

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 19, 2016 Session

**DEMQUARTER HEALTHCARE INVESTORS, L.P. v. OP  
CHATTANOOGA, LLC, ET AL.**

**Appeal from the Chancery Court for Hamilton County  
No. 13-0521 Jeffrey M. Atherton, Chancellor**

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**No. E2016-00031-COA-R3-CV-FILED-DECEMBER 29, 2016**

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This case involves the lease of a skilled nursing facility. The lessee assigned the lease, and the assignee then subleased the nursing facility. While the appeal raises multiple issues, we have determined that the lessor prevails and that the judgment of the trial court must be reversed and the case remanded.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and JOHN W. MCLARTY, J., joined.

Barry Goheen, Atlanta, Georgia, and Scott M. Shaw, Chattanooga, Tennessee, for the appellant, DemQuarter Healthcare Investors, L.P.

Joshua A. Powers, Chattanooga, Tennessee, for the appellees, OP Chattanooga, LLC, and FC-THC Leasing, LLC.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

The facts in this case are voluminous and complex. We will begin with a bare-bones summary to provide a context for a discussion of the issues on appeal and will then add details in the analysis sections as necessary for an understanding of the questions under consideration.

DemQuarter Healthcare Investors, L.P. (“DemQuarter”) owns the Stratford House, a skilled nursing facility in Chattanooga, Tennessee. Douglas Mittleider is the president

of DemQuarter's general partner. DemQuarter's purchase of Stratford House was originally financed by GMAC Commercial Mortgage Corporation ("GMAC"); the loan was later converted into a mortgage-backed security, with LaSalle National Bank ("LaSalle") acting as trustee of DemQuarter's loan on the Stratford House for the benefit of holders of GMAC securities.

DemQuarter leased Stratford House to OP Chattanooga, LLC ("OPC") pursuant to an agreement executed in May 2003. At the time of the original lease in May 2003, OPC was wholly owned by Tandem Health Care, LLC ("Tandem"). Also in May 2003, another Tandem entity, OP Whites Creek, leased a long-term care facility in Whites Creek, Tennessee, called the Windsor House.

### Key Provisions of Stratford House Lease

The following summary serves to highlight key provisions of the lease between DemQuarter and OPC that will be discussed in detail in the analysis section of the opinion.

The lease ran for five years with an option to renew for two additional five-year periods. Under section 9.1 of the lease, the term "Event of Default" includes an event of default under the lease agreement between Brookside Healthcare Investors, L.P. and OP Whites Creek, Inc., regarding Windsor House. Under section 10.1, if DemQuarter "proposes to sell or otherwise transfer the Facilities to any party . . . [OPC] or one or more of its Affiliates as Lessee may designate shall have the right of first refusal to purchase the Facilities prior to Facilities being offered for sale or sold to any other Person." The right of first refusal ("ROFR") provision provides a formula for calculating the purchase price.

Pursuant to section 11.20, OPC "shall not assign this Lease or sublet the entire Facilities or any portion thereof, without the prior written consent of [DemQuarter], which consent shall not be unreasonably withheld or delayed." This section also states, however, that OPC may assign or sublet the facilities without DemQuarter's consent "to an Affiliate of Lessee" and to certain other persons. "Affiliate" is a defined term under the lease.

### Corporate Restructuring

In 2006, Tandem's principal shareholders sold Tandem's stock to Formation Capital, LLC ("Formation Capital") and JER Partners. Two of Tandem's former senior executives, Joseph Conte and Gene Conte, thereafter created Consulate Health Care ("Consulate"). In 2011, an investor group led by Formation Capital purchased 100% of the stock of LaVie Health Care, LLC. In July 2012, Consulate merged into LaVie, and LaVie adopted the Consulate Health Care corporate name.

### OPC Assignment of the Lease

In 2007, OPC entered into an agreement to assign the Stratford House lease to FC-THC Leasing, LLC (“FC-THC”). Consulate Facility Leasing, LLC (“Consulate Facility”) subleased Stratford House from FC-THC in 2007. Stratford Facility Operations, LLC (“SFO”) sub-subleased Stratford House from Consulate Facility that same year. All of these agreements were placed in escrow and then released in August 2007. On August 29, 2007, DemQuarter sent a default letter to OPC stating that, pursuant to the terms of the lease, the lease could not be assigned without the lessor’s prior written consent.

### Purchase Negotiations and Attempted Lease Renewals

In April 2007, DemQuarter informed OPC that a third party was interested in purchasing both the Stratford House and Windsor House facilities, thus triggering OPC’s ROFR. Under section 10.1 of the lease, the purchase price is defined as follows: “the EBITDARM of the Facilities for the immediately preceding four calendar quarters ended March 31, June 30, September 30 and December 31, multiplied by 5.38; provided, however, that the purchase price shall not be less than Six Million Seven Hundred Thousand and 00/100 Dollars (\$6,700,000.00).” “EBITDARM” is a defined term under the lease.<sup>1</sup> Negotiations broke down because the parties could not agree on a purchase price; they differed in their calculation of EBITDARM.

