UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Clive Gray, Plaintiff,	:	
v.	:	File No. 2:03-CV-92
Page Stegner, Lynn Stegner, and Penny Rainey, Defendants.	:	

OPINION AND ORDER
(Papers 32, 39, 56, 64, & 69)

Plaintiff Clive Gray brought this diversity action under Vermont property law, seeking ownership of a piece of property in Greensboro, Vermont. He seeks specific enforcement of a right of first refusal and a voiding of a sale transferring the property from Defendants Page and Lynn Stegner to Defendant Penny Rainey. The case is currently before the court on cross-motions for summary judgment. Defendant Rainey has also filed a motion to strike certain exhibits to Gray's statement of undisputed facts, as well as all statements of fact based on those exhibits.

For the reasons set forth below, Gray's motion for

summary judgment (Paper 39) is DENIED. The Stegners' motion for summary judgment (Paper 56) and Rainey's motion for summary judgment (Paper 32) are GRANTED. Rainey's motion to strike (Paper 64) is GRANTED. Gray's motion to compel the deposition of Attorney Matthew Daly (Paper 69) is DENIED as moot.

Background

Unless otherwise noted, the following facts are undisputed. In 1958, Philip and Margaret Gray conveyed a cabin and land by warranty deed to Wallace and Mary Stegner. (Paper 42, Exhibit A; Paper 58, ¶ 3). The land is located in Greensboro, Vermont, and is now known as 366 Grays Drive ("the Property"). (Paper 42, Exhibit A; Paper 58, ¶ 3). The deed conveying the Property contained the following language:

> In the event that the said grantees or their children desire to convey the property hereby conveyed, the said Philip Hayward Gray and/or Margaret Day Gray, or any or all of their children who are now living, shall have the right to purchase said property for its then fair market value.

(Paper 42, Exhibit A; Paper 58, ¶ 3).

On January 25, 1975, Wallace and Mary Stegner conveyed the Property to Edwin Free, Jr., and three days later, Free

conveyed the Property to Wallace and Mary Stegner as trustees of the Wallace E. Stegner and Mary P. Stegner Revocable Trust. (Paper 42, Exhibits F-1 & F-2; Paper 58, ¶ 5). On April 29, 1992, Mary Page Stegner[1] conveyed the Property to Stuart Page Stegner[2] and Lynn Marie Stegner (collectively "the Stegners") as co-trustees of the Stegner Family Trust of April 29, 1992. (Paper 42, Exhibit A-1; Paper 58, ¶ 5). On September 29, 1999, the Stegners conveyed the Property to themselves as co-trustees of the Stegner Family Trust. (Paper 42, Exhibit A-2; Paper 58, ¶ 5). The language of the preemptive right was changed slightly in the September 29, 1999 deed. (Paper 42, Exhibit A-2; Paper 58, ¶ 5). It read "In the event that the said grantees desire to convey the property hereby conveyed, the children of Philip Hayward Gray and/or Margaret Gray Day who were living on December 31, 1957 shall have the right to purchase the property for its then fair market value." (Paper 42, Exhibit A-2).

On August 1, 2002, Page Stegner sent a letter by regular

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[1] Wallace Stegner was deceased.

[2] Stuart Page Stegner is the son of Mary and Wallace Stegner. Lynn Marie Stegner is his wife.

U.S. Mail to each of the six Gray children informing them that he and his wife were interested in selling the Property for $215,000. (Paper 42, Exhibit A-3; Paper 58, ¶ 7). It appears that there was no written response to this letter, but it does appear that Page Stegner and one of the Gray children discussed the sale briefly in September. (Paper 42, Exhibit H; Paper 81, Exhibit 1). On October 1, 2002, Page Stegner sent an email to the Gray children, stating that, as he had heard nothing concrete from the Grays he was planning to pursue other options with the sale of the Property. (Paper 42, Exhibit I; Paper 81, Exhibit 1).

On October 2, 2002, Clive Gray sent an email to Page Stegner, informing him that the Grays were interested in purchasing the Property, and asking him to call to discuss the details. (Paper 42, Exhibit I-1). On October 5, 2002, Page Stegner emailed Clive Gray, informing him that there had been several expressions of interest in the Property, including one from Penny Rainey[3] for the full asking price. (Id. at Exhibit

[3] Penny Rainey is a cousin of Clive Gray. At the time of these events, she owned a house near the Property. (Paper 43, Exhibit J-2.)

