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Case Number 570,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. UDAY S. UTHAMAN,	:	
	:	
Plaintiff Below,	:	
Appellant,	:	No. 570, 2014
	:	
v.	:	On Appeal from the Court of
	:	Chancery of the State of Delaware,
FAIR HILL, L.P., a Delaware Limited Partnership,	:	Civil Action No. 9135-VCG
	:	
Defendant Below,	:	
Appellee.	:	
	:	

APPELLANT'S REPLY BRIEF

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Dated: February 10, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

OTHER

ARGUMENT

At the heart of this case is a memorandum drawn up at a meeting between appellant Dr. Uday Uthaman and a representative of Fair Hill, Dr. LeRoy, on July 12, 2006. The two discussed Fair Hill's desire to increase Dr. Uthaman's monthly rent payment for a unit on its property at 249 East Main Street in Newark (the "Property") on which he had been conducting his medical practice for several years; and Dr. Uthaman brought up requests of his own, including that Dr. LeRoy confirm his understanding that he would be given "first consideration" to purchase the Property in the event it were sold. Taking a paper on which Dr. Uthaman had jotted down his requests, Dr. LeRoy responded to each of them. Next to Dr. Uthaman's "first consideration" phrase, he wrote the legal term "=first refusal," then signed and dated the document, and designated it as a "Memo" (the "Memorandum"). A22 (emphasis in original).[1] The next month, Dr. Uthaman began paying the requested increased rent.

The Memorandum exemplifies the kind of "writing, signed by the party to be charged," that satisfies the statute of frauds with respect to an interest in real estate. The Memorandum also illustrates two additional bedrock principles of contract law: that a court will construe the terms of a contract objectively and will look to extrinsic evidence to resolve any ambiguity in them. Together, these three principles govern this appeal as follows: (1) the extrinsic evidence presented by

[1] "A[ ]" refers to Dr. Uthaman's Appendix; "B[ ]" refers to Fair Hill's Appendix; "OB[ ]" refers to Dr. Uthaman's opening brief; and "AB[ ]" refers to Fair Hill's answering brief. Unless otherwise noted, capitalized terms are as defined in Dr. Uthaman's opening brief.

Dr. Uthaman resolves in his favor any ambiguity as to whether the Memorandum grants him a right of first refusal and whether his increased rent payments are valid consideration for the written confirmation of that right; (2) the objective theory of contracts renders irrelevant any subjective uncertainty on the part of Dr. Uthaman as to how the right of first refusal would operate or how the price would be determined, because a right of first refusal, as a matter of law, requires that the holder match the terms of a third party offer, including price; and (3), the Memorandum, as signed by Dr. LeRoy and in light of all the evidence, satisfies the statute of frauds and requires that the right of first refusal be honored. As addressed below, Fair Hill's arguments boil down to futile attempts to avoid the dispositive force of each of these three principles.

In considering these issues, this Court reviews the trial court's reading of the Memorandum *de novo.*[2] As to factual issues, the Court will reverse a grant of summary judgment, even on a stipulated record, if it finds that the trial court "reached its conclusions by selectively considering the material facts."[3] The Court does not give "high deference" to the trial court's contract interpretations and findings of fact as Fair Hill contends. AB 15.[4]

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[2] OB 18-19. *See also Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991) ("The proper interpretation of language in a contract, while analytically a question of fact, is treated as a question of law both in the trial court and on appeal. Therefore, this Court must make its own interpretation of the contractual language.") (internal citations and quotations omitted).

[3] OB 18 (quoting *Seaford Golf and Country Club v. E.I. DuPont de Nemours and Co.*, 925 A.2d 1255, 1264 (Del. 2007)).

[4] In *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002), cited by Fair Hill, the Court stated that a "trial court's *denial* of summary judgment is entitled to a high level of deference."

I. THE 2006 MEMORANDUM IS AN ENFORCEABLE AGREEMENT WITH AN UNQUALIFED RIGHT OF FIRST REFUSAL.

The Memorandum reflects an agreement to grant Dr. Uthaman an unqualified right of first refusal on the Property that is enforceable without an express pricing mechanism and is supported by valid consideration. Fair Hill's arguments to the contrary fail because they: (A) offer no persuasive response to the textual and extrinsic evidence showing that Fair Hill granted a right of first refusal; (B) run contrary to Delaware's objective theory of contracts and the law on rights of first refusal; and (C) cannot change the fact that Dr. Uthaman's payment of increased rent is valid consideration for a right of first refusal.