By letter dated January 25, 2008, FC-THC informed DemQuarter of its intent to renew the lease for Stratford House for another five years. In March 2008, counsel for DemQuarter responded that the lease was in default and the notice of renewal was therefore ineffective. At the same time, the parties were again discussing a purchase agreement. They ultimately agreed on a purchase price and entered into an asset purchase agreement. The sale never went through, however, because FC-THC was unable to secure financing due to the crisis in the debt markets. Meanwhile, FC-THC continued to pay and DemQuarter continued to accept the rent for Stratford House.

By letter dated January 29, 2013, FC-THC informed DemQuarter of its intent to renew the lease for Stratford House for another five years. In a letter dated February 8,

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<sup>1</sup> EBITDARM is defined, in pertinent part, as follows:  
[E]arnings of Lessee before interest, taxes, depreciation, amortization, rent and management fees, with such elements comprising EBITDARM being determined in accordance with GAAP. EBITDARM shall be calculated by subtracting all direct operating expenses of a Facility, determined on an accrual basis in accordance with GAAP, from total income of such Facility. . . . Direct operating expenses of a Facility consist of all direct expenses determined on an accrual basis in accordance with GAAP to operate such Facility and include, without limitations, . . . (v) bad debt expense of the Facility, whether actual or accrued. . . .

2013 confirming an earlier telephone conversation, DemQuarter stated that the lease was in default and, therefore, FC-THC could not make a valid exercise of renewal of the lease term.

### Lawsuit

DemQuarter filed its complaint against OPC and FC-THC (collectively, “the defendants”) on July 19, 2013, alleging causes of action for breach of contract and declaratory judgment. The defendants filed an answer and counterclaim for breach of contract and declaratory relief. On September 30, 2014, DemQuarter filed a motion for declaratory judgment. A hearing on the motion was held on October 13, 2014, and the defendants’ attorney did not appear at the hearing. The trial court granted DemQuarter’s motion and decreed that its October 21, 2014 order was a final order pursuant to Tenn. R. Civ. P. 54.02.

The defendants filed a motion to set aside the trial court’s October 21, 2014 order. Counsel for the defendants submitted an affidavit in support of the motion to explain his absence at the earlier hearing. The trial court granted the defendants’ motion to set aside. DemQuarter’s motion for declaratory judgment was subsequently heard again and denied by the trial court.

The matter proceeded to trial, which began on April 28, 2015. DemQuarter presented extensive testimony from Mr. Mittleider, and the defendants cross-examined the witness.<sup>2</sup> At that point, the trial court, *sua sponte*, raised the issue of section 11.14 of the lease, which states that any disputes not resolved within thirty days of notice of the dispute “shall be submitted to arbitration as set forth in Section 11.15, below.”<sup>3</sup> The trial court specifically inquired whether the defendants had waived the right to arbitration. The defendants asserted that they had not waived arbitration and made an oral motion for arbitration, which the trial court granted, over the objections of DemQuarter. The trial court entered an order compelling arbitration. Two weeks later, before arbitration had taken place, the trial court entered an agreed order setting aside its order compelling arbitration and setting the case for trial.

When the trial resumed, DemQuarter read into evidence portions of the deposition of Christina Firth, chief compliance officer and senior vice president for Formation Capital. At the end of the plaintiff’s proof, the defendants made a motion for involuntary dismissal, which was denied by the trial court.

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<sup>2</sup> DemQuarter also submitted an offer of proof of testimony from David Sharp, a director with MidCap Financial, a company specializing in healthcare lending. This offer of proof is not at issue on appeal.

<sup>3</sup> Section 11.15 provides, with some exceptions, that all claims and controversies “shall be subject to binding arbitration.”

The defendants' proof consisted of the testimony of the following witnesses: Gene Curcio, who was a chief financial officer at Tandem when the lease was signed, as well as an officer of OPC, an officer of Consulate, an officer of Consulate Facility Leasing, and an officer of Stratford Facility Operations; and Ms. Firth. Mr. Mittleider testified again on rebuttal.

On December 8, 2015, the trial court entered a detailed memorandum opinion and order. The court held that OPC did not breach the lease; that DemQuarter was not at fault for the defendants' failure to exercise the ROFR in 2007; that the ROFR was not extinguished in 2007 and, even if it was, it would have been renewed if the defendants had been permitted to exercise the second renewal of the lease; and that neither party was entitled to attorney fees. DemQuarter appealed.

### Issues on Appeal

On appeal, DemQuarter asserts that the trial court erred in: (1) setting aside its order granting DemQuarter's motion for declaratory judgment; (2) then denying DemQuarter's motion for declaratory judgment; (2) compelling arbitration in the middle of the trial; (3) misinterpreting the ROFR provision in the lease; and (4) misconstruing the cross-default provision in the lease and failing to include specific findings of fact and conclusions of law in its order. The defendants argue that the trial court erred in failing to award them their attorney fees.

### ANALYSIS

#### (1) Setting Aside Order Granting Declaratory Judgment

The first issue presented is whether the trial court erred in setting aside its order granting DemQuarter's motion for declaratory judgment. We have decided this issue based upon a matter of law, for which our review is de novo, with no presumption of correctness. See *Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 496 (Tenn. Ct. App. 2008).

DemQuarter filed its motion for declaratory judgment, with 23 exhibits, on September 30, 2014, seeking a ruling, *inter alia*, that the defendants breached the lease by subleasing Stratford House without DemQuarter's written consent; that because an event of default existed and continued from August 2007 forward, and because an event of default existed and continued in 2013, the defendants could not extend the lease; "as a result of the failure to extend the Lease Agreement, it terminated by its own terms on May 16, 2013"; and that, even if the lease agreement had not expired, the ROFR "was extinguished and OPC no longer had a right of first refusal after 2008."

On the last page of the motion for declaratory judgment, DemQuarter included a notice of hearing for October 13, 2014. The certificate of service stated that plaintiff served defendants' counsel via United States mail. The defendants failed to respond to the motion or to attend the hearing. In an order entered on October 13, 2014, the trial court granted DemQuarter's motion for declaratory judgment. On October 22, 2014, the defendants filed a motion to set aside the trial court's order granting the plaintiff declaratory judgment and for a rehearing. The motion was accompanied by an affidavit of W. Bradley Gilmer, attorney for the defendants, who testified concerning extenuating personal circumstances (including the death of his father and a trial) going on at the time he received the motion and his failure to see or calendar notice of the hearing. In an order entered on November 12, 2014, the trial court granted the motion to set aside the order granting declaratory judgment.

In order to address the trial court's action on the motion to set aside, the first step in our analysis must be to "decide where the motion, and the orders being discussed, fit within the scheme of our Rules of Civil Procedure." *Byrnes v. Byrnes*, 390 S.W.3d 269, 274 (Tenn. Ct. App. 2012). DemQuarter entitled its original motion "Motion for Declaratory Judgment." Tennessee courts are not, however, bound by the titles of pleadings and motions, but will "give effect to the substance of the motion according to the relief sought." *Ferguson v. Brown*, 291 S.W.3d 381, 387 (Tenn. Ct. App. 2008); *see also Baxter v. Heritage Bank & Trust*, No. M2012-02689-COA-R3-CV, 2014 WL 1118072, at \*3 (Tenn. Ct. App. Mar. 19, 2014).

Tennessee Rule of Civil Procedure 57 addresses declaratory judgments and provides, in pertinent part, that "[t]he procedure for obtaining a declaratory judgment pursuant to Tennessee Code Annotated, § 23-1101 *et seq.*,<sup>4</sup> shall be in accordance with these rules." Tennessee Rule of Civil Procedure 56.01, part of the summary judgment rules, provides:

A party seeking to recover upon a claim, counterclaim, or cross-claim *or to obtain a declaratory judgment* may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(Emphasis added). DemQuarter's "motion for declaratory judgment"<sup>5</sup> was essentially a

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<sup>4</sup> Now Tennessee Code Annotated Sections 29-14-101 *et seq.*

<sup>5</sup> The Tennessee Rules of Civil Procedure contain no mention of a "motion for declaratory judgment."

motion asking the court for summary judgment on its claim for a declaratory judgment. This court is of the opinion that, in order to obtain a declaratory judgment, the proper procedure under the circumstances of this case was for DemQuarter to file a motion for summary judgment. Thus, the trial court should have treated DemQuarter's motion for declaratory judgment as a motion for summary judgment.

Pursuant to Tenn. R. Civ. P. 56.04, a motion for summary judgment must be "served at least thirty (30) days before the time fixed for the hearing." DemQuarter's motion was first heard and decided by the court only thirteen days after it was served by mail on the defendants. The defendants did not have a chance to respond to DemQuarter's motion as contemplated under Tenn. R. Civ. P. 56.04. *See* TENN. R. CIV. P. 56.04 (stating that "adverse party may serve and file opposing affidavits not later than five days before the hearing"). Moreover, contrary to the requirements of Tenn. R. Civ. P. 56.04, the trial court's order did not "state the legal grounds upon which the court . . . grant[ed] the motion." On this basis alone, the trial court properly set aside its order granting the motion.<sup>6</sup>

## (2) Denying DemQuarter's Motion for Declaratory Judgment

DemQuarter argues that the trial court "erred in allowing new arguments from Defendants under the guise of an unauthorized surreply, then using those new arguments to deny the motion for declaratory judgment." To understand this argument, some procedural history is necessary.

