MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Was-24-27

Charles Samuel Keegan
Plaintiff-Appellant

v.

Estate of Phyllis C. Bradbury, et al.
Defendants-Appellees

On Appeal from the Maine Superior Court, Washington County

BRIEF OF APPELLEES

Estate of Phyllis C. Bradbury, William E. Bradbury and Barbara Anne Schuffler

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I. APPELLEE'S STATEMENT OF THE CASE

The following Paragraph No. 26 was contained in an otherwise routine and comprehensive agreement for the purchase and sale of real estate located at 7 Lower High Street in Eastport:

> 26. OTHER CONDTIONS: Buyer would like the Right of First Refusal on the other side of abutting lot if ever sold Map K-7 Lot 1

This appeal addresses whether Paragraph No. 26 creates a contractual right of first refusal or whether it fails, either because the language is merely precatory or because the provision would violate the rule against perpetuities.

II. STATEMENT OF FACTS

This is an appeal from the grant of a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim on which relief can be granted. Accordingly, the factual allegations are derived entirely from the complaint, which, for purposes of this appeal, are deemed to be true. The following is a summary.

The Appellant, Charles Keegan, contracted to buy property at 7 Lower High Street in Eastport from Appellees, William E. Bradbury and Barbara Anne Shuffler, who were acting as co-

personal representatives of the Estate of Phyllis Clarke Bradbury. Paragraph No. 26 of their purchase and sale agreement, dated October 8, 2021, contained the following provision:

> 26. OTHER CONDITIONS: Buyer would like the Right of First Refusal on the sale of abutting lot if ever sold Map K-7 Lot 1

The agreement contained no further elaboration or reference to this language in Paragraph No. 26.

The parties closed on Mr. Keegan's purchase of 7 Lower High Street and his deed, dated November 22, 2021, was recorded at the Washington County Registry of Deeds in Book 4859, Page 162, on December 1, 2021.

Subsequently, Mr. Bradbury and Ms. Shuffler, as personal representatives, decided to sell the adjoining lot, Map K-7, Lot 1 – the parcel reference in Paragraph No. 26 of the purchase and sale agreement. They instructed their real estate agent to notify Mr. Keegan that they were negotiating with potential buyers and invited his response.

Mr. Keegan told the Appellees that he needed to know whether there was a signed purchase and sale agreement expressly subject

to the alleged right of first refusal. He told the Appellants, "I am happy to match the terms of the offer once I have confirmation of a bona fide third-party offer." On September 28, 2022, Mr. Keegan recorded an affidavit at the Washington County Registry of Deed asserting that the property was subject to his right of first refusal.

Notwithstanding Mr. Keegan's efforts, Mr. Bradbury and Ms. Shuffler, as personal representatives, sold the abutting lot, Map K-7, Lot 1, to the co-Appellants, Craig J. Holmes and Melissa M. Holmes, who, according to the complaint, had actual knowledge of Mr. Keenan's claim.

III. STATEMENT OF THE ISSUES

1. **Whether the Superior Court Correctly Found that Paragraph No. 26 of the Agreement Is Not Ambiguous;**

2. **Whether the Language of Paragraph No. 26 Is Merely Precatory and Does Not Create a Right of First Refusal; and**

3. **Whether a Right of First Refusal Created by Paragraph No. 26 of the Purchase and Sale Agreement Would Be Void Under the Rule Against Perpetuities.**

IV. SUMMARY OF APPELLEES' ARGUMENT

The extent of the Appellees' obligation under the purchase and sale agreement was contained in its Paragraph No. 2, where they agreed to sell Lot 7 at Lower High Street to the Appellant. Nowhere in the agreement did they grant or promise to grant a right of first refusal on Lot 1.

That the Appellant "would like the Right of First Refusal on the sale of abutting lot if ever sold" is merely a statement of the Appellant's wish or desire. Such precatory language, containing neither an offer nor an acceptance, cannot create contractual rights and obligations.

Also, if such language were held sufficient to create otherwise enforceable contractual rights, the provision would violate the rule against perpetuities. Language creating property rights in Lot 1 that may vest at some undefined time in the future "if ever sold," but not necessarily within 21 years after the death of an individual then alive or within 90 years after its creation does not conform to the requirements specified in 33 M.R.S. § 111.1.

V. LEGAL ARGUMENT

1. WHETHER THE SUPERIOR COURT CORRECTLY FOUND THAT PARAGRAPH NO. 26 OF THE AGREEMENT IS NOT AMBIGUOUS

The Appellees agree with the Appellant that whether a contract provision is ambiguous is a question of law. The rule was explained in *Portland Valve, Inc. v. Rockwood Sys. Corp.*, 460 A.2d 1383, 1387 (Me. 1983) as follows:

> The issue of whether contract language is ambiguous is a question of law for the Court. . .. The interpretation of an unambiguous written contract is a question of law for the Court; the interpretation of ambiguous language is a question for the factfinder. . .. The interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence. Once an ambiguity is found then extrinsic evidence may be admitted and considered to show the intention of the parties. . .. Contract language is ambiguous when it is reasonably susceptible of different interpretations [*Internal citations omitted*.]

