MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. WAS-24-227

Charles Samuel Keegan

Plaintiff-Appellant

v.

Estate of Phyllis C. Bradbury, et al.

Defendants-Appellees

On appeal from the Maine Superior Court, Washington County

HOLMES APPELLEES' APPEAL BRIEF

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STATEMENT OF THE CASE

This case concerns, a dispute arising out of the sale of One Lower High Street, Eastport, ME, (hereinafter the "Property") from the Estate of Phyllis C. Bradbury (hereinafter the "Estate") to Craig J. Holmes and Melissa M. Homes (hereinafter collectively the "Holmes") in the autumn of 2022. The dispute boils down to whether the Appellant had an actual right of first refusal to the Property. Appellant asserts that the right of first refusal was under the purchase and sale contract between himself and the Estate when he purchased the abutting lot, 7 Lower High Street, Eastport, Maine. No such right of refusal existed because there was no demonstration of a meeting of the minds as required under Maine contract law. The right of first refusal was never agreed-upon by the Appellant and the Estate. Therefore, Appellant had no basis for the claims brought in the Washington County Superior Court.

STATEMENT OF FACTS

Appellant and the Estate entered into a purchase and sale agreement dated October 8, 2021 (hereinafter the "P&S Agreement") for 7 Lower Hight Street, Eastport, Maine (hereinafter "Appellant's Property). *Appendix* (hereinafter "*App.*") p. 11, 109-113. Pages one through four of the P&S Agreement are initialed at the bottom as required, while page 5 provides the appellant's signature along with the

signature for the personal representative of the Estate. *App.* p. 109-113. Paragraph 26 of the P&S Agreement contained the following language: "Buyer would like the Right of First Refusal on the sale of abutting lot if ever sold Map K-7 Lot 1." *App.* p. 112. Neither Appellant nor the Estate initialed this specific language that was inserted in paragraph 26 of the P&S Agreement. *App.* p. 112. Appellant's Property was conveyed to him by virtue of a Deed of Sale by Personal Representative dated November 22, 2021, and recorded in Book 12657, Page162 at the Washington County Registry of Deeds. *App.* p. 114-116. Nowhere in the aforementioned Deed is there any reference to the Estate conveying a right of first refusal to Appellant. *App.* p. 114-116.

In September 2022, the Estate undertook efforts to sell the Property. *App.* p. 11. Appellant was notified by the Estate's real estate broker that the Estate was engaged in negotiations with a potential buyer for the property. *App.* p. 12. Appellant wrote that he was interested in using his right of first refusal, but he required that an executed agreement, with a sale price, between the Estate and a potential buyer be sent to him in order for him to decide whether to exercise his right of first refusal. *App.* p. 12. Appellant executed and recorded an affidavit that stated he possessed a right of first refusal on the Property. *App.* p. 12.

The Estate sold the property to Holmes, and Holmes accepted the deed. *App.* 12. Appellant never told the Estate or any other party that he wished to

exercise his supposed right of first refusal. *App.* p. 12. Appellant was not presented with a written document for the sale of the Property prior to its conveyance to the Holmes. *App.* p. 12.

PROCEDURAL HISTORY

On May 26, 2023, Appellant filed a three-count complaint at the Washington County Superior Court (hereinafter "Superior Court") against the Appellees. *App.* p. 3. The first count of Appellant's complaint sought an order under Maine Declaratory Judgment Act that applies to all Appellees and declares the following: (1) Appellant has a legally enforceable right of first refusal over the Property; (2) compels the Appellees to relinquish all rights to the Property and give Appellant the Property; (3) declares the Estate acted with "fraud, deceit, and/or malice in causing the [Estate-to-Holmes Deed] to be executed;" (4) declares the Holmes are not bona fide purchasers for value of the Property; and (5) declares the personal representatives of the Estate violated their fiduciary duties as personal representatives. *App.* p. 13.

The second count of Appellant's complaint alleged a breach of contract, specifically the P&S Agreement, by the Estate. *App.* p. 17-18. This count alleges that the Estate breached the P&S Agreement by failing to comply with Appellant's alleged right of first refusal. *App.* p. 17-18.

The final count of Appellant's complaint sought the equitable remedy of rescission of the deed conveying the Property to the Holmes. *App.* p. 19. This count alleged that the aforementioned conveyance violated Appellant's alleged right of first refusal. *App.* p. 19.

The Estate filed a Motion to Dismiss Appellant's complaint on August 3, 2023. *App.* p. 5. Appellant filed an Objection to the Estate's Motion to Dismiss, and the Estate filed a Reply Brief. *App.* p. 5. On January 14, 2024 the Superior Court granted the Estate's Motion to Dismiss. *App.* p. 5-6.