DemQuarter's motion for declaratory judgment was heard by the trial court for the second time on November 26, 2014. In a detailed order entered on December 22, 2014, the court stated that, in accordance with Tenn. R. Civ. P. 56.01 and 57, the motion would be treated as a motion for summary judgment. The trial court granted DemQuarter's motion on the statute of limitations issue and denied its motion on the breach of contract issue, finding that disputed issues of material fact remained. The Court further provided that it would "rule on DemQuarter's Motion regarding the right of first refusal issue, in due course."

After this order, DemQuarter filed a "Motion for Ruling on Previously Submitted Briefing" in which it sought a ruling on "whether Defendants' right of first refusal to purchase The Stratford House ("Stratford") was extinguished after Defendants exercised the right but failed to purchase Stratford." DemQuarter stated its position as follows:

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<sup>6</sup> Because we have decided that the trial court properly set aside the order on the ground that the motion was improperly granted under the Rules of Civil Procedure, we need not address the defendants' argument that their attorney's failure to appear at the hearing was the result of excusable neglect. We note, however, that the case of *Ferguson v. Brown*, 291 S.W.3d 381 (Tenn. Ct. App. 2008), lends support to the defendants' position.

Defendants' position, that the right of first refusal is still in effect, has created uncertainty for the parties, and may present an obstacle to potential transactions involving the facility. As a result the parties need the Court's guidance on this point, and DemQuarter respectfully requests that the Court issue its decision on the question of whether, under Section 10.1 of the lease agreement that is the subject of this case, Defendants' exercise of the right of first refusal, and subsequent failure to purchase Stratford, extinguished the right going forward.

DemQuarter then quoted section 10.1 of the lease, concerning the ROFR, and copied the portions of the parties' briefs concerning this section.

The defendants filed a response to DemQuarter's Motion for Ruling asserting that genuine issues of material fact remained as to the application of the ROFR provision and that the provision was ambiguous. DemQuarter then replied to the defendants' response in order to deny the defendants' assertion that the plaintiff admitted that the lease provision was ambiguous. The defendants filed a supplemental response to the plaintiff's motion for summary judgment arguing that the defendants' motion on the ROFR issue should be denied. DemQuarter filed a reply to the defendants' response to the motion for declaratory judgment asserting that the supplemental response raised a new issue.

The trial court entered an order on February 13, 2015 in which it ultimately denied DemQuarter's motion for summary judgment on the ROFR. First, however, the trial court considered the issue of "[w]hether the Court should consider the newly-posed arguments by the Defendants in their January 30, 2015 brief." This is the issue raised by DemQuarter on appeal. Summarizing the procedural history, the trial court noted that, "At motion call on January 26, 2015, the Court permitted the Defendants one final opportunity to demonstrate a genuine fact in dispute that would preclude summary judgment in favor of the Plaintiff on this [ROFR] issue." The trial court further stated that the defendants' "second response significantly departed from [their] previous argumentation and strategy."

Specifically addressing DemQuarter's assertion that the defendants' newly-raised arguments should be disallowed, the trial court reasoned as follows:

The Court is sympathetic to the prejudice argument raised by Plaintiff. This litigation has been ongoing since 2013 and, as Plaintiff correctly notes, the documents utilized by Defendants in their new arguments have also been long-standing exhibits in this case. Seemingly, the only "new" issue is the arguments based upon those documents—essentially, Defendants are merely pushing a new interpretation of the evidence. Yet, this is equally true for the Plaintiffs—these documents have been [longstanding] exhibits in this case. *Both* parties have had access to them and *both* parties have



litigated the issue of the right of first refusal. Furthermore, the Court intentionally withheld ruling on that issue both in its Order dated December 23, 2014 and during motion docket on January 23, 2015, precisely because the Court wanted supplemental facts and arguments to further develop this issue. Accordingly, the Court will allow and consider the arguments posited by Defendants in their January 30, 2015 brief.

In Tennessee, “trial courts possess broad discretionary authority to control their dockets and the proceedings in their courts.” *Hessmer v. Hessmer*, 138 S.W.3d 901, 904 (Tenn. Ct. App. 2003) (citing *Hodges v. Att’y Gen.*, 43 S.W.3d 920, 921 (Tenn. Ct. App. 2000)). The trial court in the present case specifically requested “supplemental facts and arguments to further develop this [ROFR] issue.” Moreover, contrary to DemQuarter’s suggestion, it did have the opportunity to respond, and did in fact file a reply, to the defendants’ response to the motion for declaratory judgment. We find no abuse of discretion in the trial court’s decision to allow the defendants’ new arguments raised in their “surreply” brief and to rely on those arguments in denying the motion for summary judgment.

