MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Cumb 24-311

RICHARD A. LIBERTY, *et al.*

Plaintiffs-Appellants

v.

ALVIN G. MACK, *et al.*

Defendants-Appellees

On Appeal from the Maine Superior Court, Cumberland County

APPEAL BRIEF OF APPELLEE

Attorney for Defendant-Appellee

Steven E. Cope, Esq.
COPE LAW FIRM
461 Stevens Avenue
PO Box 1398
Portland, ME 04104
207-772-7491

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MAINE CASES

FEDERAL CASES

MAINE SUPREME JUDICIAL COURT **Sitting as the Law Court**
Docket No. Cum-24-311

****

RICHARD A. LIBERTY et al.

APPELLANT

v.

ALVIN G. MACK et al.

APPELLEE

****

APPELLEE'S

APPEAL BRIEF

(Title to Real Estate is Involved)

NOW COMES the Defendant-Appellee ALVIN G. MACK, by and through his undersigned counsel, and submits herewith his Appeal Brief in opposition to the Appeal presented by Plaintiffs-Appellants Richard A. Liberty, et al.

STATEMENT OF THE CASE

Appellee adopts Appellants' Statement of the Case.

STATEMENT OF FACTS

In their Appeal Brief, the Appellants have limited their appeal to a single issue: whether the Libertys met their burden of proof on damages resulting from the failure of Alvin Mack to give the Libertys notice that he had entered into an option (the "Option Agreement", (App. p. 81)) to sell certain property located at 17 LBJ Drive in Harrison Maine (the "Property") in which the Libertys had a right of first refusal.

The following facts augment and supplement the facts contained in the

Appellants' Statement of Facts. Except to the extent that the Appellant challenges the interpretation of the contract provisions in the Option Agreement as a factual matter, the facts as found by the Court in the Judgment and as stated in the Appellants State of Facts and this Supplemental Statement of Facts are not in dispute.[1]

The Trial Court found that "Alvin Mack is bound by the Limited Release through actual knowledge, record notice and by virtue of taking ownership of Big Mack, including its then-existing obligations." (Judgment, p.10)[2] For the purposes of the limited issue presented to this Court by the Appellants in this Appeal, the Appellee does not challenge the Trial Court's rulings that: (i) the Limited Release was a binding contract; (ii) there was an agreement between the Libertys and others for a right of first refusal that imposed upon Alvin Mack an equitable duty to give the Libertys notice of the Option Agreement; and (iii) Alvin Mack did not give notice after entering into the Option Agreement. (Judgment, pp 11-12).

Three witnesses, Alvin Mack, Frederick Lockwood and Todd Colpitts, testified at trial regarding the comprehensive nature of the transaction in which the

---

[1] The facts are stated as found by the Court in its Judgment dated April 19, 2024 (App. pp. 28-40, "Judgment, ¶ ____") and in the evidence and testimony presented at trial where indicated.

[2] The Appellee has reservations as to how the Limited Release satisfies the requirements for a valid, binding contract under conventional contract principals, or what obligation it was notice of but accepts these determinations for purposes of this appeal as these findings have no material affect on the issue presented.

Option Agreement was executed and the intention of the parties in agreeing to the Option Agreement.

Alvin Mack, the owner of the Property, entered into the Option Agreement with Investment Properties, Inc., a corporation owned by Frederick Lockwood ("Lockwood") in order to afford him the opportunity to purchase the Property. The purchase price was the negotiated short sale price of the outstanding first mortgage on the Property held by TD Bank ((App. p. 177). The Option Agreement was executed on February 24, 2016, in conjunction with numerous related agreements, loans and mortgages among Alvin Mack, Investment Properties, Inc., Frederick Lockwood and Atlantic Northern, LLC (and its affiliates) ("Atlantic Northern") at a closing held at the offices of Atlantic Northern's counsel (the "2016 Closing"). Atlantic Northern is a private lending institution which provided a number of loans to Mack, Lockwood and Investment Properties, Inc. The Closing Agenda for these transactions appears at Trial Exhibit 62. The various obligations addressed in the Closing Agenda are described in paragraphs 18-24 of the Affidavit of Todd Colpitts, a loan officer of Atlantic Northern ((Trial Exhibit 64); these paragraphs were admitted into evidence by stipulation of the parties ((Tr. Vol. III, p. 170). The Closing documents referred to in Trial Exhibit 64 were introduced as Trial Exhibits 65, 66, 67 and 68 and also appear in the Appendix, at pp. 176-237.

Colpitts testified that all of the debts secured by the mortgages on the Property held by Atlantic Northern including several new mortgages granted at the

2016 Closing would have to be paid in order for Atlantic Northern to release its liens upon the exercise of the Option Agreement. At 2016 Closing, Atlantic Northern granted Investment Properties, Inc. a new line of credit in the amount of $475,000 (App. p. 176) to finance the payoff of the TD Bank loan should Investment Properties, Inc. exercise the Option Agreement and close on the purchase. The line of credit was secured by an additional mortgage on the Property. Colpitts further testified that he had ordered a title examination and procured title insurance on the Property for the various mortgages. The title insurance commitment (Trial Exhibit 86) made no mention of any right of first refusal in favor of the Libertys. Colpitts also testified that he had obtained an appraisal of the Property in connection with the new loans and mortgages which assessed the fair value of the Property to be approximately $650,000 (Tr. Vol. III, p. 173).

Alvin Mack testified that he was present at the 2016 Closing and that it addressed all the outstanding obligations involving Alvin Mack, Lockwood and Investment Properties (and others.) related to the Property among other obligations. Lockwood had previously expressed an interest in purchasing the Property and Alvin Mack, as the owner, was willing to accommodate. Alvin Mack and Investment Properties, Inc. entered into the Option Agreement as the vehicle to allow Lockwood two years to purchase the Property if and when he was financially able to do so.

At the 2016 Closing, Alvin Mack signed mortgages on the Property in favor

of Atlantic Northern to secure a $62,000 loan to Louis Mack Company, Inc., a $45,000 loan to Investment Properties, Inc. and a $575,000 loan to Investment Properties, Inc. These mortgages were junior to the mortgage loan to TD Bank which had an approximate balance of $440,000. (Tr. Vol. IV, pp 37-38). Alvin Mack further testified that Lockwood consented to these mortgages as they were for loans previously made by Atlantic Northern to him. He testified that he and Lockwood understood that Atlantic Northern would only release its mortgages on the Property if they were paid. (Tr. Vol. IV, p. 99-101).

Lockwood testified that he knew that the mortgages executed at the 2016 Closing encumbered the Property for his own benefit and that he knew they needed to be paid off at the time he might exercise the Option Agreement. ((Tr. Vol. I, pp. 156 and 171) Lockwood also testified that he understood and agreed that the price for the option was not just the TD Bank balance but also included the other mortgages that were placed on the Property at the 2016 Closing. (Tr. Vol. I, pp. 226-227) Lockwood further testified that he never exercised the option in the Option Agreement because there were too many liens on the Property and he did not have the funds available to clear all these liens. (Tr. Vol. I, p. 226-227)

The above evidence is consistent with Trial Justice's detailed findings which appear in Paragraphs 40-42 of the Judgment. The Trial Court reaffirmed in the last page of the Judgment that the Property was encumbered with the Atlantic Northern mortgages well beyond the TD Bank mortgage balance.

At trial, the Trial Justice stated to Appellants' trial counsel: "I find it

unbelievable that this transaction would go forward, and Mr. Mack would be obligated to pay off all that debt. So it just doesn't make sense to me, your theory of the case." (Tr. Vol. IV, p. 101)[3]

On February 16, 2018, Alvin Mack conveyed the Property to Atlantic Northern (App. p. 272) pursuant to an agreement for a deed in lieu of foreclosure (Trial Exhibit 25B) which relieved Alvin Mack of his personal and guaranty liability to Atlantic Northern which the Court found was $317,407. (Judgment, ¶ 45) Atlantic Norther acquired the Property subject to total indebtedness in the amount of $759,940, inclusive of the TD Bank mortgage debt of $443,533 and its own debt in the amount of #317, 407. As part of this transaction, Atlantic Northern ordered a title examination of the Property and procured title insurance from Bernstein, Shur. The title commitment (Trial Exhibit 82) contained no exception for any right of first refusal.

Shortly after Atlantic Northern purchased the Property and took possession, the Libertys became aware of the conveyance to Atlantic Northern and claimed it violated their right of first refusal. Disputing the Liberty's claim and to clear title, Atlantic Northern filed a suit in 2018 in which Atlantic Northern and the Libertys were the only parties. The parties reached a privately mediated and arbitrated

[3] This excerpt from the transcript is included in this Brief to support the Trial Court's decision (Judgment, Final Paragraph on page 12) and for the fact that the Court gave Plaintiffs' counsel a heads up, prior to the conclusion of the trial, that the Libertys, standing in the shoes of Investment Properties, Inc., under the Option Contract, would not be able to purchase the for the amount due TD Bank alone, which at time was approximately $440,000.

settlement in which the Libertys agreed to pay $250,000 to Atlantic Northern to purchase the Property subject to the TD Bank mortgage debt. The parties disagreed about the meaning of the term "subject to" in their settlement agreement and the matter was arbitrated by the mediator. the Libertys challenged the award and the Court negated the award and the settlement based on failure of the parties to have a meeting of the minds. (See Justice Horton's rulings in *Atlantic Northern, LLC v Richard Liberty et als*, CUMSC-RE-18-0298, (Trial Exhibit 51)

The present action was initiated by Atlantic Northern against the Liberty later in 2018 seeking to quiet title to the Property in light of the Libertys' ongoing claim that they had an unsatisfied right of first refusal. The Libertys joined Alvin Mack as a third-party defendant. The Libertys and Atlantic Northern reached a settlement through judicial mediation. The Libertys agreed to pay Atlantic Northern $155,000 in exchange for title to the Property subject to the TD Bank mortgage which at the time had a balance of $395,755. The Libertys took title in the name of Marie, LLC, a limited liability company which they owned. (Judgment, ¶ 50) The Trial Court found that total consideration for the purchase was $551,000 (Judgment, ¶ 50). The Libertys subsequently paid off TD Bank.

During the trial in this matter, the Libertys limited their case to damages they would have sustained from not being afforded the opportunity to exercise their right of first refusal in connection with the Option Agreement. In its Judgment, the Trial Court found that the Libertys had failed to prove their damages and awarded Judgment to Alvin Mack. The Court observed that had the

Libertys assumed Investment Properties, Inc.'s position under the Option Agreement, the Libertys would not have been able to acquire the Property solely for the TD Bank debt. The Trial Court concluded that the Option Agreement did not allow a damage claim should Alvin Mack be able to convey unencumbered title and that in any event, the Libertys did not prove what hypothetical damages they might have incurred had they sought to compel Alvin Mack to convey the property with no encumbrance, the Court granted judgment for Alvin Mack. This appeal followed.

PROCEDURAL HISTORY

The Appellee adopts the Appellants' Procedural History with the following additional details:

a. Big Mack Development, Inc., originally named as a third party Defendant by the Libertys in their Third Party Complaint was never served with the Third Party Complaint and was dismissed by the Court on January 25, 2024.

b. James H. Johnson and Deborah A. Johnson were dismissed as parties in on August 19, 2021.

c. Marie, LLC was joined as party Plaintiff on January 25, 2024 with respect to Count III. The Appellants dismissed Count III at the commencement of the trial.

d. Louis Mack Co., Inc. was dismissed by the Court on January 25, 2024.

e. Atlantic Northern, the original Plaintiff in this case was dismissed on July 19, 2021, following the consummation for the settlement.

f. The Trial Court changed the party identification of the Libertys from Third Party Plaintiffs to Plaintiff and Alvin Mack from Third Party Defendant to Defendant.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellee defers to the Appellants' Statement of issues Presented for Review.

SUMMARY OF APPELLEE'S ARGUMENT

As more fully stated below, Appellee asserts that Judgment in Appellee's favor is supported by applicable law and to the extent it is based on factual findings, the findings are supported by substantial evidence in the record. The Trial Court committed no error that would warrant this Court to sustain the pending appeal.

STANDARD OF REVIEW

In addition to the Standards of Review set out in the Appellants' Brief, the following additional Standards apply.

In *Williams v Ubaldo*, 670 A.2d 913 (Me. 1995), the Court made clear that for a Plaintiff to prevail on a claim for damages, the evidence of these damages must not be speculative or uncertain: "In order to be recoverable, damages must not be uncertain or speculative but must be grounded on facts in evidence." *King v. King*, 507 A.2d 1057, 1059 (Me. 1986); see also, *Michaud v. Steckino*, 390 A.2d

524, 530 (Me. 1978) ("It is well settled law that damages are not recoverable when uncertain, contingent, or speculative. Damages must be grounded on established positive facts or on evidence from which their existence and amount may be determined to a probability. They must not rest wholly on surmise and conjecture.") (citations omitted)." *Williams v. Ubaldo*, 670 A.2d at 917 (Me. 1995)

"In cases involving the interpretation of contract language, the proper standard of review depends on whether the contract language at issue is ambiguous, which we determine de novo. See *Testa's, Inc. v. Coopersmith, 2014 ME 137, ¶ 11, 105 A.3d 1037 (Me. 2014)*. "Contract language is ambiguous when it is reasonably susceptible of different interpretations." *Am. Prot. Ins. v. Acadia Ins.*, 2003 ME 6, ¶ 11, 814 A.2d 989 (quotation marks omitted). If a contract is ambiguous, this Court reviews the interpretation of the contract for clear error by the fact finder. See *Villas by the Sea Owners Ass'n v. Garrity*, 2000 ME 48, ¶ 9, 748 A.2d 457 (Me. 2000); see also *Testa's, Inc*., 2014 ME 137, ¶ 11, 105 A.3d 1037. If a contract is unambiguous, this Court reviews its language de novo. See *Spottiswoode v. Levine*, 1999 ME 79, ¶ 25, 730 A.2d 166 (Me. 1999); see also *Testa's, Inc.*, 2014 ME 137, ¶ 11, 105 A.3d 1037*." 55 Oak St. LLC v. RDR Enters*., 2022 ME 28, P15

APPELLEE'S LEGAL ARGUMENT

THE SUPERIOR COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF ALVIN MACK AS A MATTER OF LAW AND BASED ON THE UNDISPUTED FACTS.

1. In construing the Option Agreement as a whole, the Superior Court correctly concluded, as a matter of law, that the Libertys could not compel the purchase of the Property for the TD Bank debt alone.

"An agreement is legally binding if the parties "mutually assented to be bound by all its material terms; the assent [was] manifested in the contract, either expressly or impliedly; and the contract [was] sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties." *Stanton v. Univ. of Me. Sys*., 2001 ME 96, ¶ 13, 773 A.2d 1045 (Me. 2001) (quotation marks omitted). If each party communicated to the other a "distinct and common intention," the contract will be enforceable. Id. (quotation marks omitted). We interpret the unambiguous terms of a contract according to their ordinary meaning, see *Travelers Indem. Co. v. Bryant*, 2012 ME 38, ¶ 9, 38 A.3d 1267, unless the contract explicitly provides otherwise, see, e.g., *ABN AMRO Mortg. Group v. Willis*, 2003 ME 98, ¶¶ 3, 4, 829 A.2d 527 (applying contract's definition of "default" when construing a mortgage contract)." *Barr v. Dyke*, 2012 ME 108, P13 and see *Pew v. Sayler*, 123 A. 3rd 522, 529 (ME 2015)

"To establish a legally binding agreement the parties must have mutually assented to be bound by all of its material terms; the assent must be reflected and manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties." *Sevigny v. Home Builders Association of Maine, Inc.,* 429 A.2d 197, 202 (Me. 1981); *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978); *Pendleton v. Sard*, 297 A.2d 889, 892 (Me. 1972)." *Roy v. Danis*, 553

A.2d 663, 664 (Me. 1989) "A contract exists when the parties mutually assent to be bound by all its material terms, the assent is either expressly or impliedly manifested ***in the contract***, and the contract is sufficiently definite." *McClare v. Rocha*, 2014 ME 4, P 16, 86 A.3d 22" *(emphasis added) Testa's, Inc. v. Coopersmith*, 2014 ME 137, P8; See also *Barr v. Dyke*, 2012 ME 108, P13

Once the existence of a contract has been established, a dispute may arise as to the construction of the terms of the contract. In *Augusta v. Quirion*, 436 A.2d 388, 392 (Me. 1981), the Court addressed the standards for interpreting and construing the terms of a contract.

> The construction of contract language is a matter of law for the court to determine. *Soper v. St. Regis Paper Co.*, Me., 411 A.2d 1004, 1006 (1980); *T-M Oil Co., Inc. v. Pasquale*, Me., 388 A.2d 82, 85 (1978). Contract language is to be construed to implement the intent of the parties. *Corbett v. Noel*, 160 Me. 407, 413, 205 A.2d 165 (1964); *Salmon Lake Seed Co. v. Frontier Trust Co.*, 130 Me. 69 153 A. 671 (1931); see *Lincoln Pulp & Paper Co., Inc. v. Dravo Corp.*, 436 F. Supp. 262, 271 (D. Me., 1977). The situation of the parties must govern the construction of contract language. See Ames v. Hilton, 70 Me. 36, 43 (1879). The language employed by the parties is to be construed to give effect to the plain meaning of the words used. *Soper*, at 1006; *T-M Oil Co., Inc.*, at 85; *Lewiston Fire Fighters Ass'n, Local 785 v. City of Lewiston, Me.*, 354 A.2d 154 (1976).

Augusta v. Quirion, 436 A.2d 388, 392 (Me. 1981); 1981 Me. LEXIS 990, ¶ 9

In reviewing contract language, the Law Court reviews the language *de novo. Farrington Owners' Ass'n v. Conway Lake Resorts, Inc.,* 2005 ME 93, P10, 878 A.2d 504, 507 (Me. 2005) *Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1282 (Me. 1993).

"All parts and clauses must be considered together that it may be seen if and

how far one clause is explained, modified, limited or controlled by the others." *Apgar v. Commercial Union Ins. Co.* 683 A2d 497, 498 (Me. 1966), citing *Globe Indem. Co. v Jordan*, 634 A.2d at 1282, supra. "It is a well established principle that a contract is to be interpreted to give effect to the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished." *Foster v. Foster*, 609 A.2d 1171, 1172 (Me. 1992).

"We have long recognized that canons of construction require that a contract be construed to give force and effect to all of its provisions, and we will avoid an interpretation that renders meaningless any particular provision in the contract." *Farrington Owners' Ass'n v. Conway Lake Resorts, Inc*., 2005 ME 93, P10, 878 A.2d 504, 507 (quotation marks omitted). See also *Estate of Barrows*, 913 A.2d 608, 611-612.

The Appellant's principle issue on appeal is that the Court misconstrued or misapplied certain contract language contained in the Option Agreement (App. p. 117, (Trial Exhibit 20). The Appellant argues that the Option Agreement obligated Alvin Mack to delivery a warranty deed free and clear of liens for a purchase price equal to the payoff of the TD Bank first mortgage loan notwithstanding the existence of Atlantic Northern mortgages securing over $680,000 of additional debt. They rest this argument on what they characterize as the unambiguous language of Paragraphs 6 and 9.1 of the Option Agreement.

The Appellants make no mention of Paragraph 12.9 which explicitly limits

the remedies available to Investment Properties, Inc. if the optionor cannot remove the title exceptions, i.e. the Atlantic Northern mortgages. The Trial Court correctly observed that Paragraphs 6 and 9.1 were title conditions to closing and Paragraph 12.9 extended a choice should the title condition not be achievable: either terminate the option or accept the Property as is. The parties to the Option Agreement were free to negotiate any number of remedy options: the parties agreed to the terms in Paragraph 12.9. The Trial Court correctly held that the Libertys standing in the shoes of Investment Properties, Inc. under the apparent right of first refusal have the benefits of and are subject to the restrictions contained within the four corners of the Option Agreement. The Trial Court's task was to consider the intent of the parties as evidenced by the agreement as a whole, giving due and appropriate consideration to every paragraph of the Option Agreement. Paragraph 12.9 contains an conditional election that must be read in conjunction with Paragraph 9.1. The inclusion of Paragraph 12.9 is wholly consistent with the entirety of the 2016 Closing at which not only the Option Agreement was executed but also other loans were granted and mortgages were placed on the Property. Everyone understood and intended that all of these mortgages would have to be paid off should the Option Agreement be exercised.

It was incumbent on the Libertys to prove their damages. First, the Libertys needed to prove what they would have had to pay had they stepped into Investment Properties, Inc's position on the Option Agreement. Perhaps this might have been a negotiated discounted payoff. Perhaps the Libertys would have

had to pursue a derivative claim for specific performance against Alvin Mack seeking an order compelling him to clear all the Atlantic Northern liens out of his own pocket despite the language in the Option Agreement. The Libertys presented no evidence on this issue; rather they took a position that ignored Paragraph 12.9 and insisted at trial that they had only to payoff TD Bank.

The Trial Court construed Paragraphs 6, 9.1 and 12.9 harmoniously so as to give effect to the meaning of each and to inform the Trial Court of the intent of the parties evidenced by the plain language of the contract. The Option Agreement obligated Alvin Mack to convey the Property by Warranty Deed free and clear of most liens (Paragraphs 6 and 9.1) but if he could not, the Option Agreement limited the optionee's choices: either take subject to these encumbrances or terminate the Option Agreement (Paragraph 12.9). As a matter of law, the express language in the Option Agreement did not afford the optionee a damage claim if the optionor could not deliver clear, unencumbered title. The title provision was simply a condition precedent to the completion of the sale which the optionee could invoke or waive, depending on the state of the title. The failure to provide clear title was not a breach or default of the contract. No damages would have arisen under the terms of the Option Agreement if Alvin Mack was unable to satisfy the clear title condition. The Libertys have no damage claim under the plain language of the Option Agreement even if they had received notice of the Option Agreement and had attempted by failed to purchase the Property for the balance due TD Bank. The Trial Court did not err in granting judgment for Alvin

Mack because there was no contractual basis for their recovery of damages under the Option Agreement.

2. ***If Damages are recoverable as a matter of law under the Option Agreement for a breach of the Libertys' right of first refusal, the Libertys failed to present evidence of their damages.***

Assuming *arguendo* that the Libertys are able to overcome the legal obstacle that the plain language of the Option Agreement precludes the recovery of damages, the Libertys have the burden of proof on damages and must present evidence at trial from which the Court can make reasoned fact based finding.[4] Simply stated, there was no evidence introduced by the Appellants to satisfy their fundamental burden. The Trial Court correctly determined that the Libertys failure to introduce such evidence precludes an award of damages and entitles Alvin Mack to judgment in his favor.

As discussed above, this Court has long held that speculative or inspecific claims for damages cannot be the basis for a sustainable award of damages.

---

[4] The presumption that damages might be recoverable requires a legal determination that Alvin Mack has contractual liability under an agreement granting a right of first refusal. There is no finding to this effect; the only finding was that Alvin Mack had knowledge of a right of first refusal between the Libertys and Big Mack Development established by the Limited Release, that Alvin Mack had record notice of the Limited Release though he had not assumed or ratified it, and that Alvin Mack had no liability under the secret Sale Agreement to which he was not a party and had no knowledge. Maine law recognizes an equitable duty to provide notice if a right of first refusal applies with an equitable right of the holder to seek to recover the property, *Van Dam v. Spickler*, 2009 ME 36 ; 968 A.2d 1040 (Me. 2009); 2009 Me. LEXIS 35, but only the parties to a right of first refusal agreement or persons who affirmatively obligate themselves to an existing right of first refusal have contract-based damages liability. See *Pew v. Sayler*, 123 A. 3rd 522, 529-530 (ME 2015). Since the Libertys presented no evidence of damages, the issue of whether Alvin Mack had contractual liability for damages need not be determined.

Essentially, it is not fact finder's job to guess what the damages are.

In this case, the Libertys needed to show that they would have had to pay more to acquire the Property under the Option Agreement than they would have paid had they matched the terms of Alvin Mack's sale of the Property to Atlantic Northern in 2018 ($759,940, (Judgment, ¶ 45)), or at a minimum, more than they actually paid to Atlantic Northern and TD Bank following the settlement in June, 2021 ($551,000 (Judgment, ¶ 50)). [5]

Additionally, the Libertys would have to establish that they could have compelled Alvin Mack to deliver the property free and clear of liens beyond the TD Bank payoff and then what amount they might have had to pay to achieve that outcome. This would obligate Libertys to prove the case within the case, similar to what a plaintiff in professional liability case must show through expert testimony to prove damages. The Libertys would also have to defeat numerous equitable and other defenses to prevail. If the Option Agreement was ambiguous or if extrinsic evidence would have been admissible on the issue of the intent of the parties, the Libertys would have to overcome the overwhelming and uncontroverted evidence that none of the parties to the Option Agreement expected or intended that Alvin Mack would have had to satisfy the Atlantic mortgages out of his own pocket or sell at a substantially lower price than its

[5] In a footnote, the Trial Court acknowledged that the Libertys' settlement with Atlantic fulfilled their duty to mitigate their damages. (Judgment, p.13).

appraised value. Even Lockwood acknowledged in testimony that he had to pay off Atlantic Northern himself and he did not have the funds to do so for the duration of the term of the Option Agreement. The Libertys introduced no credible evidence that they would have had the financial ability to do so.

The Libertys' argue that their damages were the difference between the price they paid Atlantic Northern in 2021 and the amount of the TD Bank loan in 2016. As discussed above, if a fact based damage calculation needed to be made under the language of the Option Agreement, the Option Agreement made clear that TD Bank balance was not the baseline component to determine these damages. Rather, the Libertys had to show what it would have cost them should they be able to compel performance under the Option Agreement as they interpret it. Since no such evidence was presented, there was no basis for the Court to ascertain mathematically what damages had been incurred. On the record in this case, the Libertys' claim for damages was, at best, speculative and the Libertys' failure to prove their damages justified judgment in favor of Alvin Mack.

CONCLUSION

For the reasons set forth above, there was no applicable right of first refusal in favor of the Libertys that subjected Alvin Mack to damages. Even if damages were available to the Libertys, they failed to present evidence of such damages. The pending appeal should be denied.

Dated: February 5, 2025

Steven E. Cope, Bar No. 2111
Attorney for Appellee, Alvin G. Mack
COPE LAW FIRM
461 Stevens Avenue, Portland, ME 04103
Telephone: (207) 772-7491
Email address: scope@copelegal.com

CERTIFICATE OF SERVICE

I, Steven E. Cope, Esq., certify that I served the above Brief of Appellee on the Appellant's counsel, Gerald B. Schofield, Jr., Esq, electronically on February 5, 2025.

Steven E. Cope