The scope of what the sellers (Appellees) offered to sell and what the buyer (Appellant) accepted to buy is contained in Paragraph No. 2 of the purchase and sale agreement. Paragraph No. 2 states, in effect, that the Appellees were selling and the Appellant was buying property "located at 7 Lower High St and described in

deed(s) recorded at (the Washington County) Registry of Deeds Book(s) 3553, Page(s) 376."

"A contract is ambiguous either where its terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of the words employed and obligations undertaken." *Minturn v. Monrad*, 64 F.4th 9, 14 (1st Cir. 2023). This contract contains no language that can be interpreted as an offer by the Appellants to convey an interest in Lot 1 to the Appellant. A statement of a buyer's wish neither creates nor implies a statement of a seller's intention.

The Appellant argues, in effect, that a court may review extrinsic evidence while determining whether language is ambiguous. However, the case law is clear: a court may consider extrinsic evidence only after finding an ambiguity. *See T-M Oil Co. v. Pasquale*, 388 A.2d 82, 85 (Me. 1978), where the court held:

> Contract language that is unambiguous must be given its plain meaning, and the question of that meaning is purely one of law. . .. However, *when the contract language is ambiguous* and that ambiguity does not disappear when examined in the context of the other provisions in the instrument, ... it is proper for the factfinder to entertain extrinsic evidence casting light

> upon the intention of the parties with respect to the meaning of the unclear language. [*Italics added; internal citations omitted.*]

See also language quoted from *Portland Valve, Inc.*, page 7 herein.

Extrinsic evidence becomes admissible only after a finding that a contract provision is ambiguous. There is no precedent in the caselaw permitting a trial court to ferret through extrinsic evidence in search of an ambiguity.

2. WHETHER THE LANGUAGE OF PARAGRAPH NO. 26 IS PRECATORY AND DOES NOT CREATE A RIGHT OF FIRST REFUSAL

An expression of a wish or intention is not an offer to do anything governed by the law of contracts.

In *Owen v. Tunison*, 131 Me. 42, 158 A. 926 (1932), the plaintiff wrote a letter to the defendant, asking to buy property in Bucksport for $6,000. The defendant replied by writing:

> Because of improvements which have been added and an expenditure of several thousand dollars it would not be possible to sell it unless I was to receive $16,000 cash.

The plaintiff replied that he accepted the offer to sell for $16,000; however, the defendant declined to sell. The issue became whether the defendant's statement quoted above was a legally

binding offer to sell the property for $16,000. The court held that it was not. “There can be no contract for the sale of the property desired, no meeting of the minds of the owner and the prospective purchaser, unless there was an offer or proposal of sale. It can not be successfully argued that the defendant made any offer or proposal of sale.” *Id.,* at 44.

RESTATEMENT OF CONTRACTS, § 18 reads: “Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.” In the present case, there is no “manifestation of mutual assent;” the document contains only the statement of a “wish” by the Appellant and silence from the Appellees.

The mutual acceptance of the specific and comprehensive provisions in the purchase and sale agreement relating to the sale of Lot 7 does not amount to a “manifestation of mutual assent” to the creation of a first refusal applicable to Lot 1 as expressed by the Appellant in his wish documented in Paragraph No. 26.

In Broad St. Nat'l Bank v. Collier, 112 N.J.L. 41, 44, 169 A. 552, 553 (1933), the court said, “An expression of desire or hope is

not of itself an offer which will become a contract upon acceptance by the adversary party." "Precatory words are words whose ordinary significance imports entreaty, recommendation, or expectation rather than any mandatory direction." *Kemper v. Brown*, 325 Ga.App. 806, 808, 754 S.E.2d 141, 144 (2014) (cited by the Superior Court in its January 14, 2024, Order, page 6, footnote 3).

Other cases include *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797F.2d 370, 381 (7th Cir. 1986))("An expression of desire or hope is not of itself an offer which will become a contract upon acceptance by the adversary party"); *Johnson v. Herren*, C.A. No. 88-160-II, 1988 Tenn. App. LEXIS 715, at *6 (Ct. App. Nov. 10, 1988) (An offer "must be more than a mere expression of desire or hope"), and *Abrams v. Ill. Coll. of Podiatric Med.*, 77 Ill. App. 3d 471, 477, 32 Ill. Dec. 680, 684, 395 N.E.2d 1061, 1065 (1979) (student handbook was "more in the nature of an unenforceable expression of intention, hope or desire.")