### (3) Arbitration

DemQuarter next argues that the trial court erred in granting the defendants’ mid-trial motion to compel arbitration and that, as a result of this error, it suffered prejudice necessitating a new trial. We have concluded that, even if the trial court erred in ordering arbitration, DemQuarter waived the issue by agreeing to continue with the trial.

As discussed above, two weeks after the trial court ordered arbitration, the court entered an agreed order, on May 14, 2015, signed by the attorneys for all of the parties. This order begins with the following statement:

COME NOW Plaintiff, DemQuarter Healthcare Investors, L.P., and Defendants, OP Chattanooga, LLC and FC-THC Leasing, LLC, *by agreement*, and respectfully request the Court to set aside its Orders of May 5, 2015: (a) granting Defendants’ Motion to Compel Arbitration, and (b) granting Immediate Interlocutory Appeal, for the reasons set forth below[.]

(Emphasis added). The agreed order provided for the requested relief and decreed that “the remainder of the trial of this matter shall be reset for July 8 and 9, 2015.” Thus, by signing the agreed order, DemQuarter agreed to abandon its interlocutory appeal and to proceed with the trial. An agreed order is a binding contract and “represent[s] the achievement of an amicable result to pending litigation.” *Silliman v. City of Memphis*, 449 S.W.3d 440, 448 (Tenn. Ct. App. 2014) (quoting *Henderson v. Wilson*, No. M2009-01591-COA-R3-CV, 2011 WL 683905, at \*4 (Tenn. Ct. App. Feb. 25, 2011)). If DemQuarter thought that the delay caused by the arbitration order had caused prejudice

to its case and required a new trial, it should not have continued with the trial. By agreeing to continue with the trial, DemQuarter waived this issue.<sup>7</sup>

(4) Right of First Refusal (“ROFR”) provision

DemQuarter argues that the trial court erred in holding that the ROFR was not extinguished when the defendants did not purchase Stratford House in 2007.<sup>8</sup> In particular, DemQuarter asserts that the trial court erred: in finding that the defendants did not “fail” to purchase the Stratford House; and in finding that the ROFR was renewed with each renewal lease term. The defendants maintain that they were unable to purchase Stratford House due to DemQuarter’s fault.

Section 10.1 of the lease agreement addresses the ROFR and provides, in pertinent part:

If Lessor proposes to sell or otherwise transfer the Facilities to any party, except to one of its Affiliates, at any time during the Lease Term, Lessee or one or more of its Affiliates as Lessee may designate shall have the right of first refusal to purchase the Facilities being offered for sale or sold to any other Person. Lessor shall provide Lessee written notice of its desire to sell the Facilities, and Lessee shall have thirty (30) days following the receipt of such notice to advise Lessor in writing of whether Lessee is exercising its right to purchase the Facilities. The closing of the sale and purchase of the Facilities (a “Purchase Closing”) shall take place within ninety (90) days following Lessee’s notice of exercise of its right of first refusal, on such date and at such time and place as Lessee and Lessor may mutually agree. The purchase price, payable in immediately available funds at the Purchase Closing, shall be the EBITDARM of the Facilities for the immediately preceding four calendar quarters ended March 31, June 30, September 30 and December 31, multiplied by 5.38; provided, however, that the purchase price shall not be less than Six Million Seven Hundred Thousand and 00/100 Dollars (\$6,700,000.00). . . . If Lessee shall give Lessor written

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<sup>7</sup> We further note that there is no evidence of prejudice to DemQuarter from the delay caused by the arbitration order. DemQuarter does not identify specific ways in which the trial was unfair or in which the defendants gained an unfair advantage. Almost all of the exhibits were entered at the beginning of the trial by agreement of the parties. The defendants put on two witnesses, both of whom were familiar to DemQuarter. This case is not like most of the cases cited by DemQuarter because arbitration did not actually occur.

<sup>8</sup> We find no merit in DemQuarter’s argument that the trial court erred in “resolving the ROFR issue on a basis neither advocated nor briefed by any party.” *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”).

notice of exercise of the right of first refusal to purchase the Facilities but thereafter shall thereafter [sic] fail to purchase the Facilities through no fault of Lessor within ninety (90) days, then Lessee shall forfeit its right of first refusal to purchase the Facilities. If Lessor gives notice to Lessee of its desire to sell the Facilities, the Lessee declines to exercise its right of first refusal, and Lessor fails to sell the Facilities to a third Person within two hundred ten (210) days after the date of such notice, then Lessee shall thereafter have the right of first refusal, as set forth above, to purchase Facilities.

The trial court's final memorandum and order contains detailed findings and conclusions regarding the ROFR, which will be set out below as relevant to the issues under discussion.<sup>9</sup> The trial court's initial finding regarding the ROFR was that "the 2007 and 2008 sale discussions were two separate negotiations." The court then proceeded to consider "whether the preponderance of the evidence supports a finding of fault attributable to either party for the failed 2007 sale discussions."

a. "Fault" of DemQuarter

The pertinent portion of section 10.1 of the lease states that "[i]f Lessee shall give Lessor written notice of exercise of the right of first refusal to purchase the Facilities but thereafter shall fail to purchase the Facilities *through no fault of the Lessor* within ninety (90) days, then Lessee shall forfeit its right of first refusal to purchase the Facilities." (Emphasis added). The trial court determined that DemQuarter was not at fault in the defendants' failure to purchase Stratford House. The court reasoned as follows:

The word "fault" is not defined within the four corners of the Lease. Therefore, the term must be interpreted according to its plain and ordinary meaning. *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93 (Tenn. 2012). In the context of civil law, *Black's Law Dictionary* defines "fault," as follows: "The intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person." *Black's Law Dictionary* 683 (9th ed. 2009). More specifically, *Black's Law Dictionary* defines "contractual fault" as follows: "Fault resulting from the intentional or negligent failure to perform an enforceable obligation in a contract." *Id.* Thus, the proper analysis is to determine whether

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<sup>9</sup> The first issue considered by the trial court in its memorandum and opinion is whether OPC breached the lease. The court ruled that FC-THC, CFL, and SFO were "affiliates" with OPC under the lease and that, therefore, the defendants "were not in breach of the Lease by virtue of assigning and/or subleasing the Stratford House without DemQuarter's consent." The trial court further held that "DemQuarter unreasonably withheld or delayed giving written consent to OPC to allow OPC to sublet the Stratford House before OPC released the 2007 Assignment and Sublease Agreements from escrow." These rulings have not been appealed by DemQuarter.

Defendants failed to purchase the Properties within 90 days due to the “intentional or negligent failure [of DemQuarter] to perform an enforceable obligation” in the lease.

The record suggests that the only change in the EBITDARM calculation made by Mittleider was the removal of the questioned amount of “bad debt,” because Plaintiff felt the calculations were not in accordance with GAAP. Therefore, it boils down to this: The purchase price was to be calculated using “the immediately preceding four calendar quarters,” and Plaintiff asserts the inclusion of the “prior period revenues” resulted in an inaccurate EBITDARM calculation because the write-offs were for activity outside the four calendar quarters contemplated by the EBITDARM. In contrast, on cross-examination, Curcio explained that the “bad debt” complained of by Plaintiff was the result of a “balance sheet calculation” to show that its inclusion was appropriate in order to increase the “reserve” to account for claims. *On balance, the Court finds both explanations equally reasonable and logical.* Under the terms of the Lease, DemQuarter was contractually obligated to honor Defendants’ ROFR at the purchase price calculated by EBITDARM using “the immediately preceding four calendar quarters” multiplied by 5.38. *However, there appears to be a good-faith dispute as to whether the inclusion of some of the “bad debt” by Defendants is properly within “the immediately preceding calendar quarters” [as] contemplated by the Lease. As a result, the Court fails to find that DemQuarter “intentional[ly] or negligent[ly] fail[ed] to perform an enforceable obligation,” because DemQuarter was under no obligation to sell its Properties at a price that inaccurately reflected the Lease terms. For this reason, the Court fails to find that Plaintiff was at fault for the failed 2007 sale discussions.*

(Emphasis added) (citations to record and footnotes omitted).

The evidence does not preponderate against the trial court’s determination that both parties’ explanations regarding their calculations of EBITDARM are “equally reasonable and logical” and that there was a “good-faith dispute” as to the inclusion of “bad debt.” Although the defendants assert in their brief that DemQuarter “unreasonably ignored the EBITDARM formula and arbitrarily increased the purchase price by nearly \$1.5 million,” they cite no evidence in the record or legal authority to support these statements. The same is true of the remaining sentences in the single paragraph devoted to this issue in the defendants’ brief. We find no error in the trial court’s conclusion that DemQuarter was not at fault in the defendants’ failure to purchase the Stratford House in 2007.

b. Defendants' Failure to Purchase

The next issue under the lease is whether the defendants "fail[ed] to purchase the Facilities." The trial court reasoned as follows:

Reading the provisions together, the correct analysis is whether Defendants "fail[ed] to purchase the Facilities [at the price set by EBITDARM] through no fault of Lessor." However, the parties obviously did not contemplate a dispute over the correct computation using EBITDARM. For this reason, the Court is unwilling to proclaim that Defendants *failed* to purchase the property because the correct purchase price was never settled. Thus, the Court finds that the ROFR did not extinguish after the end of the 2007 sale discussions.

When resolving disputes regarding the interpretation of a contract, "our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). If the contract language is clear and unambiguous, the language must be interpreted "according to its plain terms and ordinary meaning." *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93 (Tenn. 2012) (citing *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008)). "The interpretation should be one that gives reasonable meaning to all of the provisions of the agreement, without rendering portions of it neutralized or without effect." *Maggart*, 259 S.W.3d at 704. "We seek to avoid rewriting an agreement under the guise of construing it, as the parties are not entitled to an agreement different from the one they negotiated." *Lambert v. Lambert*, No. M2013-01885-COA-R3-CV, 2014 WL 3563630, at \*7 (Tenn. Ct. App. July 18, 2014) (citing *Long v. McAllister-Long*, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2006)).

The word "fail" is not defined in the lease. The ordinary meaning of the word "fail" is as follows: "[t]o be deficient or unsuccessful; to fall short of achieving something expected or hoped for." BLACK'S LAW DICTIONARY (10th ed. 2014). Applying this definition to the facts at issue, we conclude that the defendants failed to purchase the Stratford House. There is no element of fault associated with the definition of the term "fail." Moreover, because the contract provision at issue uses the word "fault" in reference to the lessor but not in reference to the lessee, it would be inappropriate to imply a requirement of fault to the lessee. *See S.M.R. Enters., Inc. v. S. Haircutters, Inc.*, 662 S.W.2d 944, 949 (Tenn. Ct. App. 1983) (discussing application of *maxim expressio unius est exclusio alterius*: "where a contract by its express terms includes one or more things of a class it simultaneously implies the exclusion of the balance of that class").

We conclude that the trial court erred in finding that the defendants did not fail to

purchase Stratford House. Based on the plain meaning of the word “fail,” the defendants fell short of achieving the expected goal of purchasing the facility. Thus, the ROFR extinguished after the 2007 sale discussions ended.

c. Renewal of ROFR

The trial court continued with its analysis and reached the further conclusion that, even if the defendants failed to purchase the Stratford House, the ROFR was subject to renewal with each renewed lease term. We find this interpretation of the lease to be contrary to the language of the agreement.

The trial court reasoned as follows:

From the plain and ordinary meaning of its terms, it cannot be said that the ROFR is renewed under 10.1 due to DemQuarter’s failure to sell the property within 210 days after the notice of ROFR. The Lease specifically states, “Lessee *declines* to exercise its right of first refusal.” There is no dispute that Defendants initially chose (rather than declined) to exercise the ROFR. However, Section 10.1 obviously contemplates a situation in which the ROFR is renewed if the Lessor fails to sell the property. For this reason, it is within harmony of the Lease provisions for the ROFR to be renewed. Section 3.2 of the Lease titled “Renewal Options” states:

Provided that an Event of Default has not been declared and is then continuing, Lessee may *renew the Lease Term* for up to two (2) additional consecutive sixty (60) month periods (each a “Renewal Lease Term”) *upon the same terms and conditions contained herein*, by written notice to Lessor not less than ninety (90) days prior to the expiration of the then-current Lease Term. The Initial Lease Term *and each Renewal Lease Term, if exercised, are referred to herein as the “Lease Term.”*

(Ex. 1) (emphasis added). First, Section 3.2 specifically provides that the Lessee may “*renew the Lease Term . . . upon the same terms and conditions.*” (Ex. 1) (emphasis added). Second, Section 3.2 specifically states that “[t]he Initial Lease Term and *each Renewal Lease Term, if exercised, are referred to herein as the ‘Lease Term.’*” (Ex. 1) (emphasis added). Finally, Section 10.1 states that “at any time during the *Lease Term*, Lessee . . . shall have the right of first refusal to purchase the Facilities.” (Ex. 1) (emphasis added). Reading Sections 10.1 and 3.2 in tandem show[s] that each Renewal Lease Term is subject to the same terms

and conditions, which would necessarily include the ROFR upon the renewal of the Lease. Because the Court fails to find an Event of Default has occurred against Defendants as outlined in Section 9.1 of the Lease, the ROFR would have renewed had Defendants been allowed to exercise the second renewal period before the dispute arose.

In the beginning section of its opinion, the trial court determined that the defendants had not defaulted under the lease, and this finding is not at issue on appeal. The trial court reasoned that, even if the defendants did not fail to purchase the Stratford House in 2007, they should have been allowed to renew the lease, and the ROFR should have renewed with the lease. We disagree with the latter part of the court's reasoning. Contrary to the trial court's interpretation, section 10.1 of the lease does not contemplate renewal of the ROFR. The part of section 10.1 at issue states that, if "the Lessee *declines to exercise its right of first refusal*, and Lessor fails to sell the Facilities to a third Person within two hundred ten (210) days after the date of such notice, *then Lessee shall thereafter have the right of first refusal*, as set forth above, to purchase Facilities." (Emphasis added). This provision allows the lessee to retain its ROFR in the event that the lessee does not exercise the right and the lessor fails to sell the property within 210 days. However, in this case, the lessee did exercise the right, so this language does not apply.

