EFiled: Jan 26 2015 02:53PM EST
Filing ID 56660083
Case Number 570,2014

IN THE

Supreme Court of the State of Delaware

DR. UDAY S. UTHAMAN,
Plaintiff Below, Appellant,

v.

FAIR HILL, L.P., A DELAWARE LIMITED PARTNERSHIP,
Defendant Below, Appellee.

NO. 570, 2014

APPEAL FROM THE CHANCERY COURT OF
THE STATE OF DELAWARE

C.A. NO. 9135-VCG

DEFENDANT BELOW, APPELLEE FAIR HILL, L.P.'S ANSWERING BRIEF

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JANUARY 26, 2014

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NATURE OF PROCEEDINGS

On December 4, 2013, Appellant Dr. Uday S. Uthaman ("Uthaman") filed a Verified Complaint (the "Complaint") in the Court of Chancery asserting claims for breach of contract, specific performance and declaratory judgment, each rooted in a purported right of first refusal held by Uthaman to purchase an office plaza located in Newark, Delaware (the "Property") owned by Appellee Fair Hill, L.P. ("Fair Hill"). Fair Hill responded to the Complaint by filing a motion to dismiss (the "Motion to Dismiss"). While expressing skepticism as to the viability of Uthaman's claims, the Vice Chancellor denied the Motion to Dismiss. B025, ln. 3-9, 14; B027, ln. 1-6.

Upon completion of discovery, the parties filed cross-motions for summary judgment. A hearing was held on the cross-motions (the "Dispositive Hearing") at which counsel stipulated to treat the submitted evidentiary record as trial evidence, thereby permitting the Vice Chancellor to weigh evidence and enter a final judgment on the merits pursuant to Court of Chancery Rule 56(h) even if summary judgment was not appropriate. A-150, ln. 12 – A-152, ln. 23. After the close of argument, Vice Chancellor Glasscock granted Fair Hill's motion for summary judgment, entered judgment in its favor on all claims in the Complaint and denied Uthaman's motion (the "Decision"). A-197, ln. 20 – A-205, ln. 8.

On October 3, 2014, Uthaman filed this appeal followed by his Opening Brief on December 22, 2014. Fair Hill moved this Court to affirm the Decision pursuant to Supreme Court Rule 25(a), which was denied on January 5, 2015. This is Fair Hill's Answering Brief.

COUNTER-SUMMARY OF ARGUMENT

1. **DENIED**. The Vice Chancellor did not err in finding that the parties neither negotiated nor agreed upon any mechanism for determining the purchase price of the Property pursuant to the one page handwritten memo of notations between the parties from 2006 (the "Memo") which purports to memorialize all of the terms of the purported right of first refusal or any other rights for the Property (the "Right of First Refusal") or otherwise. The Memo from 2006 contains no reference to a purchase price or a mechanism to determine a purchase price for the Property. Furthermore, neither Uthaman during his deposition, nor his counsel at the Dispositive Hearing, could point to any evidence that the parties negotiated and agreed upon any mechanism for determining purchase price. Rather, Uthaman and his counsel offered a variety of speculative and conflicting methods by which a purchase price could be established none of which the evidence showed were ever even discussed with Fair Hill. As the Vice Chancellor noted, the evidence demonstrates that a purchase price for the Property was never discussed as Uthaman's counsel admitted at the Dispositive Hearing. A-159, ln. 10-24.

Uthaman contends that there was no need for the parties to agree upon a purchase price for the Property pursuant to the Right of First Refusal because the right was "unqualified," thereby providing Uthaman with the ability to "match" the purchase price and other terms offered by a third party. Uthaman Open. Br. 2. There are two fundamental problems with this contention. First, the ability to "match" the purchase price offered by a third party is in fact a mechanism for establishing price and Uthaman offered no credible evidence that the ability to

"match" price was negotiated and agreed upon as found by the Vice Chancellor . A-155, ln. 15 – A-160, ln. 24; A-201, ln. 16 – A-202, ln. 20. Second, Uthaman did not allege in the Complaint that the Right of First Refusal permitted him to "match" the purchase price offered by a third party. In fact, his interrogatory responses clearly state that he believes the Right of First Refusal is triggered before the Property is marketed for sale and any third party offers are even received. B046-47, ROG #24. In other words, Uthaman contends that he had the right to negotiate with Fair Hill to buy the Property before a third party offer is even received. A-168, ln. 24 – A-169, ln. 2. Furthermore, Uthaman's own deposition testimony indicates that he believed that the purported Right of First Refusal permitted him to negotiate a purchase price and other terms as opposed to "matching" a third party purchase offer. A-104 at 75:5-14.

2. **DENIED**. The Vice Chancellor did not err in finding that the Memo did not satisfy the requirements of the statute of frauds. The insufficiency of the Memo, standing alone, to satisfy the statute of fraud was conceded by Uthaman's counsel at the Dispositive Hearing when he acknowledged that evidence of an oral agreement was the only manner by which Uthaman could prove his claims. A-161, ln. 14 – A-163, ln. 7. In his decision, the Vice Chancellor agreed and held "[i]t is crystal clear to me that this document [Memo] itself is not an enforceable contract. It is not [Pierre LeRoy's] agreement in the language of the purported contract that he was agreeing to a right of first refusal; let alone what the terms of such a right contractually may be. It is only evidence to me that a right of first refusal was discussed in 2006." A-200, ln. 14-21.

As the Vice Chancellor correctly noted, this case is a textbook example of why the statute of frauds was created – to prevent self-serving testimony, unsupported by written evidence, from giving rise to rights in real property. A-200, ln. 22 – A-201, ln. 10.

Because the Memo failed to satisfy the statute of frauds, in order for Uthaman's claims to survive, he needed to demonstrate through "clear and convincing" evidence that the "partial performance" exception to the statute of frauds was applicable.[1] Uthaman's contention that he met the partial performance exception to the statute of frauds fails. The evidence offered by Uthaman to demonstrate "partial performance" of the Right of First Refusal simply constituted unilateral activities performed by Uthaman that amounted to little more than routine and customary maintenance work (e.g. painting and replacement of worn carpet) that were consistent with the normal operation of a busy medical office and were entirely consistent with the terms of the leases between the parties that required any repairs, renovations or improvements to be made at Uthaman's expense. A-202, ln. 21 – A-203, ln. 24.

3. **DENIED**. The arguments advanced by Uthaman fall far short in demonstrating through "clear and convincing" evidence that he was entitled to specific performance of the alleged Right of First Refusal. In order for a plaintiff to prove a claim for specific performance of a contract, the contract must be established "clearly and convincingly."[2] Based on the record, the Vice Chancellor

[1] *East Coast Resorts, Inc. v. Paroni et al.*, 1990 Del. Ch. LEXIS 204, at *9-10 (Del. Ch. Dec. 3, 1990), *citing Durand v. Snedeker*, 177 A.2d 649, 652-53 (Del. Ch. 1962).

