THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CHAD AND KELLY SHORT

v.

JOHN AND LORI LAPLANTE, AS TRUSTEES OF THE LAPLANTE FAMILY REVOCABLE TRUST

Case No. 2020-0113

Rule 7 Mandatory Appeal From Merrimack County Superior Court
Docket No. 217-2018-CV-00422

REPLY BRIEF OF PLAINTIFFS/APPELLANTS CHAD AND KELLY SHORT

Gregory L. Silverman, NH Bar No. 265237
DICKINSON & SILVERMAN, PLLC
63 Pleasant St.
Hooksett, NH 03106
(603) 724-8089
gsilverman@dickinsonsilverman.com

October 19, 2020

15 Minute Oral Argument Requested

Additional Justice under RSA 490:3 Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENT

I. MUTUAL ASSENT MUST BE FOUND

A. Patent and Latent Ambiguities.

The LaPlantes contend that this case is exactly like the *Peerless* ship. DB.[1] 17. This reasoning misses the boat. An enforceable contract must be found here because the provision is a patently ambiguous – not latently ambiguous – term.

Judge Posner illustrated how contractual ambiguities are either "patent" or "latent." *Colfax Envelope Corp. v. Local No. 458-3M*, 20 F.3d 750, 752-54 (7th Cir. 1994). A patent ambiguity exists when the phrasing itself is ambiguous, or a term the parties "should have realized…was unclear." *Id*. at 753. A "latent" ambiguity exists when the term appears to be "unequivocal but [is] not." *Id*.; *see also Latent Ambiguity* and *Patent Ambiguity*, Black's Law Dictionary (11th ed. 2019); *cf. Ettinger v. Pomeroy Ltd. P'ship*, 166 N.H. 447, 450 (2014) (discussing patent and latent ambiguities in a deed).

A "meeting of the minds" must be found with a patently ambiguous term because:

> When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are *for* in contract cases—to resolve interpretive questions founded on ambiguity.

Colfax, 20 F.3d at 754 (emphasis in original). Only a latently ambiguous term, which each party believed had one meaning without reason to know otherwise, allows for a conclusion that the parties' differences go "so deep that it is impossible to say that they ever agreed," and thus, did not mutually assent to contract:

> It is when parties agree to terms that reasonably appear to each of them to be unequivocal but are not, cases like that of

[1] "DB" refers to the LaPlantes' Brief.

> the ship *Peerless* where the ambiguity is buried, that the possibility of rescission on grounds of mutual misunderstanding, or the term we prefer, latent ambiguity, arises.

Id. at 754 (emphasis in original). The Restatement (Second) of Contracts confirms this "workable rule": "when the misunderstanding has its source in the ambivalence or double meaning as opposed to the inherent vagueness of an expression." § 20, Reporter's Note cmt. d.

B. The Provision is Patently Ambiguous

Here, the ambiguity is patent because, on its face, the language of the provision is reasonably susceptible to multiple interpretations. The provision is silent on what rights either party has, if any, if the LaPlantes failed to fulfill the contingency of finding "suitable housing no later than July 14."

The LaPlantes improperly conflate "contingency" with "termination" when arguing that the provision is unambiguous.[2] DB. 23. A contingency is an "event that may or may not occur in the future." *Contingency*, Black's Law Dictionary (11th ed. 2019). The provision includes a contingency: the LaPlantes "finding suitable housing no later than July 14, 2018." The PSA is "subject to" this contingency. But what can either party do if that contingency does not occur? The provision provides no guidance, rendering it patently ambiguous. *See* PB. 17;[3] *see also Behrens v. S.P. Const. Co*., 153 N.H. 498, 501 (2006) (the disputed term failed "to identify which party would decide the amount to be financed.").

[2] The LaPlantes waived their right to argue that the trial court erred by admitting extrinsic evidence to interpret the ambiguous provision. They never sought to exclude evidence introduced for this purpose. This inaction, along with their failure to appeal this issue, is fatal. *See* N.H.R. Evid. 103(a)(1) ("A party may claim error in a ruling to admit or exclude evidence only if…[it] timely objects….").

[3] "PB" refers to the Shorts' Brief.

The provision has no latent, hidden double meaning like the Peerless ship. *See Oswald v. Allen*, 285 F.Supp. 488, 492 (S.D.N.Y.1968) ("neither party had reason to know of the latent ambiguity" in the Peerless case); *see also Coffin v. Bowater Inc*., 501 F.3d 80, 97–98 (1st Cir. 2007) (a latent ambiguity may only be proven with objective evidence, not "the self-serving testimony of one party…as to what the contract 'really' means" because courts are mindful that they "may not deprive the contracting parties of the protection they sought when they embodied their agreement in writing.").

The LaPlantes also misconstrue New Hampshire decisional law as demanding mental synchrony. *See, e.g., Behrens*., 153 N.H. at 501 ("There must be a meeting of the minds on all essential terms in order to form a valid contract."). Under the objective standard, this language means that the parties must agree on what material terms formed their agreement. Otherwise, "every misunderstanding between the parties following execution of an agreement could possibly void a contract." *Canada Life Assur. v. Guardian Life Ins*., 242 F. Supp. 2d 344, 356 (S.D.N.Y. 2003); *see also* Restatement (Second) of Contracts § 20 cmt. b ("material differences of meaning are a standard cause of contract disputes" which "necessarily requires interpretation").

"The most important function of contract law is to provide a legal remedy for breach in order to enhance the utility of contracting as a method of organizing economic activity." Richard Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1582 (2005). The LaPlantes argue for a subjective standard which would impermissibly allow parties to "gamble on a favorable interpretation and, if that fails, repudiate the contract with no liability." *See Colfax*, 20 F.3d at 754. The trial court erred by concluding the PSA was unenforceable for a failure of mutual assent.

II. THE LAPLANTES BREACHED THE PSA

A. Both Parties Indisputably Never Intended the Provision to Grant Termination Rights.

The LaPlantes provide no plausible explanation of why their contemporaneous writings *consistently* contradicts their trial testimony. Their emails indisputably showed that they (and their realtor) had no understanding the provision could be interpreted to allow for termination until a stranger recommended it. Remand is unnecessary to determine the parties' objective intent.

First, the LaPlantes make no attempt to explain why, before the PSA was signed, their provision-related requests are silent about any desire to possibly terminate and remain at the property. *See* P.App.[4] 131 (if the Shorts were "uncomfortable with [the] open-ended arrangement" of making the closing date based on the LaPlantes' discovery of suitable housing, then "we would request" a 60-day post-closing rental option); P.App. 92; P.App. 96-98 (Ms. LaPlante was agreeable to substituting her 60-day "rental request" with the July 14 deadline provided the "agreement is signed within the next day or two."); P.Add. 49.[5] (the trial court found that Rosenthall suggested to Coen that the LaPlantes only wanted the July 14 deadline instead of a 60-day vacate deadline); P.App. 50-51.

Second, the LaPlantes are similarly silent on why they might have wanted to stay at the property, even though it caused Ms. LaPlante's hellish allergies which forced the sale. PB. 18-19. When asking for the Shorts' consent to cancel in the first of their two direct emails on June 5, the LaPlantes explained how they "could not continue to live" at the property,

[4] "P.App." refers to the Shorts' Appendix.
[5] "P.Add." refers to the Shorts' Addendum.

but only after the PSA was executed did Ms. LaPlante first "realize[] spring passed and I had no allergy symptoms! It hadn't occurred to me before last night…." P.App. 88.

Third, the LaPlantes claim that they would not have agreed to any language "requiring them to continue to look for housing if [the] Tidewater [property] fell through." DB. 30-31. Yet this testimony is wholly incongruent with Ms. LaPlante's June 4 email (one day after execution) that:

> Whatever happens in regards to purchasing a home on our part, should not be affecting their process in moving forward.