J-2). On October 9, 2002, Stegner emailed Ben Benoit, the trust officer responsible for a trust of which Rainey is a beneficiary, and from which Rainey received the money to purchase the Property. (Paper 81, ¶ 1 & Exhibit 1). In that email, Stegner indicated that Clive Gray had called and stated that he would be exercising his preemptive right. (Id. at Exhibit 1). Stegner also indicated that "the one member of the family I won't sell the property to under any circumstances is Clive." (Id.). On October 11, 2002, Clive Gray emailed the Stegners informing them that he intended to get a mortgage to finance part of the purchase price. (Paper 42, Exhibit K). Clive Gray also stated "on the issue of 'fair market value,' I think you will agree that it was not the intent of our parents when they put the language in to the deed that a Gray family purchaser would have to match the bid of a third party desiring to acquire the place at any price." (Id.).

On October 30, 2002, the Stegners forwarded a letter to each of the Gray children, formally informing the Grays that the Stegners had received a formal offer for the Property from Penny Rainey. (Paper 58, Exhibit 8). The Stegners enclosed

copies of the Purchase and Sale Contract, and informed the Gray children that they still had the opportunity to exercise their purchase rights under the deed. (Id.). The Stegners informed the Grays that "if you desire to purchase the property yourself, you may do so if you match identically Penny's offer." (Id.). On November 13, 2002, Clive Gray wrote to the Stegners, indicating that he wished to exercise his right of first refusal, and would purchase the Property for $215,000, the price stipulated in the Purchase and Sale Contract with Penny Rainey. (Paper 42, Exhibit Exhibit L; Paper 58, Exhibit 9). Clive Gray told the Stegners that his attorney would contact their attorney to work out the details. (Paper 42, Exhibit L; Paper 58, Exhibit 9).

It appears that the attorneys were in contact with each other, but no documentation of any phone conversation is contained in the record. On November 20, 2002, the Stegners' attorney, Matthew Daly, sent an email to David Blythe, Clive Gray's attorney. (Paper 42, Exhibit O; Paper 58, Exhibit 10). In that email, Attorney Daly indicated that the Stegners were still willing to sell the land to Clive Gray, as long as he would pay the purchase price by December 1, 2002, and deposit

$15,000 of the purchase price in escrow by November 26, 2002. (Paper 42, Exhibit O; Paper 58, Exhibit 10). Attorney Daly indicated that the Stegners intended to hold Clive Gray to the December 1 deadline, because he had already had ample notice of their intent to sell the Property. (Paper 42, Exhibit O; Paper 58, Exhibit 10). On November 22, 2002, Attorney Blythe emailed Attorney Daly, explaining that the December 1, 2002 date was not a reasonable closing date. (Paper 42, Exhibit P). Attorney Blythe argued that, despite the advance notice, "it would not have made any sense at all for the Gray family to start running around lining up financing or looking into other aspects (such as the title search, etc.) unless and until a firm offer was placed before the family." (Id.). Attorney Blythe also argued that, because a number of people had the right to purchase the Property, more notice was required, and that the actions of the Stegners in preventing Clive Gray from obtaining an appraisal of the Property precluded them from setting a deadline.[4] (Id.).

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[4] In order to obtain financing for the purchase of the house, Clive Gray was required to obtain an appraisal of the Property. (Paper 43, Exhibit M.) An appraiser, Gary Kuron, contacted Page Stegner regarding an appraisal sometime within

On January 19, 2003, Page Stegner sent an email to Clive Gray, indicating that the closing with Penny Rainey had been postponed from December 1st "in the interest of fairness to [Clive Gray's] claim." (Id. at Exhibit W). However, Stegner then informed Gray that the closing had taken place on January 10, 2003, explaining that

> our personal financial situation simply would not permit us to wait any longer, and at this point, after five and a third months, the fact that you have still merely expressed the "intent to exercise" your right of first refusal without formally doing so, combined with the real possibility of Ms. Rainey losing patience and withdrawing her offer, left us with no choice.

(Id.). A deed conveying the Property to Penny Rainey was recorded on January 27, 2003. (Id. at Exhibit X). It does not appear from the record that Clive Gray ever submitted a formal Purchase and Sale Contract to the Stegners or ever gave any notice of a definite closing date.

Summary Judgment Standard

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving

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two weeks of October 16, 2002, and was denied access to the Property. (Id. at Exhibit N.)

party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), or "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 97 (2d Cir. 2000)(quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). "A fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" O'Hara v. Weeks Marine, Inc., 294 F.3d 54, 61 (2d Cir. 2002)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

"When determining whether there is a genuine issue of fact to be tried, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." Winter v. United States, 196 F.3d 339, 346 (2d Cir. 1999). As to any claim or essential element for which the non-moving party bears the burden of proof at trial, the non-moving party must make a showing sufficient to establish the existence of that claim or element. Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90,

95 (2d Cir. 1998)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); DiCola v. SwissRe Holding, Inc., 996 F.2d 30, 32 (2d Cir. 1993)). "Credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997).

Summary judgment is mandated, however, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Discussion

A. Jurisdiction

As a preliminary matter, in his complaint Clive Gray alleges that this Court has jurisdiction over the matter based on diversity of the parties, under 28 U.S.C. § 1332(a). In their answer, however, the Stegners denied that they were not citizens of Vermont at the time this action was filed. If the Stegners were citizens of Vermont at that time, then the

parties would not be completely diverse, and this Court would lack subject matter jurisdiction. On October 19, 2004, this Court issued an Order to Show Cause why the action should not be dismissed based on lack of subject matter jurisdiction.[5] (Paper 82).

Gray has submitted evidence that tends to show that the Stegners were residents of New Mexico at the time this action was filed, a fact which would establish complete diversity of the parties. The evidence includes Lynn Stegner's deposition testimony that the Stegners' primary residence was in New Mexico, and that the camp they retained in Vermont was merely a summer place. (Paper 83, Exhibit 1). When "there is evidence indicating the party has more than one residence, or the residence is unclear, the court should focus on the intent of the party." Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991). Factors to be considered in determining a party's residency include where the party's real and personal property is located, where the party exercises

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[5] A district court may raise the issue of subject matter sua sponte at any time. Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 700 (2d Cir. 2000)

political rights, where the party pays taxes, and where the party maintains a license and bank accounts. Id. at 1228. The Deed conveying the Property to Penny Rainey states that "Stuart Page Stegner and Lynn Marie Stegner, of Santa Fe, Santa Fe County, New Mexico" were making the conveyance. (Paper 83, Exhibit 7). Gray also avers that the Stegners pay tax on the camp at a "non-resident" rate, and that they do not have Vermont licenses. The Stegners have not submitted any evidence, and have not rebutted any of Gray's evidence. As such, for the purposes of these motions, there is sufficient evidence to show that diversity jurisdiction exists.

B. Motion to Strike

Rainey has filed a motion to strike Gray's affidavit in support of his motion for summary judgment. Rainey argues that the affidavit was not under oath, that the exhibits attached are not sworn to or certified, and that several statements are not based on personal knowledge, are hearsay, are argumentative, or interpret documents that speak for themselves. In response to that motion, Gray filed a supplemental affidavit in support of his motion, which was sworn to and which incorporated his previous affidavit and all

exhibits thereto by reference. He has therefore corrected the first two problems Rainey cites. Although he responded to these objections (see Paper 71), he does not respond to Rainey's assertions regarding the substance of the statements.

If no opposition is filed to a motion, it "is deemed unopposed and is granted without oral argument, unless the court in its discretion deems it necessary to set the motion for a hearing." L.R. 7.1(a)(6). In addition, the Court agrees with Rainey's objections to the specific statements. The Court will therefore strike all or a portion of the statements objected to in Gray's affidavit (Paper 42). The Court will rely on the documentary evidence submitted with the affidavit, however.

C. Merits

1. Validity of the Preemptive Right

The 1958 deed conveying the Property to Wallace and Mary Stegner contained the following language:

> In the event that the said grantees or their children desire to convey the property hereby conveyed, the said Philip Hayward Gray and/or Margaret Day Gray, or any or all of their children who are now living, shall have the right to purchase

said property for its then fair market value.

(Paper 58, ¶ 3). Gray argues that this language gave him a right to purchase the Property, if and when Wallace and Mary Stegner or their children decided to sell it. Rainey and the Stegners argue that the clause was not enforceable, that even if the clause was valid, Gray's right to purchase terminated as a result of a series of transfers during the 1970s and 90s, and that the statute of limitations bars Gray's ability to lay claim to the land.

The language in the deed gives Gray a preemptive right to purchase the Property. A preemptive right, or right of first refusal, is used to give "the seller and others the right to purchase the property when the buyer decides to sell." Restatement (Third) of Property: Servitudes, § 3.4 cmt. f. A preemptive right ripens into an option when a bona fide purchaser appears. See Alling v. C.D. Cairns Irrevocable Trusts Partnership, 927 F. Supp. 758, 764 (D. Vt. 1996). Under Vermont law, preemptive rights are valid so long as they are reasonable and do not violate the rule against perpetuities. Burgess v. Howe, 134 Vt. 370, 372 (1976). Vermont has adopted a "wait and see" rule in determining

whether a restraint on alienation violates the rule against perpetuities. 27 V.S.A. § 501 ("In determining whether an interest would violate said rule . . . the period of perpetuities shall be measured by actual rather than possible events."); Burgess, 134 Vt. at 372. There is no violation of the rule, so long as, at the time of the event, "the common law measure given as 'lives in being and twenty-one years' has not been violated, there is no violation of the rule." Burgess, 134 Vt. at 373 (citation omitted); Colby v. Colby, 157 Vt. 233, 234-37 (1991).