[2] *Hazen v. Miller*, 1991 Del. Ch. LEXIS 191, at *16 (Del. Ch. Nov. 18, 1991).

concluded that Uthaman failed to clearly and convincingly demonstrate that the alleged Right of First Refusal was a valid and enforceable contract, the first required element for a claim of specific performance because there was not (i) a meeting of the minds to enter into the purported right; (ii) an agreement upon essential terms of the right; and (iii) consideration exchanged for the right. A-199, ln. 3 – A-202, ln. 20.

The second required element for his claim for specific performance requires Uthaman to demonstrate through clear and convincing evidence that he was ready, willing and able to perform the Right of First Refusal as alleged (i.e. to match the terms of the existing purchase agreement Fair Hill was bound to for sale of the Property). *Walton v. Beale*, 2006 Del. Ch. 23, at *13 (Del. Ch. Jan. 30, 2006). Uthaman unequivocally stated at his deposition that he was unwilling to match the terms of the existing purchase agreement for the Property between Fair Hill and a third party (the "Purchase Agreement") and further that he was not in a financial position to close upon the sale of the Property pursuant to the terms of the existing agreement. A-114 at 116:11 – A-115 at 119:22. Accordingly, even if Uthaman were found to have an enforceable Right of First Refusal, his claim for specific performance must fail given his own testimony that he was unwilling and unable to meet the terms and conditions of the Purchase Agreement.

COUNTER-STATEMENT OF FACTS

Uthaman's three claims are rooted in a single Right of First Refusal to purchase the Property which he claims was orally extended to him in 1999 by Dr. Pierre LeRoy ("LeRoy"), a former partner in Fair Hill, and then subsequently memorialized in 2006 - seven years - later in the Memo. A-50, ¶15; A-51, ¶18. The record before the Vice Chancellor supported his Decision that: (1) there was no meeting of the minds between the parties necessary to enter into an agreement, or an agreement on the essential terms of any such agreement, both of which are necessary for the formation of a binding Right of First Refusal; (2) there was no exchange of consideration for the alleged Right of First Refusal; and (3) that Uthaman failed to prove by competent evidence that the alleged Right of First Refusal satisfied the statute of frauds or any exception thereto.

I. THE 1999 LEASE BETWEEN UTHAMAN AND FAIR HILL.

After meeting LeRoy in or about 1994, Uthaman decided in 1999 to lease space at the Property and open his first medical practice in Delaware. A-99 at 54:3-55:6. Uthaman entered into a lease with Fair Hill on May 1, 1999 for one unit in the Property known as Unit 1, Building 1 (the "1999 Lease"). The initial term of the 1999 Lease ran until April 30, 2000 and the lease was subsequently renewed for consecutive one year terms with the current term scheduled to expire on April 30, 2015. B060-61, ROG # 8. The 1999 Lease contains a variety of terms, but makes no reference to the purported Right of First Refusal.

In and around the time the 1999 Lease was executed, Fair Hill listed the Property for sale. A-11 at 108:6 - A-113 at 111:23. Uthaman testified that at the time of the listing LeRoy advised him that he should consider purchasing the Property and that LeRoy informed him that there was a notation on the listing agreement indicating that "someone" had a right of first refusal. A-103 at 70:12-71:21. However, Uthaman admitted to having never seen an addendum or other listing materials that included the mysterious notation and neither party located or produced any documents containing the purported addendum or the identity of the "someone" to whom it related.[3] *Id.* at 72:2-3.

II. ALLEGED ORAL AGREEMENT IN 1999 GRANTING THE RIGHT OF FIRST REFUSAL.

Uthaman contended that "shortly after" the execution of the 1999 Lease, LeRoy orally extended him the Right of First Refusal. A-50, ¶15. However, Uthaman did not plead in his Complaint that in 1999 any terms were agreed upon for the purported Right of First Refusal nor was he able to describe at his deposition what terms, if any, were discussed and agreed upon for the purported right[4]. In fact, Uthaman testified that in 1999 he had no idea what a right of first refusal even was. A-104 at 74:1-4. When asked what the purchase price (an

[3] Uthaman's Complaint conflicts with his deposition testimony as to the time when he was told a notation was made on the listing agreement indicating a right of first refusal. In his Complaint, Uthaman asserts that he was first granted the Right of First Refusal orally "shortly after the parties entered into the 1999 Lease," which occurred after the Property was removed from active listing for sale. A-50, ¶¶ 11 – 15. Therefore, the timeline of events asserted in the Complaint makes it impossible for the asserted notation in a listing agreement (to the extent it ever existed) to have been related to the Right of First Refusal claimed by Uthaman.

[4] LeRoy passed away during the pendency of this matter on June 14, 2014 and was not deposed.

essential term for such an agreement) would be for the Property pursuant to the purported Right of First Refusal, Uthaman stated that "price was not discussed." *Id.* at 74:11. When asked if the Right of First Refusal would require Fair Hill to accept any purchase price offered by Uthaman, he testified that he "did not know." *Id.* at 75:5-10. When asked what would transpire according to the Right of First Refusal if a third party offered a higher purchase price than the one offered by Uthaman, Uthaman again testified that he did not know. *Id.* at 75:15-16. When asked similar questions by the Vice Chancellor at the Dispositive Hearing, Uthaman's counsel was similarly unable to point to any evidence that the parties discussed or agreed upon a methodology for determining price or any other essential terms of the right of First Refusal. A-155, ln. 20 – A-157, ln. 16; A-159, ln. 10-21; A-164, ln. 2 – A-168, ln. 15.

As illustrated above, Uthaman's own deposition testimony repeatedly supports the conclusion that the parties never intended to enter into a binding right of first refusal with respect to the Property (or any other binding right) or discussed or agreed upon essential terms for such a right, but instead merely had informal conversations during which it was discussed that Uthaman should consider making an offer to purchase the Property if and when Fair Hill decided to sell it. A-105 at 78:2-79:20. Uthaman's interrogatory responses further reflect the informal nature of the discussions: "Plaintiff responds that [Pierre] LeRoy orally extended plaintiff the right of first refusal advising plaintiff that if LeRoy decided to sell the property

in the future, he would consider selling to plaintiff first." (emphasis added). B042-43, ROG # 17.

Lastly, Uthaman has not alleged, and the record does not contain, any evidence that any consideration was exchanged in 1999 for the purported Right of First Refusal. This is a fact that Uthaman's counsel affirmatively conceded at the Dispositive Hearing. A-199, ln. 16 – A-200, ln. 1.

