MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Cum-24-311

Richard A. Liberty et al.

Plaintiffs-Appellants

v.

Alvin G. Mack et al.

Defendants-Appellees

On appeal from the Maine Superior Court, Cumberland County

APPEAL BRIEF

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MAINE SUPREME JUDICIAL COURT **Sitting as the Law Court**
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RICHARD A. LIBERTY, ET AL.	)	
	)	**APPELLANTS' APPEAL BRIEF**
Appellants,	)	
v.	)	(Title to Real Estate Is Involved)
	)	
ALVIN G. MACK, ET AL.	)	
	)	
Appellees.	)	

NOW COME Plaintiffs-Appellants, **RICHARD A. LIBERTY, ET AL.**, by and through undersigned counsel, in that matter related to Defendants-Appellees, **ALVIN G. MACK, ET AL.**, and hereby appeal the Superior Court's Judgment dated April 19, 2024 as follows:

I. STATEMENT OF THE CASE

This appeal arises out of Alvin Mack's breach of a right of first refusal held by Richard and Linda Liberty (collectively, the "Libertys") on the sale of real property located at 17 LBJ Drive, Harrison, Maine (the "Property" or "17 LBJ"). The Superior Court held that the Libertys' right of first refusal was valid, and that it was materially breached by Alvin Mack when he granted an Option Agreement to Investment Properties, LLC without notifying the Libertys and offering them the same terms. The only issue on appeal is whether the Libertys met their burden of proving damages as an essential element of their claim against Alvin Mack for breach of their right of first refusal.

II. STATEMENT OF FACTS

In 1984, Richard and Linda Liberty purchased a lot in a development located on Long Lake in Harrison, Maine. (Tr. Vol. II, 22). The Libertys purchased the lot in order to create a compound that would remain in the family. (Tr. Vol. II, 26). In 1985, the Libertys conveyed a portion of their aforementioned lot, said portion being 17 LBJ, to James and Debra Johnson. (A. 68). Debra Johnson is Linda Liberty's sister. (Tr. Vol. II, 23). The Johnsons executed a promissory note in the amount of $15,000.00 in favor of the Libertys. (A. 151). The Johnsons needed to build a home on their portion of the lot. (Tr. Vol. II, 26). To make it easier for the Johnsons to obtain a construction loan, the Libertys did not take a mortgage. (Tr.

Vol. II, 28). In addition to the $15,000.00 promissory note, the Johnsons executed a document titled "Option to Purchase Real Estate with Time and Terms Contingent on a Bona Fide Offer" (hereinafter "1985 ROFR") in favor of the Libertys stating that the Grantor (i.e., the Johnsons) would not:

> sell or otherwise convey the land and buildings [at 17 LBJ] to any person unless (1) the Grantor has received a bona fide written offer to purchase the same signed by the person making such offer (the offeror), containing all terms of purchase and permitting acceptance by the Grantor at any time not less than sixty (60) days after mailing the notice, (2) the Grantor has given the Optionee written notice, signed by the Grantor, mailed postage prepaid to the Optionee…stating the name and address of the offeror, the terms and conditions of the offer and the encumbrances subject to which the property is to be conveyed, and containing an offer by the grantor to sell to the same Optionee on the same terms and conditions as said bone fide offer….

(A. 69). The 1985 ROFR further states that that "any purported conveyance in violation of [the 1985 ROFR] shall be void." (A. 69). In the event that the Libertys exercise the option and purchase the Property, they would get credit for any amount owed by the Johnsons. (A. 69). The 1985 ROFR states that it does not apply to "a bona fide mortgage given to a financial institution." (A. 69).

The Johnsons lived at 17 LBJ from 1985 until 2009, at which time the Property was being foreclosed upon. (Tr. Vol. II, 41-42). The Johnsons' lender (Aurora Loan Services, LLC) held a lien on the Property in the amount of $720,000.00, which exceeded the value of the Property. (A. 77). The Libertys were concerned that they would lose their ability to exercise their rights under the

1985 ROFR upon foreclosure. (Tr. Vol. II, 43, 48). They were not in a position to purchase the Property at the underwater value. (Tr. Vol. II, 42, 49). Mr. Liberty discussed the situation with Adam Mack, who was a consultant to him on a real estate development project in Gray. (Tr. Vol. II, 43). Mr. Liberty had known Adam Mack since he was a child and understood him to be a real estate expert who could help him resolve the issue regarding 17 LBJ. (Tr. Vol. II, 43). Adam Mack is Alvin Mack's son. (Tr. Vol. II, 44). With Mr. Liberty's blessing, Adam Mack negotiated a direct short sale of the Property for $392,000.00, at which time he knew that Mr. Liberty eventually wanted to purchase the Property at its fair market value and bring it back into the family compound. (Tr. Vol. II, 46, 49). Adam Mack and the Libertys negotiated an agreement, titled "Agreement on the Sale of 17 LBJ Lane, Harrison, Maine" (hereinafter the "Sale Agreement"), between the Libertys and AMJK Properties, LLC ("AMJK"). (A. 72). Adam Mack signed the Sale Agreement on behalf of AMJK as its manager. (A. 72). Under the Sale Agreement, the parties agreed that AMJK would purchase the Property, make improvements to it, and attempt to resell it, and the Libertys would "continue to have a RFR on the property." (A. 72). The Sale Agreement includes profit-sharing provisions under which, if the Libertys did not purchase the Property in accordance with their rights under the Sale Agreement, they would receive 50% of the profits from the sale up to $65,000.00. (A. 72). The Sale Agreement does not

mention the credit for the Johnson debt included in the 1985 ROFR. (A. 72). The Sale Agreement indicated that the Property could be transferred "to a related entity of AMJK, Julia Kopytova, Adam Mack, Alvin Mack, Big Mack Development, or the Minat Corporation (Exempt Entities)" without triggering the Libertys' ROFR or the need for a cash payout to the Libertys. (A. 72). Adam Mack was affiliated with each of the Exempt Entities. (Tr. Vol. III, 10-11). Adam Mack testified at trial that the reason for including the related entities was to enable him to purchase 17 LBJ with whichever of the related entities could obtain the best financing terms. (Tr. Vol. III, 17-18). The Sale Agreement expressly states that the Libertys (collectively referred to therein as "RLL") "shall have the same RFR on the Property if any of the Exempt Entities acquire the Property and that RLL will still retain its [sic] 50% of Profit up to a total return to RLL of $65,000 when Exempt Entities sell the Property." (A. 72). The Libertys signed the Sale Agreement on September 13, 2009, and Adam Mack signed on September 14, 2009. (A. 72).

Though it is missing, the original Purchase and Sale Agreement with the Johnsons named The Minat Corporation ("Minat") as the buyer of 17 LBJ. (A. 152). On September 14, 2009, Minat assigned the original Purchase and Sale Agreement to Big Mack Development. (A. 152). Adam Mack executed the assignment on behalf of Minat as its agent, and again on behalf of Big Mack Development as its manager. (A. 152). On September 16, 2009, Adam and Alvin

Mack each signed a "Written Unanimous Consent to Action Taken by the Officers & Shareholders & Directors Without a Meeting" (hereinafter the "Unanimous Consent"), whereby Adam Mack transferred his 100% ownership of Big Mack Development to Alvin Mack. (A. 73). The Unanimous Consent authorized Big Mack Development to purchase 17 LBJ from the Johnsons for $392,000.00 and finance the acquisition loan with a loan through Sawin Capital, LLC ("Sawin"). (A. 73). The ownership transfer of Big Mack Development enabled the financing of the purchase of the Property using Alvin Mack's credit. (Tr. Vol. III, 27, 55). Adam Mack testified at trial that he could not get financing through his own companies, so his father stepped in. (Tr. Vol. III, 27). Adam and Alvin Mack worked with multiple lenders to get financing for the short sale before financing was ultimately obtained through Sawin. (Tr. Vol. III, 24-25). Sawin provided a short-term loan in the amount of $420,000.00, with $20,000.00 reserved for improvements to the Property after closing. (A. 82).[1] Alvin was aware when he entered into the loan agreement with Sawin that he would quickly need to refinance. (Tr. Vol. IV, 27).

On September 18, 2009, the Libertys executed a "Limited Release of Option to Purchase Real Estate" (hereinafter the "Limited Release"), under which they released the 1985 ROFR "in order to permit the sale of property located at 17 LBJ

[1] Page 2 is missing from the three-page Commitment Letter attached to the Libertys' Complaint as Exhibit H and produced at trial as Pl.'s Ex. 14.

Drive, Harrison, Maine to BIG MACK DEVELOPMENT, a Maine corporation, and/or its affiliates." (A. 81). Sawin, Big Mack Development's lender, required the Limited Release to complete the sale of the Property. (A. 77). The Limited Release was recorded in the Cumberland County Registry of Deeds ("CCRD") on September 29, 2009 in Book 27286, Page 108. (A. 81). The Limited Release expressly states that the release applies only to the conveyance of 17 LBJ to Big Mack Development and/or its affiliates, and that "the Option to Purchase shall otherwise remain in full force and effect." (A. 81). The Libertys executed the Limited Release in reliance on the promise that their ROFR would remain in full force and effect as described in the Sale Agreement. (Tr. Vol. II, 162).

The Johnsons conveyed 17 LBJ to Big Mack Development by Warranty Deed dated September 22, 2009 and recorded in the CCRD on September 29, 2009 in Book 27286, Page 109. (A. 79). Alvin Mack was the sole owner of Big Mack Development at the time of the transfer. (A. 73, 79; Tr. Vol. IV, 64). The Warranty Deed to Big Mack Development does not mention the 1985 ROFR, the Sale Agreement, or the Limited Release. (A. 79). The Warranty Deed and the Limited Release were recorded within a minute of each other at the Registry of Deeds. (A. 79-81). Alvin Mack was on record notice of the Limited Release and the 1985 ROFR when he purchased the Property. (A. 69, 79-81). Alvin Mack testified at trial that, at some point in the run-up to the closing on 17 LBJ, he was

made aware that there was an issue with the title but did not know what the specific issue was. (Tr. Vol. IV, 24-25). He further testified that it was his understanding that the issue had to be cleared up in order to proceed with the closing. (Tr. Vol. IV, 24-26). Adam Mack had previously testified at trial that, although he could not remember providing a copy of the Sale Agreement to his father, the right of first refusal described in the Sale Agreement was "a key point of the deal" with the Libertys that he would have discussed with his father prior to closing. (Tr. Vol. III, 42-43). The Superior Court found that (1) it is more likely than not that Alvin Mack had actual knowledge that the Libertys had to release their ROFR before the Johnsons could convey the Property to Big Mack Development; (2) the ROFR was the issue that arose before closing, and Alvin Mack had specific knowledge about the nature of the issue; (3) Alvin Mack knew that part of the agreement was that the Libertys would retain their right of first refusal; (4) although there was insufficient evidence to support a finding that Alvin Mack reviewed or was aware of the Sale Agreement, he was aware of the Limited Release; and (5) the Limited Release was a binding contract between the Libertys and Big Mack Development, who acquired the Property pursuant to the Limited Release. (A. 32).

After closing on the sale of 17 LBJ to Big Mack Development, Adam Mack was involved in hiring people to perform improvement work on the Property,

including painting and planting blueberry bushes to address concerns raised by the Department of Environmental Protection. (Tr. Vol. III, 84, 90). According to Alvin Mack's testimony at trial, the $20,000.00 of financing from Sawin that was reserved for improvements to the Property was used quickly after closing. (Tr. Vol. III, 28). Alvin Mack then refinanced the Sawin financing through a Home Equity Line of Credit from TD Bank in the amount of $450,000.00 and granted a mortgage on the Property in favor of TD Bank to secure the loan. (A. 153). TD Bank paid off the Sawin debt directly. (Tr. Vol. III, 107).

On February 2, 2010, Big Mack Development conveyed the Property to Alvin Mack, individually, by Warranty Deed recorded in the CCRD on February 5, 2010 in Book 27577, Page 217. (A. 84). During a period of time in 2010-2011, 17 LBJ was used as a rental property managed by Alvin Mack and Frederick Lockwood. (Tr. Vol. II, 70). Alvin Mack and Mr. Lockwood were involved in significant real estate development projects together, including multiple rental properties in Lewiston. (Tr. Vol. 1, 157). The Lewiston properties were owned by Mr. Lockwood's limited liability company, Investment Properties, LLC. (Tr. Vol. 1, 157-158).

On August 16, 2011, Alvin Mack entered into a purchase and sale agreement with Steven and Nancy Rogers, prospective buyers of 17 LBJ, under which the purchase price for the Property was $495,000.00. (A. 156). Alvin Mack never

notified the Libertys of his agreement with the Rogers, and the sale ultimately did not go through. (Tr. Vol. IV, 69-71).

On February 28, 2014, Interim Capital, LLC made a loan to Investment Properties, LLC, as evidenced by an Adjustable Rate Promissory Note (hereinafter referred to as "Note #8013"), in the original principal amount of $578,041.83. (A. 90). Interim Capital, LLC is related to Capital Servicing, Inc. (d/b/a Atlantic National Servicing LLC), which acts as an agent in the administration of loans for several lending entities including Interim Capital, LLC, Atlantic Northern LLC, Atlantic National Trust, LLC, Interim Holdings, LLC, Atlantic Holdings, LLC, Atlantic Capital Finance Company, LLC, and others (referred to herein collectively as "Atlantic"). (Tr, Vol. III, 130). Note #8013 was secured by a senior mortgage and security agreement encumbering multiple rental properties in Lewiston, and a junior mortgage and security agreement encumbering property owned by Louis Mack Co., Inc., located at 750 Warren Avenue, Portland, Maine. (A. 96-97, 238). Mr. Lockwood executed Note #8013 on behalf of Investment Properties, LLC as its manager. (A. 98). Louis Mack Co., Inc., Mr. Lockwood, and Samuel Richard Mack each executed a Guaranty for the payment of Note #8013. (A. 102-116).

On June 17, 2014, Interim Capital, LLC assigned its mortgage from Louis Mack Co., Inc., dated February 28, 2014, to TD Bank, N.A. (A. 117). The

mortgage was secured by 750 Warren Avenue, Portland, Maine. (A. 117). The Assignment of Mortgage was recorded in the CCRD on June 23, 2014 in Book 31582, Page 47. (A. 117).

On July 30, 2015, Interim Capital, LLC made a loan to Investment Properties, LLC, as evidenced by an Adjustable Rate Promissory Note (hereinafter "Note #8012"), in the original principal amount of $45,000.00. (A. 161). Note #8012 was secured by a mortgage and security agreement encumbering rental properties in Lewiston, including those encumbered by the mortgage and security agreement associated with Note #8013 and others. (A. 167). Note #8012 was executed by Mr. Lockwood on behalf of Investment Properties, LLC as its manager and individually as a Guarantor. (A. 169).

On October 29, 2015, Atlantic National Trust, LLC made a loan to Louis Mack Co., Inc. and Alvin G. Mack, as evidenced by a Promissory Note (hereinafter "Note #7005"), in the original principal amount of $62,000.00. (A. 172). Alvin Mack granted a mortgage on 17 LBJ to Atlantic National Trust, LLC to secure Note #7005. (A. 187).

On February 24, 2016, Alvin Mack and Mr. Lockwood executed a document titled "Certificate of Partners." (A. 89). The Certificate of Partners states that Alvin Mack, Frederick Lockwood, and Samuel Mack (who never executed the document) were the "sole partners in the ownership of 17 LBJ Drive [sic]

Harrison, Maine, which is more particularly described in the Warranty Deed from Big Mack Development to Alvin G. Mack dated February 2, 2010 and recorded February 5, 2010 in the CCRD in Book 27577, Page 217." (A. 89). The Certificate of Partners authorized "the financing of a line of credit as a co-borrower with Alvin G. Mack in the maximum amount of $475,000.00 with Atlantic Capital Finance Company LLC." (A. 89). Alvin Mack never conveyed an interest in the Property to Mr. Lockwood. While Mr. Lockwood testified that he believed he was an owner of the Property by virtue of the Certificate of Partners, Alvin Mack testified that the purpose of the document was to allocate some of the profit to Mr. Lockwood if Alvin ever sold the Property at a "big profit." (Tr. Vol. I, 167; Tr. Vol. IV, 43). In conjunction with the Certificate of Partners, Alvin Mack and Mr. Lockwood executed an Option Agreement under which Alvin Mack granted Investment Properties, LLC an option to purchase the Property. (A. 118). The Option Agreement states that the "purchase price for the acquisition of the Real Estate shall be the short sale price obtained in negotiations with TD Bank plus all closing cost [sic] for the sale." (A. 119). The option was to remain in effect for two years. (A. 118). Alvin Mack testified that the balance on the TD Bank loan was about $450,000.00 when the Option Agreement was executed. (Tr. Vol. IV, 37-38)[2]. The Option Agreement was not recorded, and Investment Properties did

[2] To the extent that Alvin Mack's testimony is "indiscernible" in the transcript, please see finding 40 on page 7 of the Superior Court's Judgment. (A. 34).

not exercise the option to purchase the Property. The Option Agreement further states that "[c]onveyance shall be made by Warranty Deed conveying good marketable title to said Real Estate, as defined by the standards adopted by the Maine Bar Association, free and clear of encumbrances, except for conventional utility easements and such restrictions as would not make the title unmarketable." (A. 119). Also on February 24, 2016, Atlantic Capital Finance Company, LLC extended a line of credit to Investment Properties, LLC, as evidenced by an Adjustable Rate Line of Credit (hereinafter "Note #3010"), in an amount not to exceed $475,000.00. (A. 176). Note #3010 was secured by mortgages and security agreements encumbering 17 LBJ and multiple properties in Lewiston and Windham. (A. 182, 222). Alvin Mack and Investment Properties, LLC granted Atlantic additional mortgages encumbering 17 LBJ in connection with Note #8013 and Note #8012 that same day. (A. 190, 206). Alvin Mack testified at trial that the purpose of the $475,000.00 line of credit was to obtain a short sale pay off of the TD Bank loan, though a short sale never occurred. (Tr. Vol. IV, 90-91).

In the winter of 2016-2017, a frozen pipe burst at the Property causing substantial damage to the home. (Tr. Vol. II, 72-73; Tr. Vol. IV, 44-45). Alvin Mack, Mr. Lockwood, and their entities experienced serious financial difficulties and were ultimately unable to meet their obligations to Atlantic. On May 4, 2017,

Atlantic entered into a Loan Modification Agreement with Investment Properties, LLC, Louis Mack Co., Inc., and Alvin Mack (collectively referred to therein as "Borrowers"), and Mr. Lockwood[3], Louis Mack Co., Inc., and Alvin Mack, as Personal Representative of the Estate of Samuel Richard Mack (collectively referred to therein as "Guarantors" or, together with the Borrowers, "Obligors"). (A. 124). The Loan Modification Agreement provides that the legal balance of the Borrowers' obligations to Atlantic was approximately $828,562.67 and contemplated payment of the obligations in a specified order. (A. 124). In Paragraph 2 of the Loan Modification Agreement, Atlantic agreed to provide a legal balance credit of $279,000.00 less closing costs for three Lewiston rental properties owned by Investment Properties, LLC (275 Bates, 73 Bartlett, and 182 Blake Street). (A. 124). In Paragraph 3 of the Agreement, Atlantic agreed to release its interest in an additional rental property in Lewiston (184 Bartlett Street) for a net amount of $315,000.00 to Atlantic by June 8, 2017. (A. 124). The parties included a handwritten provision as subparagraph 3(a) stating that "[f]inal deficiency will be allocated between 750 Warren Ave and a cash payment by a future agreement between the Parties." (A. 124). On May 24, 2017, the parties executed a First Amendment to Loan Modification Agreement. (A. 257). The Amendment stated that Atlantic would provide a legal balance credit of

[3] The Loan Modification Agreement mistakenly names Richard Lockwood, rather than Frederick Lockwood, as a Guarantor/Obligor. Frederick Lockwood testified at trial that he was a party to this Agreement and executed the document himself. (Tr. Vol. I, 186-190).

$315,000.00 less closing costs for 184 Bartlett Street and agree to release its interest in 17 LBJ and an undeveloped lot in Windham for a net amount to Atlantic of $225,000.00 by June 30, 2017. (A. 257). The Amendment also stated that "Paragraph 3 of the Agreement is deleted." (A. 257).

On September 22, 2017, Atlantic National Trust LLC, Atlantic Capital Finance Company LLC, and Interim Capital LLC, entered into a Forbearance and Modification Agreement with Louis Mack Co., Inc., Investment Properties, LLC, Alvin G. Mack, individually, Frederick Lockwood, individually, and Alvin G. Mack, in his capacity as Personal Representative of the Estate of Samual Richard Mack. (A. 259). The Forbearance and Modification Agreement pertains to Note #8013, Note #8012, Note #7005, Note #3010 (collectively, the "Notes"), and associated mortgages. (A. 259-271). As of August 18, 2017, the amount due on the Notes was $353,665.58. (A. 262). The Forbearance and Modification Agreement provided that Atlantic would discharge the 17 LBJ and Varney Hill Road, Windham mortgages if the Borrowers paid Atlantic $215,000.00 on or before October 31, 2017. (A. 262). Per the Agreement, the $215,000.00 would be applied against the obligations in a specified order: (1) Note #8012, (2) Note #3010, (3) Note #7005, and (4) Note #8013. (A. 262).

On February 16, 2018, Alvin Mack executed an Agreement for Deed in Lieu of Foreclosure regarding 750 Warren Avenue and an Agreement for Deed in Lieu

of Foreclosure regarding 17 LBJ in favor of Atlantic. (A. 130, 139). Alvin Mack conveyed 17 LBJ to Atlantic Northern LLC by Warranty Deed dated February 16, 2018 and recorded in the CCRD in Book 34662, Page 53 on the same day. (A. 272). Atlantic took title to the Property subject to the TD Bank mortgage and Atlantic encumbrances, including Note #8012, Note #3010, Note #7005, and Note #8013. (A. 295). At the time of the conveyance to Atlantic Northern LLC, the TD Bank mortgage was $442,533.00. (A. 295). Atlantic's encumbrances on the Property totaled $317,407.21. (A. 294). The conveyance relieved Alvin Mack of indebtedness in the amount of $759,940.21. (A. 294-295). The Real Estate Transfer Tax Declaration ("RETTD") executed by Alvin Mack and Atlantic Northern LLC in connection with the transfer of 17 LBJ states that the fair market value of the Property at the time of the transfer was $317,000.00. (A. 274). The Libertys were not put on notice of the conveyance to Atlantic. They learned of the transaction from workers at the Property in the spring of 2018. (Tr. Vol. II, 74-76). They learned of the other offers triggering their right of first refusal after litigation ensued. (Tr. Vol. II, 86-87, 91, 101).

The Libertys and Atlantic resolved the claims between them when Atlantic conveyed the Property to Marie, LLC, a limited liability company created by the Libertys to own the Property on their behalf. (A. 276). The Libertys paid Atlantic $155,000.00 for the Property and took title to the Property subject to the TD Bank

mortgage. (A. 276-287). They paid the TD Bank mortgage off for $395,755.51. (A. 288). The total cost to the Libertys to acquire the Property was $550,755.51. (A. 276-287, 288).

III. PROCEDURAL HISTORY

This matter has a long procedural history, but, for the purposes applicable to this Appeal, can be properly summarized as follows:

On June 12, 2019, Richard and Linda Liberty ("Liberty") filed their Complaint, thereby initiating this matter before the Cumberland County Superior Court. (A. 6). While there were initially additional parties to the underlying action, the Libertys amended their Complaint (the "Amended Complaint") by that Amended Complaint dated, and filed, on January 14, 2022 (A. 41). As a result of the Amended Complaint, those other parties initially made a part of this matter, are not germane to the subject matter of this appeal and not the subject of the Amended Complaint, and therefore not recited herein, and the applicable Parties to the underlying action, and, resultantly, to this Appeal, are the Plaintiff-Appellants, the Libertys, and the Defendant-Appellees, Alvin G. Mack ("Mack") and Big Mack Development, LLC ("Big Mack"), respectively. (A. 15, 41). The Libertys' Amended Complaint was comprised of three Counts: Count I – Breach of ROFR and Limited Release and Contract; Count II – Fraudulent Conveyance; and Count III – Warranty Deed Covenant Claims. (A. 15, 41). Despite counsel for Mack and

Big Mack filing a Motion for Summary Judgment (09/12/2023; A. 28) and Liberty filing a Motion for Partial Summary Judgment (10/02/2023; A. 24), both such Motions were denied by Orders dated January 25, 2024, allowing the Counts to proceed to Trial. (A. 28-40), which occurred by Bench Trial held on February 20-22, 2024, and March 28, 2024. (A. 23-24).

Prior to said Trial, the Libertys voluntarily dismissed Count III of their Amended Complaint, and, as noted in the Judgment, the Court issued Judgment for the Defendants on Count II of the Amended Complaint at the close of the Libertys' evidence, leaving only Count I to be decided by the Court. (A. 26). With respect to Count I, the Libertys stated at trial that they were claiming damages for breach of their right of first refusal only in connection with the Option Agreement and Certificate or Partners – they chose not to claim damages in connection with any earlier "trigger" or Alvin Mack's transfer of 17 LBJ to Atlantic. (Tr. Vol. IV, 5). The Court issued its Judgment on Count I of the Amended Complaint by Judgment entered on April 22, 2024, and closed the case on April 22, 2024. (A. 23, 26). The Court issued Judgment for Defendants on said Count I, finding that the Libertys failed to prove damages. (A. 23, 26).

After the Judgment was issued, the ' filed a Motion for Amendment of Judgment after Trial pursuant to M.R.Civ.P. 59(e) (the "Motion") (A. 26), which said Motion was denied by Order entered June 17, 2024. (*Id.*). Thereafter, the

Libertys filed this Appeal by Notice of Appeal filed on July 8, 2024 (*Id.*), the Transcript was filed August 1, 2024 (A. 26), and the record on Appeal was sent to the Law Court on August 8, 2024. (*Id.*).

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

DID THE SUPERIOR COURT ERR IN ISSUING JUDGMENT IN FAVOR OF ALVIN MACK ON COUNT I, HAVING ERRONEOUSLY FOUND THAT THE LIBERTYS FAILED TO PROVE DAMAGES FOR BREACH OF A RIGHT OF FIRST REFUSAL BECAUSE:

A. THE LIBERTYS WOULD NOT HAVE BEEN ABLE TO ACQUIRE THE PROPERTY FOR $450,000.00 AT THE TIME OF THE OPTION AGREEMENT; AND

B. THE LIBERTYS COULD NOT HAVE COMPELLED ALVIN MACK TO SELL THEM THE PROPERTY FREE OF ENCUMBRANCES PURSUANT TO THE OPTION AGREEMENT?

V. SUMMARY OF APPELLANTS ARGUMENT

This is an appeal of the Judgment dated April 19, 2024, whereby the lower court found that the Libertys failed to prove damages, an essential element of their claim for breach of a right of first refusal, and therefore issued judgment in favor of Alvin Mack as a matter of law. (A. 28-40). As discussed in the Judgment, the lower court found that (1) it was the intent of the Libertys and Big Mack Development to apply the Limited Release to the sale of the Property to Big Mack Development, (2) Alvin Mack is bound by the Limited Release through actual knowledge, record notice, and by virtue of taking ownership of Big Mack,

including its then-existing obligations, and (3) Alvin Mack materially breached the ROFR by granting the Option Agreement to Investment Properties, LLC without satisfying his equitable duty to offer the same terms to the Libertys as holders of a ROFR. (A. 36-38). With respect to damages, the Libertys argued that they would have needed $450,000.00 (i.e., the outstanding debt on the TD Bank mortgage, as provided in the lower court's finding #40) to acquire the Property if they had been tendered the Option Agreement granted to Investment Properties, LLC. (A. 38). Because they spent $551,000.00 to acquire the Property from Atlantic subject to the TD Bank debt, the Libertys incurred $101,000.00 in damages as a result of Alvin Mack's breach of their ROFR (plus costs and attorneys fees that have not yet been calculated). The lower court found that the Libertys would not have been able to acquire the Property for $450,000.00 at the time of the Option Agreement, because the Property was encumbered by Atlantic mortgages securing debt of both Alvin Mack and Investment Properties, LLC, and they could not have compelled Alvin Mack to resolve the encumbrances and sell them the Property. (A. 39). In the event that Alvin Mack could not have cleared the encumbrances, the lower court found that the Libertys would have had two choices: (1) walk away from the deal or (2) purchase the Property subject to the Atlantic encumbrances. (A. 39).

The Libertys' position on appeal is that the lower court erred in determining that they failed to prove damages as an essential element of their claim for breach of

a right of first refusal. The lower court's conclusion is inconsistent with the findings set forth in its Judgment and goes against well-established Maine precedent pertaining to breach of a right of first refusal.

VI. STANDARD OF REVIEW

The standard of review that applies when reviewing a judgment entered on a motion for judgment as a matter of law pursuant to M.R. Civ. P. 50(d) in a nonjury trial depends on whether the trial court made findings of fact. *St. Louis v. Wilkinson Law Offices, P.C.*, 2012 ME 116, ¶ 14, 55 A.3d 443 (citing *Nightingale v. Leach*, 2004 ME 22, ¶ 2, 842 A.2d 1277). "When the trial court has entered the judgment solely on the sufficiency of the evidence, without determining the facts, the judgment is reviewed as though it were entered pursuant to M.R. Civ. P. 50(a)," in which case the Law Court considers "the evidence and every justifiable inference from the evidence in the light most favorable to the party against whom the judgment was entered." *Id.* (quoting *Nightingale v. Leach*, 2004 ME 22, ¶ 2, 842 A.2d 1277). When the trial court has entered the judgment at the close of the plaintiff's case after making findings of fact, the Law Court accepts those findings unless they are clearly erroneous. *Id.* at ¶ 15 (citing *Nightingale v. Leach*, 2004 ME 22, ¶ 2, 842 A.2d 1277); *Smith v. Welch*, 645 A.2d 1130, 1131-32 (Me. 1994); *Wyman v. Osteopathic Hosp. of Me., Inc.*, 493 A.2d 330, 333-34 (Me. 1985)). As with any other appeal, on issues on which the plaintiff had the burden of proof, the

clear error standard of review requires that, to overturn a finding that a plaintiff has failed to prove one or more elements of a claim, the plaintiff must demonstrate that a contrary finding is compelled by the evidence. *Id.* at ¶ 16 (citing *Handrahan v. Malenko*, 2011 ME 15, ¶ 13, 12 A.3d 79; *Westleigh v. Conger*, 2000 ME 134, ¶ 12, 755 A.2d 518). A factual finding is clearly erroneous when "no competent evidence in the record . . . support[s] the finding; the finding is based on a clear misapprehension of the meaning of the evidence; or the force and effect of the evidence, taken as a whole, rationally persuades to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case." *Stiff v. Town of Belgrade*, 2024 ME 68, ¶ 11, 322 A.3d 1167 (quoting *H.E. Sargent, Inc. v. Town of Wells*, 676 A.2d 920, 923 (Me. 1996)). In a clear error review, the Law Court will vacate a factual finding only if there is no competent evidence in the record to support it. *Sulikowski v. Sulikowski*, 2019 ME 143, ¶ 9, 216 A.3d 893 (citing *Ehret v. Ehret*, 2016 ME 43, ¶ 14, 135 A.3d 101).

VII. APPELLANTS' LEGAL ARGUMENT

I. THE SUPERIOR COURT ERRED IN DETERMINING THAT THE LIBERTYS FAILED TO PROVE DAMAGES AND THEREFORE FAILED TO MEET AN ESSENTIAL ELEMENT OF THEIR CLAIM FOR BREACH OF A RIGHT OF FIRST REFUSAL

1. The Superior Court erred in finding that the Libertys would not have been able to acquire the Property for $450,000.00

free and clear of all Atlantic encumbrances at the time of the Option Agreement.

As explained by the Law Court, "the 'holder of a right of first refusal on a piece of land only has the right to receive an offer to buy the land.'" *Van Dam v. Spickler*, 2009 ME 36, ¶ 19, 968 A.2d 10403 (quoting 3 Eric Mills Holmes, *Corbin on Contracts* § 11.3, at 470 (Joseph Perillo ed., 1996)). "[A] right of first refusal 'ripens' into an option once an owner receives an offer and makes a good-faith decision to accept it." *Id.* at ¶ 20 (quoting 3 Eric Mills Holmes, *Corbin on Contracts* § 11.3, at 470-71 (Joseph Perillo ed., 1996)). A property owner who transfers property to a third-party buyer in violation of a right of first refusal creates "an enforceable option in the rightholder." *Id.* (quoting *Koch Indus. v. Sun Co.,* 918 F.2d 1203, 1211 (5th Cir. 1990)). "When a transfer of property in violation of a right of first refusal gives rise to an enforceable option, the option 'is not perpetual and the rightholder must choose between exercising it or acquiescing in the transfer of property.'" *Id.* at ¶ 21 (quoting *A.G.E., Inc. v. Buford,* 105 S.W.3d 667, 673 (Tex. App. 2003)). To determine whether to exercise an option to purchase property, the option-holder must have "enough information about the terms of the . . . deal to make an informed choice about purchasing . . . **on those terms**." *Id.* (quoting *Koch,* 918 F.2d at 1212) (bold added). "Upon notice of a bona fide offer to purchase, the right of first refusal ripens into an option to purchase the property **at the price and otherwise on the terms stated in the offer**." *Fienberg v.*

Hassan, 77 Mass. App. Ct. 901, 902 (2010) (quoting *Frostar Corp. v. Malloy*, 63 Mass. App. Ct. 96, 103 (2005)) (bold added).

In this case, the Option Agreement between Alvin Mack and Investment Properties, LLC states that "[t]he purchase price for the acquisition of the Real Estate shall be the short sale price obtained in negotiations with TD Bank plus all closing cost [sic] for the sale." (A. 119). Alvin Mack testified at trial that the balance on the TD Bank loan was about $450,000.00 when the Option Agreement was executed. (Tr. Vol. IV, 37-38). The Option Agreement further states that "[c]onveyance shall be made by Warranty Deed conveying good marketable title to said Real Estate, as defined by the standards adopted by the Maine Bar Association, free and clear of encumbrances, except for conventional utility easements and such restrictions as would not make the title unmarketable." (A. 119). These terms are expressly acknowledged in findings 40-41 of the lower court's Judgment. (A. 34-35).

2. The Superior Court's finding that the purchase price under the Option Agreement includes the Atlantic debt is inconsistent with well-established Maine precedent.

Whether contract language is ambiguous is a question of law reviewed *de novo*. *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 12, 814 A.2d 989 (citing *Apgar v. Commercial Union Ins. Co.*, 683 A.2d 497, 498 (Me. 1996)). "[W]hen interpreting a contract, a court needs to look at the whole instrument." *Id.* (citing

Peerless Ins. Co. v. Brennon, 564 A.2d 383, 384-385 (Me. 1989)). If a court determines that contract language is unambiguous, then its interpretation "must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence." *Id.* at ¶ 11 (quoting *Portland Valve, Inc. v. Rockwood Sys. Corp.*, 460 A.2d 1383, 1387 (Me. 1983)). "Contract language is ambiguous when it is reasonably susceptible of different interpretations" *Id.*; *see also Villas by the Sea Owners Ass'n v. Garrity*, 2000 ME 48, ¶ 9, 748 A.2d 457) ("a contractual provision is considered ambiguous if it is reasonably possible to give that provision at least two different meanings."). If a contract is ambiguous, construction of the contract "is a question of fact determined by the fact-finder and reviewed for clear error." *Id.* (citing *Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 516 (Me. 1996). "It is a well established principle that a contract is to be interpreted to give effect to the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished." *Estate of Barrows*, 2006 ME 143, ¶ 13, 913 A.2d 608 (quoting *Foster v. Foster*, 609 A.2d 1171, 1172 (Me. 1992)). The Law Court has long recognized that "canons of construction require that a contract be construed to give force and effect to all of its provisions, and [it] will avoid an interpretation that renders meaningless any particular provision in the contract." *Id.* (quoting

Farrington Owners' Ass'n v. Conway Lake Resorts, Inc., 2005 ME 93, ¶ 10, 878 A.2d 504).

The lower court provided no analysis as to whether the Option Agreement is ambiguous. The language provided in Sections 6 and 9.1 is directly quoted in the court's own findings of fact as set forth in the Judgment. (A. 34-35). Section 6 of the Option Agreement states that "[t]he purchase price for the acquisition of the Real Estate shall be the short sale price obtained in negotiations with TD Bank plus all closing cost [sic] for the sale." (A. 119). Section 9.1 of the Option Agreement states that "[c]onveyance shall be made by Warranty Deed conveying good marketable title to said Real Estate, as defined by the standards adopted by the Maine Bar Association, free and clear of encumbrances, except for conventional utility easements and such restrictions as would not make the title unmarketable." As discussed in the Judgment, the lower court found that, "[o]n its face, the Option Agreement allows Investment Properties to purchase the property for the balance of the TD Bank mortgage as of February 24, 2016 plus closing costs." (A. 38). The court then went on to conclude that, "[i]f the Libertys were to assume Investment Properties' position, then, they would not have been able to acquire the Property solely for the balance of the TD Bank mortgage; they would have the choice between walking away from the deal or taking the Property subject to the Atlantic Northern encumbrances." (A. 39). The court's basis for its conclusion was that it

saw "no reason why Alvin Mack would have cleared all of the Atlantic Northern obligations on his own to hand the Property over to Investment Properties for a mere $450,000.00." (A. 39).

To the extent that the lower court found that the Option Agreement is clear on its face as to the purchase price, its interpretation of that language must be based on its plain meaning as a matter of law. *Portland Valve, Inc.*, 460 A.2d 1383, 1387 (Me. 1983). The plain meaning of Section 6, as described in the lower court's Judgment, is that Investment Properties had the option to purchase the Property for the balance of the TD Bank mortgage as of February 24, 2016 plus closing costs. (A. 39). Alvin Mack testified at trial that the balance on the TD Bank loan as of February 24, 2016 was about $450,000.00. (Tr. Vol. IV, 37-38). While the lower court necessarily relied on extrinsic evidence (i.e., Alvin Mack's testimony) to determine the balance of the TD Bank loan as of February 24, 2016, the language in Section 6 is unambiguous insofar as it is not reasonably susceptible to multiple interpretations. *Portland Valve, Inc.*, 460 A.2d 1383, 1387 (Me. 1983). Nothing in Section 6 or any other provision of the Option Agreement indicates that the parties intended to include the Atlantic debt in the purchase price. (A. 118-123). Alvin Mack was obligated to sell the property for $450,000.00, the balance of the TD Bank Loan, so it was Alvin Mack's obligation to clear Atlantic's encumbrances, and the court imputed a contractual obligation with the Option

Agreement that was not otherwise a part of said Agreement. Alvin Mack had the obligation to convey the property at the price he testified was owed on the TD Bank loan - $450,000.00. In addition to Section 6, the unambiguous language in Section 9.1 makes clear that a conveyance pursuant to the Option Agreement would be made free and clear of the Atlantic encumbrances. (A. 119). Thus, even if the purchase price is ambiguous, a court's role in resolving the ambiguity as a factfinder is to "give effect to the intention of the parties as reflected in the written instrument…." *Estate of Barrows*, 2006 ME 143, ¶ 13, 913 A.2d 608 (quoting *Foster*, 609 A.2d 1171, 1172 (Me. 1992)). To interpret the purchase price in Section 6 to include the Atlantic mortgages would render Section 9.1 meaningless in violation of long-standing Maine precedent regarding contract interpretation. *Id.* (quoting *Farrington Owners' Ass'n*, 2005 ME 93, ¶ 10, 878 A.2d 504). "The plain language of the contract cannot be stretched or tortured to provide meaning sufficient to make [a party's] theory of interpretation of the language workable." *Portland Valve, Inc.*, 460 A.2d 1383, 1388 (Me. 1983) (quoting *Augusta v. Quirion*, 436 A.2d 388, 394 (Me. 1981)).

VIII. CONCLUSION

For the reasons stated above, the Libertys request that the Law Court reverse the Judgment and award damages to the Libertys in the amount of $101,000.00.

Dated: December 10, 2024

Respectfully submitted by:

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CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 7A(i) of the Maine Rules of Appellate Procedure, I, Gerald B. Schofield, Jr., a Member in good standing of the Bar of the State of Maine and counsel for Plaintiff-Appellant Richard A. Liberty, *et al*, hereby certify as follows:

A. On December 10, 2024, I served ten (10) copies of the within Brief on Appeal and eight (8) copies of the Appendix on the Clerk of the Maine Supreme Judicial Court by hand, addressed as follows:

Matthew E. Pollack, Clerk
Maine Supreme Judicial Court
142 Federal Street
P.O. Box 368
Portland, Maine 04101

And one (1) electronic copy of each such Brief and Appendix by e-mail, at lawcourt.clerk@courts.maine.gov.

B. On December 10, 2024, I served two (2) copies of the within Brief on Appeal and one (1) copy of the Appendix on counsel for Defendant-Appellees Alvin G. Mack, *et al*, by placing them in the U.S. mail, postage prepaid, and e-mail, addressed as follows:

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DATED: December 10, 2024

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