A. Fair Hill Granted a Right of First Refusal.

Fair Hill does not contest the black letter principle that questions of contract interpretation may be resolved by resort to extrinsic evidence when the terms of the document are ambiguous. OB 20, 27-28. In fact, as discussed below, Fair Hill relies on extrinsic evidence itself. However, Fair Hill relies heavily on the trial court's finding that the Memorandum "of itself" is not an enforceable agreement, as if that were the end of the matter. A200 at 53:14-16; *see* AB 3, 14, 20.[5] The text of the Memorandum, read as a whole, demonstrates that Fair Hill meant what

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(emphasis added). Dr. Uthaman's appeal is from the trial court's *grant* of Fair Hill's motion for summary judgment as well as its denial of his cross-motion.

[5] The trial court found "crystal clear" only that the 2006 Memorandum "of itself" – that is, viewed in isolation – "is not an enforceable contract." A200 at 53:14-16. Fair Hill incorrectly contends that the trial court also found it "crystal clear" that the discussions between Dr. Uthaman and Dr. LeRoy "that took place in 2006 at the time the Memo was prepared" did not indicate a meeting of the minds. AB 14.

it said when it inserted a right of first refusal into the Memorandum. And the extrinsic evidence removes any remaining doubt in that regard.

1. The textual evidence shows that a right was granted.

Fair Hill does not dispute that the Memorandum is structured as a set of four specific proposals and responses, or that Dr. LeRoy responded to the last of the proposals (point 5), seeking "first consideration if selling," by inserting the term "=first refusal," which denotes a legal right.[6] Fair Hill also does not dispute that Dr. LeRoy (1) wrote his initials immediately under his designation of the right of first refusal, (2) dated the document in his own hand notwithstanding that Dr. Uthaman had already dated it, and (3) designated the document as a "Memo" (A22 (emphasis in original)) – that is, a memorialization of its terms.[7] Each of these additional actions is consistent with an intent to render more formal, and memorialize for future reference, his grant of a right of first refusal: If the Memorandum were just doodlings of a "casual conversation" as Fair Hill contends (AB 14), Dr. LeRoy would have had absolutely no reason to take such actions. Fair Hill's contention that its agreement to a right of first refusal is "unsupported by the evidentiary record" (AB 20) is without merit.

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[6] Dr. LeRoy acted on the preceding three requests by (i) agreeing that there would be no additional increase in rent in the "foreseeable" future; (ii) agreeing that Dr. Uthaman could sublease unit 1 with his approval, and (iii) questioning and not accepting a proposal whereby his requested "250" monthly increase in rent would be withdrawn from Dr. Uthaman's "deposit" of "2000" until it was exhausted. A22 (see notes at bottom of page and OB 7).

[7] Whether Dr. LeRoy realized it or not, this was precisely what the statute of frauds requires to uphold a right of first refusal. 6 *Del. C.* § 2714 (requiring that a right in real estate be supported by a written contract or a "memorandum . . . signed by the party to be charged therewith").

Fair Hill argues that, if Dr. LeRoy had wished to accept Dr. Uthaman's request for "first consideration of [sic] selling," he would have written "ok" as he did in accepting point 3, relating to a sublease. AB 11. However, if Dr. LeRoy had merely written "ok" next to "first consideration if selling," he would have risked accomplishing nothing because Dr. Uthaman's phrase was not as well-defined in the law as the concept of a right of first refusal. On the other hand, if Dr. LeRoy was not willing to confirm his grant of a right of first refusal, the last thing he would have done would have been to insert that right into the document, sign and date it, and designate it as a Memo. His decision to grant Dr. Uthaman's request for confirmation of a right of first refusal by writing in that legally significant term was more powerful and effective than a simple "ok" because it both confirmed the right and clarified it in a way that rendered it enforceable. Finally, Fair Hill's admission that Dr. LeRoy used the Memorandum to accept "point 3" undermines its attempt to liken the document to "casual conversation."

In sum, the Memorandum, viewed as a whole, contains multiple textual indications that Fair Hill intended to confirm in writing the grant of a right of first refusal and not just "evidence" that a right "was discussed." A200 at 53:20-21.[8] But if any doubt remains, the extrinsic evidence clearly and convincingly confirms that Fair Hill meant what it said when it confirmed in writing, in the Memorandum, Dr. Uthaman's right of first refusal.

[8] Fair Hill incorrectly contends that the clearly erroneous standard rather than a de novo standard of review applies to the trial court's finding on this issue. AB 27. *See* n.2 *supra*.

2. The extrinsic evidence confirms that a right was granted.

The extrinsic evidence confirms that Fair Hill granted Dr. Uthaman a right of first refusal in several ways. Most obviously, while the only signer is "PLL," Fair Hill does not dispute that Pierre L. LeRoy initialed the Memorandum and had authority to do so on behalf of Fair Hill, and that Dr. Uthaman was the other party.

To the extent that any doubt remains as to whether Dr. LeRoy intended to grant the right that he wrote into the Memorandum, the Court may consider "the surrounding circumstances and what the parties intended and believed to have been the result."[9] The extrinsic evidence shows that Dr. LeRoy had attempted to sell the Property in 1999 or 2000 and had offered it to Dr. Uthaman first. OB 5-6. The record evidence also shows that the discussion of a rent increase directly resulted in the renewed discussion of the right of first refusal in 2006. A116 at 123:17 to A117 at 126:24. Based on this record, the trial court found, "I have no doubt that . . . Dr. LeRoy wanted [Dr. Uthaman] to buy the property." A204 at 57:20-22.[10]

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[9] *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968) (concluding that summary judgment was "inappropriate" because "there is evidence which, if accepted by the trier of fact, would support the conclusion that [the parties] intended to be bound" and noting that "[u]nder Illinois law, this decision [i.e., whether the parties entered into an "enforceable agreement"] is to be reached after consideration of the surrounding circumstances and what the parties intended and believed to have been the result."). *See also Arnold Palmer Golf Co. v. Fuqua Industries. Inc*., 541 F.2d 584, 588-589 (6th Cir. 1976) (remanding case back to district court because the issue of whether the parties intended to be bound was a factual question and noting "it is permissible to refer to extrinsic evidence to determine whether the parties intended to be bound by the Memorandum.") (*citing Itek*, 248 A.2d at 629); *American Express Travel Related Services. v. Redner*, 2006 WL 664698, at *3 (Mich. Ct. App. Mar. 16, 2006) ("when deciding whether a valid contract was formed, a court should examine extrinsic evidence").

[10] As recently as April 2014, Dr. LeRoy acknowledged that he believed that there is a document that says Dr. Uthaman has a right of first refusal. OB 11 n.9; A77. While Fair Hill

Fair Hill relies on extrinsic evidence in a futile effort to sow doubt as to whether Dr. LeRoy intended to grant the right of first refusal. For example, Fair Hill argues that, in light of Dr. LeRoy's oral promises to Dr. Uthaman in 1999 regarding a right of first refusal, it "defies logic" that Dr. Uthaman would even want to confirm and memorialize the right in writing. AB 20. On the contrary, this litigation has amply demonstrated that Dr. Uthaman would have been foolish not to. Although it found the oral communications in 1999 did not give rise to an enforceable right of first refusal (A201 at 54:16 to A202 at 55:20), the trial court did not question Dr. Uthaman's desire to memorialize the right in writing in 2006. Nor should Fair Hill do so now.[11]

Second, Fair Hill states that Dr. Uthaman testified that Dr. LeRoy only agreed to "consider" selling him the Property. AB 28. Dr. Uthaman's use of the

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disputes this (AB 19 n.9), the testimony speaks for itself. When asked whether Dr. Uthaman initiated this litigation "because he had believed he had a right of first refusal to purchase the property," Dr. LeRoy responded, "yes." The questioner then asked, "is there a document that says that"—meaning, is there a document that says that Dr. Uthaman has a right of first refusal. Dr. LeRoy responded, "I believe there is. That's been submitted to the attorneys involved." A77. In stating, "I believe there is," Dr. LeRoy indicated that he believed there is "a document that says that." In this context, "a document that says that" refers to a document that says that Dr. Uthaman has a right of first refusal. It was that document – the Memorandum – that was "submitted to the attorneys."