III. THE 2006 RENT INCREASE AND THE MEMO.

On July 12, 2006, Uthaman and LeRoy met to discuss Fair Hill's intent to raise the monthly rent for the upcoming renewal term of the 1999 Lease, the first such increase since the 1999 Lease was executed seven years earlier. A-122 at 146:5 – 147:10. At that meeting, Uthaman took out a single piece of plain paper and wrote five points he felt were important to his continued tenancy at the Property, which he wanted to discuss with LeRoy. A-116 at 122:9 – A-119 at 133:12. During that same meeting, LeRoy made his own notations on the paper as he listened to Uthaman. *Id.* Through discovery it was determined that the following notations in the Memo are attributable to LeRoy:

(a) LeRoy inserted the word "foreseeable" next to Uthaman's point #2 regarding "No increase Rent future" (A-117 at 125:2-15);

(b) LeRoy wrote the word "ok" followed by the letter "c" with a hyphen over it and the word "approval," which can be translated as "ok with approval" next to Uthaman's point #3 captioned "sublease" (A-117 at 125:21 – 128:19);

(c) LeRoy wrote "??" next to Uthaman's point #4 captioned "take from deposit" (A-117 at 128:20 – A-118 at 130:12);

(d) LeRoy wrote "= first refusal" next to Uthaman's point #5 captioned "1st consideration if selling" (A-118 at 130:20 – 132:23); and

(e) LeRoy wrote a "?" at the very bottom of the page where Uthaman made notes proposing that a portion of the existing $2,000 security deposit held by Fair Hill be applied to the monthly rent on an ongoing basis. (A-122 at 145:6-23).

At the conclusion of the meeting, Uthaman retained the only copy of the Memo. B066-67, ROG # 17. Fair Hill subsequently prepared an amended version of the 1999 Lease containing the terms discussed and agreed upon during the meeting, including increased monthly rent (Section 3) and Uthaman's ability to sublet space with Fair Hill's prior approval (Section 17) (the "2006 Amendment"). B001-6. The 2006 Lease Amendment was executed by Fair Hill before being delivered to Uthaman and contains no reference at all to the alleged Right of First Refusal. Although Uthaman acknowledged that the preparation of the 2006 Amendment was important to Fair Hill to memorialize the modified terms of the 1999 Lease, he did not believe it was necessary to sign the 2006 Amendment given his relationship with LeRoy and he never did execute it. A-119 at 133:10-20. Uthaman acknowledged that LeRoy "probably" would not have presented him with the 2006 Amendment containing terms that he did not believe they had agreed upon. A-120 at 138:1-7.

Uthaman contends that the Memo contains a complete memorialization of the terms of the purported Right of First Refusal. Uthaman depo. Tr. at 131-32. Similarly, Uthaman asserts in the Complaint that the Memo "memorialized" the

Right of First Refusal granted in 1999. A-50, ¶ 18. However, at the Dispositive Hearing and confronted with the established record, including Uthaman's deposition testimony, Uthaman's counsel conceded that the Memo could not form the basis for the alleged Right of First Refusal. A-162, ln. 16 – A163, ln. 7. In fact, the Memo neither contains nor provides any reference to essential terms for the alleged Right of First Refusal or any indication that LeRoy agreed to the purported Right of First Refusal. Unlike point #3 in the Memo regarding Uthaman's interest in subleasing a portion of his leased space, which Leroy indicated would be "ok" subject to Fair Hill's prior approval, there is no such indication of any demonstrative or definitive acceptance in the Memo that LeRoy agreed to Uthaman's point #5 titled "1st consideration of selling." LeRoy's only notation next to point #5 was simply "= first refusal," which the Vice Chancellor reasonably determined, based on the record, was, at most, merely a paraphrase of what Uthaman explained he desired at the time – "to be granted a right of first refusal to purchase the Property." B067, ROG # 19.

IV. THE 2011 LEASE FOR ADDITIONAL SPACE AT THE PROPERTY.

In May 2011, Uthaman approached Fair Hill about leasing a unit in Building 2 of the Property that he intended to use for administrative purposes. A-123 at 149:10-18. Uthaman's proposal for leasing the new unit was outlined in a document that he prepared and delivered to Fair Hill. A-25-31. The proposal made no mention of the alleged Right of First Refusal that Uthaman contends

applies to the entire Property, including the additional unit in Building 2 that was the subject of the proposed new lease.

After receiving the proposal, Fair Hill prepared and sent Uthaman a proposed lease for Suite 7 in Building 2 at the Property for a one year term ("2011 Lease"). Uthaman did not initially sign the 2011 Lease because he wanted a longer initial term. A-124 at 155:12 - 156:13. Uthaman negotiated an addendum to the 2011 Lease that provided him with the option to extend the term by three one-year renewal terms (the "Addendum"). A-32. The Addendum was signed by Fair Hill and Uthaman on May 24, 2011. *Id.* On the following day, Uthaman signed the 2011 Lease. *Id.* Uthaman testified that he waited to sign the 2011 Lease because he wanted first review the Addendum to ensure that it accurately reflected the parties' agreement which demonstrates his understanding of the importance of memorializing agreements in writing. A-124 at 155:1-5.

V. THE REPAIRS/IMPROVEMENTS UTHAMAN PERFORMED AT THE PROPERTY WERE COMPLETED CONSISTENT WITH THE TERMS OF THE 1999 LEASE AND 2011 LEASE.

In response to Fair Hill's position that the statute of frauds barred the enforcement of the alleged Right of First Refusal, Uthaman responded that he performed certain "renovation" work on his two rental units at the Property, beginning in 2008, that collectively totaled approximately $52,000.[5] At the

[5] Coincidentally, despite asserting in the Complaint that he "expended significant resources" to repair and renovate his two rental units at the Property Uthaman was unable to respond to even basic questions at his deposition regarding the scope and nature of such work. A-50, ¶ 19; A-129

Dispositive Hearing, Uthaman's counsel acknowledged, however, that the purported "renovations" amounted to little more than painting, the replacement of carpet and the addition of room dividers Uthaman believed made the space more convenient for his practice. A-176, ln. 22 – A-177, ln. 2. Accordingly, the Vice Chancellor noted that the scope of the purported work and "renovations,"[6] which were performed over a series of years and consistent with efforts necessary to maintain a busy medical office were undertaken in a manner entirely consistent with the terms of both the 1999 Lease and 2011 Lease that each provided that any and all maintenance, repairs and improvements made to the leased space were to be performed at the tenant's sole and exclusive expense. A-16, ¶11, A-27, ¶ 11. Moreover, even if the renovations were somehow construed as evidence that Uthaman relied upon a belief that he held the Right of First Refusal, the renovations were the unilateral act of Uthaman and do not indicate mutual intent on the part of Fair Hill as is necessary under Delaware law for the partial performance exception to apply.[7]

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at 173:19 – A-131 at 182:17. Further, Uthaman failed to bring to his deposition invoices or other evidence of such work despite his deposition Notice clearly requested such documentation.

[6] The purported renovations made to Units 7 & 8, Building 2 were not performed by Uthaman because Delaware Pain and Spine Center, Inc. is the tenant under the 2011 Lease and that corporation is not a party to this case. Therefore, any repairs to the rental units that are the subject of the 2011 Lease were performed and paid for by a non-party to this case.

[7] The Vice Chancellor noted that the work performed by Uthaman could not have been undertaken in reasonable reliance upon his belief that he would one day benefit from them as the owner of the Property because the Right of First Refusal, as alleged to exist, did not guarantee Uthaman that he would own the Property in the future – it merely provided him with an opportunity to match an offer to purchase the Property. A-202, ln. 21 – A-204, ln. 14.

VI. THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND THE VICE CHANCELLOR'S DECISION.

The issues addressed by the Vice Chancellor in his Decision were neither novel nor complicated and relate to well-settled areas of Delaware law, namely: (1) the formation of contracts pertaining to the conveyance of interests in real property and (2) the application of the doctrine of the statute of frauds to such alleged contracts. The four cornerstone findings in the Decision are: (1) it was "crystal clear" that neither the discussions between LeRoy and Uthaman in 1999, nor those that took place in 2006 at the time the Memo was prepared, are indicative that there was ever a meeting of the minds or an intent to enter into the alleged Right of First Refusal, but rather that the discussions amounted to casual conversation that Uthaman should consider purchasing the Property if and when Fair Hill were to decide to sell it (A-199 at 52:16 – A-200 at 53:1, 14-21; A-201 at 54:16-19); (2) no consideration was exchanged in 1999 at the time Uthaman alleged the Right of First Refusal was granted to him (A-200 at 53:2-6); (3) there is no credible evidence that the parties discussed and agreed upon essential terms for the alleged Right of First Refusal, including a mechanism for determining the purchase price of the Property (*Id.* at 52:16 – A-200 at 53:1); and (4) even assuming, *arguendo,* that the purported Right of First Refusal was granted verbally, Uthaman did not demonstrate through clear and convincing evidence that there was partial performance that would justify an exception to the application of the statute of frauds (A-202 at 55:21 – A-204 at 57:14).

ARGUMENT

I. THE VICE CHANCELLOR'S FINDING THAT THE PARTIES DID NOT ENTER INTO THE PURPORTED RIGHT OF FIRST REFUSAL AND THAT THERE WAS NO ENFORCEABLE CONTRACT IS BASED UPON AN ACCURATE APPLICATION OF LAW AND IS WELL-GROUNDED IN THE EVIDENTIARY RECORD.

A. Question Presented

Did the trial court err in ruling, on a summary judgment record, that the 2006 Memorandum did not grant Uthaman a right of first refusal to the Property based on a finding that there was no "meeting of the minds" between him and Leroy as to the mechanism for determining price, even though the 2006 Handwritten Memo purports to provide for a right of "first refusal" which by law requires the price to be determined by a third party offer?

B. Standard of Review

This Court reviews a trial court's decision on cross-motions for summary judgment, both as to the facts and the law, *de novo*. *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992). However, a trial court's decisions on a motion for summary judgment are given high deference and rarely disturbed upon appeal. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). This Court will draw its own factual conclusions only if the trial judge was clearly wrong and will examine legal issues to determine whether the trial court erred in formulating or applying legal concepts. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990). Where the parties have stipulated that the paper record shall constitute the trial record for cross-motions for summary judgment, as is the case in this appeal, the trial judge

may weigh evidence and resolve conflicts. *Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002).

Each of Uthaman's three claims (breach of contract, specific performance and declaratory judgment) share a common element of proof - Uthaman must demonstrate that the Right of First Refusal is a valid and enforceable contract.

In order to prevail on his claim for breach of contract, Uthaman is required to establish the existence of a contract for the Right of First Refusal, the breach of an obligation imposed by that contract, and resulting damages. *VLIW Tech, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). The first element of his breach of contract claim necessitates Uthaman to establish that the purported Right of First Refusal existed as a valid and enforceable agreement, which requires a demonstration of a mutual assent to the terms of the contract by all parties thereto. *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1303 (Del. Ch. 1983).

Uthaman's claim for specific performance also requires that he demonstrate there was a valid and enforceable contract for the Right of First Refusal. *Messick v. Moore*, 1994 Del. Ch. LEXIS 231, at *9-10 (Del. Ch. Oct. 26, 1994). However, the degree of proof required for Uthaman's claim for specific performance is higher than that required for his breach of contract claim, and he was required to establish the formation of the Right of First Refusal as a valid and binding agreement through clear and convincing evidence. *Hazen*, 1991 Del. Ch. LEXIS 191 at *16; *Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 Del. Ch. LEXIS, at *8 (Del. Ch. Jan. 13, 1988); *Durand v. Snedeker*, 177 A.2d 649 (Del. Ch. 1962); *Hudson v. Layton*, Del. Super., 5 Harr. 74 (1848).

The required elements for Uthaman's claim for declaratory judgment are set forth in 10 DEL. C. § 6502: "[a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." (emphasis added). Accordingly, in order for Uthaman to prevail on his claim for declaratory judgment it was essential that there be a valid and enforceable contractual Right of First Refusal.

C. Merits of the Argument

1. *The Vice Chancellor Appropriately Concluded That There Was No Reliable Evidence the Parties Intended to Contract, Agreed Upon Essential Terms, or Exchanged Consideration for the Purported Right of First Refusal.*

Uthaman alleges in the Complaint that the purported Right of First Refusal was orally granted to him in 1999 shortly after the execution of the 1999 Lease and was then memorialized seven years later in the Memo. A-50, ¶¶ 15, 18. However, as discussed below, the evidentiary record unequivocally indicates that the parties never: (i) intended to enter into any purported Right of First Refusal in either 1999 or 2006, (ii) agreed upon any of the essential terms for such a right, including the ability to "match" any third-party purchase offers made for the Property, or (iii) exchanged consideration for the alleged right. The portion of the Decision finding that the Right of First Refusal was never entered into as a valid and binding contract is grounded on the foregoing three points, each of which independently render the purported Right of First Refusal unenforceable.

i. The Vice Chancellor Correctly Concluded That There Was No "Meeting of the Minds" in 1999 to Enter Into the Right of First Refusal.

Under Delaware law, the essential terms of a right of first refusal must be agreed upon by the parties thereto otherwise the right is too vague to be enforceable. *James J.* Gory *Mech. Contracting, Inc. v. BPG Residential Partners V, LLC et al.*, 2011 Del. Ch. LEXIS 200, at *10 (Del. Ch. Dec. 30, 2011); *Hindes v. Wilmington Poetry Soc'y*, 138 A.2d 501, 503 (Del. Ch. 1958). A party asserting that a right of first refusal exists must demonstrate that the parties reached a "meeting of the minds" on the essential terms of such right and cannot rely upon a court to: (i) define terms that the parties left hopelessly vague or (ii) supply essential terms for which the parties never bargained. *Walton*, 2006 Del. Ch. LEXIS 23, at *13, *citing Mehiel v. Solo Cup Co.*, 2005 Del Ch. LEXIS 66 (Del. Ch. May 13, 2005)). Delaware courts have repeatedly found that the essential terms of an agreement involving the transfer of real property are the price, the date of settlement and the subject property to be sold. *Walton,* 2006 Del. Ch. LEXIS 23, at *21, *citing River Enters., LLC v. Tamari Props., LLC*, 2005 Del. Ch. LEXIS 26, at *1 (Del. Ch. Feb. 15, 2005)).

Uthaman alleged in his Complaint that the Right of First Refusal was granted orally in 1999, a contention that Uthaman conspicuously glosses over in his Opening Brief. A-50, ¶ 15. However, at the Dispositive Hearing Uthaman's counsel argued that if the Right of First Refusal was entered into as a binding agreement it was done so in 2006 at the time the Memo was prepared. A-154, ln. 3-13.

The only evidence Uthaman offered in support of the purported oral grant of the Right of First Refusal in 1999 was his testimony that in 1999 LeRoy told him that he would "consider" selling him the Property. A-105 at 78:2-79:20. In his Opening Brief, Uthaman faults the Vice Chancellor for giving too much weight to Uthaman's deposition testimony.[8] Uthaman Open. Br. at 13. Yet, Uthaman's deposition testimony was the only evidence offered in the record of the purported Right of First Refusal and Uthaman's counsel at the Dispositive Hearing stated that oral evidence was necessary in order for Uthaman to prove his claims. A-161, ln. 9 – A-163, ln. 7. Uthaman, in his interrogatory responses, similarly described the alleged Right of First Refusal as being extended orally as follows:

> Plaintiff responds that [Pierre] LeRoy orally extended Plaintiff the Right of First Refusal, advising Plaintiff that if LeRoy decided to sell the Property in the future, he would consider selling to Plaintiff first. (emphasis added). B043, ROG # 17).

For its part, Fair Hill denied that the Right of First Refusal was orally granted in 1999 or at any other time.[9] B065, ROG #14. It was entirely appropriate for the Vice Chancellor to consider Uthaman's deposition testimony in this case and there is no evidence to suggest that the Vice Chancellor gave such testimony any more weight than the Memo, the parties' discovery responses or anything else that

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[9] Uthaman cites to a sealed deposition transcript in an unrelated case, taking an exchange completely out of context, and argues that LeRoy admitted to the existence of the Right of First Refusal. Uthaman Open. Br. 11. The cited testimony constitutes nothing more than an acknowledgement that: (1) the planned sale of the Property pursuant to the Purchase Agreement had not been completed because Uthaman filed suit pursuant to his "belief" that he had a right of first refusal to purchase the Property, and (2) Uthaman had produced the Memo, which he contends supports his claim. The questioner at the deposition and LeRoy both use the word "believe," demonstrating that they were merely discussing the contentions asserted by Uthaman in this matter and that LeRoy was not offering an admission against Fair Hill's interests.

comprised the evidentiary record. Furthermore, the Vice Chancellor was permitted to weigh the evidence in reaching the Decision. *Cerberus Intern., Ltd.*, 794 A.2d at 1149.

ii. The Vice Chancellor's "Crystal Clear" Finding that the "Memo" Prepared in 2006 Failed to Create an Enforceable Right of First Refusal Is Supported By the Evidentiary Record and the Admission of Uthaman's Counsel as to its Inadequacy.

Uthaman focuses on his belief that the Memo from 2006, prepared seven years after he contends the Right of First Refusal was orally granted, is objective evidence that the parties entered into such an agreement in 1999. Uthaman Open. Br. 18-19. As previously noted, this contention is unsupported by the evidentiary record and is directly contrary to the admission of Uthaman's counsel that the Memo could not, standing alone, form an enforceable agreement for the Right of First Refusal. A-161, ln. 14 – A-163, ln. 3. In fact, as found by the Vice Chancellor, the Memo merely documents a wish list of discussion points that Uthaman prepared in response to the proposed increase in his rent by Fair Hill relating to his ongoing tenancy, one of which was the notation "1st consideration if selling." If Uthaman believed that the Right of First Refusal was granted in 1999 as he contends, it defies logic as to why he was seeking that right in 2006.[10] A-50, ¶ 15.

Based on the record before the court, the Vice Chancellor found that LeRoy's handwritten notations in the Memo do not come close to indicating assent

[10] "1st consideration if selling" does not amount to an enforceable right of first refusal. Rather, it is consistent with Uthaman's view that "Plaintiff responds that [Pierre] LeRoy orally extended plaintiff the right of first refusal advising plaintiff that if LeRoy decided to sell the property in the future, he would consider selling to plaintiff first." (emphasis added). B042-43, ROG #17.

to the purported Right of First Refusal as Uthaman contends. LeRoy did make notations on the Memo agreeing to permit subleasing of the subject space with prior approval from Fair Hill by noting "okay c̄ approval," (medical short-hand for "ok with approval") and paraphrasing Uthaman's words "1st consideration if selling" by writing "= first refusal." B065, ROG #14. However, as Fair Hill noted in its interrogatory responses, and as the Vice Chancellor found, LeRoy's words "= first refusal" was merely a paraphrase of what LeRoy believed Uthaman described he desired. B067, ROG #19. Conspicuously absent was any indication of assent or approval. Uthaman further testified that he believed Fair Hill prepared the 2006 Amendment as a memorialization of what the parties had agreed upon and the 2006 Amendment makes no reference to the Right of First Refusal. A-120 at 138:1-7.

For all of the foregoing reasons, the evidentiary record supports the Vice Chancellor's factual determination that the Memo "clearly" does not indicate an agreement to enter into the Right of First Refusal and is merely evidence that the parties discussed such right at the time. A-200, ln. 14-21.

iii. Even if There Was a Meeting of the Minds to Enter Into the Right of First Refusal, the Parties' Failure to Agree Upon a Mechanism for Establishing a Purchase Price Independently Renders it Unenforceable.

Delaware law provides that parties must agree upon a mechanism for establishing the purchase price of real property that is the subject of a right of first refusal otherwise the right is too vague to be enforceable.[11]

[11] Without the required specificity of material terms, an alleged agreement to grant a right of first refusal is too vague to be enforceable. *James J. Gory Mech. Contracting, Inc.*, 2011 Del. Ch.

Uthaman argues that a purchase price for the Property pursuant to the alleged Right of First Refusal did not need to be agreed upon when the right was purportedly granted because the price is supplied by a third-party purchase offer. Uthaman Open. Br. 22. Uthaman's contention is based upon an assumption, unsupported by the evidentiary record, that the parties agreed that the alleged Right of First Refusal gave Uthaman the ability to match the purchase price offered for the Property by a third party. The ability to match a third-party purchaser's offered price is a price term (or perhaps more accurately a mechanism for determining price). As the Vice Chancellor noted at the Dispositive Hearing, the purchase price term of a right of first refusal can be set in a variety of ways, is subject to negotiation and is not *de facto* the ability to match the price offered by a third party.[12] A-155, ln. 20 – A-158, ln. 9. The record contains no evidence that Uthaman and Fair Hill agreed upon an "unqualified" right of first refusal permitting Uthaman to "match" the purchase price and other terms of a third-party purchase offer. In fact, Uthaman's own testimony indicates that the Right of First Refusal is anything but unqualified given his description that the right allowed him to negotiate for terms different from those offered by a third-party purchaser, including price. A-104 at 75:5-14. Specifically, Uthaman described his ability to negotiate the price he would pay for the Property and that he would determine the

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LEXIS 200, at *10; *Hindes*, 138 A.2d at 503. *See also* 72 Am. Jur. 2d STATUTE OF FRAUDS §246 (purchase price is a necessary term).

[12] *See Crestview Builders, Inc. v. The Noogle Family L.P.*, 816 N.E.2d 1132, 1136 (Ill. App. 2004) (holding that a right of first refusal to purchase real property must contain an express method whereby price is determined and that price is not implicitly that which is offered by a third party).

price by obtaining appraisals and undertaking other undefined efforts. *Id.* at 75:5-19. The various methods of establishing purchase price described by Uthaman during his deposition are anything but clear, are at times inconsistent and contradictory, and certainly do not constitute an "unqualified" agreement that price is to be determined by matching a third-party offer. Further, there is no reference in the Memo to the ability to match a third-party purchase offer for the Property or any other mechanism for establishing price. A holder of an "unqualified" right of first refusal does not have an opportunity to negotiate price. *Colonial Mgmt., Inc. v. Olivere*, 1976 WL 5198, at *5 (Del. Ch. June 8, 1976).

Uthaman argues that the Vice Chancellor placed too much weight on his deposition testimony regarding how the price for the Property was to be established *vis-à-vis* the alleged Right of First Refusal. Uthaman Open. Br. 23-24. Contrary to Uthaman's attempt to portray himself to the Court as being unsophisticated, unknowledgeable and easily confused by real estate terminology, the evidentiary record indicates that he had prior experience negotiating, entering into and litigating an option to purchase a commercial property. A-95 at 38:8 – A-97 at 47:18; A-132 at 186:15-188:24. Accordingly, Uthaman is familiar with rights to purchase real property and is not the confused and unsophisticated deponent he now suggests to have been. Further, the only evidence of the term of the price to be paid for the Property pursuant to the alleged Right of First Refusal is Uthaman's own, self-serving testimony, requiring the Vice Chancellor to consider and weigh it.

For the foregoing reasons, the Vice Chancellor's finding that even assuming, *arguendo,* that there was sufficient evidence that the parties intended to enter into a Right of First Refusal that such right was nonetheless unenforceable because the parties never agreed upon a mechanism for establishing the purchase price for the Property is firmly grounded in the evidentiary record and is a correct application of controlling law. A-201, ln. 12 – A-202, ln. 20.

iv. Even if The Parties Intended to Enter Into the Alleged Right of First Refusal and Agreed Upon Essential Terms, There Is No Evidence that Consideration Was Ever Exchanged for the Right.

In order for a contract (including one for a right of first refusal to purchase real property) to be enforceable there must be an exchange of consideration. *United Health Alliance, LLC v. United Medical, LLC*, 2013 Del. Ch. LEXIS 289, at *19 (Del. Ch. Nov. 27, 2013); *Heckman v. Nero*, 1999 Del. Ch. LEXIS 50 (Del. Ch. Mar. 26, 1999). There is no evidence that any consideration was exchanged at the time the alleged Right of First Refusal was purportedly granted in 1999, a fact Uthaman's counsel conceded at the Dispositive Hearing. A-199, ln. 22 – A-200, ln. 1. Accordingly, the Vice Chancellor properly concluded that the alleged Right of First Refusal is independently unenforceable for lack of consideration. *Id.*

Uthaman has conveniently chosen to ignore the absence of any consideration exchanged for the alleged Right of First Refusal at the time he contends it was granted in 1999, and instead argues that consideration was exchanged in 2006 by way of Uthaman agreeing to the increased monthly rent for the 1999 Lease. Uthaman Open. Br. 24. This argument is inconsistent and flawed. First, Uthaman asserted in his Complaint, and testified at his deposition, that the Right of First

Refusal was granted in 1999, was never modified in any way, and that the Memo serves as nothing more than a memorialization of the prior agreement. A-114 at 113:12-114:3; A-50, ¶ 18. Therefore, if the alleged Right of First Refusal was granted in 1999 and was complete as an agreement at that time, how could any consideration be exchanged seven years later serve as consideration for the long-finalized right?[13] Additionally, Uthaman's willingness to pay increased rent under the 1999 Lease beginning in 2006 is insufficient consideration for the alleged Right of First Refusal because it is illusory.[14] The 1999 Lease expressly requires that any amendments thereto be memorialized in writing and signed by the party against whom enforcement is sought. 1999 Lease, par. 29. Therefore, the purported promise from Uthaman that he would continue to rent Unit 1, Building 1 from Fair Hill at the higher monthly rent is actually unenforceable because Uthaman never signed a written document amending the 1999 Lease with those terms. Furthermore, Uthaman's promise to begin paying a higher monthly rent pursuant to the 1999 Lease beginning in 2006, the first rent increase of any kind under the lease, served as consideration for the 2006 Lease Amendment to the 1999 Lease and is wholly unrelated to the alleged Right of First Refusal Uthaman contends he was granted seven years earlier.

The Vice Chancellor did not err in finding that there was no credible evidence any consideration was exchanged and the Decision should be affirmed.

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[13] 17 C.J.S. CONTRACTS § 101 (2011) ("Consideration is an essential element of a contract including implied contracts as well as to express contracts and must be present when the contract is made.").

[14] 17a Am. Jur. 2d CONTRACTS § 130 (2004) (a promise is illusory and insufficient if it fails to bind the promisor, who retains the option of discontinuing performance).

II. THE VICE CHANCELLOR DID NOT ERR IN CONCLUDING THAT THE RIGHT OF FIRST REFUSAL IS INDEPENDENTLY UNENFORCEABLE BECAUSE IT FAILS TO SATISFY THE STATUTE OF FRAUDS.

A. Question Presented

Did the trial court err in determining, on a summary judgment record, that the 2006 Memorandum violated the statute of frauds, even though it is a writing, signed by or on behalf of Fair Hill, the party to be charged, that (a) reasonably identifies the subject matter of the contract, (b) indicates that a contract has been made, and (c) states with reasonable certainty the essential terms of the agreement by creating a right of first refusal. In the alternative, did the trial court err in holding that Uthaman's improvements to the Property in reliance on the 2006 Memorandum did not warrant enforcement of the right of first refusal to avoid injustice?

B. Standard of Review

The standards set forth in Argument I are incorporated herein by reference.

C. Merits of the Argument

In addition to the Vice Chancellor's finding that the alleged Right of First Refusal was unenforceable because the basic elements required for a binding contract under Delaware law were absent, the Vice Chancellor separately held that the alleged Right of First Refusal is independently unenforceable because it failed to satisfy the applicable statute of frauds. A-202, ln. 21 – A-204, ln. 14.

Uthaman has never taken the position that the statute of frauds is inapplicable to the alleged Right of First Refusal and Delaware law clearly

provides that the statute is applicable to rights of first refusal pertaining to the acquisition of rights in real property. 6 DEL. C. § 2714; *Bielo v. Delaware Wild Lands, Inc.*, 1995 Del. Ch. LEXIS 25 (Del. Ch. Feb. 8, 1995. Rather, Uthaman contends that the Memo satisfies the statute of frauds' requirement that the written evidence of the purported contract be expressed with reasonable certainty. *Crockett v. Green*, 3 Del. Ch. 466 (Del. Ch. 1870), *cited in Blaskovitz v. Cook*, 1989 Del. Ch. LEXIS 147, at *3 (Del. Ch. Oct. 31, 1989)). Specifically, Uthaman summarily argues, without pointing to any portion of the record supporting such contention, that the Memo "clearly" grants the Right of First Refusal and that the right provides Uthaman the privilege to "match" the terms of any third-party offer to purchase the Property. Uthaman Open. Br. 26-27. To the contrary, the Memo does not contain any such acknowledgement of an agreement with respect to the purported Right of First Refusal and nowhere does it reference the right to "match" the terms of any third-party purchase offer. Rather, the Memo merely contains the following text addressing the purported right: "1st consideration if selling=first refusal," and the Vice Chancellor did not clearly err in concluding that this language evidenced nothing more than the fact that a right of first refusal was discussed in 2006. A-200, ln. 14-21.

Contrary to Uthaman's assertion, the Vice Chancellor did consider evidence extrinsic to the Memo, including the deposition testimony of Uthaman, before concluding that the Memo did not evidence that the parties entered into a Right of

First Refusal. Uthaman Open. Br. 27; A-200, ln. 7-21. Uthaman testified that he discussed with LeRoy whether Fair Hill would consider selling him the Property and he never testified that the parties had discussed or agreed upon a method for establishing a purchase price for the Property, including the ability for him to "match" the price offered by a third party. A-105 at 78:2-79:20. Uthaman's testimony is entirely consistent with the Memo and the conclusion of the Vice Chancellor that the parties did nothing more than informally discuss Uthaman's desire in 2006 to be granted some sort of a right and never agreed (i) to enter into such a right or (ii) upon the essential terms for any such right. A-200, ln. 14-21.

Uthaman also argues that if this Court were to determine that the Vice Chancellor appropriately concluded that the Right of First Refusal was unenforceable because it violated the statute of frauds that the Vice Chancellor nonetheless erred in failing to hold that the limited, partial performance exception to the statute was applicable. Uthaman Open. Br. 29-31. In order to succeed in establishing a part performance exception, the party asserting the exception has the high burden of establishing by clear and convincing evidence that the acts claimed to demonstrate such performance: (1) show an unequivocal, mutual recognition by both parties of the existence of a contract and (2) would not have been undertaken but for the contract at issue. *East Coast Resorts, Inc.*, 1990 Del. Ch. LEXIS 204, at *9-10, *citing Durand v. Snedeker*, 177 A.2d 649, 652-53 (Del. Ch. 1962); *Walton*, 2006 Del. Ch. LEXIS 23, at *16, *citing Sargent*, 2005 Del. Ch. LEXIS 116 at *5

(reasoning that "the act relied on as part performance should be an act that would not have occurred absent a contract or agreement relating to the land. Further, the actual part performance must be a joint act, or an act which 'clearly indicates mutual assent' of the parties to the oral agreement.").

Uthaman's alleged partial performance is limited solely to repair and renovation work to the interior of the units he rented at the Property, which he claimed to have undertaken over many years beginning in 2008. Uthaman Open. Br. 29-30. These actions, which Uthaman characterizes as partial performance, do not meet the requirements as an exception to the statute of frauds for several reasons. First, the work performed at Uthaman's expense was unilateral on his part as well as customary and necessary, periodic repairs, maintenance or alterations that one would reasonably expect a responsible tenant to perform in connection with a professional medical office. A-176, ln. 2 – A-177, ln. 2; A-193, ln. 15 – A-195, ln. 12. Furthermore, the work is entirely consistent with the terms of both the 1999 Lease and 2011 Lease, each of which provide that the tenants thereunder are financially responsible for not only maintenance and repair work to the interior of the leased space, but also for "all alterations, improvements and changes." A-15, ¶ 7; A-16, ¶ 11; A-26, ¶ 7, A-27, ¶ 11.

Uthaman makes much of the fact that beginning in 2008 he spent $52,000 to replace carpet, paint and install partitions in his rental units at the Property and contends that the Vice Chancellor underestimated the significance of such work by

stating in the Decision that over the course of Uthaman's 15-year tenancy he spent an average of $3,000 or $4,000 a year. Uthaman Open. Br. 29-30. However, Uthaman misses the point in focusing exclusively on the dollar figure of his alleged work. The Vice Chancellor's determination that the alleged work did not constitute partial performance of the Right of First Refusal did not turn on the cost of the work, but rather on the nature of such work being consistent with maintenance activities necessary for Uthaman's rental units, and further, was performed according to the terms of the existing leases between Fair Hill and Uthaman that required the tenant pay for any repairs or improvements. A-15, ¶ 7; A-16, ¶ 11; A-26, ¶ 7, A-27, ¶ 11. Furthermore, the Vice Chancellor did not err in calculating the average amount expended by Uthaman during the course of his fifteen-year tenancy at the Property.[15]

Uthaman failed to demonstrate by clear and convincing evidence that the parties "unequivocally" partially performed the alleged Right of First Refusal, which is necessary for him to establish a valid exception to the statute of frauds that would otherwise bar his claims. *East Coast Resorts, Inc.*, 1990 Del. Ch. LEXIS 204 at *9-10. The Vice Chancellor's factual findings with respect to the

[15] The fact that Uthaman spent nothing on renovations or repairs until 2008 is of no consequence for the purposes of the trial court's consideration of the partial performance exception to the statute of frauds. For one, Uthaman's average annual expenditure during his tenancy was $3,000 or $4,000 as the Vice Chancellor noted. Further, the fact that Uthaman did not perform any work until 2008 is consistent with the fact that his work was necessary repairs performed on units that were untouched for the prior nine years of his tenancy and does not indicate reliance upon the conversations that took place in 2006 at the time the Memo was prepared. Not surprisingly, the Vice Chancellor was unpersuaded by Uthaman's self-serving affidavit regarding his motivations in performing the work. A-144, ¶ ¶11,12.

alleged partial performance were not clearly erroneous and his application of the governing law regarding the partial performance exception to the statute of frauds was appropriate. Accordingly, the Vice Chancellor's conclusion that the Right of First Refusal was independently unenforceable due to the statute of frauds and that the partial performance exception did not apply should be affirmed.

Uthaman also asserts that if this Court affirms the Decision with respect to the application of the partial performance exception to the statute of frauds that it should nonetheless remand the matter for the Vice Chancellor to consider for the first time whether the doctrine of detrimental reliance would qualify as an exception to the statute of frauds in this instance. Uthaman Open. Br. 30-31. Detrimental reliance was not an issue raised or squarely placed before the Vice Chancellor below and is not an appropriate subject for this appeal pursuant to Supreme Court Rule 8. Nonetheless, the Vice Chancellor did address the issue of whether Uthaman could have reasonably relied upon the Right of First Refusal in performing the purported work. The Vice Chancellor concluded that given (i) Uthaman's testimony that he was not willing to match the terms of the existing third-party purchase offer for the Property and (ii) the fact that the alleged Right of First Refusal did not guarantee Uthaman that he would one day own the Property, Uthaman's purported work could not have reasonably been performed in reliance upon the purported right. A-202, ln. 21 – A-204, ln. 14.

III. UTHAMAN'S CLAIM FOR SPECIFIC PERFORMANCE ALSO FAILS BECAUSE HE ADMITTED TO NOT BEING READY, WILLING AND ABLE TO PERFORM UNDER THE TERMS OF HIS OWN, ALLEGED RIGHT OF FIRST REFUSAL.

A. Question Presented

Should an order of specific performance be issued where, as here, Uthaman has demonstrated by clear and convincing evidence that he has a valid, enforceable right of first refusal and he is ready, willing, and able to exercise his right under commercially reasonable terms?

B. Standard of Review

The standards set forth in Argument I are incorporated herein by reference.

C. Merits of the Argument

Under Delaware law, a party seeking specific performance of a right of first refusal has the burden of demonstrating by clear and convincing evidence that they have a valid contract and are ready, willing and able to perform their obligations under such contract.[16] *Walton*, 2006 Del. Ch. 23 at *13; *Morabito v. Harris*, 2002 Del. Ch. LEXIS 27, at *5-6 (Del. Ch. Mar. 26, 2002). The remedy of specific performance may be granted at the court's discretion upon breach of a valid contract for the sale of land. *Messick*, 1994 Del. Ch. LEXIS 231, at *9-10. As discussed in the above Argument sections of this brief, Uthaman failed to demonstrate that he has a valid and enforceable Right of First Refusal, a required element of his claim for specific performance. Accordingly, the Vice Chancellor did not need to address Uthaman's willingness and ability to perform the alleged

[16] *See also Hazen*, 1991 Del. Ch. LEXIS 191, at *16 (holding that in order to justify specific performance the subject contract must be established with a high degree of proof - clear and convincing evidence); *Carteret Bancorp, Inc.*, 1988 Del. Ch. LEXIS, at *8.

Right of First Refusal in order to deny his claim for specific performance. Nonetheless, Uthaman asks this Court to consider whether, if it were to first decide to reverse the Vice Chancellor's finding that the Right of First Refusal did not exist as an enforceable agreement whether the evidence clearly and convincingly indicates Uthaman was ready, willing and able to "match" the terms of the Purchase Agreement. Uthaman Open. Br. 32-34.

The evidentiary record clearly reflects that Uthaman stated he was not ready, willing and able to match the terms of the Purchase Agreement. Uthaman was asked at his deposition the straightforward question as to whether he would pay the stated purchase price for the Property set forth in the Purchase Agreement and his response was a resounding and repeated "no" despite having the opportunity to conduct any discovery and due diligence he desired with respect to the Property during discovery. A-134 at 195:7 – A-135 at 199:20.

Uthaman contends in his Opening Brief that he was ready, willing and able to perform and to match the terms of the Purchase Agreement because he had secured financing. Uthaman Open. Br. 33. This assertion is contrary to the record. Uthaman testified that he applied for a loan for $1,000,000 to be used towards the purchase the Property, but had not been approved. A-114 at 116:20 – A-115 at 117:12. Uthaman further testified that he did not know whether he had sufficient funds to bridge the gap between the $1,000,000 in financing (assuming he was ultimately approved) and the purchase price for the Property set forth in the Purchase Agreement. A-114 at 116:11 – A-115 at 119:22. Furthermore, setting aside Uthaman's financial ability to match the terms of the Purchase Agreement

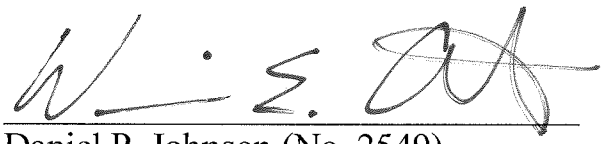
for the Property, his testimony is clear and unequivocal that he was not willing to acquire the Property in "as is" condition (a condition of the existing Purchase Agreement) or at the price contained in Purchase Agreement. A-115 at 119:1-20. Accordingly, Uthaman's claim for specific performance is independently unenforceable because the evidentiary record does not clearly and convincingly establish that that he was ready, willing and able to perform under the Right of First Refusal as alleged and "match" all terms of the existing Purchase Agreement. Lastly, specific performance is an extraordinary and elective remedy that is to be granted only when the equities tip in favor of such relief and where legal damages are insufficient. *Morabito*, 2002 Del. Ch. LEXIS 27, at *6. The equities in this case favor Fair Hill, particularly given that it is a party to a binding, arm's-length Purchase Agreement for the Property with a *bona fide* third-party purchaser and because both parties to the agreement expended significant time, energy and expense in entering into the agreement and preparing for settlement. Uthaman has suggested that the Property is uniquely valuable to him because he has established a medical practice at the Property and spent money renovating the interior of rental units. Uthaman Opening Br. 34. These reasons are unpersuasive. The repair/renovation work is consistent with the terms of Uthaman's leases that clearly and expressly provide that any improvements or alternations made by the tenant are at tenant's expense and will become the property of Fair Hill upon the conclusion of the leases. A-15, ¶ 7; A-16, ¶ 11; A-26, ¶ 7, A-27, ¶ 11.

CONCLUSION

For the foregoing reasons set forth in this brief, Fair Hill respectfully requests that the Decision of the Vice Chancellor be affirmed.

Respectfully submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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Dated: January 26, 2015