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

REPLY BRIEF OF APPELLANTS EVAN AND KELLY GREENWALD

January 7, 2019

EVAN AND KELLY GREENWALD

By their attorneys

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENT IN REPLY

A. The Greenwalds' Purchase Rights Were Triggered

Defendants offer no justification for the Keatings' bad faith conduct in lying to the Greenwalds about their alleged decision not to sell the Property, in order to prevent the Greenwalds from exercising their purchase rights under the Agreement. Defendants also cannot escape the fact that before the sale to the Uickers, they were specifically warned they could be found to have violated the intent of the Agreement and breached the Greenwalds' purchase rights. Nor do Defendants attempt to legitimize the trial court's conclusion that "because the Keatings must have an acceptable offer to intend to sell the property," an intent to sell could not trigger the Greenwalds' purchase option. Greenwald Br. at 18. This conclusion lacks merit, as shown in the Greenwalds' Brief. In the face of these facts, Defendants' argument that the Greenwalds' purchase rights were not triggered rings hollow.

Instead, Defendants argue the words "intends to re-list" and "listed on MLS" in Paragraph 18B are unambiguous and must be construed to mean that an intent to re-list on MLS was a condition precedent to the Greenwalds' purchase rights, even if this was not the parties' intent. Defendants' position is contrary to well-established rules of contract interpretation. Contracts should not be construed in a manner that leads to an unreasonable result, or that places one party at the mercy of the other. Further, extrinsic evidence of the parties' intent may be considered to determine whether even unambiguous contract language should be treated as a condition precedent.

The issue is not whether the words referencing an MLS listing are ambiguous when viewed in isolation. Rather, the issue is whether the parties intended for those words to mean that an intent to sell through MLS alone, exclusive of any other sales method, would trigger the Greenwalds' rights. Defendants have not offered any plausible reason why the parties would

have intended for an intent to sell through an MLS listing to trigger the Greenwalds' purchase rights, while an intent to sell through other means would not. Instead, the parties' conduct demonstrates that they did not intend the Greenwalds' rights to be limited in this manner.

1. Defendants Rely on Extrinsic Evidence of the Parties' Intent

While arguing against the consideration of extrinsic evidence to determine the parties' intended interpretation of the Agreement, Defendants too rely on extrinsic evidence to support their position. Defendants, for example, quote repeatedly from a portion of an October 23, 2016 email from Evan Greenwald, to argue that the Greenwalds understood that a re-listing on MLS (or an intent to do so) were conditions precedent. E.g., Uicker Br. at 11, 20; Mulligan Br. at 12, 19 n.3, 21; Jill Keating Br. at 13. However, Defendants omitted the key portion of the email, in which Dr. Greenwald stated unequivocally that the "spirit and intent of the contract" was for the Greenwalds' purchase price to apply whether or not the Property was listed on MLS through a broker. Specifically, Dr. Greenwald wrote:

> … my lease purchase contract for first option to buy and right of first refusal has narrow language in it, regrettably, which talks about if the Keatings "relist" or intend to "relist" the property for sale that we have first option to buy. Technically, they didn't relist the property on MLS, although the fact that a realtor was involved, who already had a buyer, precluded their relisting the property. But the spirit and intent of the contract is quite clear, they knowingly breached the contract with malintent, in order to sell to another party, likely with the support and malintent of a realtor with a NH realtor's license.

App. at 755-56 (emphasis added).

2. An Intent to Re-List on MLS Was Not a Condition Precedent

Contrary to Defendants' argument, extrinsic evidence is admissible to determine whether the parties intended for the Greenwalds' purchase rights to hinge on an intent to re-list on MLS, rather than an intent to sell. Contracts should be interpreted in a manner consistent with the parties' intent, and common sense. See R. Zoppo Co. v. Dover, 124 N.H. 666, 671 (1984). Even

where contract language is unambiguous, courts will consider extrinsic evidence of the parties' intent in order to interpret, not contradict, that language, and determine if the language should be construed as a condition precedent. See Lapierre v. Cabral, 122 N.H. 301 (1982); see also Cavanagh v. Cavanagh, 598 N.E.2d 677, 678 n.4 (Mass. App. Ct. 1992) ("[e]ven where language of a contract is not ambiguous on its face we may consider extrinsic evidence of the parties' intent which explicates, but does not contradict, its meaning in a particular context"); Knox v. Knox, 59 N.W.2d 108, 113 (Mich. 1953) ("Whether a provision in a contract is a condition the nonfulfilment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract").