[11] Fair Hill spills much ink over the 1999 discussions between Drs. Uthaman and LeRoy (AB 6-9, 14, 18-20), even though Dr. Uthaman does not contest the trial court's finding that those discussions, alone, did not create enforceable rights. In so doing, Fair Hill overstates the trial court's findings as if they applied to events in 2006. For example, Fair Hill claims that the trial court found that there is "no credible evidence that the parties discussed and agreed upon the essential terms of the right of first refusal." AB 14. However, the cited portion of the ruling addresses circumstances "as of 1999" and the trial court's finding that there was no meeting of the minds "as of that time." A199 at 52:16 to A200 at 53:1. Similarly, based on the fact that the doctors did not attempt in 1999 to predict, or even discuss, the purchase price if the Property were sold years later, Fair Hill broadly contends that they "never intended to enter into a binding right of first refusal." AB 7-8.

phrase "first consideration if selling" is actually more intuitive than a right of "first refusal," because a right has value, not because the holder may refuse an opportunity, but because the holder has a right to consider accepting an opportunity. Most tellingly, however, Dr. LeRoy understood very well that Dr. Uthaman was seeking written confirmation of a right of first refusal. That is why he confirmed and accepted Dr. Uthaman's request for "first consideration if selling" by writing "=first refusal." A22.[12]

As Dr. Uthaman previously pointed out (OB 9 n.7), a proposed revision of the 1999 Lease Agreement for unit 1, which Dr. LeRoy gave to Dr. Uthaman five months after the Memorandum, in December 2006 (the "December 2006 Draft"), shows only that the landlord/tenant relationship between them operated on "auto-pilot" without much insistence on formality. The December 2006 Draft is a marked-up copy of the 1999 Lease Agreement that had been sitting in Dr. LeRoy's word processor for seven years. The level of attention given to the Draft is demonstrated by the fact that it understates, by $1,025 per month, the rental payment of $2,250 that Dr. Uthaman had begun making in August of that year in reliance upon the Memorandum. B1. Dr. Uthaman did not even read the December 2006 Draft, let alone sign it, and there was no evidence to suggest that Dr. LeRoy cared enough to follow up about it. A119 at 135:19-23. Yet, Fair Hill presents the December 2006 Draft as a kind of Rosetta Stone that purportedly

[12] Dr. Uthaman explained that it was always his understanding that Dr. LeRoy agreed that "he would offer me [Dr. Uthaman] first" and that he would "have the opportunity" to Purchase the Property. A105 at 78:1-20 to 79:1-17; *see also* A108 at 92:3-14 (explaining that "[b]efore anybody could buy, I have the choice whether I could buy it or not.").

reveals that Dr. LeRoy was bent on incorporating into a formal document the terms that he and Dr. Uthaman had "discussed and agreed upon" in the meeting that produced the Memorandum five months earlier, even though Dr. LeRoy did not even keep a copy of the Memorandum. AB 10.[13] No credible evidence supports such speculation. Fair Hill appears to suggest that the December 2006 Draft intentionally incorporated point 3 of the Memorandum (the sublease provision), while omitting any reference to the right of first refusal. AB 10. But the 1999 Lease Agreement contained, word-for-word, the same sublease provision that reappeared in the December 2006 Draft. A17 ¶ 17; B4 ¶ 17. Fair Hill's contention that its cross-examination extracted an admission from Dr. Uthaman that he divined Dr. LeRoy's unspoken alleged intentions is similarly meritless.[14]

Finally, the 2011 Lease Agreement relating to a new rental unit (A25-31) also says nothing that undermines the Memorandum or the right of first refusal. Dr. Uthaman did not sign the 2011 Lease Agreement until May 25, 2011, after he

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[13] Fair Hill's admission that the Memorandum memorialized "the terms discussed and agreed upon during the meeting" on July 12, 2006 (AB 10) undermines its effort to reduce the meeting and the Memorandum to the level of "casual conversation." AB 14.

[14] Fair Hill claims that Dr. Uthaman admitted that the 2006 Proposed Lease "was important to Fair Hill to memorialize the modified terms of the 1999 Lease." AB 10, *see also* AB 20. Dr. Uthaman testified that he did not know what Dr. LeRoy was thinking but for his part, "I always thought I don't need because we always had a good understanding." A119 at 133:23-134:12; *see also* A119 at 135:3 ("I don't know his thoughts at the time"). Asked to speculate as to what he thought Dr. LeRoy thought regarding the December 2006 Draft, Dr. Uthaman replied, "I don't know." A119 at 136:4 to A120 at 137:22. When pressed as to whether he thought that Dr. LeRoy would present him with a lease "that embodied something that he did not think you would agree to" (A120 at 138:1-4), Dr. Uthaman indicated that he did not think that Dr. LeRoy would try to slip something by him ("probably he would not have done such a thing" (A120 at 138:6-7; A100 at 60:11-19)), but went on to make clear that he did not know what to think and to point out that "this" (the right of first refusal on the Property) "was not part of" the lease. A120 at 138:17-139:8.

had negotiated with Dr. LeRoy a written Addendum (A32) securing gradual rent increases over a four-year period. Fair Hill says that his action in obtaining the Addendum demonstrates his understanding of the importance of memorializing agreements in writing. But that is exactly what he did in obtaining from Dr. LeRoy written confirmation of his right of first refusal through the Memorandum, before agreeing to pay the rent increase that Dr. LeRoy was requesting at that time.

B. No Express Pricing Mechanism is Required.

The designation of a right of first refusal in the Memorandum establishes an enforceable right, regardless whether the right, including manner in which the right is to be determined, is expressly articulated. A right of first refusal entitles the holder to purchase a property on the same terms as those accepted by a third party buyer, and that such a right is not void for failure to specify definite terms and conditions because they will be supplied by the third party's offer. OB 20-21 and nn. 18-22. Under Delaware's objective theory of contracts, the legal right exists whether or not Dr. Uthaman understood how it would operate.

Fair Hill mistakenly claims that Dr. Uthaman's argument is "based upon an assumption, unsupported by the evidentiary record, that the parties agreed" that the right of first refusal gave Dr. Uthaman "the ability to match the purchase price offered for the Property by a third party." AB 22. The "evidentiary record" that Dr. Uthaman needs for this issue is the Memorandum and its written confirmation of a right of an unqualified right of "first refusal." Under Delaware law, "a right of first refusal, unless qualified, means according to custom that the holder may elect

to take the property at the same price and on the same terms and conditions as those proposed by the third party."[15] None of the Delaware cases that Fair Hill relies upon holds that an express pricing mechanism is required.[16]

Dr. Uthaman's position is supported by both Delaware law and the great weight of authority generally.[17] Fair Hill cites just one decision from another

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[15] *Colonial Mgmt., Inc. v. Olivere*, 1976 WL 5198, at *5 (Del. Ch. June 8, 1976) (cited at AB 23). While the trial court noted that there are "lots of different ways to structure" a right of first refusal, and Delaware law does not require "a fair market value" price if the parties prefer some other approach (A157 at 10:22 to A158 at 11:3), the parties' ability to negotiate a custom-tailored right does mean that an unqualified right of first refusal is unenforceable, nor did the trial court so hold.

[16] Fair Hill contends generally that "the essential terms of a right of first refusal must be agreed upon by the parties" in order for the right to be enforceable. AB 18, 21 n.11. But none of the cases cited addresses rights of first refusal. In *James J. Gory Mech. Contracting, Inc. v. BPG Residential Partners V, LLC et al.*, 2011 WL 6935279,*2 (Del. Ch. Dec. 30, 2011), the issue was whether a payment memo constituted a valid contract and thus superseded any previous payment obligations owed to the plaintiff by the defendant. In *Hindes v. Wilmington Poetry Society*, 138 A.2d 501, 503-504 (Del. Ch. 1958), the court declined to grant specific performance of a contract that left consideration open for negotiation. *See also Walton v. Beale*, 2006 WL 265489 (Del. Ch. Jan. 30, 2006) and *River Enterprises, LLC v. Tamari Properties, LLC*, 2005 WL 356823 (Del. Ch. Feb. 15, 2005)) (addressing the sale of land generally and not whether a right of first refusal must contain an express pricing mechanism).

[17] *See* OB 20-21 and nn. 18-22; *see also Steinberg v. Sachs*, 837 So.2d 503, 505 (Fla. Dist. Ct. App. 2003) (concluding that "trial court erred as a matter of law in its determination that [first refusal contract] was voidable for lack of enforceable terms such as price and the time period during which [holder of right] could exercise his right of refusal. The price was necessarily supplied by the third party's offer."); *Bristol-Myers Squibb Co. v. Ikon Office Solutions, Inc.*, 295 F.3d 680 (7th Cir. 2002) (concluding that "Missouri courts liberally find right of first refusal clauses to be specific enough to be enforced, even when they are missing some important terms.") (citations omitted); *Polemi v. Wells*, 759 P.2d 796, 799 (Colo. App. 1988) (holding that a "right of first refusal clause is enforceable, under certain circumstances, notwithstanding the absence of specific terms regarding the price, method of acceptance, or time of acceptance. We adopt the reasoning of these cases [from other jurisdictions] that the missing terms are 'fixed' by the lessor's acceptance of a bona fide, third-party offer.") (citations omitted); *Roy v. George W. Greene, Inc.*, 533 N.E.2d 1323, 1326 (Mass. 1989) (same); *Janas v. Simmons*, 1987 WL 9903 (Ohio Ct. App. Apr. 17, 1987) (same; concluding that "no price term in the individual contract is required if the parties use words even close to the terms of art 'first right of refusal' or 'first option to buy'"); *DiMaria v. Michaels*, 455 N.Y.S.2d 875, 877 (N.Y. App. Div. 1982) (same); *Barling v. Horn*, 296 S.W.2d 94, 98 (Mo. 1956) (same); 17A Am. Jur. 2d

jurisdiction that holds that an agreement upon a "right of first refusal" is too vague as to price to be enforceable.[18] In reviewing de novo the trial court's interpretation of the meaning and enforceability of the grant of a right of first refusal, this Court will not defer either to its legal interpretation or consideration of Dr. Uthaman's uncertainty regarding the operation of the term, but will apply the objective meaning of the term consistent with case law. That law calls for reversal of the trial court's ruling on this issue.

C. The Payment of Increased Rent is Valid Consideration.

As with the parties' agreement to a right of first refusal, the consideration for the right is evident in the terms of the Memorandum and definitively confirmed by the extrinsic evidence. The "250" dollar rent increase is referenced in the Memorandum, along with the agreement that there be no further rent increase in the "foreseeable future" (A22), but any ambiguity as to these terms dissolves when they are understood in light of the undisputed testimony that Dr. LeRoy was seeking a rent increase of $250 a month on the day that they reached agreement on the Memorandum. OB 9, OB24; A116 at 123:17 to A117 at 126:24.[19] The

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Contracts § 57 ("Courts liberally find right-of-first-refusal clauses to be specific enough to be enforced, even if they are missing some important terms.").

[18] AB 22, n.12 (citing *Crestview Builders, Inc. v. Noogle Family Limited Partnership*, 816 N.E.2d 1132 (Ill. App. 2004)).

[19] As Dr. Uthaman explained, the Memorandum came into existence as a direct result of Dr. LeRoy's request to raise the rent: "We always talked about someday I'm buying the place and the pain clinic that Dr. LeRoy established could continue. He was happy about that. So we had discussion about me acquiring the place at some point in time when they're selling so we told – *when the topic come to increase the rent, that's the time I told him we have been talking all these things. That's how the memorandum came into existence*." A114 at 113:23-114:14 (emphasis added).

extrinsic evidence also shows that Dr. Uthaman started paying the increased rent of $2,250 per month in August 2006, immediately after the parties agreed to the terms in the Memorandum. A119 at 133:4-9. Over the course of the last eight years, these increased payments have added up to a non-illusory $25,000.

Fair Hill mistakenly contends that Dr. Uthaman's argument with respect to consideration is "inconsistent" because Dr. Uthaman believed that Dr. LeRoy had promised him a right of first refusal as early as 1999. AB 25. However, it is one thing to be "talking all these things"; it is quite another to confirm an unenforceable oral promise in writing in exchange for an agreement to a rent increase. Having successfully argued that any 1999 promises were unenforceable, Fair Hill cannot now claim that those same communications render illusory Dr. Uthaman's actions in securing a legally enforceable right of first refusal through the 2006 Memorandum and rent increase. Nor can the consideration of over $25,000 that Fair Hill has taken in over the last eight years suddenly be rendered "illusory" by the absence of a formal lease amendment. AB 25.

II. THE MEMORANDUM SATISFIES THE STATUTE OF FRAUDS AND SHOULD BE ENFORCED TO AVOID INJUSTICE.

A. The Memorandum Satisfies the Statute of Frauds.

Fair Hill does not dispute that the Memorandum satisfies the basic requirements of the statute of frauds that there be a "memorandum . . . signed by the party to be charged." OB 25-26; AB 25-28. Rather, Fair Hill renews its arguments on the contract issues addressed above and in Dr. Uthaman's opening brief. OB 25-28. Fair Hill mistakenly claims that Dr. Uthaman argues these points "without pointing to any portion of the record." AB 27. In fact, Dr. Uthaman referred the Court to the evidence and arguments "set forth in Argument I" rather than repeat them. OB 27. Similarly here, Dr. Uthaman refers the Court to Argument I above, which demonstrates that the Memorandum, viewed in light of extrinsic evidence, reasonably identifies the right of first refusal, confirms the right in writing, and establishes with reasonable certainty the essential terms of the agreement, including the consideration of increased rent.

B. The Memorandum Should Be Enforced to Avoid Injustice.

As demonstrated by the multiple factors considered by Delaware courts, including those set forth in Section 139 of the Restatement (Second) of Contracts (OB 29-31), questions of part performance and detrimental reliance call for the exercise of judgment in light of the facts and circumstances at hand. Among other things, the Court considers "the extent to which an action . . . corroborates evidence of the making and terms of the promise, or the making of the terms are

otherwise established by clear and convincing evidence."[20] The Court need not reach this issue because the Memorandum, viewed in context, satisfies the statute of frauds. But even if it did not, the right of first refusal should nonetheless be enforced under these equitable principles.

Dr. Uthaman's investment of over $52,000 in reliance upon the right of first refusal, on top of his rental payments of $27,000 to $40,000 per year, strongly corroborates the other evidence of the making and terms of the right of first refusal in the Memorandum and in the circumstances surrounding it, which in any event "are otherwise established by clear and convincing evidence." Given the facts and circumstances test called for by the Restatement and case law, the trial court's miscalculation of the extent of Dr. Uthaman's annual investment – by almost a factor of three[21] – is reversible error. Fair Hill does not deny that the trial court erred in spreading Dr. Uthaman's six-year investment over fifteen years, to 1999, seven years before he obtained the right of first refusal. Rather, Fair Hill notes only that the trial court "did not err in calculating the average amount expended" over that incorrect, 15-year period. AB 30.

Dr. Uthaman's post-Memorandum investment is particularly significant in light of the fact that (i) prior to the Memorandum, there is no evidence of any such

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[20] OB 31 at n.39, citing Restatement § 139(2)(c). Fair Hill does not dispute the applicability of the facts and circumstances test set forth in Section 139 to determine whether injustice can be avoided only by enforcement of the right of first refusal. *See also CBA Collection Servs., Ltd. v. Potter, Crosse & Leonard, P.A.*, 1996 WL 527214, at *7 (Del. Super. Ct. Aug. 14, 1996) *aff'd*, 687 A.2d 194 (Del. 1996) (applying Restatement § 139).

[21] The trial court's low range estimate of $3,000 per year is almost three times less than the average of nearly $9,000 ($8,666) per year, when Dr. Uthaman's expenditures of $52,000 are spread over the six years in which they were made.

investment, (ii) under the leases, such improvements would belong to Fair Hill, and (iii) given the inchoate nature of Dr. Uthaman's right of first refusal, he might never have an opportunity to purchase the Property. All these facts further corroborate the evidence of the making and terms of the right of first refusal by any reasonable measure. Fair Hill's arguments to the contrary, that Dr. Uthaman's investment cannot be partial performance because the renovations were "consistent with" the terms of the 1999 and 2011 Lease Agreements, which state that "all alternations, improvements, and changes" shall be done "at the cost of the Lessee, and shall be the property of the Lessor" (AB 29; A16 ¶ 11; A27 ¶ 11), and because he had no "guarantee" that he would eventually own the Property, are unpersuasive and drawn from inapposite cases.[22] In a case such as this, where the holder of a right of first refusal is also a lessee, any automatic disqualification based on a right to make improvements would be unreasonable and prove too much, since no renovation, by such a lessee, no matter how radical, could then ever qualify as part performance or detrimental reliance. And as to the lack of any guarantee, a lessee who holds only a right of first refusal would be expected to invest *less* in the leasehold property, as he has no right to purchase the property, whereas a lessee who holds a guaranteed right to purchase has a greater incentive to invest. The equitable principles recognizing exceptions to the statute of frauds do not penalize persons who make a considerable investment in reliance on an inchoate right.

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[22] *Walton*, 2006 WL 265489, at *4.