P.App. 107. The LaPlantes fail to even mention this fundamental contradiction.

Fourth, the LaPlantes provide an implausible explanation about the inconsistencies between their testimony and two direct emails to the Shorts asking for consent to cancel the PSA. The LaPlantes never referenced the provision in their first email, which was sent because the Shorts "deserve[d] an explanation" for "wanting to cancel the [PSA] at this stage." P.App. 129; 88. The LaPlantes' reason for this conspicuous absence? They wanted to avoid "hostility by throwing legalese at them." DB. 27. But this rationalization directly contradicts Ms. LaPlantes' testimony that she had previously asked Rosenthall to inform the Shorts that they were "exercising the contingency." Tr. 139-140.

Fifth, the LaPlantes do not dispute that, after the Shorts would not agree to cancel, they (and their realtor) were unsure how to proceed. Nor is there disagreement that they mentioned the provision in their second email to the Shorts only after a stranger recommended they "point[] out the provision in section 19." PB. 26. And instead of "exercising the contingency," as the LaPlantes purportedly had done hours earlier, their

second email to the Shorts again asked them to "agree to cancel the [PSA] rather than extend the process to July 14." P.App. 90.

No reasonable person who had purposely included the provision to terminate the PSA anytime after the Tidewater purchase collapsed would have conducted themselves as the LaPlantes. Their testimony which contradicts their contemporaneous writings may be disregarded by this Court to conclude that the LaPlantes' conduct showed they indisputably never intended the provision to grant termination rights. *See Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) ("Documents or evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it."); *Johnson v. Arkansas State Police*, 10 F.3d 547, 553 (8th Cir. 1993) ("Where documentary or objective evidence contradicts witness testimony, an appellate court may reverse even a finding purportedly based on a credibility determination"); *SiOnyx, LLC v. Hamamatsu Photonics K.K.*, 332 F. Supp. 3d 446, 478 (D. Mass. 2018) ("Contemporaneous documentary or physical evidence is the most reliable, because the risk of litigation-inspired fabrication or exaggeration is eliminated.").

B. The Realtors' Shared Trade Practice Mandates that the Provision Excludes Termination Rights.

The LaPlantes also leave unchallenged that Rosenthall's trade practice required notice to all potential buyers that a seller desired to reserve termination rights if unable to find suitable housing. As Rosenthall reasoned, all parties should "clearly understand how things could change" after they entered into a PSA. Tr. 234-35. Nor do the LaPlantes debate that Coen's trade practice adhered to these same professional principles.

The LaPlantes instead argue that Coen never conveyed to Rosenthall "what [the Shorts] wanted." DB. at 28. This ignores that Coen twice reiterated that the Shorts would agree to a 60-day move out deadline, as

first proposed by the LaPlantes. PB. 31; P.App. 92. It was Rosenthall who never clarified that a vacate deadline 60 days from closing was inconsistent with the LaPlantes purported intent – as the realtors' shared trade practice would have required. Instead, as the trial court properly found, Rosenthall "suggested the LaPlantes only wanted to change the date." Add. 49.

The LaPlantes provide no authority distinguishing the "fundamental contract law" that the Shorts' interpretation[6] controls. PB. 32-33.

C. Even Assuming the LaPlantes' Interpretation and Theory of Termination, They Subsequently Ratified the PSA with No Termination Notice.

The Shorts properly preserved this argument. Reviewing the Shorts' citations, PB. 7, shows they unambiguously articulated below that the LaPlantes "never declared the PSA terminated." P.App. 204; 220; 263 ("The LaPlantes never notified the Shorts they believed the PSA effectively terminated on or before July 14.").