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). A literal reading must be rejected "if common sense tells [the court] that the result would be absurd or unreasonable." Cadle Co. v. Vargas, 771 N.E.2d 179, 183 (Mass. App. Ct. 2002); see also Fishman v. LaSalle Nat'l Bank, 247 F.3d 300, 302 (1st Cir. 2001) ("Common sense is as much a part of contract interpretation as is the dictionary or an arsenal of canons," meaning that it is centrally important that the [contract] reading makes sense – that is, it carries out what one might imagine to be a plausible objective of parties so situated"); Fleet Nat'l Bank v. H&D Entm't, 96 F.3d 532, 538 (1st Cir. 1996) (contracts "must be construed in accord with common sense," meaning "words matter; but the words are to be read as elements in a practical working document and not as a crossword puzzle"). In "cases of discordance between text and reality, courts strive for a just solution by bringing to bear the familiar standard that, 'Every contract imposes upon each party a duty of

good faith and fair dealing in its performance and its enforcement.'" Cadle, 771 N.E.2d at 183 (quoting Restatement (Second) of Contracts § 205 (1979)).

Defendants demonstrated their understanding that the Greenwalds' purchase rights were triggered by the Keatings' intent to sell to the Uickers. Because of this understanding the Keatings lied to the Greenwalds and claimed they were not selling the Property, even though one month earlier they had reached a "deal" to sell the Property to the Uickers. App. at 495. The Uickers and their title attorney had the same understanding, and recommended allowing the Greenwalds to exercise their first refusal rights. App. at 255, 325.

In an attempt to establish a contradiction between the parties' intent and the contract language, Defendants argue the Agreement "specifically exempted private sales, where the Property was not to be marketed on MLS." Jill Keating Br. at 23. This is incorrect. Paragraphs 18B and 18C do not refer to private sales, or contemplate a sale through any means other than re-listing on MLS. Nor do they suggest that sales without an MLS listing would fall outside the scope of the Agreement.

Under analogous facts, courts have refused to construe even unambiguous contract terms as establishing a condition precedent. For example, in Thomas J. Dyer v. Bishop Engineering, 303 F.2d 655 (6th Cir.), a subcontract required the contractor to pay the subcontractor a total of $115,000, but stated: "no part of [the $115,000] shall be due until five (5) days after the Owner shall have paid the Contractor." Id. at 656. The owner filed for bankruptcy before paying the contractor, and the contractor argued a condition precedent to paying the subcontractor had not occurred. The Sixth Circuit disagreed, concluding "[i]t seems clear … under the facts of this case that it was the intention of the parties that the subcontractor would be paid" within a reasonable time of completion, even if the contractor had not been paid. The court reasoned that

if this was not the parties' intent, "it could have been so expressed in the unequivocal terms dealing with the possible insolvency of the owner." Id. at 661.

Similarly, in Cavanagh v. Cavanagh, 598 N.E.2d 677 (Mass. App. Ct. 1992), the parties executed an agreement in their divorce which required the plaintiff to convey the marital home to the defendant for $397,500, with said amount to be paid in four installments. The fourth installment, for $97,500, was "to be paid upon the sale of the marital home by [the defendant]." Id. at 678. The defendant later renounced any intention of selling the home and argued the final payment was not due because a condition precedent was not met. Id. The trial court granted summary judgement for the defendant, but the appellate court reversed. Id. On appeal, the court first held that, as a matter of contract construction, "[e]ven where language of a contract is not ambiguous on its face we may consider extrinsic evidence of the parties' intent which explicates, but does not contradict, its meaning in a particular context." Id. at 678 n.4 (citing cases). The court concluded that construing the agreement to mean the defendant would never have to make the final payment would be unreasonable, particularly since the conditional event, the sale of the home, was entirely within the defendant's control. Id.[1]

Likewise here, the Agreement does not contemplate the sale of the Property in any manner other than through a re-listing. This made logical sense, since the Property was already listed for sale, and was delisted as part of the Agreement so it would be available for the Greenwalds to rent the following summer. Moreover, the parties' understanding and expectation that any future sale would occur after a relisting is underscored by the last sentence of

[1] The principles underlying these cases are reflected in Section 227(1) of the Restatement (Second) of Contracts ("Standards of Preference with Regard to Conditions"), which states: "In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk."

Paragraph 18B, which states unequivocally "[i]t is agreed that any sale shall be managed by John Goodhue, realtor, as listing agent." (Emphasis added.) If the parties had contemplated that there could be sales that would not trigger the Greenwalds' purchase rights, they easily could have included language to that effect in the Agreement.

Defendants' literal interpretation of isolated phrases, without the context of the remaining language, violates contract construction principles because it lacks common sense and creates an unjust, illusory promise. If the language permitted the Keatings to avoid the Greenwalds' purchase rights merely by claiming an intent to use a sales method that did not involve MLS, the Keatings could easily nullify the Greenwalds' rights. This is particularly true given that Defendants have not offered any reason why such a particular manner of expressing the Keatings' intent to sell would be necessary in order to trigger the Greenwalds' rights. Re-listing on MLS was not a condition precedent, but merely how the parties' anticipated the Keatings would express their intent to sell.

3. The Parol Evidence Rule Does Not Apply

Defendants maintain the parol evidence rule prohibits any use of extrinsic evidence in this case. However, Defendants overlook the distinction between "extrinsic" and "parol" evidence: although parol evidence is a type of extrinsic of evidence, the parol evidence rule applies only to extrinsic evidence offered to "vary the terms" of an integrated contract. Lapierre v. Cabral, 122 N.H. 301, 307 (1982); Parkhurst v. Gibson, 133 N.H. 57, 61-62 (1990).

The parol evidence rule "does not exclude evidence offered for the purpose of interpreting and giving a meaning to the terms of the contract." 5 Corbin on Contracts § 24.10. "[I]nterpretation of contracts and application of the parol evidence rule are two distinct processes, because interpretation " asks what the parties intended to be the meaning of terms that

are unquestionably part of their contract," whereas "[i]n applying the parol evidence rule, a court inquires instead whether, previous to or contemporaneously with their assent to their written contract, the parties agreed upon an additional term or terms." 5 Corbin on Contracts § 24.12. In short, extrinsic evidence may be used "to discern the meaning of a term already contained in the contract," so long as it does not offer new or contradictory terms. Id.; see also Restatement (Second) Contracts § 212(1), cmt. b (stating that extrinsic evidence like the course of dealing between the parties may be admitted, even where the contract language is not ambiguous, so long as the extrinsic evidence does not change the plain meaning of the writing). This is consistent with this Court's rule of construction, stated above and applied in cases without a finding of ambiguity, recognizing that the "parties' situation at the time of the agreement" should be considered "together with all the provisions" in the agreement. R. Zoppo, 124 N.H. at 671.

Here, the extrinsic evidence of the parties' circumstances at the time of the formation of the Agreement and the parties' subsequent conduct does not add any new term; it merely explains how the parties intended the existing language to be applied. In any event, Defendants do not offer any argument that the exception to the parol evidence permitting extrinsic evidence to prove a condition precedent is inapplicable in this case. See Lapierre, 122 N.H. at 307 (holding that parol evidence is admissible as "proof of a condition precedent"). Consequently, extrinsic evidence may be considered to show the parties' did not intend intent to relist as a condition precedent.

B. The Implied Covenant of Good Faith and Fair Dealing Applies to the Keatings' Conduct

Defendants argue that if the Agreement granted the Keatings the discretion to avoid the Greenwalds' purchase rights by selling the Property through a private sale, there could be no breach of the implied covenant of good faith and fair dealing. This is incorrect. While the

implied covenant may not vary the express terms of a contract, the express terms of the Agreement here do not contemplate the Keatings defeating the Greenwalds' purchase rights by intending to sell through a process not involving an MLS listing. Further, when a contract vests a party with discretion, that discretionary power is restricted by the implied covenant of good faith and fair dealing. See Birch Broadcasting v. Capitol Broadcasting, 161 N.H. 192, 198 (2010); see cf. Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 284 (1992) (quotation omitted) (holding that the general rule that actions pursuant to an express covenant may not violate an implied covenant "does not eliminate implied covenants from agreements with express terms," but checks "anything inconsistent with those express covenants, or which might otherwise have implied an undertaking of a more enlarged character").

Even where a contract unambiguously vests the obligor with discretionary power, such promise is still illusory if not supported by adequate consideration. See Third Story Music v. Waits, 48 Cal. Rptr. 2d 747, 752-53 (Cal. Ct. App. 1995) (applying California law; cited by Hobin v. Coldwell Banker, 144 N.H. 626, 630-31 (2000)). In other words, no matter how an obligor exercises its discretion, the detriment to the obligor must still constitute consideration. Id. Where there are reciprocal promises, and the contract unambiguously "confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 924 (Cal. 1985).

For example, in Cal. Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 484 (Cal. 1955), a contract for the sale of lettuce permitted the buyer to unilaterally set the purchase price. The court concluded that, despite this express term, the contract would avoid being rendered illusory and void because the implied covenant of good faith and fair dealing would apply.

Similar legal necessity was found in Perdue, where the court found that customer contracts would otherwise be illusory for lack of mutuality if the contracts were interpreted to grant the bank's unbridled discretion to set nonsufficient fund charges to be paid by the customer. 38 Cal. 3d at 924.

Here, the Agreement contains reciprocal promises: the Keatings promised to grant the Greenwalds purchase rights in return for financial consideration. Defendants' interpretation of the Agreement grants the Keatings limitless discretion to foreclose the Greenwalds from receiving the benefit of their purchase option and first refusal rights, even if the Keatings again decided to solicit offers for purchasing the Property. Because Defendants would nonetheless retain the full value of the monetary consideration paid by the Greenwalds, Defendants' exercise of discretion is without any detriment. Such unbridled discretion is not supported by adequate consideration and, consequently, the implied covenant of good faith and fair dealing must apply to avoid such an illusory promise.

The Keatings violated the implied covenant through a pattern of misconduct that Defendants do not deny. Consequently, the Greenwalds are entitled to an award of summary judgment on their claims against Richard and Barbara Keating and Jill Keating for breach of the implied covenant of good faith and fair dealing.

Respectfully submitted,

EVAN AND KELLY GREENWALD

By their attorneys,

Dated: January 7, 2019

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CERTIFICATE OF SERVICE

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

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