Finally, Fair Hill claims that Dr. Uthaman's post-Memorandum investments cannot qualify as part performance because they were not a "joint act" but instead were "unilateral" improvements. AB 13, 29. But the case that Fair Hill relies on for this proposition, *Sargent v. Schneller*,[23] does not require a "joint act" but rather states that the act constituting part performance "must be a joint act, *or* an act which 'clearly indicates mutual assent' of the parties to the oral contract."[24] Also, *Sargent* did not involve a lessee who already held rights but rather a plaintiff who held no prior interest in the property at issue but sought, unsuccessfully, to enforce an oral contract to purchase the property based on his payment of a $68 legal bill, his possession of a key to the premises, and his performance of light yard work for less than two days. That is not this case.

In sum, while Dr. Uthaman satisfies all the requirements of the statute of frauds, he would be entitled to equitable relief even if he did not.

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[23] 2005 WL 1863382 (Del. Ch. Aug. 2, 2005).

[24] *Id.* at *5 (emphasis added). *Sargent* acknowledged that "making valuable improvements on the land in reliance on the oral contract generally demonstrate[s] part performance." *Id.* at *5 and n. 37.

III. THE RIGHT OF FIRST REFUSAL SHOULD BE ENFORCED BY SPECIFIC PERFORMANCE.

Dr. Uthaman has met the requirements for specific performance by demonstrating that he has a valid right of first refusal, that he is ready, willing and able to purchase the Property according to the terms of the Purchase Agreement, and that the equities weigh in his favor. OB 32-34. Dr. Uthaman has demonstrated throughout this litigation a commitment to exercising the right of first refusal that he believed was his since 1999, and that was confirmed in writing in 2006, and that he continues to seek to exercise in order to purchase the Property on which he has built his pain management practice over the last fifteen years. His actions speak louder than words.

Yet, Fair Hill questions whether Dr. Uthaman is ready, willing, and able to meet the terms of the Purchase Agreement based on his responses to questions at his deposition in July 2014, taken just a few days after he had received a copy of the detailed Purchase Agreement. A134 at 195:8-9; A39-46. The supposed admissions were that Dr. Uthaman wanted "time to discuss with the attorney" (A134 at 195:22-23); that he did not "object to anything" in the Purchase Agreement (A134 at 196:5-7); he did not understand the Purchase Agreement to be "as is" (A135 at 197:15-22); and that he would not purchase the Property "as is," referring to the need for a title search (A135 at 199:17-24).

Based on its contention that the Purchase Agreement would be considered "as is" (AB 34), Fair Hill claims that Dr. Uthaman admitted that he has no interest in purchasing Property. But had he been given time to discuss the matter with his

attorney, Dr. Uthaman might have understood that Purchase Agreement gives the buyer time to confirm conveyance of "good and marketable title" and gives the seller a 30-day cure period in the event of any objections. A41 ¶ 12. He might also have understood that the buyer has a right to conduct a "pre-settlement inspection" to confirm *inter alia* that electrical, plumbing and other systems are in operating order. A42 ¶ 19. At least in these respects, the Purchase Agreement was not completely "as is," contrary to Fair Hill's contention. AB 34. And while Fair Hill correctly points out that Dr. Uthaman had not yet obtained financing as of his deposition (AB 33), he had applied for it (A115 at 117:13 to 118:15) and had the benefit of a 60-day financing contingency. A40 ¶ 6. Finally, Dr. Uthaman had reason to be vague about paying the difference between $1 million and the purchase price in light of his uncertainty as to "what price it would stick to" in light of other "litigation" that was "going on." A115 at 117:1-12.[25]

In sum, Dr. Uthaman has satisfied the requirements for specific performance.

[25] If the record were expanded, Dr. Uthaman would point to testimony by Dr. LeRoy in another case that the true price for the Property might actually be significantly lower than the amount set forth in the Purchase Agreement.

CONCLUSION

For the reasons set forth above, Dr. Uthaman respectfully requests that the Court (i) reverse the trial court's bench ruling granting Fair Hill's motion for summary judgment and denying his cross-motion, and (ii) remand the case with instructions that the trial court issue an order of specific performance requiring Fair Hill to honor Dr. Uthaman's right of first refusal. In the alternative, Dr. Uthaman respectfully requests that the Court remand the case for further proceedings consistent with its ruling, with leave to expand the record, so that the trial court will have an opportunity to resolve any remaining issues and assess the credibility of the witnesses at a full hearing on the merits.

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