In this case, the 1958 deed gave Philip and Margaret Gray and their children living at the time the Property was originally conveyed the right to repurchase the Property if Wallace and Mary Stegner or their children decided to sell it. Gray was one of the children living at the time of the original deed. As such, the clause does not violate the rule. The clause is valid and enforceable, therefore, as long as it is reasonable.

In Colby, the Vermont Supreme Court considered several factors in determining whether a preemptive right clause was reasonable. See id. at 236. Specifically, the court looked

at (1) the duration of the restraint; (2) the repurchase price specified in the clause; (3) the "public interest in allowing property to be freely marketable;" and (4) whether the original grantor still had an interest in the land surrounding the lot at issue. Id. As already noted, the duration of the clause in this case does not violate the rule against perpetuities, and is therefore not unreasonable on that basis. In addition, the clause specifies that the repurchase price will be the Property's "then fair market value." (Paper 58, Exhibit 1). A price set at the fair market value of the land is not unreasonable. Although the original grantors have died, the children referred to in the deed still own the surrounding property. Finally, the clause does not prevent the Stegners from selling the Property. It merely gives the Grays the option of purchasing the Property, should the Stegners decide to sell it. The clause as a whole is reasonable and enforceable.

The defendants argue that even if the clause is valid and was enforceable by Phillip and Margaret Gray, the preemptive right was personal in nature and may not now be enforced by their children, none of whom were parties to the deed. They

also argue that the preemptive right, as a personal contractual right, does not run with the land, and therefore cannot be enforced against the Stegners.

"In order to enforce a restrictive covenant against an owner other than the original coventee, the covenant must run with the land." Chimney Hill Owners' Assoc. v. Antignani, 136 Vt. 446, 454 (1978). Page Stegner was not a party to the original covenant; in order to enforce the preemptive right against him, it must run with the land. Four requirements must be met for a covenant to run with the land: (1) the covenant must be in writing; (2) the parties must intend that the covenant run with the land; (3) the covenant must touch and concern the land; and (4) there must be privity of estate between the parties. Albright v. Fish, 136 Vt. 387, 393 (1978).

The language in the deed satisfies the first requirement; the preemptive right is in writing. The fourth requirement is also met; although the Property has been transferred in the past to non-family members, all of the transfers were made with the purpose of setting up various trusts for Stegner family members. It would be inequitable for those transfers,

made without notice of any kind to the Gray family, and for which little or no consideration was paid, to extinguish the purchase right. It is not clear that the parties intended to have the covenant run with the land. The language of the preemptive right binds only the original parties and their children. It is also not clear that a preemptive right touches and concerns the land.

It is unnecessary to determine whether the preemptive right runs with the land or touches and concerns the land, however. Gray argues that the Stegners' behavior estops them from now denying that Gray had a preemptive right to purchase the Property. Gray notes that "the record is clear that Defendants Stegner repeatedly represented and confirmed to Plaintiff that they were bound by the 1958 and 1999 purchase right and Defendants Stegner were careful to incorporate that right in the October 2002 purchase contract between Defendants as well as in their various trust deeds." (Paper 71 at 12).

Under Vermont law, "[t]he doctrine of [equitable] estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations or

commitments to the injury of one to whom they were directed and who reasonably relied thereon." Fisher v. Poole, 142 Vt. 162, 168 (1982). "[E]quitable estoppel works to prevent one party from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations." Id. A party who invokes estoppel must prove four elements: (1) the party to be estopped must know the facts; (2) he must have intended that his conduct be acted upon, or "the acts must be such that the party asserting the estoppel has a right to believe it is so intended;" (3) the party asserting the estoppel must be ignorant of the facts; and (4) he must rely on the conduct of the party to be estopped to his detriment. Id.

In this case, the Stegners knew of the previous transfers, and knew that the transfers had occurred without notice to the Gray children. They included a slightly altered version of the clause in their September 1999 deed. They also notified the Gray children of their desire to sell the Property, and acknowledged the preemptive right. The Stegners repeatedly represented to Gray that he had a right to purchase

the Property under the deed. The Gray children, and in particular Clive Gray, did not know of the previous transfers, and believed that the Stegners intended to honor the preemptive right. As a result, Gray did not bring an action to enforce the preemptive right until after the Property had already been sold to a third party. Even if the preemptive right was, in fact, no longer valid, Gray relied on their representations that they would honor it and suffered a detriment as a result. As such, the Stegners are now estopped from claiming that the preemptive right was not valid.

2. Exercise of the Preemptive Right

The determination that the preemptive right was valid and enforceable does not end the inquiry, however. The Stegners argue that Gray failed to exercise the right in a timely fashion. They also argue that Gray was required to identically match Rainey's offer. They argue that, when he failed to match the offer, they were entitled to sell the Property to Rainey. Gray argues that the clause was not a right of first refusal, because it did not require that a third-party purchaser exist. He argues that he was therefore

not required to match the terms of the sales contract between the Stegners and Rainey. He further argues that he did exercise his right in a timely manner, and that the Stegners frustrated his performance by refusing to allow his bank to appraise the Property.

The Stegners originally notified the Gray children that they were interested in selling the Property in a letter dated August 1, 2002. (Paper 58, ¶ 7). In that letter, Page Stegner indicated that he would like to be able to put the house on the market "before the summer season is entirely over." (Paper 58, Exhibit 6). It appears that, sometime around September 14, Sherrard Gray, one of the Gray children indicated to Stegner that an offer was being put together, but no offer seems to have been made. (Paper 42, Exhibit H). The only record of this conversation is an email from Sherrard Gray to Clive and Burr Gray (Id.). In relating that conversation, Sherrard Gray indicated that Page Stegner would give them the winter to work on a deal. (Id.). On October 1, 2002, the Stegners sent an email to the Gray children indicating that they had heard nothing further from anyone, and that they were going to pursue other options. (Paper 42,

Exhibit I). On October 2, Clive Gray emailed the Stegners that his family was "in the process of putting together a proposal." (Paper 42, Exhibit I-1). On October 5, the Stegners emailed Clive and Burr Gray, indicating that they now had a full price offer on the house, but they still intended to honor the Grays' right of first refusal. (Paper 42, Exhibit J-2). On October 30, the Stegners sent Gray a letter with a copy of the purchase and sale contract between the Stengers and Rainey, and indicated that Gray could still exercise his preemptive right by matching the terms of the contract within fifteen business days. (Id. at Exhibit C). Gray sent a letter on November 13, 2002, indicating that he would purchase the property for $215,000, but the letter made no mention of a closing date or deposit. (Id. at Exhibit L). Gray's attorney followed up with an email to the Stegners' attorney, indicating that the closing date was not acceptable, but making no mention of an alternate date. (Id. at Exhibit P).

The language in the deed does not specify the time limits for exercising the right of first refusal, or specify any terms other than the price, which was set at the fair market

value. (Paper 59, ¶ 4). When supplementary terms are necessary, "terms that are reasonable under the circumstances are supplied by the court." Restatement (Third) of Property: Servitudes, § 4.2. Two months does not seem an unreasonable time period to allow Gray to make an offer, especially considering the informal communications between the Stegners and the Grays. Once the offer from Rainey became a formal offer by virtue of the written contract, however, the nature of the right changed, and the Grays were required to act to preserve their right.

As already noted, a preemptive right ripens into an option with the appearance of a bona fide purchaser. See Alling, 927 F. Supp. at 764; see also Bricker v. Walker, 139 Vt. 361, 364 (1981) ("Since a right of first refusal in effect becomes an option with the appearance of a purchaser, other than the optionee, who is ready, willing and able to buy, it is subject to the same rules requiring performance according to its terms."). Once Rainey made her offer, as memorialized in the sales contract, then, Gray had an option to purchase the Property at the same price and under the same material terms. See Cameron v. Double A. Serv., Inc., 156 Vt. 577, 581

(1991) ("the right of first refusal gives the [holder] the power to accept the offer of sale on "the identical terms offered by the third person,"); Bricker, 139 Vt. at 364 ("The essence of an option is that it must be accepted according to its terms if it is to generate a binding contract.") "There is no completed contract for sale of the property described in an option until the optionee has accepted the offer according to its terms." Buchannon v. Billings, 127 Vt. 69, 74 (1968). Material terms in a contract for the sale of real estate include the property to be sold, the purchase price, deposit amount, and the closing date. Quenneville v. Buttolph, 175 Vt. 444, 457 (2003).

a. Material Terms

As already noted, on November 13, 2002, Clive Gray sent a letter to the Stegners, indicating that he wished to exercise his right to purchase the Property for $215,000. (Paper 42, Exhibit L). The letter may have been a sufficient exercise of the option, even though it was not a formal purchase and sale contract. The letter was in writing, and contained a description of the Property and the purchase price. (Id.). It did not, however, contain a closing date. In an email

dated November 22, 2002, Gray's attorney informed the Stegners' attorney that a December 1 closing date was not reasonable. (Paper 42, Exhibit P). The actual closing date on the purchase and sales contract between the Stegners and Rainey was November 30, 2002. (Id. at Exhibit D). In addition, a deposit amount or due date was never mentioned in any of the communications.[6] In other words, Gray did not offer to purchase the Property under the identical, material terms of Rainey's offer, and as such did not properly exercise his rights. See Cameron, 156 Vt. at 581; Bricker, 139 Vt. at 364.

Gray argues that he did not need to match the identical terms of the Rainey offer, arguing that "[t]he holder of a purchase right under Vermont law can validly exercise his

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[6] On October 5, 2005, well after the time for any response to either Rainey's or the Stegners' motions for summary judgment, Gray submitted a "Supplemental Memorandum in Support of Summary Judgment by Plaintiff and in Opposition to Motions for Summary Judgment Filed by Defendant." (Paper 81). In that memorandum, Gray alleges that no deposit was actually paid by Rainey. He presents evidence of this in the form of the Stegner-Rainey closing statement, which indicates that no deposit was tendered by Rainey. (Paper 81, Exhibit 13). Even if Rainey never tendered a deposit, however, Gray still failed to offer to tender a deposit or to match or suggest a definite alternative to the closing date.

rights even though the acceptance was not 'a mirror image of the offer,' citing Cameron. (Paper 71, p. 15). That language refers to the method of acceptance, however, rather than the terms of the agreement. In Cameron, the court found that the holders of the right did not need to give a

mirror image of the form of acceptance, and were excused from attending the closing. Cameron, 156 Vt. at 584. The court also found, however, that the holders of the right were willing to perform under the material terms of the agreement, and even set a closing date. Id. The sellers were unwilling to convey the property to them under those terms. Cameron, 156 Vt. at 584. The sellers then added an additional term to the agreement, which the holders of the right refused to accept. Id. The court found that the additional term was not material to the agreement, but instead was an attempt by the sellers to modify the agreement and withdraw the original offer. Id. at 261-62. In other words, Cameron did not hold that the holder of a right of first refusal that has turned into an option by virtue of a third party offer is permitted to reject material terms.

b. Closing Date

In this case, Gray rejected one of the material terms of the Rainey contract, the closing date. He never offered an alternative closing date. The closing between Rainey and the Stegners did not take place until the middle of January 2003, rather than on December 1, 2002. That gave Gray an additional month and a half during which to match Rainey's offer and try to negotiate a closing date. He never did so. He now argues that he was not aware of the postponement, but it appears that the attorneys for the parties were still in contact, and knew that the closing did not take place on December 1. (Paper 43, Exhibits R-W). On December 17, Gray's attorney sent an email stating that Gray wished to go ahead with the purchase "along the lines of my letter (email) to you of November 22." (Id. at Exhibit V). The November 22 email expressly rejected the initial closing date, and neither the November 22 email nor the December 17 email proposed an alternative, definite, closing date. (Id., Exhibits P & V). As such, neither constituted an acceptance of the option, and neither formed a contract.

Gray argues that the extension of the closing date created a new contract between the Stegners and Rainey, and

that the Stegners were obligated to re-offer the Property on the new terms. Rainey's attorney testified that the delay in closing had to do with conducting a title search and conducting the closing by mail, rather than because a new contract had been formed. (Paper 71, Exhibit 1). He also testified that the delay was due, in part, to the uncertainty associated with the preemptive right. (Id.). Gray presents no evidence that the delay was, in fact, a new contract between the Stegners and Rainey, with more favorable terms for Rainey. It is undisputed that Gray never offered any date as a potential closing date. In his affidavit in support of Gray's motion, Gray's real estate attorney states that "Attorney Daly originally insisted that Clive Gray had to close by December 1, 2002, but then seemed to back away from that position but never proposed a new closing date although he agreed that one should be set." (Paper 53, ¶ 17.) After Gray rejected the closing date in purchase and sale contract it was incumbent upon him to offer an alternative date. Once the Stegners had a purchase and sale contract with Rainey, Gray's preemptive right ripened into an option contract. By failing to either match the material terms of the Rainey offer

or even to present definite alternate terms, Gray rejected the option. He failed to exercise his right in a proper and timely manner, and cannot now argue that the Stegners had to keep offering the property to him.[7]

Even assuming that Gray was not offered the January closing date, and that Daly had reassured Blythe in mid-December that the closing would not take place until Gray's rights had been satisfied, neither Gray nor Blythe ever offered a firm closing date as part of Gray's offer to purchase. As already stated, Gray rejected his option to purchase by rejecting the original closing date. By failing

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[7] Gray argues that he needs to depose the Stegners' attorney, Matthew Daly, to determine whether Gray was given a new chance to purchase the Property with a closing date of mid-January, whether Daly assured Blythe that the closing would not take place until Gray's rights had been fully satisfied, and whether Gray was entitled to raise part of the money through a mortgage. (Paper 69). The last issue is a matter of law, and will be discussed below. As for the other issues, Blythe has submitted an affidavit in support of Gray's motion, in which he states that Gray was never offered the January closing date and that he "understood from Attorney Daly that the Stegners and Rainey would not close and the Property would not be conveyed to Rainey." (Paper 53, ¶ 14). Gray also has the testimony of Benoit, who was working with Daly regarding the transaction between the Stegners and Rainey. Daly's testimony is therefore not necessary for the purposes of deciding this motion. Gray's motion to compel is therefore denied.

to offer any alternative date, Gray failed to make a firm offer for the Property, and no contract was ever formed between Gray and the Stegners. As such, the Stegners were within their rights to sell their property to Rainey.

c. Frustration of Purpose

Gray argues that the actions of the Stegners frustrated his performance of his right to purchase. He argues that the previous transfers to and from the various trusts violated his right to purchase by "trying to transform the written terms of these deeds into a right dependant on a third party offer which must be matched and to alter the terms of said deed rights." (Paper 71, p. 16). Any change in the language of the deed did not change his purchase right, however. If he had acted in a definite manner in August, September, or October of 2002, he would have been able to purchase the Property at the fair market value, with terms to be negotiated by the parties. As already discussed, Vermont case law dictates that the offer by Rainey turned Gray's right into an option to purchase on the same terms. See Bricker, 139 Vt. at 364. As of the Stegners' October 30 letter, Gray had to match Rainey's offer.

Gray has consistently maintained that he was never given sufficient time to act on his purchase right. On November 20, 2002, the Stegners' attorney emailed Gray's attorney, informing him that the Stegners were prepared to honor Gray's right if he would pay the purchase price by December 1 and submit a deposit of $15,000 by November 26, to be held in escrow until closing. (Paper 42, Exhibit O). It appears that Gray's attorney responded on November 22 that the "December 1, 2002 timeframe is not reasonable for a couple of compelling reasons." (Paper 42, Exhibit P). Among those reasons were the need for extra time to discuss the purchase option, considering that a number of individuals had a right to purchase, and the refusal of the Stegners to allow a mortgage appraiser on the Property in October. (Id.). Gray's attorney also stated that "despite some notice in advance that the property was on the market and that Ms. Rainey in particular was a potential purchaser, it would not have made any sense at all for the Gray family to start running around lining up financing or looking into other aspects (such as a title search, etc.) until and unless a firm offer was placed before the family." (Id.). Gray seems to insist that he was under

no obligation to do anything, other than wait for an offer. This is in contrast to his argument that the deed did not require the Gray children to match another offer, but instead gave them the absolute right to purchase the Property at the fair market value. (Paper 71, pp. 3-4).

The Gray children had a right to purchase the Property at the fair market value in the event the Stegners wished to sell it. It did not give them the right to prevent the Stegners from ever selling it to a third party, especially when the Grays took very little concrete action toward purchasing it themselves. The Stegners notified all of the Gray siblings at the beginning of August that they wished to sell the Property. (Paper 42, Exhibit A-3). At that point, it not only made sense that Gray would "start running around lining up financing or looking into other aspects (such as a title search, etc.)," he had to do so in order to exercise his rights. The Stegners' communications with the Grays indicate that they were waiting on an offer from any of the Grays, rather than formulating an offer to put before the Grays. (Paper 43, Exhibits A-3, B, C, H, I-1, J-2). Although Gray indicated interest in purchasing the Property, he did not

submit a formal offer until his letter of November 13, 2002. (Paper 43, Exhibit L). As already discussed, at that point the purchase right had become an option to purchase the land on the same terms as the Rainey contract. The letter did not create a contract, as it left out material terms. The Property was only conveyed in the middle of January 2003, at which point Gray had known of the Stegners' desire to sell for more than five months, and had neither made a complete formal offer nor given acceptance of the option. He cannot now claim that he did not have sufficient time.

d. Right of Appraisal

Gray also argues that the Stegners frustrated his attempt to exercise his purchase right by refusing to allow an appraisal of the Property. Rainey, in turn, argues that the Stegners were under no obligation to allow an appraiser, because Rainey's offer was not contingent upon financing. She argues that Gray's desire to obtain financing altered a material term of the contract. This is not the case. Mortgage financing is a material term when the mortgage is

financed by the seller of the property. See Quenneville, 175 Vt. at 451 ("financing was indeed a material term of the proposed contract because seller was to finance one-third of the purchase price"); Benya v. Stevens and Thompson Paper Co., Inc., 143 Vt. 521, 526 (1983) ("financing was clearly an integral part of the contract since defendant was expected to finance three-quarters of the purchase price."). Mortgage financing that is not seller financed, however, is not a material term, as the seller still receives cash on delivery. See Dickson v. McMahan, 140 Vt. 23, 26 (1981). As such, Gray's desire to obtain a mortgage to finance the purchase was not a material term.

Nevertheless, the Stegners' refusal to allow an appraiser on the Property in October does not excuse Gray's failure to provide the other missing, material terms. The evidence shows that the appraiser contacted the Stegners "within two weeks of 10/16/02" and was informed that an appraisal was inappropriate at that time. (Paper 43, Exhibit N). The appraisal was on hold as of October 30, 2002, and there is no evidence that any effort at a second attempt was made. (Id.). Merchants Bank approved a $40,000 mortgage for Gray on November 8, 2002,

contingent on various conditions, including that Gray obtain an appraisal of the Property. (Paper 43, Exhibit M). Again, there is no evidence that Gray attempted to obtain an appraisal after the initial attempt in October. A single refusal to permit the Property to be appraised, before a formal offer was made, does not constitute frustration.[8]

Even if the Stegners' single refusal to allow an

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[8] Gray argues that the Stegners were unwilling to have the Property appraised, because they were "obviously worried that any appraisal by the Merchants Bank of 366 Grays Drive would fix the 'fair market value' thereof under the purchase right in the original deed." (Paper 81, p. 4). Gray presents no evidence to support this assertion. In addition, after Rainey and the Stegners entered into their purchase and sale contract, the price of the Property was fixed at $215,000, and the preemptive right ripened into an option to purchase the Property at the contract price. At that point, an appraisal was not necessary to determine the fair market value. Although Gray argues that the delay in closing made the contract a sham, he presents no evidence to support this assertion. As already discussed, the delay appears to have stemmed from Rainey's concerns regarding Gray's rights, coupled with the delays that are inherent in a closing conducted by mail. The Stegners' attorney was still communicating with Gray's attorney in the middle of December, but Gray never offered a definite date for closing. In addition, Gray alleges that there turned out to be problems with the chain of title, and Rainey's attorneys were hesitant to go through with the sale until the Grays' rights were resolved. (Paper 41, ¶ 103). Although this is supported by the record, see Paper 41, Exhibit P-1, there is no evidence to support the idea that the contract was a sham.

appraiser on the property did raise a factual issue of frustration of purpose, however, Gray would still not be entitled to relief. He currently seeks to have the contract between the Stegners and Rainey voided. He then wishes to have the court specifically enforce his right of first refusal, and order the Stegners to sell him the property. The Stegners did not prevent Gray from exercising his right of first refusal, however. A right of first refusal is not an absolute right to buy property. Gray did not act on his right in a concrete way until after the appearance of a bona fide purchaser. At that point, Gray's right ripened into an option to purchase the property on the identical terms. Cameron, 156 Vt. at 581. As already discussed, Gray rejected a contract with the Stegners, because he rejected the closing date and never provided an alternative, firm closing date. The closing date is a material term in a contract for the sale of real property. Quenneville, 175 Vt. at 457. The absence of a material term means that no contract was formed. State v. Delaney, 157 Vt. 247, 253 (1991) ("the need to negotiate additional material terms in order to reach an agreement indicates that defendant did not make an offer."). By failing

to accept the option contract, Gray lost his chance to exercise his right of first refusal. He can not now ask this Court to overturn the contract between Rainey and the Stegners, and then create a contract between Gray and the Stegners.

Finally, Gray argues that the Stegners never properly notified him of their desire to sell the Property, because they never informed him that they owned the Property as trustees of their 1999 family trust. He argues that all communications with the Stegners were in their individual capacity, rather than as trustees. Gray cites no law to support this proposition. In addition, nothing in the record supports the idea that there were additional trustees who had to act. As such, it is unclear to this Court why the Stegners would have had to make it clear that they were acting as trustees of their own trust.

Gray also argues that the October 30 notice was insufficient, because it did not notify all of the holders of the right of the sale. (Paper 42, Exhibit C). Earlier communications had been addressed to all holders of the right, however, and Gray was the only one who had expressed any

interest in the purchase. (Id., Exhibits A-3, I). In addition, Gray himself was on notice of the need to exercise the right, and was notified of the specific terms of Rainey's offer. None of the other holders of the right have joined this lawsuit. As such, it appears that the other holders were sufficiently notified of the need to exercise their right and had no interest in purchasing the Property themselves.

It is undisputed that Gray never offered the Stegners a definitive closing date. As such, Gray failed to exercise his purchase right under the deed in a reasonable and timely manner, and the Stegners are entitled to summary judgment.

Conclusion

For the foregoing reasons, Rainey's motion to strike (Paper 64) is GRANTED; defendants' motions for summary judgment (Papers 32 & 56) are GRANTED; and Gray's motion for summary judgment (Paper 39) is DENIED. Gray's motion to compel (Paper 69) is DENIED as moot.

Dated at Burlington, in the District of Vermont, this 14th day of January, 2005.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge