The Keatings told the Greenwalds that they had discussed the Agreement with their children

on Thanksgiving and their children had objected to the sale of the property. (Greenwald Aff. ¶ 10.) The Keatings further explained that one of their sons had received a promotion and would therefore be able to afford the cost of maintaining the Property. (Id.) Barbara Keating testified that she was still hoping that her children would "end up" with the property so she did not think it was necessary to share with the Greenwalds their discussions with the Uickers. (B. Keating Dep. 122:3–5, 122:21–123:1.) Pursuant to the contract, the Greenwalds rented the property for $12,000 per month during July and August 2016. (Greenwald Aff. ¶ 12; B. Keating Dep. 114:3–17.)

Through July and August 2016, the Keatings continued to represent to the Greenwalds that they planned to keep the property in the family. (B. Keating Dep. 122:17–23.) On July 19, 2016, when the Greenwalds sent Barbara Keating a text message to confirm the receipt of their August 2016 rental payment, they expressed their continued interest in purchasing the property, stating, "Love the island. Wish your kids weren't interested in it . . . Any chance you or they would want to sell the back half of your land to reduce their tax burden[?]" (Greenwald Aff. ¶ 13, Ex. 2 (ellipsis in original); see B. Keating Dep. 123:11–24.) Barbara Keating replied on July 23, 2016, the day she received the check, declining the offer to sell the back half of the property, stating that "[t]here is really no building lot as our land is 2.3 acres," and added, "[a]lso, having privacy is lovely." (Greenwald Aff. ¶ 13, Ex. 2; B. Keating Dep. 124:6–17.)

During the summer of 2016, the Uickers continued to look at other property to purchase. (1st Uicker Aff. ¶ 8.) On July 12, 2016, the Uickers listed their Cow Island property for sale because they believed having cash available would make them more attractive buyers. (Id.) According to Barry Uicker, the decision to sell their Cow Island property was not based on the prospect of purchasing the Keatings' property, as they did not know if the Keatings would decide

to keep the property or agree to a particular purchase price. (Id.) Rather, they would have applied the proceeds from the Cow Island property to the purchase of any island property. (Id.) On July 28, 2016, the Uickers signed a purchase and sales agreement to sell the Cow Island property to a buyer. (Id. ¶ 8.) Mulligan represented the Uickers in the sale of this property. (2d Mulligan Aff. ¶ 6.) Although Coldwell Banker received a commission on this sale, Mulligan did not receive payment as she normally would. (2d Mulligan Aff. ¶ 6, Ex. 1.)

In early September 2016, the Uickers contacted the Keatings and informed them that the Cow Island camp was under a purchase and sales agreement and again expressed a desire to purchase the Keatings' property. (1st Uicker Aff. ¶ 9.) The Uickers met with the Keatings and Jill Keating at the property to discuss the potential purchase. (Id.) At this time, Barry Uicker read the Agreement in detail and believed that the Greenwalds' first option to purchase had never been triggered because the Keatings had not relisted the property. (Id.) At that point, the Uickers decided to make an offer of $750,000 in cash to purchase the property. (Id.) The Keatings accepted. (Id.)

According to Mulligan, Barry Uicker informed her that the Uickers and Keatings reached an agreement but he expressed concern about a right of first refusal in the Greenwalds' lease agreement. (1st Mulligan Aff. ¶ 8.) Mulligan offered to call Jack Bielagus, a local real estate attorney who works at Accurate Title in Meredith, with whom Mulligan frequently works on real estate transactions. (Id. ¶ 9.) Mulligan then contacted Bielagus about the terms in the Agreement. (Id.) He informed her that the sale to the Uickers was "uncertain" and recommended that they discuss the matter if the parties began to consider entering into a written agreement. (Id.)

On September 6, 2016, the Keatings, Jill Keating, the Uickers, and Mulligan met with Bielagus at Accurate Title. (Id. ¶ 9.) According to Mulligan, Bielagus stated that the right of first refusal was ambiguous and likely required the Keatings to list the property for sale before the Greenwalds had any rights. (Id.) However, according to Bielagus' memorandum, which he drafted after the meeting, during the meeting he "explored the possibility of providing the [Greenwalds] with a signed agreement to purchase from the Uickers & Keatings and provide the 4 days notice." (Greenwalds' Obj. Uickers' Mot. Summ. J., Tab C, File Memo.) According to the memorandum, Richard Keating in response to this suggestion "emphatically declared that 'No Way in Hell' would he sell [the property] to the Greenwalds." (Id.) When a discussion ensued about the possibility of a lawsuit filed by the Greenwalds for specific performance or damages, Richard Keating "was not concerned" and said "'let him sue me.'"[3] (Id.) On September 9, 2016, the Uickers, Richard Keating, and Jill Keating signed a purchase and sales agreement for the sale of the Property. (J. Keating Aff., Ex. B.) That same day, Jill Keating executed a power of attorney for her father to act on her behalf regarding the property, which Mulligan notarized. (Id. ¶ 5; 1st Mulligan Aff. ¶ 11, Ex. 1.)

On September 14 or 15, 2016, the Uickers and the Keatings closed on the sale at Coldwell Banker in Laconia. (1st Uicker Aff. ¶ 9; 1st Mulligan Aff. ¶ 12.) Mulligan attended the closing. (1st Mulligan Aff. ¶ 12.) The Uickers used the money from the Cow Island sale towards the purchase of the Keatings' property. (Mulligan Dep. 85:4–5.) On September 21, 2016, five days after the Uickers purchased Mink Island, Barbara and Jill Keating closed on the Whortleberry property. (Greenwald's Obj. Uickers' Cross-Mot. Summ. J., Whortleberry Deed.)

[3] After the meeting, on September 13, 2016, Bielagus suggested in an email to the Uickers and Mulligan that the Uickers and Keatings obtain an indemnity agreement from the Greenwalds. (Id., Tab D, File Memo.)

In November 2016, the Greenwalds learned that the Keatings sold the property to the Uickers. (Greenwald Aff. ¶ 14.) This litigation followed.

PROCEDURAL BACKGROUND

On January 26, 2017, the Greenwalds filed this action for (1) specific performance against the Uickers, seeking a court order requiring the Uickers to sell the Property to the Greenwalds for $750,000 (Count I), and (2) damages for breach of contract against the Keatings (Count II), (3) breach of the implied covenant of good faith and fair dealing against the Keatings (Count III), (4) tortious interference with contractual relations against Mulligan (Count IV), and (5) violation of the CPA against Mulligan (Count V). (See generally Compl.) The Keatings did not answer the complaint and instead, on March 6, 2017, filed a motion for summary judgment against the Greenwalds, arguing that the terms of the Agreement were unenforceable because Jill Keating, who owned the Property as a joint tenant with the right of survivorship, did not sign the Agreement and did not have knowledge of or assent to its terms. (Court index #6.) After the Greenwalds filed an objection to the Keatings' motion for summary judgment, (court index #18), the court granted the Greenwalds' assented-to motion to schedule a hearing on the Keatings' motion for summary judgment, (court index #25).

On May 30, 2017, prior to the hearing, the Greenwalds cross-moved for summary judgment on their claims against the Keatings, arguing that the Keatings breached the contract and the implied covenant of good faith and fair dealing by failing to disclose Jill Keating's ownership interest and failing to provide the Greenwalds with the first option to purchase and the right of first refusal prior to selling the Property to the Uickers. (Court index #31.) In the same motion, the Greenwalds moved for summary judgment on their claim against the Uickers,

arguing that they are entitled to specific performance because the Uickers opted to proceed with the purchase with knowledge of the Greenwalds' purchase rights under the Agreement. (Id.)

On June 23, 2017, the Uickers objected to the Greenwalds' motion for summary judgment and cross-moved for summary judgment on the Greenwalds' claim against the Uickers. (Court index #37.) On June 29, 2017, Barbara Keating subsequently filed an objection to the Greenwalds' cross-motion for summary judgment. (Court index #38.) In Barbara Keating's and the Uickers' pleadings, they assert that, even if the Agreement is valid, the Greenwalds had no purchase option or right of first refusal under the Agreement at the time the Property was conveyed to the Uickers because the conditions precedent set forth in Paragraph 18(b) and 18(c) were never met. They also argue that the Greenwalds' breach of the implied covenant of good faith and fair dealing fails because the Greenwalds had constructive notice of Jill Keating's ownership interest in the Property.

On June 30, 2017, the court held a hearing on the pending motions. The same day, the Greenwalds filed a reply in support of their motions for summary judgment against Barbara Keating and the Uickers. (Court index #40.) At the hearing, the court determined that it would hear arguments on the Uickers' cross-motion for summary judgment at a later date because the Uickers' cross-motion was not ripe for review. Further, at the Uickers' request, the court reserved ruling on issues that were "too interwoven" with arguments raised by the Uickers' cross-motion so that the parties would have an opportunity to fully brief and argue these issues. On June 28, 2017, while the court took these issues under advisement, the Greenwalds objected to the Uicker's cross-motion for summary judgment.[4] (Court index #42.)

[4] Richard Keating was also a named defendant to this action but was dismissed by order dated March 16, 2017, after he passed away. (Court index #7.) On June 30, 2017, following the hearing on summary judgment, the court granted the Greenwalds' request to appoint a representative for Richard Keating, finding that his death did not extinguish the pending claims against him under RSA 556:15. (Court index #22.) However, since the date of the

On August 22, 2017, the court issued its order on the pending motions addressed at the hearing. (Court index # 43.) In its order, the court found that the Agreement was valid and enforceable, notwithstanding the absence of Jill Keating's knowledge or assent at the time the Agreement was executed. (See Order at 15.) The court therefore denied Barbara Keating's motion for summary judgment. (Id. at 19.) However, the court held in abeyance two remaining issues, determining that they were interwoven with the Uickers' arguments which had not been fully briefed at the time of the hearing: (1) whether the Agreement contained a condition precedent which had not been met, and (2) whether the Keatings breached the implied covenant of good faith and fair dealing during the formation of the Agreement by failing to disclose Jill Keating's ownership interest in the property. (Id. at 18–19.) Accordingly, the court denied without prejudice the Greenwalds' cross-motion for summary judgment against Barbara Keating and their motion for summary judgment against the Uickers with the intent to rule on these motions pending additional briefing and arguments from the parties.

On October 26, 2017, the court granted the Greenwalds' motion to amend their complaint to add Jill Keating as a defendant to their claims of breach of contract (Count II) and breach of the implied covenant of good faith and fair dealing (Count III). (Court index #44.) Then, on November 22, 2017, Mulligan moved for summary judgment on the Greenwalds' claims against her (court index #52), to which the Greenwalds object (court index #67). Finally, Jill Keating moved for summary judgment against the Greenwalds' claims against her (court index #84), to which the Greenwalds object (court index #87).

---

court's order on the Greenwalds' motion, nothing has been filed with the court to show that Richard Keating's interests are being represented in this litigation. Nevertheless, because the court has been of the understanding that Barbara Keating is representing Richard Keating's interest even if not formally so designated, the court treats Barbara Keating's motions and objections as representing herself and the interests of Richard Keating.

The court held a hearing on pending motions on May 17, 2018. At the time of the hearing, the following summary judgment motions were pending before the court and ripe for ruling: (1) the Greenwalds' cross-motion for summary judgment against the Keatings (Counts II and III) and motion for summary judgment against the Uickers (Count I); (2) the Uickers' cross-motion for summary judgment against the Greenwalds (Count I); (3) Mulligan's motion for summary judgment against the Greenwalds (Counts IV and V); and (4) Jill Keatings' motion for summary judgment against the Greenwalds (Counts II and III).[5]

Although it appeared that the Greenwalds were prepared to argue their motion to dismiss, motion to revise the case structuring order, and motion to amend their complaint, Jill Keating noted that the notice of hearing only specified that the hearing would cover the pending summary judgment motions. As such, the court heard argument on summary judgment only. The court noted that, if a party had a request for argument on the other motions, the court would address the request following argument on summary judgment. However, no parties requested argument on the other motions, and the court addresses those motions in a separate order.

LEGAL STANDARD

Summary judgment is proper only "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 (2010). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006) (citation omitted). The moving

[5] At the hearing, Barbara Keating orally moved to join Jill Keating's motion for summary judgment. Because the Greenwalds assert the same claims against Barbara Keating and Jill Keating, and because Jill Keating's arguments on summary judgment may be applied to the claims against her and the Keatings, the court grants Barbara Keating's motion to join Jill Keatings' summary judgment motion and accordingly analyzes Jill Keatings' arguments on summary judgment as applied to Richard, Barbara, and Jill Keating.

party has the burden of proving his right to summary judgment. Concord Grp. Ins. Co. v. Sleeper, 135 N.H. 67, 69 (1991). In ruling on cross-motions for summary judgment, the court "consider[s] 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." City of Concord v. State, 164 N.H. 130, 133 (2012) (quotation omitted).

ANALYSIS

The parties' motions for summary judgment set forth numerous arguments as to the individual claims asserted against each defendant. However, one argument is central to all of the summary judgment motions and objections: whether the language of Paragraph 18 in the Agreement required the Keatings to list the property for sale in order to trigger the Greenwalds' purchase rights. Thus, the court first interprets the language of the Agreement, and then determines the effect of the language on the parties' individual claims.

I. Interpretation of the Agreement

"The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide." Behrens v. S.P. Const. Co., 153 N.H. 498, 503 (2006). "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 Tr. v. Cc Enterp., 147 N.H. 137, 139 (2001) (quotation and brackets omitted). Absent ambiguity, "the parties' intent will be determined from the plain meaning of the language used in the contract." Birch Broad., Inc. v. Capital Broad. Corp., 161 N.H. 192, 196 (2010) (quotation omitted). When the court determines that a contract is not ambiguous, "the plain meaning rule prohibits the admission of

parol evidence that would contradict the plain meaning of the terms of the contract." Lapierre v. Cabral, 122 N.H. 301, 305 (1982) (quotation omitted).

The parties do not dispute that Paragraph 18 bestows two purchase rights to the Greenwalds: a first option to purchase the property and, if the Greenwalds do not exercise that right, a right of first refusal. The parties also do not dispute that the terms of Paragraph 18 require some kind of condition to be met in order for the Greenwalds to exercise those rights. See In re Estate of Kelly, 130 N.H. 773, 781 (1988) ("Conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must occur before there is a right to performance" (ellipses and quotations omitted).). However, the parties dispute what kind of condition Paragraph 18 requires. The defendants argue that the condition precedent to the Greenwalds' first option to purchase is the Keatings' intent to relist the property for sale, and the condition precedent to the Greenwalds' right of first refusal is the Keatings' act of listing the property for sale on MLS. The Greenwalds argue that the condition precedent to their first option to buy is the Keatings' intent to sell the property, and the condition precedent to their right of first refusal is the receipt of a signed purchase and sales agreement from a third party. (See Greenwalds' Reply Keatings' Obj. ¶ 9.)

As an initial matter, the court must first determine whether the language of the agreement is ambiguous. The defendants argue that the language of Paragraph 18 is unambiguous and therefore the court is confined to determining the parties' intent based on the plain language of the Agreement. While the Greenwalds point to some facts relating to events prior to and after the formation of the contract in their oral argument, they do not expressly argue that the provisions relating to their purchase rights are ambiguous nor do they point to any clauses within the Agreement on which the parties could reasonably differ as to their meaning. Cf. Sunapee

Difference, LLC v. State, 164 N.H. 778, 790 (2013). As discussed at length below, the court finds on review of the entire Agreement that the provisions relating to the Greenwalds' purchase rights provides no reasonable basis for the parties to differ as to their meaning. Therefore, the court finds that the Agreement is not ambiguous and therefore limits its analysis to its plain language without the aid of parol evidence. Holden Eng'g & Surveying, Inc. v. Pembroke Rd. Realty Tr., 137 N.H. 393, 395–96 (1993).

"Conditions in contracts are construed in accordance with their ordinary meaning." Estate of Kelly, 130 N.H. at 781. "A proviso in a contract creates a condition, in the absence of anything in the contract to show that such was not the intention of the parties." Id. "As a rule of thumb, provisions which commence with words such as 'if,' 'on condition that,' 'subject to' and 'provided' create conditions precedent." Holden, 137 N.H. at 396. "As a general rule, conditions precedent are not favored, and [the court] will not so construe such conditions unless required by the plain language of the agreement." Estate of Kelly, 130 N.H. at 781.

In viewing the language of Paragraph 18 which sets forth the first option to purchase and the right of first refusal, the court finds that the language clearly creates conditions precedent that relate to listing the property for sale. First, Subsection B in Paragraph 18 states, in relevant part, "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." (Agreement ¶ 8(b).) "In the event that" falls squarely within the category of provisions that create a condition precedent. This phrase signals that the rest of the sentence is not binding if the specific event does not occur. Though the Greenwalds argue that the triggering event is the Keatings intent to sell the property, this reading contravenes the plain

language of the provision, which refers to the triggering event as the "inten[t] to re-list the property for sale."

Second, Subsection C of Paragraph 18 states, "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, . . . the landlord agrees to offer tenant legal right of first refusal to purchase the property." (Agreement ¶ 18(c).) Again, the subsection contains the provision "[i]n the event that," which means that a certain event—here, the Keatings' offer of first refusal to the Greenwalds—will not occur if two conditions are not met: (1) the tenant did not exercise the first option to purchase the property, and (2) the Keatings listed the property. Thus, according to the unambiguous language, the Greenwalds' right of first refusal is not triggered if the Keatings did not list the property for sale.

However, the court does not end its inquiry there, as it must view the conditional language within the context of the Agreement as a whole. A right of first refusal is typically understood as providing "its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser." Glick v. Chocorua Forestlands Ltd. P'ship, 157 N.H. 240, 247 (2008). Courts often recognize a "right of first refusal" and a "first option to purchase" as synonymous phrases. Id. (noting that the phrases "First Right to Buy" or "Right of Pre-emption" are frequently used interchangeably with "right of first refusal); see also Kunji Tamura v. De Iuliis, 281 P.2d 469, 472 (Or. 1955) ("the first option to buy indicates . . . the usual situation whereby if the owner receives an offer from a third party, the lessee . . . shall have a right to meet any such bona fide offer of the third party"); King v. Dalton Motors, Inc., 109 N.W. 2d 51, 53 (Minn. 1961) ("Unless the context of the agreement indicates otherwise, the use of 'first option to buy' . . . imports a preferential right on the part of the lessee to purchase the

leased premises at the same price and upon the same terms" as a bona fide offer from a third party.). However, the Agreement uses the phrases "first option to purchase" and "right of first refusal" as distinct rights triggered by separate but related conditions, with one right occurring before the other. Thus, the court looks to the language of the 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. See Glick, 157 N.H. at 247 ("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" and the conditions that trigger those rights" (emphasis in original)).

The language creating the "first option to purchase" does not provide a traditional right of first refusal that would empower the Greenwalds to exercise a preferential right to purchase the property when the Keatings receive an acceptable offer from a third party. Rather, it provides the Greenwalds with the option to purchase the property by their own offer before the Keatings publically seek an offer from third parties, as made clear by the language "[i]n the event the Landlord intends to re-list the property for sale," "prior to property being listed on MLS," and "[i]f a sale price is agreed upon." (Agreement ¶ 18(b).) Thus, the option to purchase cannot be triggered by the Keatings' intent to sell because the Keatings must have an acceptable offer to intend to sell the property. See Roy v. George W. Greene, Inc., 533 N.E. 2d 1323, 1325 (Mass. 1989) ("[a]n owner cannot truly elect to sell until he has an opportunity to do so, that is, until he has received a bona fide and enforceable offer to purchase"). Rather, the option to purchase must be triggered by Keatings' intent to publically seek an offer, an option which the Greenwalds must exercise or decline to exercise before the Keatings may publically seek offers

through listing the property for sale. As such, the intent of the Agreement was to condition the Greenwalds' first option to purchase on the Keatings' intent to list the property for sale, not their intent to sell.

Because the first option to purchase is not based on matching a third party's offer but rather the Greenwalds' own independent offer, Jill Keating is correct that Subsection B is unenforceable for lack of 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). Though an agreement need not include a fixed price, it must "prescribe[] a method which will necessarily result in the determination of the price." Id. (purchase price was "readily determinable" where the agreement provided that the price of the property would be set by an appraisal). Here, the contract does not prescribe a method that would result in the determination of the price. Rather, it provides vague language—"[i]f the sale price is agreed upon during or after the term of this lease"—which does not set forth a "readily determinable" method to reach a purchase price, nor does it appear to even bind either of the parties to the sale if a purchase price was not "agreed upon." See King v. Dalton Motors, Inc., 109 N.W. 2d 51, 53–54 (Minn. 1961) (right of first refusal agreement provided "no standard for ascertaining the price or any other condition of the sale" where it merely stated that the price was "to be negotiated and to be agreeable between the parties at the time of the sale"); cf. DiMaria v. Michaels, 455 N.Y.S. 2d 875, 876 (N.Y. App. Div. 1982) (right of first refusal agreement provided a "definitely ascertained standard by which the price term may be determined" because the language implied that the "price to be agreed upon is that of an acceptable offer for the property from a third party"). Thus, even if the condition precedent was met, the court finds that the first option to purchase is unenforceable for lack of an essential term.

This leaves the right of first refusal in Subsection C. Although the right in Subsection B is unenforceable, the court looks to its language where necessary to assist it in determining the parties' intent in Subsection C.

Subsection C provides for a right of first refusal that comports with the common understanding of the phrase. See Glick, 157 N.H. at 247 (a right of first refusal is, "[g]enerally speaking, . . . a conditional option which is dependent upon the decision to sell the property by its owner"). Specifically, Subsection C provides the Greenwalds the "legal right of first refusal to purchase the property . . . upon presentation of another signed purchase and sales agreement" from a third party. Though this right of first refusal is conditioned "upon the decision to sell the property by its owner" after receiving an offer, like traditional rights of first refusal, Glick, 157 N.H. at 247, this right follows the Greenwalds' first option to purchase. Since Subsection B required the Keatings to provide the Greenwalds with the first option to purchase prior to listing the property for sale, the Keatings would be free to list the property for sale when the Greenwalds declined the first option. The language of Subsection C—"[i]n the event that tenant does not exercise the first option to purchase property under 18B, and the property is listed for sale on MLS"—requires this chain of events to occur, thus indicating the parties intended for the Keatings to seek offers from the public by listing the property for sale before the Greenwalds could exercise their right of first refusal. Thus, the court finds that the intent of the Agreement was to condition the Greenwalds' right of first refusal on the Keatings' act of listing the property for sale.

Jill Keating also argues that the right of first refusal in Subsection C is unenforceable because it does not contain a duration in which the right remains in effect. To support her argument, she points to Glick, where the New Hampshire Supreme Court found a right of first

refusal to be sufficiently definite where the agreement contained a description of the property, the period of time in which the rights would remain in effect, and language describing "in detail, how rights would be triggered and how they would be exercised." Glick, 157 N.H. at 253. However, Glick set forth no requirement that a contract set forth a specific duration in time in which the holder may exercise that right. Rather, the Court in Glick recognized the principle that "[c]ourts liberally find right-of-first refusal clauses to be specific enough to be enforced, even if they are missing some important terms." Id. at 252 (citing 17A Am. Jur. 2d Contracts § 57 (2004)). Here, the court finds that there are enough specific terms to make the right of first refusal sufficiently definite: the Agreement expressly states three specific conditions that must be met to trigger those rights—that the Greenwalds did not exercise the first option to purchase the property under 18B, the Keatings listed the property for sale, and the Greenwalds presented in writing their interest in purchasing the property—and an implied condition that the Keatings receive an offer from a third party that they intend to accept, the requirement that the Greenwalds be presented with a signed purchase and sales agreement from a third party, the amount of time in which the Greenwalds must decide whether to exercise their right once they receive the third party purchase and sales agreement, and the means by which they must respond. Thus, the Agreement contains the specific conditions that trigger those rights, the means by which the Keatings must notify the Greenwalds, and the method in which the Greenwalds must exercise that right. Based on these details, the court finds that the right of first refusal is sufficiently definite to be enforceable.[6] Accordingly, the right of first refusal in Subsection C is enforceable, while the first option to purchase is not in Subsection B is not.

[6] Though Jill Keating points to the lack of duration contained within Subsection C to argue that the right of first refusal is missing an essential term under Glick, none of the defendants argue that the lack of duration constitutes an unreasonable restraint on alienation. As such, the court does not address this issue.

The Greenwalds make several arguments as to why the court should not interpret the contract as requiring these conditions. First, the Greenwalds point to the last sentence in Subsection B which states, "It is agreed that any sale shall be managed by John Goodhue, realtor, as listing agent." (Agreement ¶ 18(b).) They assert that this sentence shows that the parties intended only for the Keatings' intent to sell the property to trigger the Greenwalds' purchase rights. However, it is unclear how this sentence supports the Greenwalds' argument where it merely requires the parties to utilize Goodhue to manage "any sale" as "listing agent." Though the sentence may bind the parties if the Keatings had decided to list the property for sale, it has no bearing on the nature of the Greenwalds' rights or the conditions that trigger those rights.

Second, the Greenwalds argue that listing property for sale is merely a "ministerial" function to facilitate the sale, and therefore the words "re-list" and "list" are not essential terms of the contract. The court knows of no law in New Hampshire that allows it to ignore a contractual term because it reflects an act that is "ministerial" in nature, particularly where the ministerial act constitutes the condition precedent. Although the act of listing property, whether through MLS.com or another listing service, may be "ministerial" or administrative, it is nonetheless an act that the Agreement clearly requires in order to trigger the Greenwalds' purchase rights.

Moreover, the language of the Agreement reflects an intent to provide the Greenwalds with purchase rights only under circumstances where the Keatings intended to seek offers from the public through a public listing. Thus, the Agreement gives the Greenwalds the right to exercise their purchase rights before the Keatings seek offers from the public and against potential buyers in a public sale, while reserving to the Keatings the right to convey the property

privately. In this sense, the act of listing is not merely a ministerial function; it is an essential term of the Agreement, to which the Greenwalds agreed when they executed the contract.

Third, the Greenwalds argue that the court should not interpret the contract as providing these conditions precedent because the conditions allow the Keatings to control the Greenwalds' ability to exercise their purchase rights, which the Greenwalds argue would render the Keating's promise illusory. See Restatement (Second) of Contracts § 77, cmt. a at 195 ("Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."). However, the Greenwalds do not appear to argue that the Keatings' promise is actually illusory; rather, the Greenwalds suggest that the court should construe the language such that the Keatings' promise is not rendered illusory. Thus, the court interprets the Greenwalds' argument as invoking the principle in New Hampshire law that requires the court, "where possible, [to] avoid construing a contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other." Holden, 137 N.H. at 397.

However, in Holden, even though the New Hampshire Supreme Court construed a contract in a way to avoid an unreasonable result for the plaintiff, it first found that the language of the contract did not create a condition precedent. There, after a surveyor sued the defendant for failure to pay for his services, the defendant argued that it was not obligated to pay because the surveyor failed to meet the contract's condition precedent requiring him to obtain approval from the planning board. Id. at 395–96. The Supreme Court found that the contract did not contain a condition precedent because it did not have any of the "signal words" that typically create a condition precedent, the contract did not discuss the planning board approval until the section following the terms of payment, and a later paragraph showed that payment was expected as the work was completed. Id. at 396.

After finding that the language of the contract did not impose a condition precedent, the Court went on to hold that the planning board approval was "out of the plaintiffs' control" and therefore it would be unreasonable for the plaintiff's payment to be conditioned on the planning board's approval. 137 N.H. at 397. However, while the court considered this fact when construed the contract in favor of the plaintiff, the Court did so only after it found that the plain language of the contract did not require planning board approval as a condition precedent. Id. In other words, the plain language of the contract permitted such a construction. Here, as discussed at length above, the Agreement contains clear language, both in the conditional signifiers and in reading the contract as a whole, that the Agreement requires the Keatings to intend to relist the property to trigger the first option to purchase and list the property to trigger the right of first refusal. Thus, while the court "will, where possible, avoid construing a contract in a manner that leads to harsh or unreasonable results or places one party at the mercy of the other," id. (emphasis added), the court may not do so here where the clear intent was to create these conditions precedent.

The Greenwalds urge the court to rule as the Oregon Court of Appeals did in Long v. Wayble, 618 P.2d 22 (Or. Ct. App. 1980). There, the contract stated, "Lessor agrees to give lessee first right of refusal on purchase of this property at an asking price of $35,000." Id. at 24. The defendant lessors argued that the clause required them to offer the property to the plaintiff "only if they should decide to sell the property for $35,000." Id. at 25. The Oregon Court of Appeals concluded that "the clause is clear that, if defendants decided to sell the property at all, they would first offer it to plaintiff for $35,000." Id. The Court then noted that the defendants' construction of the contractual terms was "unreasonable since, by offering the property for

$36,000, the defendants could circumvent entirely plaintiff's right to purchase, thereby rendering the provision illusory." Id.

The Greenwalds focus their attention on this last part of the ruling. They argue that, like the defendant's interpretation of the contract in Long, the Keatings' interpretation of the conditions precedent creates an illusory promise that otherwise would allow the Keatings to circumvent the Greenwalds' right of first refusal. However, like the New Hampshire Supreme Court's decision in Holden, the Oregon Court of Appeals in Long first found it "clear" that the language of the contract did not impose a condition precedent. Thus, both the New Hampshire Supreme Court in Holden and the Oregon Court of Appeals in Long construed the contract in favor of the plaintiff because the language of the contract allowed them to do so. Again, because the court here finds that the language of the Agreement does create a condition precedent, the court will not construe the Agreement contrary to its clear language.

Furthermore, the court finds that the condition precedent here does not render the promise illusory. Contracts bestowing a right of first refusal, based on the general understanding of the phrase, always give control to the property owner because the right only becomes ripe if the owner decides to sell the property to a willing buyer. See Scott v. Fry, 261 N.W. 2d 179 (Iowa Ct. App. 1977) ("a lease which grants the lessee a first option to buy is conditional upon the lessor's desire to sell . . . ."); 49 Am. Jur. 2d Landlord and Tenant ¶ 305 ("The so-called options conferred by instruments giving a 'first option,' 'first refusal,' or 'first privilege' to purchase property are conditional upon the willing, desire, or purpose of the landlord to sell."). Although the condition here is based on narrower terms than a general right of first refusal, the principle is the same: the Greenwalds agreed to pay a specific sum of money in exchange for a terminal lease agreement with a purchase right conditioned on a certain action of the owner. Here, the purchase

right was the right of first refusal and the act of the owner was the Keatings' act of listing the property for sale.

In sum, the court finds that the Agreement requires the Keatings to intend to list the property for sale as a condition precedent to the Greenwalds' first option to purchase and list the property as a condition precedent to the Greenwalds' right of first refusal. Moreover, the court finds that, even if the condition precedent was met to trigger the first option to buy, the first option to buy is unenforceable because it does not set forth an essential term. The court now addresses the Greenwalds' individual claims in light of the court's foregoing findings.

II. Breach of Contract against the Keatings and Jill Keating

A breach of that contract "occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." Audette v. Cummings, 165 N.H. 763, 767 (2013). The Greenwalds argue that the Keatings and Jill Keating breached the right of first refusal in the Agreement when they did not notify the Greenwalds that they intended to sell the property to the Uickers and failed to give the Greenwalds the opportunity to exercise their right of first refusal.

As an initial matter, Barbara Keating argues that, even assuming there was a breach of the Agreement, she cannot be held liable because she had no ownership interest in the property and therefore lacked authority to enter into the Agreement to lease the premises. (B. Keating Obj. ¶¶ 24, 30.) The court agrees. Although the Greenwalds argue that Barbara Keating was acting as the agent of Jill Keating, an agent, even if acting without authority of the principal, may only be held liable "for [her] own torts to a third person who is injured." Blouin v. Sanborn, 155 N.H. 704, 706 (2007) (emphasis added). This cause of action lies in contract, not tort, law.

Thus, because Barbara Keating did not have the authority to enter into the Agreement, the contract is not enforceable as to her.

As to Richard Keating and Jill Keating, the court finds that they did not breach the Agreement when they did not notify the Greenwalds of the sale to the Uickers or provide them with the opportunity to exercise their right of first refusal. As discussed above, the Greenwalds' right of first refusal was conditioned on the Keatings' act of listing the property for sale during or after the Greenwalds' lease term, and it is undisputed that the Keatings did not do so at any time after the Greenwalds' lease began. Thus, the court finds that the Greenwalds' right of first refusal was not triggered when the Keatings accepted the Uickers' offer. As a result, the Keatings were not required to notify the Greenwalds of the pending private sale or provide them with a right of first refusal.

The Greenwalds argue, in the event that the court agrees with the defendants' interpretation of the Agreement's condition precedent, that the defendants should be estopped from relying on that condition because the evidence shows that the Keatings intentionally refrained from listing the property for sale on MLS with the intent to prevent the Greenwalds from exercising their first refusal rights. (Greenwalds' Obj. Mullgan's Mot. Summ. J. at 9.) "Equitable estoppel forbids one from speaking against one's own acts, representations, or commitments to the injury of one to whom they were directed and who reasonably relied on them." Hawthorn Tr. v. Maine Sav. Bank, 136 N.H. 533, 537–38 (1992). To prove equitable estoppel, the plaintiff must demonstrate the following elements:

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

Id. at 38 (quotations and brackets omitted).

The court disagrees that equitable estoppel applies here. Equitable estoppel applies where a party makes a misrepresentation to induce the other party to act. The undisputed facts do not provide evidence or inference that the Keatings misrepresented their intentions of listing the property for sale in the future at the time they entered into the Agreement with the Greenwalds. Even though the parties may have discussed a right of first refusal in different terms during their discussion prior to the execution of the Agreement, the plain language contained within the Agreement clearly state that the Keatings must list the property for sale as a condition precedent to the Greenwalds' right of first refusal. Moreover, if the Greenwalds had any question as to the applicability of any particular term that the parties may have discussed prior to memorializing the Agreement in writing, that question was resolved by the integration clause which expressly states that "[a]ny prior understanding or representation" that preceded the Agreement was "superseded" by the terms of the Agreement. (Agreement ¶ 25.) Thus, the court finds that equitable estoppel does not bar the defendants from relying on the condition precedent set forth in the Agreement.

Accordingly, summary judgment is granted in their favor on the Greenwalds' breach of contract claim (Count II).

III. Breach of the Implied Covenant of Good Faith and Fair Dealing against the Keatings and Jill Keating

"In every agreement there exists an implied covenant that each of the parties will act in good faith and deal fairly with another." Richard v. Good Luck Trailer Court, Inc., 157 N.H. 65, 70 (2008) (quotation omitted). "[T]he obligation of good faith performance is better understood simply as excluding behavior inconsistent with common standards of decency, fairness and reasonableness, and with the parties' agreed-upon common purposes and justified expectations."

Id. (quotation omitted). New Hampshire law recognizes three general categories in which a party has a good-faith duty: "(1) contract formation; (2) termination of at-will employment agreements; and (3) limitation of discretion in contractual performance." Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 624 (2009) (citation omitted). The Greenwalds argue that the Keatings and Jill Keating breached the implied covenant of good faith and fair dealing in two categories: the limitation of discretion in contractual performance and, to a lesser extent, contract formation.

Barbara Keating again argues that she cannot be held liable for breach of the implied covenant of good faith and fair dealing because she had no ownership interest in the property and therefore lacked authority to enter into the Agreement to lease the premises. (B. Keating Obj. ¶¶ 24, 30.) Breach of the implied covenant of good faith and fair dealing is a matter of contract law which requires the defendant to be a valid contracting party; it is not a cause of action based in tort. See J & M Lumber and Const. Co., Inc. v. Smyjunas, 161 N.H. 714, 724 (2011) ("New Hampshire law has not recognized a claim for breach of the implied covenant of good faith and fair dealing outside of the contractual context"). Thus, because the contract is not enforceable as to Barbara Keating, any implied covenant imposed by the express terms of the contract is not enforceable against her either. Nevertheless, this finding does not bear on the liability of Richard Keating or Jill Keating, who each had an ownership interest in the property at the time the Agreement was executed. Thus, the court analyzes the Greenwalds' claim below against Richard Keating and Jill Keating.[7]

The third category of the implied covenant of good faith and fair dealing—the limitation of discretion in contractual performance—is "comparatively narrow," but "its broader function is

[7] In her summary judgment motion, Jill Keating does not assert that the Agreement is unenforceable as to her. Thus, the court assumes, for the purpose of this order only, that the Agreement is enforceable as to her and analyzes her arguments accordingly.

to prohibit behavior inconsistent with the parties' agreed-upon common purpose and justified expectations, as well as with common standards of decency, fairness and reasonableness." Livingston, 158 N.H. at 624 (quotation omitted). This category applies where there is "an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value." Centronics Corp. v. Genicom Corp., 132 N.H. 133, 143 (1989).

The Greenwalds argue that the Keatings and Jill Keating behaved inconsistently with the parties' agreed-upon purpose and acted contrary to common standards of decency, fairness and reasonableness when they failed to notify the Greenwalds' about the sale, misrepresented their intention not to sell the property, and concealed the sale of the property from the Greenwalds, preventing them from exercising their right of first refusal. (Greenwalds' Mot. Summ. J. at 15.) Jill Keating argues that the Agreement does not contain any implied requirement that the Keatings or Jill Keating inform the Greenwalds of their intent to sell or give the Greenwalds the right of first refusal where the Keatings did not list the property for sale. (J. Keatings' Mot. Summ. J. at 11. Finding otherwise, she argues, would impose a covenant of good faith and fair dealing that is inconsistent with the express covenants of the Agreement. (Id.) The court agrees.

In determining whether a contract imposes an implied covenant of good faith and fair dealing, the court looks to the language of the contract and "will not recognize an implied covenant inconsistent with that authority." Sunapee Difference, LLC v. State, 164 N.H. 778, 797 (2013). Thus, "implied covenants are qualified and restrained by any express covenants of a more limited character." Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 284 (1992) (quotations omitted). However, "[t]his rule does not eliminate implied covenants from agreements with express terms; rather, it serves only to check anything inconsistent with those

express covenants, or which might otherwise have implied an undertaking of a more enlarged character." Id.

The express terms in the Agreement do not require the Keatings to inform the Greenwalds of their intent to sell the property privately to a third party where the Keatings did not list the property for sale. Nothing in these express terms implies that the Keatings must inform the Greenwalds of the sale or provide them with a right of first refusal where the Keatings did not list the property for sale. Finding otherwise would impose an obligation that contradicts the express terms of the Agreement that conditions the Greenwalds' right of first refusal only on their act of listing the property for sale.

The court recognizes that the Agreement gave the Keatings control over the circumstances that triggered the Greenwalds' right of first refusal. However, as discussed above, the "spirit of the bargain" was not to provide the Greenwalds with an opportunity to exercise a right of first refusal to any sale; it was to provide the Greenwalds with a right of first refusal if the Keatings listed the property on the market and thereafter received an offer from a third party. Thus, the Agreement did not contain an implied covenant of good faith and fair dealing that required the Keatings to inform the Greenwalds of the sale or provide a right of first refusal if the Keatings did not list the property for sale.

The Greenwalds also argue that the Keatings breached the implied covenant of good faith and fair dealing during the formation of the Agreement because the Keatings failed to disclose Jill Keating's ownership interest in the property. (Greenwalds' Mot. Summ. J. at 15.) This argument is much less developed and was not raised by the Greenwalds during the hearing. Furthermore, the Greenwalds' did not assert this argument as a basis for their breach of the

implied covenant of good faith and fair dealing claim in their complaint. Nevertheless, the court briefly addresses this claim in light of the facts in the record.

The Keatings argue that New Hampshire law requires the Greenwalds to investigate the title to the property themselves before entering into the Agreement. (Keatings' Obj. ¶ 28). However, the Greenwalds were not bona fide purchasers for value because their right of first refusal never became ripe. Thomas v. Finger, 141 N.H. 134, 137 (1996) ("A bona fide purchaser for value is one who acquires title to property for value, in good faith, and without notice of competing claims or interests in the property."). Thus, they did not have a duty under New Hampshire law to investigate any clouds on the title to the property in order to enter into a binding lease agreement with a right of first refusal. Mansur v. Muskopf, 159 N.H. 216, 224 (2009) ("bona fide purchasers" of real estate "are obligated to fully investigate apparent discrepancies to determine whether title to the desired parcel is encumbered in any way"). Moreover, the undisputed facts show that Barbara Keating held herself out to be the owner of the property where she and Richard Keating held the title under the Agreement as "Landlord" and where she signed the Agreement.

However, in addition to proving an actual misrepresentation, the Greenwalds must also show that the Keatings made the misrepresentation "for the purpose of inducing [the Greenwalds] to . . . enter into a contract," Bursey v. Clement, 118 N.H. 412, 414 (1978), and that this misrepresentation was "material to" the Greenwalds' "decision to enter into [the Agreement] in justifiable reliance on it," Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139 (1989). The Greenwalds point to no evidence in the record to support these requirements. There is no evidence that the Keatings omitted this information for the purpose of inducing the Greenwalds to enter into the Agreement, particularly where there is evidence that Jill Keating had knowledge

that the Keatings leased the property during the summers and had not objected in the past. Moreover, there are no facts in the record that establish that this misrepresentation was material to the Greenwalds' decision to enter into the Agreement. There is no evidence in the record to indicate that, had the Greenwalds known Jill Keating owned the property, the Greenwalds would not have entered into the contract or sought to alter its terms.

Accordingly, the Keatings and Jill Keating are entitled to summary judgment on this claim.

IV. Specific Performance against the Uickers

"Generally, a decree of specific performance is intended to produce essentially the same effect as if the performance due under a contract were rendered." Livingston, 158 N.H. at 626. Thus, "in land contracts, specific performance will be decreed unless there are circumstances that make inequitable or impossible to do so." Shakra v. Benedictine Sisters of Bedford, N.H., Inc., 131 N.H. 417, 423 (1989) (quotations omitted). Where a third party purchases real property with actual or constructive notice of another party's interest in the real estate, the third party's purchase does not extinguish the existing interest in the real estate. Swanson v. Priest, 95 N.H. 64, 66 (1948). Because the condition precedent to the Greenwalds' right of first refusal was not met, the Greenwalds did not have an interest in the real estate other than their interest as lessees. As such, they are not entitled to specific performance. Accordingly, the Uickers are entitled to summary judgment on this claim.

V. Tortious Interference with Contractual Relations against Mulligan

To prove tortious interference with a contractual relationship, the Greenwalds must prove: "that the plaintiff had a contractual relationship with the seller; that the defendant[] knew of the contractual relationship between the seller and the plaintiff; and that the defendant[]

wrongfully induced the seller to breach his agreement with the plaintiff." Montrone v. Maxfield, 122 N.H. 724, 726 (1989). The Greenwalds assert that Mulligan tortiously interfered with the contractual relationship between the Keatings and the Greenwalds through her involvement in the sale of the property to the Uickers. However, as discussed above, the Keatings did not breach the Agreement, as required by the third element of tortious interference with contractual relations. Id. As such, Mulligan is entitled to summary judgment on this claim.

VI. CPA Violation against Mulligan

Under New Hampshire's CPA, RSA 358-A:2 provides, "It shall be unlawful for any person to use any method of unfair competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." The Greenwalds argue that Mulligan engaged in unfair and deceptive conduct in the course of trade or commerce when she assisted the Uickers with the purchase of the Keatings' property with knowledge of the Greenwalds' right of first refusal while conducting business as a real estate agent. Mulligan first argues that she was not conducting trade or commerce as a real estate agent; rather, she was merely doing a personal favor for her brother. Second, Mulligan argues that her actions do not constitute unfair or deceptive practices because she was aware of the condition precedent in the Agreement and had no duty to the Greenwalds.

Assuming without deciding that Mulligan was conducting trade or commerce as a real estate agent, see RSA 358-A:1, II (defining "trade or commerce" as "advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce" affecting people in this state), the court finds that the undisputed facts show that Mulligan did not engage in unfair or deceptive practices. The CPA contains a non-

exhaustive list of acts that constitute violations of the statute. Conduct that does not appear in the list must be assessed by the "rascality test," which asks whether the conduct "attain[s] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." State v. Sideris, 157 N.H. 258, 263 (2008).

The Greenwalds' argument that Mulligan engaged in unfair and deceptive practices is dependent on their incorrect assertion that the Keatings were required to provide the Greenwalds with a right of first refusal. Specifically, they argue that Mulligan unfairly and deceptively assisted the Uickers in purchasing property—including her role in the sale of Cow Island, which provided the Uickers with the necessary cash to purchase Mink Island—with knowledge that the Greenwalds held a right of first refusal and, in doing so, induced the Keatings to breach the Agreement to sell the property to the Uickers. However, the condition precedent required to trigger the Greenwalds' right of first refusal did not occur. Therefore, Mulligan did not engage in any unfair or deceptive practice in her assistance of the Uickers in purchasing the property where the Greenwalds' had no right of first refusal to exercise pursuant to the unambiguous language of the Agreement.

Though the Greenwalds make several arguments as to why Mulligan's conduct was unfair or deceptive, all of these arguments turn on the assumption that the Agreement did not contain a condition precedent that required the Keatings to list the property. Because the Greenwalds did not have a right of first refusal because the condition precedent had not occurred, Mulligan had no obligation to ensure that those rights were honored. Accordingly, Mulligan is also entitled to summary judgment on this claim.

CONCLUSION

For the foregoing reasons, the Greenwalds' cross-motion for summary judgment against the Keatings and motion for summary judgment against the Uickers is DENIED. The Uickers' cross-motion for summary judgment on Count I (specific performance) is GRANTED. Mulligan's motion for summary judgment on Counts IV (tortious interference with contractual relations) and V (CPA violation) is GRANTED. Jill Keating's motion for summary judgment, to which the Keatings join, on Counts II (breach of contract) and Count III (breach of the implied covenant of good faith and fair dealing) is GRANTED.

So Ordered.

Date: July 20, 2018

Amy L. Ignatius
Presiding Justice