Holmes filed a Motion to Dismiss Appellant's complaint on March 4, 2024. *App.* p. 6. Appellant filed an Objection to the Estate's Motion to Dismiss, and Holmes filed a Reply Brief. *App.* p. 6-7. The Superior Court granted Holmes' Motion to Dismiss on April 18, 2024. *App.* p. 6-7. This appeal followed.

STATEMENT OF THE ISSUES PRESENTED

I. THE SUPERIOR COURT DID NOT ERR WHEN IT DISMISSED APPELLANT'S COMPLAINT.

A. THE SUPERIOR COURT DID NOT ERR WHEN IT HELD THAT APPELLANT DID NOT HAVE AN ENFORCEABLE CONTRACT THAT PROVIDED A RIGHT OF FIRST REFUSAL;

B. THERE WAS NO AGREEMENT TO A RIGHT OF FIRST REFUSAL;

C. **THE SUPERIOR COURT DID NOT ERR WHEN IT HELD APPELLANT DID NOT HAVE A COGNIZABLE CLAIM UNDER MAINE'S DECLARATORY JUDGMENTS ACT; AND**

D. **PLAINTIFF HAS NO RIGHT OF RECISSION OR CLAIM IN EQUITY.**

II. **THE RIGHT OF FIRST REFUSAL VIOLATES THE RULE AGAINST PERPETUITIES.**

SUMMARY OF APPELLEES' ARGUMENT

The Superior Court was correct when it held that there was no enforceable contract between the Estate and Appellant. The Appellant's argument must fail because it asserts that precatory language is enforceable. The Superior Court was correct when it held that the precatory language was not enforceable. The Superior Court was correct when it held that the contract was unambiguous and could be ruled upon as a matter of law. The Superior Court was correct when it held that the language in paragraph 26 of the P&S Agreement did not contain enforceable language. The Superior Court was correct when it held that as a matter of law, no right of first refusal existed for the Appellant.

Additionally, the right of first refusal violates the rule against perpetuities. The Superior Court did not address that argument, because it was unnecessary.

STANDARD OF REVIEW

When reviewing a dismissal, the complaint is examined in the light most favorable to the plaintiff. *See McAfee v. Cole,* 637 A.2d 463, 465 (Me. 1994). The complaint is reviewed "to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* Dismissal should be entered when it is undisputable that the Plaintiff is not entitled to any relief. *See id.*

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR WHEN IT DISMISSED APPELLANT'S COMPLAINT.

A. THE SUPERIOR COURT DID NOT ERR WHEN IT HELD THAT APPELLANT DID NOT HAVE AN ENFORCEABLE CONTRACT WITH A RIGHT OF FIRST REFUSAL.

The first step in contract analysis is determining whether the contract language is ambiguous. *See Reliance Nat'l Indem. v. Knowles Indus. Services Corp.,* 2005 ME 29, ¶ 24, 868 A.2d 220, 228. "A contractual provision is ambiguous "if it is reasonably possible to give that provision at least two different meanings." *Id. (quoting Villas by the Sea Owners Ass'n v. Garrity,* 2000 ME 48, ¶ 9, 748 A.2d 457, 461. When contractual language is ambiguous, the interpretation of the contract is a question for the fact finder. *See id.* "The interpretation of an

unambiguous contract is a question of law." *Handy Boat Serv., Inc. v. Pro. Servs., Inc.,* 1998 ME 134, ¶ 7, 711 A.2d 1306, 1308.

"A contract is to be interpreted to effect the parties' intentions as reflected in the written instrument, construed with regard for the subject matter, motive, and purpose of the agreement, as well as the object to be accomplished." *Handy Boat Serv., Inc.* 1998 ME 134, ¶ 7, 711 A.2d at 1308. "The parol evidence rule operates to exclude from judicial consideration extrinsic evidence offered to alter, augment, or contradict the unambiguous language of an integrated written agreement." *Id.* at ¶ 11, 1308-09. Considering extrinsic evidence "is only appropriate where the agreement is ambiguous on the issue of integration." *Id.* at ¶ 11, 1309. When the language of a contract in respect to scope and integration is unambiguous, then "no extrinsic evidence concerning integration may be presented by the parties or considered by the court." *Id.* "Precatory words are words whose ordinary significance imports entreaty, recommendation, or expectation rather than mandatory direction." *Kemper v. Brown,* 325 Ga. App. 806, 808, 754 S.E.2d 141, 144 (Ga. 2014).

In *Broad St. Nat'l Bank of Trenton 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. *Banning* Co. v. *California,* 240 U.S. 142, 153; 36 Sup. Ct. 338; 60 L. Ed. 569; *Bolter v.*

Kozlowski, 211 Ill. 79; 71 N.E. Rep. 858; *Murphy v. City of Yonkers,* 213 N.Y. 124; 107 N.E. Rep. 267; 1 *Page on Contracts*,§ 78."

The Superior Court reviewed paragraph 26 of the P&S Agreement and properly concluded that the language in paragraph 26 was unambiguous. *App. p. 14*. Therefore, the interpretation of paragraph 26 was a matter of law. The Superior Court was correct when it held "(t)he plain meaning of the words in paragraph 26 do not provide Plaintiff with a *right* of first refusal if the Estate decides to sell the abutting lot." *App. p. 14*. The Superior Court was correct when it held that "(t)he words are precatory and do not establish any obligations on the parties to the agreement nor impose any obligations on any of the parties." *App. p. 14*.

Paragraph 26 of the P&S Agreement is aspirational. Nothing in paragraph 26 demonstrates any agreement between the parties. Nowhere in paragraph 26 is there to be found words memorializing an agreement between both parties. Instead, paragraph 26 says only that the Appellant "would like." That is not an agreement, and there is no ambiguity. Thus, the Superior Court was correct when it held that the words in paragraph 26 are precatory and provide no right of first refusal.

B. THERE WAS NO AGREEMENT TO A RIGHT OF FIRST REFUSAL.

Appellant's claim is based on a proposition not a contract. Paragraph 26 of the purchase and sale agreement expresses a wish, intention, or sentiment. Under no theory of contract law does it form a contract.

It is fundamental contract law, for a contract to exist, there must be a proposition by one party, acceptance by the other. *See Jenness v. Mount Hope Iron Co.,* 53 Me. 20, 23 (1864). Acceptance of a contract is completion of the contract. *See Morneault v. Cohen,* 122 Me. 543, 120 A. 915, 917 (1923). There is no proof of acceptance in Paragraph 26 of the purchase and sale agreement. Therefore, there is no enforceable contract.

A contract requires a meeting of the minds. *See Owen v. Tunison,* 131 Me. 42, 158 A. 926, 927 (1932). In *Owen,* a prospective purchaser offered $6,000 to purchase property. *See id.* The owner responded with a counteroffer for $16,000. *See id.* The court held that there was no contract formed because there was no meeting of the minds. *See id.* The proposal was not accepted, therefore no binding contract existed. *See id.* That is exactly the case at bar.

The 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 case at bar, there is no evidence of any

"manifestation of mutual assent." Appellant's desire, intention or wish is not a manifestation of mutual assent. The mutual acceptance of the specific provisions of the purchase and sale agreement relating to the sale of real estate does not amount to a "manifestation of mutual assent" to the desire expressed by Appellant in paragraph 26.

Other cases include *Olympia Equip. Leasing* Co. *v. W. Union Tel.* Co., 797 F.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.")

Appellant's statement in paragraph 26 that he "would like to have the Right of First Refusal" is a mere expression of desire, intention, hope, or wish. There is nothing that shows the Estate granting Appellant's desire, intention, hope, or wish. Therefore, no provision in the purchase and sale agreement can be construed as an agreement by the Estate to grant a right of first refusal. Under these facts, there was no contractual obligation creating a right of first refusal. An aspiration is not an agreement. The Superior Court was correct when it held that there was not an

enforceable contract granting a right of first refusal. Thus, the Superior Court was correct when it dismissed Appellant's Breach of Contract claim.

C. THE SUPERIOR COURT DID NOT ERR WHEN IT HELD APPELLANT DID NOT HAVE A COGNIZABLE CLAIM UNDER MAINE'S DECLARATORY JUDGMENTS ACT.

The Superior Court dismissed the Declaratory Judgment claim, because "Plaintiff's count I does not set forth any cognizable claim to relief under the Declaratory Judgments Act." *App p.16.* The Law Court has "consistently held that the Act may only be invoked when there is a genuine controversy." *Ten Voters of the City of Biddeford v. City of Biddeford,* 2003 ME 59, ¶7, 822 A.2d 1196, 1200. A claim under the Act must show some injury. *See id.* "A declaratory judgment action will not be entertained where the questions propounded by the parties no longer present the Court with an active dispute of real interests between the litigants." *Berry v. Daigle,* 322 A.2d 320, 325 (Me. 1974), *overruled on other grounds by Oakes v. Town of Richmond,* 2023 ME 65, 303 A.3d 650. This requirement of standing is fundamental to civil litigation. *See id.* at 325-326. As stated in the Dismissal Order, the Plaintiff must show that he has an established justiciable claim and a "sufficiently substantial interest to warrant judicial protection." *App. p. 16* (*quoting Berry,* 322 A.2d at 326).

The Superior Court was correct when it held that Appellant "does not set forth any cognizable claim to relief under the Declaratory Judgments Act." *App*

p.16. The Superior Court said it best when it held that Plaintiff's "demand for an injunction compelling the Holmes defendants to give him 1 Lower High Street does not set forth a claim under the Declaratory Judgments Act because it both seeks relief that is beyond the scope of the Act and his complaint does set forth any legitimate grounds on which he could have a legally enforceable right to the property."[1] *App p.17*. Thus, the Superior Court was correct when it dismissed Appellant's Declaratory Judgment claim.

D. APPELLANT HAS NO RIGHT OF RECISSION OR CLAIM IN EQUITY.

The Superior Court held that Appellant had no right of recission nor claim in equity, because he did not possess a right of first refusal. *App. p.19*. "Rescission is an equitable remedy which is available only on 'justifiable' grounds." *Mott v. Lombard,* 655 A.2d 362, 365 (Me. 1995).

In the case at bar, the grounds for recission are that the sale violates Appellant's right of first refusal. The Superior Court held that Appellant did not have a right of first refusal. *App. p.19*. Therefore, Appellant had no grounds much less "justifiable grounds" that would cause the Superior Court to grant the equitable remedy of recission. The Superior Court correctly held that Count III of

[1] The Dismissal Order appears to be missing the word "not." Specifically, "not" should be placed between "does" and "set forth any legitimate grounds…". Based on the context of the Dismissal Order, it seems that "not" was mistakenly omitted.

Appellant's complaint does not state any claim upon which relief should be granted. *App. p. 19.* Thus, the Superior Court was correct when it dismissed Appellant's complaint.

II. THE RIGHT OF FIRST REFUSAL VIOLATES THE RULE AGAINST PERPETUITIES.

The Superior Court dismissed Appellant's complaint because Appellant did not have a right of first refusal. Appellees also argue that the language in paragraph 26 violated the Rule against Perpetuities.

It is well established under Maine Law that a right of first refusal must conform with the Rule against Perpetuities. *See Low v. Spellman,* 629 A.2d 57, 58 (Me. 1993). A right of first refusal that is limited by a fixed price but lasts forever violates the Rule against Perpetuities. *See Pew v. Sayler,* 2015 ME 120, ¶ 21; 123 A.3d 522.

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.

33 M.R.S.A. § 111. The statute and case law demonstrate that Maine Law requires that rights adhere to the Rule against Perpetuities. The timing of when the interest was created is the critical time under the statute. At the time the interest was created title could vest within the lives of the Sellers' heirs and assigns of the Buyer's assigns; these individuals may not have been living when the interest was

created. Additionally, these individuals may have been born more than 21 years after the death of any current living person. The statute is clear that the time of creation is the focal point for determining the applicability of the rule, not hindsight. The Rule against Perpetuities requires that Plaintiff's case be dismissed.

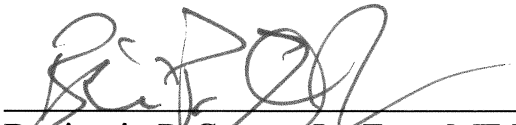
In the case at bar, the Appellant has at most a nonvested property interest. Appellant's interest, in so much as it is, provides no proof that it will either vest or terminate within 21 years after the death of a living person. Thus, paragraph 26 violates Maine's Rule Against Perpetuities.

CONCLUSION

For the reasons stated above, this Honorable Court should affirm the Dismissal Orders by the Washington County Superior Court.

Dated: September 20, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 7A(i) of the Maine Rules of Appellate Procedure, I, Benjamin P. Campo Jr., a Member in good standing of the Bar of the State of Maine and counsel for Defendants-Appellees Craig J. Holmes and Melissa M. Holmes, hereby certify as follows:

1. On September 20, 2024, I served ten (10) copies of the within Holmes Appellee Appeal Brief on the Clerk of the Maine Supreme Judicial Court by hand delivery and one (1) electronic copy, addressed and emailed as follows:

Matthew E. Pollack, Clerk
Maine Supreme Judicial Court
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2. On September 20, 2024, I served two (2) copies of the within Holmes Appellee Appeal Brief on counsel for Plaintiff-Appellant Charles S. Keegan and Defendant-Appellees the Estate of Phyllis C. Bradbury, William E. Bradbury, Barbara Anne Shuffler, by placing them in the U.S. mail, postage prepaid, and e-mail, addressed as follows:

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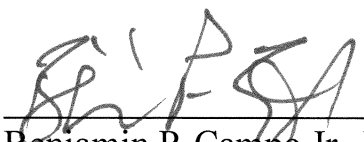
Dated: September 19, 2024



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