The LaPlantes now clarify that they terminated the PSA before they directly emailed the Shorts twice asking for their consent to cancel. Their theory is that Rosenthall acted on Ms. LaPlante's direction and verbally notified Coen that the LaPlantes were exercising the provision. DB. 29; Tr. 139-40. But it is undisputed that Rosenthall never referenced the provision on her call to Coen. Tr. 257; 83-84. The LaPlantes do not claim otherwise. The record contains no evidence which would reasonably show Rosenthall verbally provided Coen unequivocal notice that the LaPlantes had exercised the provision and terminated the PSA. PB. 33.

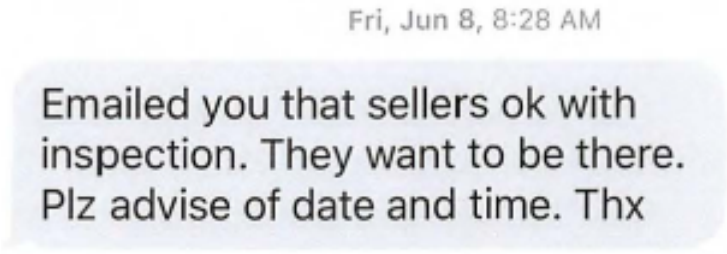
But even assuming Rosenthal had referenced the provision on this phone call, it was ineffective because the parties' PSA required written

[6] The LaPlantes parrot the trial court's unsupported finding, PB. 22-23, that the Shorts interpreted the provision to only mean that the LaPlantes could defer the closing date if they were unable to find suitable housing by July 14. DB. 23. The LaPlantes cite no evidence supporting this finding.

notice. P.App. 43, ¶ 21 ("All notices and communications must be in writing to be binding….").

Most importantly, even assuming Rosenthall could have validly provided the requisite termination notice verbally, and did so, the LaPlantes subsequently ratified the PSA's existence. After Coen texted Rosenthall that the Shorts were "not withdrawing from the contract," P.App. 52-53, Ms. LaPlante sent her first direct email to the Shorts, apologizing and requesting that they agree to cancel the PSA – with no allusion to any termination right. P.App. 88. The LaPlantes' second direct email to the Shorts also asked for their agreement to cancel "rather than extend the process to July 14." P.App. 90.

The LaPlantes re-ratified the PSA three days later when agreeing the Shorts could exercise their inspection rights. The LaPlantes are correct that Rosenthall thought it would be "crazy" for them to let the Shorts inspect the property. DB. 30. But after Rosenthall informed the LaPlantes that she had denied the Shorts' inspection request, the LaPlantes rejected their realtor's advice. P.App. 112. They agreed to the inspection to avoid "risk[ing] our getting out of the contract come 7/14." P.App. 112. Rosenthall subsequently texted Coen:



App. 56.

In sum, even assuming that Rosenthall had referenced the provision on her phone call with Coen to declare the PSA terminated, and even assuming that the PSA allowed such verbal notice, the LaPlantes later ratified the PSA's effectiveness: first in their two direct emails to the Shorts

on June 5, and then by agreeing to an inspection days later. At no time thereafter did the LaPlantes declare the provision exercised and the PSA terminated. Accordingly, the PSA was effective as a matter of law after the LaPlantes purported termination rights expired on July 14.

III. THE COVENANT OF GOOD FAITH AND FAIR DEALING

The LaPlantes do not attempt to distinguish case law which holds that a party must attempt to fulfill condition precedents[7] in good faith – even ones a party believes impossible. Instead, they claim without authority that it would be "illogical" for the law to require them to "continue looking for a new home up to the deadline." DB. 32.

The LaPlantes acknowledged that it was possible to find suitable housing if they had not ended their search five weeks early. They frustrated the Shorts' reasonable expectation of performance, and breached the covenant of good faith and fair dealing. PB. 37.

IV. SPECIFIC PERFORMANCE

The LaPlantes contractually agreed to sell their real estate for a sum nearing seven figures. While the default remedy of specific performance may appear harsh, it is simply the natural consequence of their breach, for which money damages are irreparable. *See Livingston v. 18 Mile Point Drive, Ltd*., 158 N.H. 619, 626 (2009) (the goal is to produce "the same effect as if the performance due under a contract were rendered.").

The LaPlantes' preferred standard would allow a judge to rescind the PSA by "weighing" their nine-year history at the property as more worthy than the Shorts' attempt to purchase their first house. Tr. 8-9, 31, 100. But this is irrelevant. New Hampshire jurisprudence has consistently rejected a subjective standard: "specific performance cannot be denied to permit persons to avoid improvident agreements," or claims of "hardship." *See*

[7] The Shorts assume here that the provision allowed the LaPlantes to terminate the PSA on the July 14 deadline.

Great Bay Sch. v. Simplex Wire & Cable, 131 N.H. 682, 688 (1989); *see also* PB. 38.

The LaPlantes' cited authorities are all distinguishable from this well-established principle. First, *Hanslin v. Keith* is miscited. 120 N.H. 361, 364 (1980) (concluding that the record contained "no significant equitable reasons for refusing to grant specific performance"); *see also Ross v. Eichman*, 130 N.H. 556 (1988) (affirming grant of specific performance after remand in 129 N.H. 477 (1987) (specific performance may only be denied for "significant equitable reasons")); *Bailey v. Musumeci*, 134 N.H. 280, 284 (1991) (sellers are "generally limited" in the circumstances which entitle them to specific performance) (emphasis added) (citing 5A Corbin on Contracts § 1145 (1964). The remainder of the LaPlantes' cited decisions predate *Chute v. Chute*, 117 N.H. 676 (1977).

Most importantly, the LaPlantes allege no "significant equitable reasons" – impossibility, fraud, or mistake – which could justify the refusal of specific performance. It should be ordered.

V. THE LAPLANTES' BAD FAITH COUNTERCLAIM WAS PATENTLY UNREASONABLE

This argument was properly preserved below. PB. 8. Part and parcel of the LaPlantes' counterclaim was that the Shorts' breach of contract action was in bad faith after they refused to accept that the LaPlantes had clearly and unambiguously exercised the provision they intended would allow them to terminate the PSA on June 5. PB. 39-40. As particularly argued below, the LaPlantes' counterclaim was paradoxically grounded on the Shorts "not agreeing to cancel" the PSA on June 5. P.App. 252. This certainly put the issue of "ineffective notice" front and center. DB. 17; *see also* P.App. 231 (contrasting the LaPlantes' testimony[8] that agreeing to an inspection would have been "misleading and disingenuous" after the

[8] Tr. 182-83; 191.

LaPlantes had "no doubt" terminated the PSA on June 5, with their contradictory email three days later agreeing to the inspection because they wanted to avoid risking "getting out of the contract come 7/14."[9]).

Instead of explaining how their counterclaim allegations were reasonable, the LaPlantes rely on inadmissible settlement offers and out-of-context conduct of the Shorts. DB. 18-19. These allegations were irrelevant to their bad faith counterclaim. The LaPlantes had no reasonable basis to claim the Shorts acted in bad faith by "refusing to accept" a nonexistent termination on June 5, and subsequently filing suit.

Respectfully submitted,

CHAD AND KELLY SHORT

By their Attorneys,

/s/ Gregory L. Silverman
Gregory L. Silverman, NH Bar No. 265237
DICKINSON & SILVERMAN, PLLC
63 Pleasant St.
Hooksett, NH 03106
(603) 724-8089
gsilverman@dickinsonsilverman.com

Dated: October 19, 2020

[9] P.App. 112.

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no reply brief shall exceed 3,000 words…exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 2,996 words (including footnotes).[10]

/s/ Gregory L. Silverman
Gregory L. Silverman

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for Appellees, Kate Mahan, Esq., via the court's electronic filing system on today's date.

Dated: October 19, 2020 */s/ Gregory L. Silverman*
Gregory L. Silverman

[10] The textual words total 2,977, and the words within the excerpt of Appendix documents pasted on page 11 total 19.