STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: April 4, 2017)

SARA MCGINNES AND CLIFFORD MCGINNES	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. WC-2016-0616**
	:	
TOWN OF NEW SHOREHAM, ALBERT CASAZZA, JOHN PEZZIMENTI, NANCY DODGE, BARBARA MACMULLAN, BILL PENN, EVERETT SHOREY, KEVIN HOYT, NORRIS PIKE AND JACK SAVOIE	:	
Defendants.	:	

DECISION

STERN, J. Before this Court are cross-motions for partial summary judgment. Plaintiffs, Sara McGinnes and Clifford McGinnes (Mrs. and Mr. McGinnes, respectively; collectively, Plaintiffs) ask this Court to grant summary judgment on Counts I and II of their First Amended Complaint. Defendants, Albert Casazza (Casazza) and John Pezzimenti (Pezzimenti) (collectively, Defendants), object to Plaintiffs' motion and ask this Court to summarily dispose of Counts I and II of the First Amended Complaint. Plaintiffs likewise object to Defendants' motion. Jurisdiction is pursuant to Super. R. Civ. P. 56.

I

Facts and Travel

Block Island Power Company (BIPCO) is an electric utility company that serves the Town of New Shoreham (the Town) and has been privately owned and operated since 1925. Am. Compl. ¶ 16. Prior to June 14, 2012, Mr. McGinnes, Casazza, Jerome Edwards (Edwards),

and Pezzimenti were equal shareholders of BIPCO, together owning the entirety of BIPCO's shares. Id. at ¶ 17. On June 14, 2012, Mr. McGinnes, Casazza, Edwards, and Pezzimenti executed an agreement titled "BIPCo Shareholders' Agreement" (Shareholders' Agreement). Id. at ¶ 18. The Shareholders' Agreement provided:

> "If any of the current shareholders wishes to sell his stock, the remaining shareholders will have the right of first refusal to the sale.
> "Should any of the current shareholders die, the estate may transfer the stock to a descendent heir. Should that descendant heir or the estate wish to sell the stock to a non related heir, the remaining shareholders will have the right of first refusal to the sale." Am. Compl., Ex. A.

In November 2013, Edwards unfortunately passed away, and his BIPCO shares were converted to treasury stock, which resulted in Mr. McGinnes, Casazza, and Pezzimenti each owning one-third of the outstanding shares of BIPCO. Am. Compl. ¶ 20.

Thereafter, on or about March 7, 2016, Mr. McGinnes conveyed his one-third ownership in BIPCO to Mrs. McGinnes as a marital gift. Id. at ¶ 22. The conveyance was accomplished by delivery of an endorsed certificate in accordance with BIPCO bylaws Article X, Section 2[1] and resulted in Mr. McGinnes transferring his ownership interest in BIPCO to his wife. Id. Neither Casazza nor Pezzimenti objected to the transfer; rather, the transfer was accepted and ratified. Id. at ¶ 23. Plaintiffs assert that the right of first refusal belonging to Mr. McGinnes as delineated in the Shareholders' Agreement was assigned to Mrs. McGinnes at the time of the

[1] "Subject to the restrictions, if any, imposed by the Charter or by law, title to a certificate of stock and to the shares represented thereby shall be transferred only by delivery of the certificate properly endorsed, or by delivery of the certificate accompanied by a written assignment of the same, or a written power of attorney to sell, assign or transfer the same, or the shares represented thereby, properly executed, but the person registered on the books of the corporation as the owner of shares shall have the exclusive right to receive dividends thereon and to vote thereon as such owner, and except only as may be required by law, may in all respects be treated by the corporation as the exclusive owner thereof."

transfer. Alternatively, Plaintiffs aver that Mr. McGinnes retained his right of first refusal as set forth in the Shareholders' Agreement. See id. at ¶ 24.

In early 2016, Mr. and Mrs. McGinnes, Casazza, and Pezzimenti engaged in discussions with the Town and with Northern Transmission, LLC (Northern Transmission) about the possibility of selling BIPCO shares to either entity. Id. at ¶ 25. As a result of these discussions, the Town enlisted the Electric Utilities Task Group (EUTG) to aid in developing a plan for the future operation of BIPCO should the Town purchase ownership of BIPCO. Id. at ¶ 26. Several current members of BIPCO's Board of Directors—Barbara MacMullan, Bill Penn, and Everett Shorey—were part of the Town Council which formed the EUTG. Id. Thereafter, on May 18, 2016, the Town Council voted to support a potential purchase of BIPCO and directed Nancy Dodge (Dodge), the Town Manager at the time, to "submit a resolution advocating for the passage of a state law that would allow the Town to create a non-profit successor organization to which the Town would transfer the Shares and assets of BIPCO." Id. at ¶ 27. In addition, by spring 2016, negotiations for the Town and Northern Transmission's purchase of BIPCO had progressed to such a point where material and specific transactional terms were exchanged between the parties. Id. at ¶ 28.

When Mrs. McGinnes had learned that Casazza and Pezzimenti intended to sell their BIPCO shares to the Town, she provided notice to Casazza, Pezzimenti, and the Town that she did not intend to divest her ownership in BIPCO and indicated that she would exercise her right of first refusal "on terms equal to those offered by the Town." Id. at ¶ 29. Dodge acknowledged Mrs. McGinnes's notice, but indicated that the Town intended to proceed with its purchase of Casazza and Pezzimenti's BIPCO shares nevertheless. Id. at ¶ 30; see also Am. Compl., Ex. B. Thereafter, Casazza and Pezzimenti entered into a Stock Purchase Agreement with the Town on

July 11, 2016. Am. Compl. ¶ 31; see also Am. Compl., Ex. C. The Stock Purchase Agreement acknowledged Mrs. McGinnes's right of first refusal and set a closing date within 120 days of its execution. See Am. Compl. ¶ 31. Plaintiffs allege that, subsequently, the Town planned to assume full control of BIPCO by, among other things, forming a non-profit utility district or co-op and retire Mrs. McGinnes's stock upon transfer of BIPCO stock to the new entity. See id. at ¶ 32.

On October 3, 2016, the Town formed a "BIPCO Transition Team" at a Town Council meeting, which was composed of the members now composing the BIPCO's Board of Directors. See id. at ¶ 35. Thereafter, the Town closed on its purchase of Casazza and Pezzimenti's stock on November 7, 2016 and, that same evening, appointed the members of the BIPCO Transition Team to the Board of Directors. Id. at ¶¶ 37-40.

Plaintiffs have pleaded claims for rescission of the Stock Purchase Agreement, breach of contract seeking specific performance of right of first refusal, breach of contract for damages, tortious interference with prospective business relationships, and breach of fiduciary duty against Casazza and Pezzimenti. The original Complaint also asserted a claim for breach of fiduciary duty against the current members of BIPCO's Board of Directors. On February 1, 2017, however, Plaintiffs voluntarily dismissed their claim against the board members. Subsequently, BIPCO was permitted to intervene in the action pursuant to Super. R. Civ. P. 24.

II

Standard of Review

"Summary judgment is an extreme remedy and should be granted only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as [a] matter of law.'" Rose v. Brusini, 149 A.3d 135, 139 (R.I. 2016) (quoting Plunkett v. State, 869 A.2d 1185, 1187 (R.I. 2005)). "'Only when a review of the admissible evidence viewed in the light most favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, will this Court . . . grant . . . summary judgment.'" Id. at 139-40 (quoting Nat'l Refrigeration, Inc. v. Standen Contracting Co., 942 A.2d 968, 971 (R.I. 2008)). "The party opposing 'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Id. at 140 (quoting Nat'l Refrigeration, Inc., 942 A.2d at 971).

III

Analysis

The parties ask this Court to grant summary judgment on both Counts I and II of the Amended Complaint in their respective favors. This Court will consider each Count through the scope of summary judgment in seriatim.

A

Right of First Refusal

Plaintiffs' motion requests summary judgment on Counts I and II of its First Amended Complaint. Count I seeks rescission of the Stock Purchase Agreement and is dependent upon whether the Stock Purchase Agreement was entered into in violation of a right of first refusal purportedly belonging to Mrs. or Mr. McGinnes. Count II requests that this Court order specific performance of the right of first refusal and is thus dependent upon a right of first refusal being validly granted. Defendants argue that the Shareholders' Agreement is vague and indefinite, and

thus the right of first refusal is void and unenforceable under Rhode Island law.[2] In response, Plaintiffs contend that use of the term of art "right of first refusal" leaves no question as to what was granted under the Shareholders' Agreement as well as the material terms of the covenant.

In Rhode Island, a right of first refusal is distinguishable from an option. "An option can be defined as 'a unilateral contract in which the optionor agrees with the optionee that he has a right to buy the optionor's property according to the precise terms and conditions of the contract.'" Hood v. Hawkins, 478 A.2d 181, 185 (R.I. 1984) (quoting Butler v. Richardson, 74 R.I. 344, 350, 60 A.2d 718, 722 (1948)). The Rhode Island Supreme Court has quoted approvingly Corbin's description that an option arises in situations where the purchaser has a "legal power of acceptance—a power by tendering money to create in himself a right to an immediate conveyance of the property and in the owner a duty of such conveyance." Id. (quoting 1A Corbin on Contracts § 259 at 460 (1963)).

In contrast, our Supreme Court has on multiple occasions described a right of first refusal as an "independent privilege." See Kenyon v. Andersen, 656 A.2d 963, 965 (R.I. 1995); Doyle v. McNulty, 478 A.2d 577, 579 (R.I. 1984); Hood, 478 A.2d at 185; Butler, 74 R.I. at 349, 60 A.2d at 721. Unlike an option, the right of first refusal "is not an offer and creates no power of acceptance. It is a transaction by which one party acquires what can be variously described as the 'Right of First Refusal,' the 'First Right to Buy,' or the 'Right of Preemption.'" Hood, 478 A.2d at 185. Therefore, the first refusal right does not grant in its possessor the power to compel

[2] The Town and BIPCO also object to Plaintiffs' motion for partial summary judgment and join in Defendants' motion for summary judgment. However, based on the facts of this case, both the Town and BIPCO lack standing to challenge the validity of the contractual right delineated in the Shareholders' Agreement because both entities are strangers to the Shareholders' Agreement. See DePetrillo v. Belo Holdings, Inc., 45 A.3d 485, 492 (R.I. 2012); see also Kenyon v. Andersen, 656 A.2d 963, 965 (R.I. 1995) (classifying a right of first refusal as independent from the property's ownership).

a sale; rather, "'it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the [right of first refusal] at the stipulated price.'" Id. (quoting Mercer v. Lemmens, 230 Cal. App. 2d 167, 170, 40 Cal. Rptr. 803, 805 (1964)). In other words, "a first refusal to purchase . . . does not become effective unless the [sellers] are willing to sell. If they are willing to sell they may not sell to anyone other than the [holder of the right of first refusal] until an opportunity is afforded [the holder] to purchase at the price offered." Id. (quoting Butler, 74 R.I. at 349, 60 A.2d at 721); see also 3 Eric Mills Holmes, Corbin on Contracts § 11.3, at 470 (Joseph M. Perillo ed., rev. ed. 1996) ("[T]he right [of first refusal] is subject to an agreed condition precedent, typically the owner's receipt of an offer from a third party and the owner's good-faith decision to accept it. Only then can the holder of the right decide whether or not to create a contract on the same terms that the owner is willing to accept from the third party."). Indeed, a right of first refusal is a "valuable prerogative." Hood, 478 A.2d at 185.

The parties disagree as to the methods of creating a first refusal right. On the one hand, Defendants contend that Rhode Island courts will not enforce a right of first refusal when the document granting the purported right fails to clearly and definitely delineate the price, manner, and timeframe by which the holder must abide in order to exercise his or her first refusal right. On the other hand, Plaintiffs allege that in instances where the document clearly intends to grant a first refusal right, details such as price, manner, and timeframe may be implied through the usage of the term "right of first refusal" to incorporate those terms delineated in a third-party offer.

To create a valid right of first refusal, Rhode Island requires that (1) the parties clearly and unambiguously intended to create a right of first refusal, and (2) the price and conditions of

the sale must be either fixed in the agreement or easily ascertainable. See Belliveau v. O'Coin, 557 A.2d 75, 76-77 (R.I. 1989) (citing Hood, 478 A.2d at 186). Our Supreme Court has stated that the grant of a right of first refusal must be "clear and definite." See Belliveau, 557 A.2d at 77. Whether a document granting a right of first refusal is clear and definite "'is a matter of law for the [C]ourt[,]'" and thus summary judgment is an appropriate procedural route. See id. (quoting Addison Cty. Auto., Inc. v. Church, 144 Vt. 553, 557, 481 A.2d 402, 405 (1984)).

In determining the validity of a right of first refusal, a court must first ascertain the grantor's intent. See Belliveau, 557 A.2d at 77. In so doing, "a court should look to the pertinent language of all the covenants as a whole as well as the apparent objectives of the grantor, and the conditions existing at the time the restrictions were executed." Id. After ascertaining the intent of the grantor, "[t]he second step in construing [the] right of first refusal involves the interpretation of the language of the covenant itself." Id. at 78.

In this instance, it is clear and definite that the signatories to the Shareholders' Agreement intended to create a right of first refusal. Markedly, the signatories used the term of art "right of first refusal to the sale" twice in the ninety-four word Shareholders' Agreement. Our Supreme Court has used terminology that is in all material respects identical to this phrase in describing the right the signatories to the Shareholders' Agreement wished to bring into existence. See Sawyer v. Firestone, 513 A.2d 36, 38 (R.I. 1986) ("Firestone's appeal is based on her contention that the addition of the words in the proposed deeds limiting the right of first refusal to a sale of lot No. 48 'as a separate parcel' did not alter the legal effect of the right of first refusal granted in the original agreement." (emphasis added)). As such, it is both clear and definite that, by using terminology utilized by our Supreme Court, it was the intent of the parties to the Shareholders' Agreement to create a right of first refusal.

Next, this Court must determine whether the Shareholders' Agreement clearly and definitely set the price and conditions to the sale in an explicit or easily ascertainable manner. See Hood, 478 A.2d at 186. Defendants contend that Rhode Island case law strictly and definitively requires that the document granting the right of first refusal must either explicitly lay out the terms and conditions of the first refusal sale or explicitly reference that the party executing the first refusal right may incorporate the terms of a third party offer into the sale. Plaintiffs in opposition contend that the use of the term "right of first refusal" has an independent legal meaning and is thus specific enough to be independently enforceable. See Roy v. George W. Greene, Inc., 533 N.E.2d 1323, 1324-25 (Mass. 1989).

This Court agrees with Plaintiffs and concludes that the use of the specific term of art "right of first refusal" is sufficient in its specificity to satisfy the requirements of Hood. By its very definition, a right of first refusal is "the '[r]ight to have first opportunity to purchase real estate when such becomes available, or right to meet any offer.'" Belliveau, 557 A.2d at 75 n.1 (emphasis added) (quoting Black's Law Dictionary 1191 (5th ed. 1979)). By utilizing the term of art in a document granting the right of first refusal, the Shareholders' Agreement logically incorporates its definition. As such, in granting the "right of first refusal," the signatories to the Shareholders' Agreement in this case granted the remaining shareholders the "right to meet any offer." Thus, the Shareholders' Agreement is specific as to the terms of the transaction because the terms under which the right of first refusal could be exercised were easily ascertainable in light of an incoming third-party offer—viz., the Town's offer to Casazza and Pezzimenti memorialized by the Stock Purchase Agreement. See Kenyon, 656 A.2d at 966 ("[I]n cases where no price is stated when the right is granted, the offer of the third party supplies the terms under which the right may be exercised.").

Further, the right of first refusal provision included in the Shareholders' Agreement is unlike those cited by Defendants that have been found by the Supreme Court to be vague and unenforceable. For example, in Hood, our Supreme Court held that the oral statement made by an owner to a tenant that "when he decided to sell, if the price were right and could be agreed on, and if conditions were right, and he was ready to sell, he would give the tenant a chance, or a first chance to buy" was "too vague and indefinite to be legally enforceable." See 478 A.2d at 184, 186. Unlike the unenforceable provision in Hood, the Shareholders' Agreement provided that in the event one of the current shareholders decided to sell his shares, the remaining shareholders had the right to match the offer. The Shareholders' Agreement in this case is not an agreement to negotiate and agree in the future; rather, the nature of the first refusal right granted under the Shareholders' Agreement bound the parties to allowing the remaining shareholders the opportunity to match the terms of an offer that a current shareholder would be willing to accept. Thus, the Shareholders' Agreement is distinguishable in the most material respects from the agreement that our Supreme Court refused to enforce in Hood: the Shareholders' Agreement is neither vague nor indefinite.

Moreover, although not explicit in its pricing provision, the Shareholders' Agreement is nevertheless enforceable. In Doyle, our Supreme Court held that a right of first refusal was unenforceable when it was "truly ambiguous" as to whether the price was to be determined by the amount paid in 1948 or in 1925. See 478 A.2d at 580. In this case, however, the Shareholders' Agreement grants remaining shareholders the right to match a third-party offer received by any current shareholder should the current shareholder decide, in good faith, to sell. Thus, because the price was to be set by a later offer, the Shareholders' Agreement is not vague and unenforceable. See Kenyon, 656 A.2d 966. Accordingly, the Shareholders' Agreement

meets the requirements set out by our Supreme Court and is therefore a valid grant of a right of first refusal as a matter of law.

B

Interpretation of the Right of First Refusal

The next issue requires construing and interpreting the language of the Shareholders' Agreement to determine which individuals were entitled to exercise the right of first refusal granted therein. See Belliveau, 557 A.2d at 77. Both parties maintain that the term "current shareholders" refers to the signatories to the contract and the term "remaining shareholders" refers to the signatories to the contract minus the shareholder who decides to sell his interest in BIPCO. However, the parties disagree about whether the right of first refusal survived after Mr. McGinnes transferred his BIPCO shares to Mrs. McGinnes.

A right of first refusal is a contractual right and, as such, this Court applies traditional principals of contract interpretation. "Whether a particular contract is or is not ambiguous is a question of law." Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009). Our Supreme Court has "consistently held that a contract provision is ambiguous if it is 'reasonably susceptible of different constructions.'" Carney v. Carney, 89 A.3d 772, 776 (R.I. 2014) (quoting Paul v. Paul, 986 A.2d 989, 993 (R.I. 2010)). The Court "determine[s] ambiguity by 'view[ing] the agreement in its entirety and giv[ing] to its language its plain, ordinary and usual meaning.'" Id. (quoting Vickers Antone v. Vickers, 610 A.2d 120, 123 (R.I. 1992)). As our Supreme Court has metaphorically described: "Such amphibology is not in the eye of the beholder '[with] ambiguity lurk[ing] in every word, sentence, and paragraph in the eyes of a skilled advocate . . . but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner.'" Id. (quoting Paul,

986 A.2d at 993). Accordingly, the Supreme Court has appropriately cautioned that a court "'should not . . . stretch its imagination in order to read ambiguity into a [contract] where none is present.'" Botelho v. City of Pawtucket School Dep't, 130 A.3d 172, 177 (R.I. 2016) (quoting City of E. Providence v. United Steelworkers of Am., Local 15509, 925 A.2d 246, 251-52 (R.I. 2007)). However, in carrying out its elucidative task, the Court notes that "[n]o words or phrases, in any language, have an 'objective' meaning, one that is the only true and correct meaning with which individuals are required to use them at their peril." 3 Eric Mills Holmes, Corbin on Contracts § 11.4, at 487 (Joseph M. Perillo ed., rev. ed. 1996).

"Where no ambiguity is found, it is basic that the intention of the parties must govern if that intention can be clearly inferred from the writing and if it can be fairly carried out in a manner consistent with settled rules of law." W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994) (citing Westinghouse Broad. Co. v. Dial Media, Inc., 122 R.I. 571, 581, 410 A.2d 986, 991 (1980)). "In interpreting unambiguous contracts, [the Court] 'consider[s] the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning.'" Id. (quoting Hill v. M.S. Alper & Son, Inc., 106 R.I. 38, 47, 256 A.2d 10, 15 (1969)).

In applying these fundamental contract principles, this Court concludes, as a matter of law, the Shareholders' Agreement is clear and unambiguous as to who agreed to hold and be burdened by a right of first refusal. The Shareholders' Agreement begins by stating that the signatories are the "only and equal shareholders of [BIPCO] as of June 14, 2012[.]" See Am. Compl., Ex. A. The document then continues to describe the shareholder-signatories as "current shareholders[.]" See id. The "current shareholders" agreed to grant the "remaining

shareholders"—i.e., the other shareholders to the Shareholders' Agreement—the right of first refusal should one of the "current" shareholders decide to sell his stock. In other words, Casazza, Edwards, Mr. McGinnes, and Pezzimenti, in their capacities as the only and equal shareholders of BIPCO, agreed that should any one of them choose to sell his shares in BIPCO in the future, the remaining shareholders would be entitled to the right of first refusal; or, the right to match a competing third-party offer. Thus, the current shareholders were obligated to provide the remaining shareholders "seasonable disclosure of the terms of any bona fide third-party offer" so that they could make a matching offer. Uno Rests., Inc. v. Boston Kenmore Realty Corp., 805 N.E.2d 957, 962 (Mass. 2004); see Hood, 478 A.2d at 185.

Moreover, it is also apparent based on the affidavits submitted to this Court that, in composing the Shareholders' Agreement, it was the ultimate intent of the signatories to create a right of first refusal in light of Edwards' worsening sickness so that shares of BIPCO would remain with the remaining shareholders should Edwards pass away. See W.P. Assocs., 637 A.2d at 356. Casazza, the drafter of the Shareholders' Agreement, swore that the document in dispute was

> "drafted because Jerome Edwards had the good chance of becoming terminally ill as he was entering a renal dialysis program. It was intended that the right of first refusal . . . was only for the benefit of the four shareholders named [in the Shareholders' Agreement], which is why we specifically used the word 'current.' We wanted to provide a right of first refusal which was personal to the four stockholders who were the current stockholders at the time that the [Shareholders' Agreement] was signed. We did not want any interference from a transfer to a person outside of our group, but we felt we had to do something in case someone died, and that is why I drafted the 2012 agreement." Aff. of Albert Casazza at 1 (emphasis added).

Similarly, Casazza attested that the shareholders "wanted to provide a right of first refusal which was personal to the four stockholders who were the current shareholders at the time that the

[Shareholders' Agreement] was signed." Id. (emphasis added). While divergent from Casazza's stance as it pertains to the assignability of the right, Mr. McGinnes—the only other affiant involved in this case that was also a signatory to the Shareholders' Agreement—similarly contends that the Shareholders' Agreement was intended by the signatories to be binding on each of them, not "merely a piece of paper reflecting a desire to possibly reach an agreement in the future." Second Aff. of Clifford McGinnes ¶ 2.

The Shareholders' Agreement as a whole is not reasonably subject to—nor has it been asserted to be subject to—differing interpretations. See Carney, 89 A.3d at 776. Accordingly, the Court construes the Shareholders' Agreement as Casazza, Edwards, Mr. McGinnes, and Pezzimenti—in their capacity as shareholders of BIPCO—granting unto each other a right of first refusal in the event such a shareholder wished to sell his stock.

C

Assignability

The Court is next tasked with determining whether, at the time when Mr. McGinnes transferred the entirety of his BIPCO shares to Mrs. McGinnes, there was a valid assignment of the right of first refusal delineated in the Shareholders' Agreement to Mrs. McGinnes. Plaintiffs contend that Mrs. McGinnes acquired by assignment Mr. McGinnes' right of first refusal because there is no clause in the Shareholders' Agreement preventing such an assignment. In the alternative, Plaintiffs state that if there was no assignment or if the right of first refusal was unassignable, Mr. McGinnes retained his right of first refusal. Defendants respond that a right of first refusal is a personal contract right and is unassignable unless there is explicit language in the agreement stating the contrary.

The Rhode Island Supreme Court has neither spoken directly regarding whether a right of first refusal is personal to the grantee, nor has it opined as to whether a right of first refusal is per se unassignable. However, this Court notes that the prevailing rule in the United States is that rights of first refusal are personal and therefore unassignable unless the instrument granting the right of first refusal states the contrary. See Park Station Ltd. P'ship, L.L.P. v. Bosse, 835 A.2d 646, 655 (Md. 2003) ("[R]ights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular clause granting the right refers to successors or assigns or the instrument otherwise clearly shows that the right was intended to be transferable or assignable."); Schupack v. McDonald's Sys., Inc., 264 N.W.2d 827, 836 (Neb. 1978); Fisher v. Fisher, 500 N.E.2d 821, 822 (Mass. App. 1986); Storer v. Ripley, 12 Misc.2d 662, 664, 178 N.Y.S.2d 7, 10 (N.Y. Sup. Ct. 1958); 6 Am. Jur. 2d Assignments § 28; 77 Am. Jur. 2d Vendor and Purchaser § 30; accord Malone v. Flattery, 797 N.W.2d 624 (Iowa Ct. App. 2011); 3 Eric Mills Holmes, Corbin on Contracts § 11.15, at 487 (Joseph M. Perillo ed., rev. ed. 1996); Jonathan F. Mitchell, Can a Right of First Refusal be Assigned?, 68 U. Chi. L. Rev. 985, 993 (2001). In addition, this Court is mindful that our Supreme Court has considered contracts that are personal in nature to be unassignable. See Swarts v. Narragansett Elec. Lighting Co., 26 R.I. 388, 59 A. 77, 78 (1904); see also T & T Mfg. Co. v. A. T. Cross Co., 449 F. Supp. 813, 826 (D.R.I. 1978), aff'd, 587 F.2d 533 (1st Cir. 1978). But see Mello v. Gen. Ins. of Am., 525 A.2d 1304, 1306 (R.I. 1987) ("While we do not advocate a general policy of allowing assignment of the right to sue an insurance company for bad faith, we are convinced that in certain limited circumstances the insured's right may be assigned.").

In determining whether Rhode Island would follow the prevailing rule that rights of first refusal are personal in nature and unassignable absent language in the granting document

indicating the contrary, the Court deems it necessary to reiterate the operation of a right of first refusal in contrast to an option agreement as the Rhode Island Supreme Court has done many times in discussing the validity of a first refusal right. See, e.g., Kenyon, 656 A.2d at 965; Hood, 478 A.2d at 185; Butler, 74 R.I. at 349, 60 A.2d at 721. "An option is a unilateral contract in which the optionor agrees with the optionee that he has a right to buy the optionor's property according to the precise terms and conditions of the contract." Butler, 74 R.I. at 350, 60 A.2d at 722. Accordingly, an option agreement grants the optionee the power of acceptance—"a power by tendering money to create in himself a right to an immediate conveyance of the property and in the owner a duty of such conveyance." Hood, 478 A.2d at 185. This power of acceptance does not place on the shoulders of the optionee a personal obligation to make an offer because an option is a continuing offer which is held open in accordance with the terms of the option until the optionee chooses to accept. See id.; see also Durepo v. May, 73 R.I. 71, 82, 54 A.2d 15, 22 (1947) (holding that an option is "a continuing offer for a limited period that may never be accepted . . ."). In addition, our Supreme Court has adhered to the "general rule" that an optionee may assign his or her right under an option agreement as long as the agreement does not indicate the contrary. See Melrose Enters., Inc. v. Pawtucket Form Constr., Co., 550 A.2d 300, 300-01 (R.I. 1988) (per curiam); see also Humble Oil & Refining Co. v. Lennon, 94 R.I. 509, 182 A.2d 306 (1962) (lessor's option to renew and option to purchase both assignable with the lease).

Nevertheless, rights of first refusal are markedly different from option agreements in both operation and treatment by Rhode Island courts. The right of first refusal entitles its holder to receive notice from the seller once the seller has in good faith become willing to accept an offer from a third-party so that the holder of the first refusal right may preempt the third-party offer

with a matching offer. See Hood, 478 A.2d at 185; Uno Rests., Inc., 805 N.E.2d at 962. In other words, the holder of a right of first refusal is affirmatively obligated to make an offer matching the terms of the third-party offer; such an obligation is personal to the holder of the right. See Uno Rests., Inc., 805 N.E.2d at 962 ("It is the prerogative of the holder [of the right of first refusal] then to decide whether to purchase the property at that price [contained in the third-party offer]."). As such, the holder of a first refusal right is obligated to personally exercise the right by extending to the seller an offer; significantly, the first refusal right is therefore extinguishable upon death of the holder of the right of first refusal. See Vogel v. Melish, 203 N.E.2d 411, 413 (Ill. 1964) ("[W]here a contract requires the continued existence of a particular person or thing for its performance, there is always an implied condition that death or destruction of that person or thing excuses further performance."); see also Kenyon, 656 A.2d at 966. Accordingly, a right of first refusal is personal to its holder and may not be assigned unless the parties were to agree otherwise. See Swarts, 26 R.I. 388, 59 A. at 77-78.

Moreover, it is clear that based on the language of the Shareholders' Agreement, the right of first refusal was not intended to survive the life of its holder(s). Contracts are considered personal when they are not intended to survive the life of the individual benefitting by the right. See Park Station Ltd. P'ship, L.L.P., 835 A.2d at 655. In this specific instance, the third paragraph of the Shareholders' Agreement provides: "Should any of the current shareholders die, the estate may transfer the stock to a descendent heir. Should that descendant heir or the estate wish to sell the stock to a non related heir, the remaining shareholders will have the right of first refusal to the sale." This provision thus grants the "remaining shareholders" a right of first refusal to a sale should a descendant heir or the estate of one of the current shareholders wish to sell his shares in BIPCO; it does not, however, grant the descendant heir or estate the right of

first refusal should any of the remaining shareholders wish to sell thereafter. As a result, the Court construes the right of first refusal granted under the Shareholders' Agreement as not intended to survive the life of the signatories to the Shareholders' Agreement. See Kenyon, 656 A.2d at 966 (finding significant the repeated usage of the term "mortgagor" and "mortgagee" in determining that the parties did not intend for the right of first refusal to survive after the mortgage had been discharged). Therefore, the right of first refusal in this case was an obligation that was personal in nature and not intended to be assigned or otherwise follow the ownership of stock once the shares left the signatories' possession. See Park Station Ltd. P'ship, L.L.P., 835 A.2d at 655; see also Kenyon, 656 A.2d at 965 (describing a right of first refusal as an "independent privilege").

Accordingly, because the right of first refusal granted in the Shareholders' Agreement was an unassignable personal contractual right, it could not be assigned by Mr. McGinnes to Mrs. McGinnes unless the Shareholders' Agreement permitted such an assignment. The Court concludes as a matter of law that the right of first refusal was not assigned to Mrs. McGinnes by Mr. McGinnes because the Shareholders' Agreement lacks a provision enabling such an assignment.

D

Mr. McGinnes' Ability to Exercise the Right of First Refusal

In light of Mr. McGinnes' inability to assign the right of first refusal under the terms of the Shareholders' Agreement, this Court must next determine whether his ability to exercise the right of first refusal was extinguished when he relinquished his status as a shareholder in BIPCO. Plaintiffs argue that should the Court determine that the right of first refusal was an unassignable personal contract, Mr. McGinnes retained his ability to exercise the right of first refusal

delineated in the Shareholders' Agreement. Defendants contend that because Mr. McGinnes was not a "current" shareholder at the time Casazza and Pezzimenti decided to sell their shares, he was not entitled to a right of first refusal.

As this Court has already determined, the language of the Shareholders' Agreement is clear and unambiguous. When a contract is clear and unambiguous, "the terms of the contract are to be applied as written." Gorman v. Gorman, 883 A.2d 732, 739 n.11 (R.I. 2005). In applying the Shareholders' Agreement as it was written, it becomes clear as a matter of law that the right of first refusal was applicable only to the signatories in their capacity as shareholders. The Court finds significant the continued and repeated usage of the word "shareholders": The Shareholders' Agreement granted the right of first refusal to remaining shareholders should one of the current shareholders wish to sell his BIPCO shares. The right of first refusal was therefore inextricably linked to the shareholder status of the individual holding the right of first refusal. See Kenyon, 656 A.2d at 966 (holding that the usage of the terms "mortgagee" and "mortgagor" in the document granting a right of first refusal indicated that the right extinguished upon discharge of the mortgage). Accordingly, upon Mr. McGinnes's forfeiting his status as a "shareholder" of BIPCO, his ability to exercise the right of first refusal ceased. See id.

In addition, this Court notes that at no time during his ownership of BIPCO shares was Mr. McGinnes ever able to validly exercise his right of first refusal. A right of first refusal cannot be exercised until the seller is in good faith ready to accept a third-party offer. See Kenyon, 656 A.2d at 965 (stating that a first refusal right "requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the [right of first refusal] at the stipulated price"); Uno Rests., Inc., 805 N.E.2d at 962 ("A right of first refusal is triggered by a bona fide third-party offer to purchase the property burdened by the right."). Once a seller has

received a third-party offer he or she is in good faith ready to accept, "[i]t is [then] the prerogative of the holder then to decide whether to purchase the property at that price." Uno Restaurants, Inc., 805 N.E.2d at 962. In applying the Shareholders' Agreement as it was written to the facts of this case, the right of first refusal could not be validly exercised until the "current shareholders" received an offer they were in good faith willing to accept. Such an acceptable offer did not come into existence until after Mr. McGinnes' forfeiture of his shareholder status—viz., the July 11, 2016 Stock Purchase Agreement.

Accordingly, this Court concludes that Mr. McGinnes could not exercise a right of first refusal because he was not a shareholder at the time the right of first refusal could be exercised. A conclusion to the contrary would permit the right of first refusal to continue indefinitely, which is "illogical and clearly not the intent of the parties." See Kenyon, 656 A.2d at 966.

IV

Conclusion

For the reasons stated herein, the Court grants Defendants' motion for partial summary judgment and denies Plaintiffs' motion for partial summary judgment on Counts I and II. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Sara McGinnes, et al. v. Town of New Shoreham, et al.**
CASE NO:	**WC-2016-0616**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**April 4, 2017**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Michael Daly, Esq.**
For Defendant:	**Michael R. McElroy, Esq.; Leah J. Donaldson, Esq.; John O. Mancini, Esq.; Erin A. Hockensmith, Esq.; Anthony F. DeMarco, Esq.; Katherine Merolla, Esq.**