The Appellant's statement in Paragraph No. 26 that he "would like the Right of First Refusal" is a mere expression of hope or wish. There is no provision in the purchase and sale agreement that can

be construed as an agreement by the Appellees to award a first refusal. Under these circumstances, absent a contractual obligation that creates a right of first refusal, the Superior Court properly granted the Appellees' Rule 12(b)(6) motion to dismiss the complaint.

3. WHETHER A RIGHT OF FIRST REFUSAL CREATED BY PARAGRAPH NO. 26 OF THE PURCHASE AND SALE AGREEMENT WOULD BE VOID UNDER THE RULE AGAINST PERPETUITIES.

A. The Superior Court's Failure to Address the Appellees' Alternative Theory Based on the Rule Against Perpetuities Is Not a Bar to Adjudication of that Alternative Theory by This Court

In its January 14, 2014, Order granting Appellees Bradbury's and Stauffer's Rule 12(b)(6) Motion, page 1, the Court noted that the Appellees sought, as an alternative remedy, dismissal on grounds that Paragraph No. 26 of the agreement is void under the rule against perpetuities, 33 M.R.S. § 111.

Although the Court's Order did not include an analysis, the issue of whether Paragraph No. 26 would violate the Rule Against Perpetuities remains alive – ripe for adjudication if this court should find that Paragraph No. 26 is otherwise valid and enforceable. *See,*

for example, Yankee Pride Transp. & Logistics, Inc. v. UIG, Inc., 2021 ME 65, ¶ 11, 264 A.3d 1248, where the court said, “We may affirm a summary judgment on alternative grounds from the trial court decision when we determine, as a matter of law, that there is another valid basis for the judgment." *See also Est. of Smith v. Cumberland Cnty.*, 2013 ME 13, ¶ 22, 60 A.3d 759 ("Although we reach our conclusion for reasons different from those indicated by the Superior Court . . . entry of summary judgment may be affirmed when we determine, as a matter of law, that there is another valid basis for the judgment."); and *Rainey v. Langen*, 2010 ME 56, ¶ 24, 998 A.2d 342 ("We are, of course, free to affirm a summary judgment for reasons different from those upon which the Superior Court relied.").

B. Paragraph 26 Would Violate the Rule Against Perpetuities

That a right of first refusal must conform to the rule against perpetuities is well-established in Maine’s common law. *See, for example, Low v. Spellman*, 629 A.2d 57, 58 (Me. 1993))(”Because this preemptive right of first refusal is limited by a fixed price but

endures forever, it violates the rule against perpetuities"); and *Pew v. Sayler*, 2015 ME 120, ¶ 21, 123 A.3d 522 (holding that rights of first refusal that last in perpetuity violate the rule against perpetuities).

The application of Maine's rule against perpetuities was considerably altered in 2019 by the adoption of 33 M.R.S. ch. 5-A, but the substance of the rule itself was preserved.[1]

The governing statute, 33 M.R.S. § 111.1. reads:

> A nonvested property interest is invalid unless:
>
> A. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
>
> B. The interest either vests or terminates within 90 years after its creation.

Whatever interest the plaintiff may have acquired in real estate because of the language in Paragraph No. 26 of the purchase and sale agreement, that interest is certainly "nonvested." There is no certainty that whatever interest the plaintiff may have acquired will

[1] Under Maine common law, "no interest is good unless it must vest, if at all, not later than twenty-one years after the death of some life in being at the creation of the interest." *White v. Fleet Bank*, 1999 ME 148, ¶ 10, 739 A.2d 373 (quoting from prior caselaw).

either vest or terminate within "21 years after the death of an individual then alive" or "within 90 years after its creation." Accordingly, that language which the Appellant construes as creating a right of first refusal cannot be reconciled, either with Maine's common law definition and application of the rule against perpetuities or with the modern version of the rule, 33 M.R.S. § 111.1.

VI. CONCLUSION

The language in Paragraph No. 26 cannot be construed as giving the Appellant a right of first refusal. The language is merely precatory, an expression of the Appellant's wish or desire.

Additionally, the language violates Maine's rule against perpetuities.

The decision of the Superior Court, dismissing the complaint for failure to state a claim on which relief can be granted, should be upheld for either or both reasons.

Dated: September 20, 2024

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CERTIFICATE OF SERVICE

This will certify that on September 20, 2024, I served ten copies of this Appellees' Brief on Appeal to the Clerk of the Maine Supreme Judicial Court by US. Mail, addressed as follows:

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I also served two copies of the within brief on the attorney for the Appellant, Charles Samuel Keegan, and two copies on the attorney for the co-Appellees, Craig J. Holmes and Melissa M. Holmes, by U.S. Mail, addressed as follows:

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