COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
2384CV00071-BLS2
2384CV00958-BLS2
2384CV02141-BLS2

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

JON DELLI PRISCOLI

JON DELLI PRISCOLI

v.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

GRAFTON & UPTON RAILROAD COMPANY; FIRST COLONY GROUP, LLC; AND JON DELLI PRISCOLI

Counsel Notified via email 1/9/24. BLL Asst Clerk

DECISION AND ORDER GRANTING SUMMARY JUDGMENT UPHOLDING DANA RAIL CARE'S RIGHT OF FIRST REFUSAL

Michael R. Milanoski and John P. DeWaele, III, allege that they entered into a binding agreement to purchase Grafton & Upton Railroad Company ("GURR") from Jon Delli Priscoli. But Dana Transport, Inc., which has done business under the name Dana RailCare ("Dana"), contends that it is entitled to enforce a contractual right of first refusal and buy GURR.

Delli Priscoli filed suit seeking a declaratory judgment as to whether Dana's ROFR is enforceable. Milanoski and DeWaele contend that the letter of intent containing Dana's ROFR was never enforceable and Dana should be estopped from contending it is enforceable, or the letter of intent was terminated and Dana's ROFR did not survive the termination, or the letter of intent was superseded by later contracts. Dana, GURR, and Delli Priscoli contend that Dana's ROFR is enforceable and was properly invoked by Dana. The parties seem to agree that the material facts are not in dispute, and ask the Court to resolve the issue on summary judgment.

The Court will **allow** Dana's motion for declaratory relief, **deny** the motion by Milanoski and DeWaele to enforce their contract with Delli Priscoli, and order

that final judgment shall enter declaring that Dana's ROFR is valid, still in effect, and enforceable, and that Dana made a proper and timely exercise of its right to purchase GURR.

Dana is entitled to declaratory relief in its favor because there is an actual controversy about whether Dana's ROFR is valid and enforceable, Milanoski and DeWaele have standing to challenge the validity of this ROFR, all necessary parties have been joined as parties in civil action 2384CV00958-BLS2,[1] and the undisputed material facts demonstrate that Dana's ROFR is valid and enforceable as a matter of law.[2]

The Court concludes that Milanoski and DeWaele have standing to assert that Dana's ROFR is invalid and may not be enforced, but that their challenge to this ROFR is without merit. The Court finds and concludes that the letter of intent containing Dana's ROFR is an enforceable contract, Dana is not estopped by prior statements from asserting that this ROFR is enforceable, Dana's ROFR was not terminated, and subsequent contracts with affiliates of Dana did not supersede this ROFR. Furthermore, Delli Priscoli's agreement to sell GURR to Milanoski and DeWaele triggered Dana's ROFR, and Dana gave prompt and timely notice of its intent to exercise its ROFR. Since Dana's ROFR is valid and enforceable, allegations that Dana has somehow colluded with GURR and Delli Priscoli to protect its legal rights are beside the point.

1. **Undisputed Factual Background**. The summary judgment record shows that the following facts are true.

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1 Delli Priscoli filed his declaratory judgment action in Worcester Superior Court on January 10, 2023. It was docketed as civil action 2385CV00022. The case was then transferred to the Suffolk Business Litigation Session, and assigned the new docket number 2384CV00958-BLS2.

Though Delli Priscoli's complaint names "Dana RailCare" as a defendant, Dana Transport, Inc., answered the complaint, representing that Dana RailCare is a trade name used by Dana Transport, Inc. The parties have all treated Dana Transport, Inc., as being a party to this civil action, and seem to agree that it was also party to the letter of intent between GURR and "Dana RailCare," which is discussed below.

2 See generally *Buffalo-Water 1, LLC,* v. *Fidelity Real Estate Co., LLC,* 481 Mass. 13, 18–20 (2018) (requirements for declaratory judgement claim); *Bortolotti* v. *Hayden,* 449 Mass. 193, 206 (2007) (party seeking to enforce right of first refusal was entitled to summary judgment and entry of declaration that right was valid and enforceable).

1.1. **Dana's ROFR**. Starting in 2008, GURR and Dana discussed working together to grow GURR's rail business by having Dana develop mostly vacant industrial land pit in Upton, Massachusetts, into a rail yard. They entered into a letter of intent in January 2009 (the "Dana LOI") that gave Dana the right to lease and an option to purchase the property. The Dana LOI identified the property that Dana was leasing, and had an option to purchase, as comprising roughly 33 acres of industrial land located on Maple Avenue, Upton, Massachusetts, as shown on a plan by Allen Engineering dated June 3, 2008.

The Dana LOI included the price terms of the lease arrangement and the purchase option, and contemplated that a more detailed lease or license agreement would be negotiated and executed within a month. The price terms in the Dana LOI were as follows:

- Dana was required to make a down payment of $50,000 upon signing the Dana LOI.
- Once Dana installed the first two lengths of rail track infrastructure, which was expected to be complete by around June 1, 2009, Dana was required to start making GURR's mortgage loan payments of roughly $3 million per month and to start making monthly lease payments.
- The monthly lease payment started at $3,500, would increase to $7,500 once the new rail yard achieved a weekly average of 35 railcar transloadings, and would increase to $15,000 once there was a weekly average of 75 railcar transloadings.
- Dana could exercise an option to purchase the property for $6 million on April 1 of 2010, 2011, 2012, or 2013. The initial $50,000 downpayment would be credited toward the purchase price; the monthly mortgage and lease payments would not.

This agreement required Dana to develop the leased premises as a rail yard, and to perform all necessary design and construction work at its own risk, subject to GURR's approval of all plans. And it also required Dana to use its best efforts to develop new rail business for GURR at the Upton Rail Yard, and permit GURR to use the planned facility for its rail transportation activities.

In addition, the Dana LOI provided that GURR and Dana would enter into "standard sidetrack and switching agreements governing rail operations and

service at the Upton Rail Yard," that would authorize Dana to act as GURR's agent "for purposes of transloading or other rail transportation activities."

Finally, the Dana LOI gave Dana "the right of first refusal to purchase or operate the GURR if there is a change of control of the GURR from the current owner, Jon Delli Priscoli, or if he chooses to cease rail operations at the Upton Rail Yard." It provided that Dana's ROFR would survive Dana's option to purchase the rail yard property.

1.2. **Implementation of the Dana LOI**. There is no evidence that GURR and Dana entered into a more detailed lease of the Upton Rail Yard property. But the summary judgment record establishes that GURR and Dana treated the Dana LOI itself as constituting an enforceable lease of the property.

Dana paid the $50,000 down payment required in the Dana LOI. It also made the monthly lease payments to GURR that were required in the Dana LOI; at some point the lease payment amounts rose to $15,000 per month. As discussed below, however, for a time Dana was late in making these payments.

Dana developed the land that it was leasing into the Upton Rail Yard and proceeded to have an affiliate operate that facility for GURR. Dana says that it invested closed to $50 million to do so.

GURR entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC in December 2010; this LLC is an affiliate of Dana. At the same time, GURR entered into a Purchase and Sale Agreement regarding the Upton Rail Yard property with Equipment Care Center of Grafton, LLC, which is another affiliate of Dana. This P&S was drafted to implement Dana's option to purchase the property for $6 million.

1.3. **Milanoski and DeWaele's Purchase Agreement**. In late 2022, Milanoski and DeWaele agreed to buy and Delli Priscoli agreed to sell to them his 100 percent ownership interest in GURR and all of GURR's assets except for Delli Priscoli's 50 percent ownership interest in Upton Development Group. On December 1, 2022, all three of them executed and entered into a restated letter of intent (the "2022 Restated LOI"), in which they agreed upon the material terms of a future purchase and sale agreement.

Milanoski and DeWaele agreed to pay Delli Priscoli $36 million and to assume roughly $6 million in debt to acquire GURR and most of its assets, including the Upton Rail Yard. The 2022 Restated LOI requires Delli Priscoli to deliver his

interest in GURR "free and clear of all liens with clear title" aside from certain specified debt.

1.4. **Dana's Exercise of its ROFR**. Delli Priscoli notified Dana about his acceptance of Milanoski's and DeWaele's offer to purchase GURR.

Dana responded by promptly notifying GURR that it intended to exercise Dana's ROFR. On December 28, 2022, Ron Dana sent an email to Jon Delli Priscoli that said, "It is my intent to move forward to exercise my right of first refusal on the purchase of the Grafton and Upton Railroad." On January 5, 2023, an attorney representing Dana sent a letter to an attorney representing Delli Priscoli, reiterating that "Dana hereby exercises its right of first refusal to purchase GURR on the terms set forth in the offer Mr. Priscoli received to sell his ownership interest in GURR."

2. **Analysis**. The undisputed material facts show that Dana's ROFR was and still is enforceable. Dana is therefore entitled to summary judgment in its favor declaring its rights under the binding right of first refusal. See *Bortolotti* v. *Hayden,* 449 Mass. 193, 206 (2007).

2.1. **Standing**. Milanoski and DeWaele have standing to challenge the validity and enforceability of Dana's 2009 ROFR. The assertion by GURR that they lack standing is without merit.

A party that has entered into a contract to purchase specific real estate has standing to challenge a purported right of first refusal on that property that is claimed by a third-party. See *Bortolotti, supra,* at 196–198.

As discussed above, Milanoski and DeWaele entered into a binding letter of intent to purchase GURR and most of its assets from Delli Priscoli for $36 million plus the assumption of roughly $6 million in debt. That gives Milanoski and DeWaele "a cognizable legal interest in the validity" of the Dana ROFR, "and that is enough to confer standing." *Id.* at 198.

2.2. **The Dana LOI Was a Binding Contract**. Milanoski and DeWaele contend that the Dana LOI was never an enforceable contract because it "contemplates the execution of subsequent formal agreements," does not include all material terms, and does not expressly state that the parties intended the document to be binding. They also contend that Dana should be estopped, by prior testimony before the Federal Surface Transportation Board, from asserting that the Dana LOI was and is an enforceable contract. The Court disagrees.

2.2.1. **Material Terms and Intent to be Bound**. The Dana LOI was and is an enforceable contract, even though it contemplated that "GURR & Dana will enter into a fuller detailed Lease/License agreement" and into a separate contract to govern transloading and other rail transportation activities.

"[T]o create an enforceable contract, there must be agreement between the parties on the material terms of the contract, and the parties must have a present intention to be bound by that agreement." *K&K Development, Inc.*, v. *Andrews*, 103 Mass. App. Ct. 338, 344 (2023), quoting *Situation Mgmt. Sys., Inc.* v. *Malouf, Inc.*, 430 Mass. 875, 878 (2000).

"A purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." *Air Tech. Corp.* v. *Gen. Elec. Co.*, 347 Mass. 613, 626 (1964).

But an agreement will be enforceable even if it "anticipates a more formal writing," so long as the parties "have agreed upon either the material terms, or upon the 'formulae and procedures' that will provide the material terms at some future date." *K&K Development, supra*, quoting *Frishman* v. *Maginn*, 75 Mass. App. Ct. 103, 110–111 (2009). Where the parties "have agreed upon all material terms," but contemplate the further execution of a final written agreement, it is reasonable to infer "that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *McCarthy* v. *Tobin*, 429 Mass. 84, 87 (1999) (accepted offer to purchase real estate was binding contract, even though it contemplated further purchase and sale agreement), quoting *Goren* v. *Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140 (1987) (same).

The Dana LOI was much more than a mere "agreement to agree." It contained all material terms of the lease of the planned rail yard site to Dana, of Dana's option to purchase the site, and of Dana's ROFR to purchase GURR if Delli Priscoli were to decide to relinquish control of the company or cease rail operations at the Upton Rail Yard.

The material terms of the **lease arrangement** are set forth in the Dana LOI. As discussed above in more detail, this contract identified the premises to be leased by reference to a specific plan, specified the payment terms, and required Dana to build out and operate the leased premises.

The parties made clear that they intended to be bound by these terms, not only by agreeing to them, but also by following these terms even though the parties never entered into a more detailed lease agreement. Where contract language is ambiguous, "[t]here is no surer way to find out what parties meant, than to see what they have done." *Brigade Leveraged Capital Structures Fund Ltd.* v. *PIMCO Income Strategy Fund*, 466 Mass. 368, 378 (2013), quoting *Brooklyn Life Ins. Co. of New York* v. *Dutcher*, 95 U.S. 269, 273 (1877).

The Dana LOI also contained all material terms regarding Dana's **option to purchase** the Upton property. It specified the price, and the four specific dates when Dana was entitled to exercise the option.

In any case, **Dana's ROFR** was valid and enforceable as written, whether other provisions of the Dana LOI were contractually binding or not.

Dana's ROFR was enforceable because it contained all material terms. No price or timing term was required, because the ROFR merely gives Dana the right to purchase at the right offered by a third-party, if and when Delli Priscoli decided to accept any such offer. See *Bortolotti*, 449 Mass. at 201.

A right of first refusal involving real estate "becomes operational when the 'owner has decided to accept a third person's outstanding and enforceable offer and the holder of the right has been informed of the details of that offer and has had a reasonable time to meet it.' " *Id.* at 200, quoting *Roy* v. *George W. Greene, Inc.*, 404 Mass. 67, 71 (1989). "At the time of a third-party offer that the owner has decided to accept, the right of first refusal ripens into an option to purchase according to the terms of the third-party offer." *Id.* at 201.

Dana's ROFR was contractually binding because the material terms of that right were spelled out; and it remains contractually binding even if other parts of the Dana LOI were nothing more than an unenforceable agreement to negotiate further about other issues. See *Schwanbeck* v. *Federal-Mogul Corp.*, 412 Mass. 703, 705–707 & n.2 (1992). In *Schwanbeck*, the parties entered into a letter of intent in which they agreed to "negotiate in good faith" over the terms for the purchase and sale of a business division of the defendant corporation, and also agreed that the potential buyer would have a right of first refusal if any third-party made a firm offer to purchase the business. *Id.* at 705 n.2. The Supreme Judicial Court held that, although the "negotiate in good faith" provision was not contractually binding, the separate right of first refusal was nonetheless enforceable (though it was not triggered because there was not a firm offer that complied with the Statute of Frauds). *Id.* at 705–710.

Though the Dana LOI did not contain terms of the transloading agreement that GURR later entered into with Grafton Upton Railcare LLC ("GU Railcare"), which is an affiliate of Dana, that is beside the point. Since the Dana LOI was an enforceable contract with respect to the property lease, Dana's option to purchase the property, and (most importantly) Dana's ROFR, it does not matter that the parties contemplated entering into additional business arrangements the material terms of which were not included in the Dana LOI.

2.2.2. **Estoppel Argument.** Milanoski and DeWaele argue that the Court "must hold Mr. Delli Priscoli and Mr. [Ron] Dana to their prior testimony" in affidavits submitted in 2012 and 2013 to the Federal Surface Transportation Board about the relationship between GURR and Dana, and bar them from "provid[ing] contradictory testimony here."

In other words, Milanoski and DeWaele are asking the Court to apply the doctrine of judicial estoppel, even though they do not use the term and do not cite or address any of the relevant case law.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position that it had previously asserted in another proceeding." *Mullins* v. *Corcoran,* 488 Mass. 275, 286 (2021), quoting *Otis* v. *Arbella Mut. Ins. Co.,* 443 Mass. 634, 639–640 (2005). "A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is 'directly contrary' to a position asserted in a prior case, and (2) that party 'succeeded in convincing the court to accept its prior position.' " *Spinosa* v. *Tufts,* 98 Mass. App. Ct. 1, 5 (2020), quoting *Otis, supra,* at 641. With respect to the second of these elements, it is not enough to show that the party prevailed in the prior proceeding; instead there must be evidence that the prior tribunal adopted the position that allegedly is contrary to the party's position in the current litigation. See *Mullins,* 488 Mass. at 287.

"Application of the equitable principle of judicial estoppel to a particular case is a matter of discretion." *Otis,* 443 Mass. at 639–640. "The Supreme Judicial Court has 'decline[d] to construct a categorical list of requirements or to delineate each and every possible exception.' " *Spinosa,* 98 Mass. App. Ct. at 6, quoting *Otis, supra,* at 642. "Instead, judges are to 'use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose" of safeguarding the integrity of the courts. *Spinosa, supra,* at 6, quoting *Otis, supra* at 642.

The Court declines to estop Dana from asserting that the Dana LOI was and is an enforceable contract. It does so for four reasons.

First, Milanoski and DeWaele do not cite to any Massachusetts case law applying estoppel in a civil action based on allegedly inconsistent statements made before an administrative agency, rather than in a court proceeding. The Court "is not aware of any case in Massachusetts that directly applies the doctrine of judicial estoppel to positions adopted in administrative proceedings," see *Trustees of Boston College* v. *Boston Academy of the Sacred Heart, Inc.*, 103 Mass. App. Ct. 83, 93 (2023), though it recognizes that a number of federal courts have done so, see, e.g., *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (collecting cases, and cited in *Boston Academy of the Sacred Heart, supra.*)

Since Milanoski and DeWaele have not provided any substantive argument in support of their position that judicial estoppel can be applied in the circumstances of this case, the Court considers that legal argument to have been waived. Cf. *Halstrom* v. *Dube,* 481 Mass. 480, 483 n.8 (2019) (argument raised "in a cursory fashion without citation to supporting legal authority" is waived); *Commonwealth* v. *Johnson,* 470 Mass. 300, 319 (2014) (trial court acted "well within" its discretion in declining to consider unsupported and undeveloped argument). Milanoski and DeWaele have filed a motion seeking summary judgment in their favor as to the enforceability of Dana's ROFR. In the Superior Court, moving parties are required by rule to file a written memorandum that includes "a statement of reasons, with supporting authorities, why the motion should be granted." Sup. Ct. Rule 9A(a)(2). Parties therefore waive issues and arguments that they do not raise and develop in their written memoranda.

Second, Milanoski and DeWaele have not shown that the STB adopted the statements in Mr. Dana's affidavits about Dana Transport's relationship with GURR.

The Court is troubled that Ron Dana seems to have made sworn statements to the STB that are directly contrary to his assertions in this case, and are directly contrary to the plain meaning of the Dana LOI signed in early 2009. Mr. Dana told the STB that (i) none of the Dana Companies leased the Upton Rail Yard from GURR, and (ii) although the Dana affiliate Grafton Upton Railcare, LLC ("GU Railcare") provided transloading services for GURR, Dana Transport had no contractual relationship with and did not perform any services for GURR.

But Milanoski and DeWaele have not met their burden of proving that the STB adopted Dana's position about its legal relationship with GURR.

The STB's decision in the matter in which Mr. Dana submitted the affidavits cited by Milanoski and DeWaele make clear that the STB did **not** adopt or in any way rely upon Mr. Dana's representations that no Dana company other than GU Railcare had any contractual relationship with GURR and that Dana never leased the rail yard. The STB held that GU Railcare's was conducting transloading activities at the Upton facility on behalf of GURR, that these activities fell within the statutory definition of "transportation" and were performed under the auspices of a "rail carrier," and that federal law therefore preempted local regulation of those activities. See *Del Grosso*, STB Docket No. FD 35652, 2014 WL 6852990, at *1–*4, slip. at 1–5 (STB Dec. 4, 2014).[3] The Board noted that, since "the relevant issue ... is whether *GU Railcare's* transloading activities are part of rail transportation, it would "not address ... alleged activities by *other* companies" (emphasis in original). *Id.* 2014 WL 6852990, at *9, slip op. at 11.[4]

Since the STB did not adopt Mr. Dana's stated positions regarding the legal relationship between GURR and Dana affiliates other than GU Railcare, and instead stated that it did not have to reach the issue, there is no basis for estopping Dana from taking a potentially inconsistent position in these civil actions. See *Mullins*, 488 Mass. at 287.

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[3] The STB makes its decisions available at its website. See stb.gov/proceedings-actions/decisions/.

[4] Though the petitioners in that STB proceeding sought judicial review of the Board's determination that the activities at the transloading facility constitute rail "transportation," they did not seek review of the Board's that GU Railcare was acting on behalf of GURR and thus that the transloading activities were being performed by a "rail carrier." See *Del Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 117 & 120 (1st Cir. 2015). The First Circuit held that the Board applied the wrong standard in deciding whether the transloading activities constituted transportation. *Id.* at 118–120. On remand, the STB held that the activities that GU Railcare was undertaking for GURR constitute transportation that is within the Board's statutory jurisdiction, which means that local regulation of those activities was preempted by federal law. *Del Grosso—Petition for Declaratory Order*, FD 35652, slip op. at 11 (STB served July 31, 2017). The First Circuit affirmed. *Del Grosso* v. *Surface Transp. Bd.*, 898 F.3d 139 (1st Cir. 2018).

Third, Mr. Delli Priscoli's statements to the STB could not estop Dana, even if the doctrine of judicial estoppel applied in these circumstances.

Fourth, even if Milanoski and DeWaele had shown that the doctrine of judicial estoppel would otherwise be applicable, which they have not, the Court would exercise its discretion not to estop Dana from arguing that the 2009 Dana LOI was and is an enforceable contract because it finds that Milanoski and DeWaele make that request with unclean hands.

Since judicial estoppel is an equitable doctrine, a judge may exercise their discretion not to apply it if the party seeking judicial estoppel "comes to the court with unclean hands." *Spinosa* v. *Tufts*, 98 Mass. App. Ct. 1, 8 (2020), quoting *Galaz* v. *Katona*, 841 F.3d 316, 326 (5th Cir. 2016). The unclean hands doctrine allows a judge to deny equitable relief to someone who has acted in bad faith or otherwise engaged in unfair or inequitable conduct. See *Thayer Co.* v. *Binnall*, 326 Mass. 467, 483 (1950); *Murphy* v. *Wachovia Bank of Delaware*, 88 Mass. App. Ct. 9, 15 (2015). "The question whether to deny relief based on 'unclean hands' is committed to the broad discretion of the trial judge." *Reilly* v. *Local 589, Amalgamated Transit Union*, 31 Mass. App. Ct. 633, 639 (1991).

The summary judgment record establishes the following, which indicates that Milanoski and DeWaele come to court with unclean hands.

- Delli Priscoli decided to sell GURR in September or October of 2022.
- Milanoski was the President of GURR. DeWaele also worked for GURR. When they learned that Delli Priscoli had decided to sell the company, they asked for an opportunity to buy GURR.
- Milanoski was well aware of Dana's ROFR. When Milanoski began working for GURR in 2017, Stan Gordon (who was GURR's Vice President) emailed a copy of the Dana LOI to Milanoski and specifically noted Dana's ROFR in his summary of the terms of that agreement. Then, in September 2022, Milanoski forwarded that Gordon email from Milanoski's email address at First Colony Development to Milanoski's email address at GURR.
- While the Milanoski and DeWaele were negotiating with Delli Priscoli to buy GURR soon thereafter, Delli Priscoli asked Milanoski about that status of Dana's ROFR in the 2009 Dana LOI.

- Milanoski told Delli Priscoli that Dana's ROFR had been "taken care of" and was no longer valid or enforceable. Milanoski made this representation on behalf of himself and DeWaele.
- Delli Priscoli accepted Milanoski's representation as true, because he knew that as President of the company Milanoski had complete access to GURR's books and records.
- But Milanoski knew his representation that Dana's ROFR had been terminated was **not** true. Milanoski sent an email on December 8, 2022, to his contact at the bank that Milanoski had asked to finance his purchase of GURR that said in part, "We are going to resolve the ROFR with Ron Dana from an old Letter of Intent and get signoff satisfactory to Bank's attorney."
- When Delli Priscoli's attorney reviewed the 2022 Revised LOI with Milanoski and DeWaele, the attorney followed up by asking Milanoski about Dana's ROFR, and telling Milanoski that he would not be able to get a bank loan to finance a purchase of GURR without providing evidence that Dana's ROFR had been terminated. Delli Priscoli's attorney knew that in 2020, when the limited liability company that owns the site of the Upton Rail Yard was seeking a bank loan, Milanoski provided the bank with documentation that included the Dana LOI.
- Milanoski responded by sending a number of documents to the attorney. None of them demonstrated that Dana's ROFR had been terminated. After Dana gave notice that it was exercising its ROFR, Milanoski sent additional documents to the attorney. They did not show that Dana's ROFR had been terminated either.
- Delli Priscoli met with Milanoski and DeWaele, and said he could not sell GURR to them unless Dana agreed to waive or not exercise Dana's ROFR. Milanoski did not respond. DeWaele said, "Well, let us think about it."
- Delli Priscoli's attorney concluded that there was an actual controversy about whether Dana's ROFR was enforceable, and advised Delli Priscoli to file an action seeking a declaratory judgment to resolve the issue. Which he did.

The Court finds and concludes that Milanoski and DeWaele engaged in unfair and inequitable conduct by telling Delli Priscoli that Dana's ROFR had been "taken care of," even though they must have known that Dana was likely to take the position that Dana's ROFR was valid and still enforceable. In essence, Milanoski and DeWaele tricked Delli Priscoli into selling GURR to him and signing the 2022 Restated LOI, without exploring a possible sale to Dana, by giving Delli Priscoli a misleading and knowingly incomplete assurance that Dana's ROFR was no longer valid or enforceable. The Court credits Delli Priscoli's representation, in his legal memorandum, that he would not have agreed to sell GURR to Milanoski and DeWaele if Milanoski had not assured him that Dana's ROFR was no longer valid.

In the exercise of its discretion, the Court concludes that Milanoski and DeWaele have come to court with unclean hands, and that it would therefore be inequitable for them to obtain any advantage in this litigation through application of the equitable doctrine of judicial estoppel.

2.3. **GURR Did Not Terminate the Dana LOI**. The summary judgment record establishes that, although GURR said it was terminating the Dana LOI in late 2010, GURR and Dana then resolved their differences and thereafter GURR treated the Dana LOI as being in effect.

GURR, its owner Mr. Delli Priscoli, and Dana all agree that, although conflicts arose between GURR and Dana in 2009 and 2010 as their business relationship was developing, and for a time Dana was not making lease payments required by the Dana LOI, they ultimately resolved their disputes. They also agree that the Dana LOI was not terminated, Dana proceeded to invest roughly $50 million to develop the Upton property based on the terms of the Dana LOI, and GURR continued to carry out its obligations under the Dana LOI. The undisputed factual record supports the parties view that the Dana LOI remained and remains in effect.

It follows that the Dana LOI was and still is enforceable. Where one party commits a material breach of contract, but the other party elects to continue performing, the contract remains in effect and both parties are bound by its terms. See *Kass* v. *Todd*, 362 Mass. 169, 175–176 (1972). "An injured party may refuse to consider a breach as a material one and elect to keep the contract alive. The contract then continues for the benefit of both parties[.]" *Lander* v. *Samuel Heller Leather Co.*, 314 Mass. 592, 598 (1943).

During 2010, GURR was getting increasingly concerned that Dana was not implementing and fully complying with the Dana LOI. In September 2010, GURR's Vice President Stan Gordon sent a letter to Dana's attorney complaining that Dana had repeatedly breached the Dana LOI, and taking the position that as a result the Dana LOI was "no longer in effect" and was "null and void." A month letter, Gordon sent a letter with the subject line "Notice of Default" and stating that "Dana are hereby formerly [sic] notified of their default under the LOI and that the LOI is hereby formerly [sic] terminated."

But it is undisputed that soon thereafter Mr. Delli Priscoli, Mr. Dana, Mr. Gordon and others met and resolved their issues. Thereafter both GURR and Dana considered the Dana LOI as remaining in effect. Both GURR and Dana continued to invest and work together to develop the Upton property based on that shared understanding. At the end of December 2010, GURR entered into a Terminal Transloading Agreement with GU Railcare, as contemplated in the Dana LOI, and also entered into a Purchase and Sale Agreement for the Upton party with Equipment Care Center of Grafton, LLC ("Equipment Care," another Dana affiliate) consistent with the purchase option contained in the Dana LOI. That is consistent with the undisputed evidence that GURR and Dana had resolved their differences and GURR was no longer terminating the Dana LOI.

When Milanoski began working for GURR in 2017, Gordon sent him an email attaching a copy of the Dana LOI, and describing Dana's ROFR. Gordon did not suggest had been terminated. Instead, it appears that Gordon was providing Milanoski with a copy of a key contract that continued to govern the relationship between GURR and Dana with respect to the Upton property.

In February 2020, an attorney representing GURR drafted an agreement with Dana (never executed) that was intended "to consolidate and supersede" some of the agreements between GURR and Dana or Dana's affiliates. The draft included a provision that would have expressly terminated the Dana LOI from 2009. This confirms that GURR understood that the Dana LOI was still in force. There would be no need to ask Dana to terminate its LOI if GURR had already terminated that agreement years earlier.

It is undisputed that Dana continues to pay monthly rent to GURR for the Upton Rail Yard. GURR's continued acceptance of that rent, and continued performance by allowing Dana to help run the Upton property, establishes that the Dana LOI remains in effect. See *Kass* and *Lander, supra.*

2.4. **Subsequent Contracts Did Not Supersede Dana's ROFR**. Milanoski and DeWaele also contend that Dana's ROFR was "fully integrated into" and thus eliminated by the subsequent contracts that GURR entered into with GU Railcare and Equipment Care. This argument is without merit.

The Terminal Transloading Agreement between GURR and GU Railcare provides in § 7.D:

> This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

Though the term "Parties" is capitalized, it is not defined in the contract. But the only parties to this agreement were GURR and GU Railcare.

The Purchase and Sale Agreement between GURR and Equipment Care provides in the first sentence of ¶ 13:

> This Agreement embodies the entire agreement between the parties hereto with respect to the purchase and sale and operation of the Property and supersedes any and all prior negotiations, agreements and understandings, written or formal , all of which are deemed to be merged herein.

Neither of these integration clauses had the effect of eliminating Dana's ROFR from the Dana LOI. By their terms, these clauses only defined the agreements that GURR entered into with GU Railcare and Equipment Care. They did not affect, alter, or limit the prior contract that GURR had entered into with Dana, because Dana was not a party to the transloading agreement or to this P&S. Furthermore, the subject matter of Dana's ROFR was outside the subject matter of the transloading agreement, and did not concern the sale of property to or operation of property by Equipment Care.

If GURR and Dana had intended to terminate Dana's ROFR when GURR executed the transloading agreement and this P&S, they would have had to enter into a new contract or amend the Dana LOI to do so. Dana Transport, Inc., is a "separate and distinct" legal entity; integration clauses defining the contractual rights of its affiliates GU Railcare and Equipment Care did not affect Dana's ROFR. See generally *Scott* v. *NG US 1, Inc.*, 450 Mass. 766, 766 (2008) (separate corporations or LLCs are generally "regarded as separate and distinct entities," even if there are "relationships between or among them.").

2.5. **Dana Exercised Its Right of First Refusal.** Dana properly exercised its ROFR after learning that Milanoski and DeWaele had made a bona fide offer to purchase the Upton property, as reflected in the 2022 Restated LOI that Milanoski, DeWaele, and Delli Priscoli executed on or about December 1, 2022. Dana promptly informed Delli Priscoli that it intended to exercise Dana's ROFR. It did so by email on December 28, 2022, and in a follow-up letter to Delli Priscoli's attorney on January 5, 2023.

The assertion by Milanoski and DeWaele and Delli Priscoli and Dana engaged in "collusion" in order torpedo the 2022 Restated LOI is without merit.

GURR had a contractual obligation to inform Dana about the bona fide offer by Milanoski and DeWaele to purchase the property. A right of first refusal is "a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price." *Uno Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 442 Mass. 376, 383 (2004). "The owner's obligation under a right of first refusal is to provide the holder of the right seasonable disclosure of the terms of any bona fide third-party offer." *Id.* at 383–384.

And, since Dana's ROFR was valid and enforceable, Dana did nothing improper by exercising that right.

3. **Separate and Final Judgment.** Though civil action 2384CV00958-BLS2 was previously consolidated with civil actions 2384CV00071-BLS2 and 2384CV02141-BLS2, the Court finds that there is no just reason for delaying the entry of declaratory judgment in Dana's favor on the issues that the Court has now decided regarding the enforceability of Dana's ROFR. It will therefore order that separate and final declaratory judgment shall enter forthwith in civil action 2384CV00958-BLS2. Cf. Mass. R. Civ. P. 54(b).

ORDERS

The motion by Dana Rail Care for declaratory relief in civil action 2384CV00958-BLS2 is **allowed**. The motion by Michael Milanoski and John P. DeWaele, III, to enforce their December 2022 letter of intent with Jon Delli Priscoli is **denied**.

The clerk's office shall enter separate and final judgment in civil action 2384CV00958-BLS2, stating as follows:

This action for declaratory relief came before the Court (Salinger, J.) on cross-motions for summary judgment. Having decided those motions and resolved the controversy among the parties regarding the enforceability of a particular right of first refusal, the Court hereby declares the parties' rights as follows:

(1) The right of first refusal that Grafton & Upton Railroad Company ("GURR") granted to Dana Rail Care (a trade name used by Dana Transport, Inc.) in a Letter of Intent that these parties entered into on or about January 23, 2009, was and still is an enforceable contract.

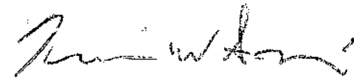
(2) This January 2009 Letter of Intent was not terminated by GURR.

(3) Under this Letter of Intent, Dana has a right of first refusal to purchase or operate GURR if Jon Delli Priscoli decides to sell or otherwise give up control of GURR. This right of first refusal is valid and enforceable.

(4) The agreement to Michael Milanoski and John DeWaele to purchase GURR and most of its assets from Mr. Delli Priscoli is a firm offer that triggered Dana's right of first refusal to purchase GURR.

(5) Dana made a timely and proper exercise of its right of first refusal by giving notice of its intent to purchase GURR soon after Mr. Delli Priscoli agreed to sell that company to Mr. Milanoski and Mr. DeWaele.

(6) Now that Dana has exercised its legal right to purchase GURR on the terms offered by Mr. Milanoski and Mr. DeWaele, it follows that Mr. Milanoski and Mr. DeWaele may not enforce the December 2022 revised letter of intent in which Mr. Delli Priscoli had agreed to sell GURR to them.



Kenneth W. Salinger
Justice of the Superior Court

9 January 2024