The general provisions of section 3.2 defining "lease term" and "renewal lease term" do not direct a different result. Under the rules of contract interpretation, "it is well-settled that the 'particular and specific provisions of a contract prevail over general provisions.'" *Lamar Adver. Co. v. By-Pass Partners*, 313 S.W.3d 779, 794 (Tenn. Ct. App. 2009) (quoting *Precision Mech. Contractors v. Metro. Dev. & Hous. Agency*, No. M2000-02117-COA-R3-CV, 2001 WL 1285900, at \*5 (Tenn. Ct. App. Oct. 25, 2001)). Section 3.2 states that "[t]he Initial Lease Term and each Renewal Lease Term, if exercised, are referred to herein as the 'Lease Term.'" Thus, contrary to the defendants' assertion, the statement in Section 10.1 that "at any time during the Lease Term, Lessee . . . shall have the right of first refusal to purchase the Facilities," read according to its plain meaning, indicates that the lessee is entitled to a single right of first refusal and that, once extinguished, that right is gone.

Based on the foregoing analysis, we conclude that the trial court erred in ruling that the defendants' ROFR was not extinguished when the 2007 sale failed to occur.

#### (5) Cross-default provision

The final part of the web we must unravel relates to the cross-default provision. DemQuarter asserts that the trial court erred in failing to enforce the cross-default provision. We have concluded that the trial court did not err.

The provision at issue appears in section 9.1 of the lease, which defines “events of default.” Under subsection 9.1(f), an event of default includes the following:

The occurrence of any event of default under that certain Lease Agreement, to be executed by and between Brookside Healthcare Investors, L.P. as landlord and OP Whites Creek, Inc. as tenant covering the nursing home commonly known as The Windsor House located in Whites Creek, Tennessee (the “Other Lease”) including, without limitation, OP Whites Creek, Inc.’s failure to pay any installment of base rent or additional rent, uncontested taxes, insurance premiums or assessments, as required by the Other Lease, and any breach, default or non-compliance by [sic] with any representation, warranty, term, covenant or condition in the Other Lease, *and* failure of OP Whites Creek, Inc. to remedy or correct such breach, default, event of default, or non-compliance as provided in the Other Lease or the ancillary agreements executed in connection therewith as the case may be.

(Emphasis added). Although the trial court did not address the cross-default provision in its analysis, the court made the following finding of fact: “Based upon the preponderance of the evidence presented, the Court is satisfied that any default regarding the Whites Creek property, indeed, was cured prior to the communications.”

DemQuarter complains that the trial court failed to make adequate findings regarding the cross-default provision. We disagree because the trial court made its determination based upon a factual finding, a finding against which the evidence does not preponderate. The relevant evidence consists of two letters and testimony regarding those letters. In the first letter, dated March 25, 2008, counsel for DemQuarter stated:

[A] default occurred under the Lease between OP Whites Creek, Inc. and Brookside Healthcare Investors, L.P. dated May 16, 2003 (the “OP Whites Creek Lease”) due to the results of a survey conducted January 7-15, 2008. Pursuant to the notice dated February 13, 2008, the Centers for Medicare & Medicaid Services imposed a denial of payment for new admissions on the facility in effect for the period of January 27, 2008 through February 3, 2008 which expressly violated Section 9.1(d)(ii) of the OP Whites Creek Lease. Pursuant to the cross-default provision of section 9.1(f) of the Lease, the default under the OP Whites Creek Lease constituted a default under the Lease, as well.

In a letter dated March 28, 2008, counsel for the defendants responded to these allegations by denying that a default under section 9.1(f) of the lease had occurred because “all survey violations were corrected and cleared within applicable deadlines.”



DemQuarter emphasizes the notice from Medicare and Medicaid for denial of payment for new admissions through February 3, 2008. Section 9.1(f) expressly provides that the lessee must fail to correct the breach, and there is no evidence that the defendants failed to do so with respect to this notice, which had been received the month prior to the exchange of letters between the two attorneys.

The evidence does not preponderate against the trial court's finding that the cross-default provision did not come into play in this case.

#### CONCLUSION

For the foregoing reasons, we reverse the decision of the trial court and remand for further proceedings consistent with this opinion. Costs of this appeal shall be assessed against the appellees, OP Chattanooga, LLC and FC-THC Leasing, LLC, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE