VERMONT SUPREME COURT
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Case No. 26-AP-047

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SEPTEMBER TERM, 2026

Jamaica Cottage Shop, Inc. v. Londonderry Industrial Park, Inc.*	}	APPEALED FROM:
	}	Superior Court, Windham Unit, Civil Division
	}	CASE NO. 23-CV-01651
		Trial Judge: Rachel M. Malone

In the above-entitled cause, the Clerk will enter:

Seller Londonderry Industrial Park, Inc. appeals from a partial summary judgment order in favor of buyer Jamaica Cottage Shop, Inc. in this breach-of-contract dispute. We affirm.

I. Procedural History

The record indicates the following. Seller owned real property in South Londonderry, Vermont. In June 2021, the parties entered into a commercial real estate lease that included an option to buy. With respect to the option, the agreement provided:

> Tenant . . . shall have the option to purchase the real property described herein for a purchase price which is the average of appraisals by two MAI-certified real estate appraisers. To exercise such option, . . . Tenant shall give written notice thereof to Landlord, in which each party shall designate an MAI-certified appraiser within 14 days. If either party fails to designate an MAI-certified appraiser within the 14 day period, the purchase price shall be the appraisal amount of the sole appraiser. On receipt of the appraisals the parties shall cooperate to execute all appropriate documents and take all appropriate action to accomplish the sale. The closing shall occur at the parties' mutual convenience, in any event not more than thirty (30) days after the receipt of the appraisal or appraisals. The parties shall divide the cost of the

> appraisals equally. Each party shall bear the costs of the transaction as is usual and customary in the state of Vermont[.]

In November 2022, buyer gave notice that it sought to exercise the purchase option and both parties obtained appraisals from MAI-certified appraisers. Buyer's appraisal was prepared by Lucas Martin in December 2022; seller's appraisal was done by Sean Sargeant in February 2023. Buyer communicated to seller its intent to close within the timeframe called for by the contract. Seller responded in early March 2023 that it was waiting for an opinion from its appraiser regarding buyer's appraisal. Buyer responded that seller could conduct its investigation but that the contract did not call for a delay of closing and it was not willing to wait. Seller replied that he would not move forward on closing "with the appraisal issue still outstanding." On April 5, 2023, buyer's then-counsel wrote a letter to seller's counsel providing him with a list of concerns about buyer's appraisal. Buyer responded that it wanted to close by April 21 and was prepared to do so. It asked seller to confirm if it was willing to close. Seller responded that it believed there were serious concerns with the appraisals that needed to be addressed. It thereafter informed buyer that it "was not in a position to close" for this reason.

Buyer then filed this suit, alleging in relevant part that seller breached the parties' contract and seeking specific performance. Buyer also sought damages for rent and insurance payments that it made to seller between April 2023—when it argued it should have been in possession of the property under the contract—up to the present, as well as an award of attorney's fees under the terms of the contract. Seller raised affirmative defenses, including that buyer's claims were barred because buyer breached the implied covenant of good faith and fair dealing and buyer had unclean hands.

Prior to the summary-judgment ruling at issue here, buyer moved to exclude the expert testimony of seller's appraiser with respect to certain topics. For reasons discussed below, the court granted buyer's request.

The court later granted partial summary judgment to buyer, concluding that seller breached the parties' contract and granting buyer specific performance.[1] The court found the central facts undisputed. Buyer had an option to purchase the property for the average of two appraisals by MAI-certified appraisers and the parties followed the process set forth in the contract for exercising the option. Seller argued that disputed material facts existed regarding its affirmative defenses that buyer violated the implied covenant of good faith and fair dealing or had unclean hands. Seller maintained that buyer's appraisal contained significant defects that lowered the appraised value and that buyer refused to address these defects when seller raised them. In support of this assertion, seller relied on deposition testimony from seller's principal that he would have gone forward with the sale if buyer had addressed seller's concerns but buyer did not do so.

The court concluded that, while seller's argument might explain why seller refused to go forward with the sale, seller did not put forth any admissible evidence to support its claim that

[1] Buyer also raised a counterclaim under an "Asset Purchase Agreement" between the parties. The court denied summary judgment on this claim, concluded that disputed material facts remained.

there were sufficient errors in buyer's appraisal such that buyer's reliance on the appraisal violated the implied covenant of good faith and fair dealing or that buyer had unclean hands. See, e.g., Fritsche v. Deer Valley Ridge at Silver Lake Ass'n of Unit Owners, 2022 UT App 11, ¶ 40, 504 P.3d 761 (recognizing that "[w]hen a party raises an affirmative defense, it bears the burden of proof for that defense"); see also Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995) ("Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact."). The court thus concluded that buyer was entitled to judgment in its favor on the breach-of-contract claim and entitled to specific performance.

Given its ruling on the contract claim, the court found buyer entitled to damages for the rent and insurance payments it made to seller during the period in which buyer should have owned the property. The court rejected seller's argument that a dispute remained regarding the amount of damages. It found that seller raised this contention for the first time at the hearing on the summary-judgment motion, arguing that buyer's damages should be offset by expenses that buyer would have incurred had the sale gone forward. This claim was not made in seller's answer or any of seller's subsequent filings and the court considered it waived. The court also awarded buyer its reasonable attorney's fees and costs pursuant to the terms of the parties' agreement. Seller appeals.

II. Arguments on Appeal

A. Motion in Limine

Seller first challenges the court's decision excluding expert testimony from seller's appraiser Sean Sargeant. On this issue, the record indicates the following. Seller filed an expert disclosure in March 2024 identifying Sargeant as an expert who might provide testimony at trial. Seller identified the subject matter of such testimony as the value of the subject property, "including fair market value and inaccuracies and errors" in buyer's appraisal. As the "grounds" for Sargeant's opinion, seller referenced Sargeant's appraisal and an April 2023 email from seller's then-attorney to counsel for buyer. In the email, seller's attorney identified items in buyer's appraisal that he said Sargeant believed should be revisited.

Buyer moved to preclude seller from introducing "unsupported evidence regarding supposed 'issues' or 'defects' " in its appraisal, particularly through expert testimony from Sargeant. Buyer explained that while the two appraisals were obviously admissible because they were called for by the contract, this was not a case where a factfinder would evaluate the trial testimony of two competing experts to determine the purchase price. The purchase price was set by contract as the average of the two appraisals. Buyer added that Sargeant conceded in his deposition that he did not write the items stated by seller's counsel in the April 2023 email; he did not make a professional review of Lucas Martin's appraisal; and that he was precluded by the professional standards of his profession from offering an opinion on Martin's appraisal. Thus, even if Sargeant's testimony was relevant, buyer argued that his opinion of Martin's appraisal was inadmissible under Vermont Rule of Evidence 702 because it was not based on a "technology or methodology that has been generally accepted in the [professional appraising community]."

Seller opposed the motion, asserting that Sargeant's deviation from accepted methodology went to the weight that the trier of fact should give to his opinion rather than its admissibility. Seller conceded that Sargeant did not develop an opinion of Martin's appraisal using the methodology required by Standard 3 of the Uniform Standards of Professional Appraisal Practice (USPAP), and that, because he did not do so, Sargeant could not follow Standard 4 of the USPAP in communicating that opinion. It was undisputed that Sargeant could not form an opinion of another appraiser's work without following Standard 3 of the USPAP. Seller argued that Sargeant could still offer testimony regarding his valuation of the property and testify to the differences between his appraisal and that conducted by Martin.

The court found that such testimony might be admissible if the factfinder were asked to evaluate the fair market value of the property. But the question here was whether Martin's appraisal sufficiently satisfied the terms of the option in the parties' agreement. The court agreed with buyer that Sargeant's testimony as to the property's fair market value was not relevant and thus, not admissible.

The court further found the testimony insufficiently reliable under Vermont Rule of Evidence 702. As indicated above, seller sought to have Sargeant testify as to the basis for his appraisal and the points on which his appraisal differed from Martin's appraisal. The purpose would be to allow the factfinder to infer that Martin's appraisal failed to meet some established standard such that buyer, in exercising the option to purchase, did not fulfill the requirement to provide an appraisal. For Sargeant to opine about errors in Martin's report, his opinion needed to satisfy Rule 702.

Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Sargeant agreed that any opinion he would have of Martin's appraisal was not based on the industry standard for forming that opinion and seller offered no other standard whereby Sargeant could assess Martin's appraisal. The court thus could not find that Sargeant's opinion of Martin's appraisal resulted from the proper application of reliable principles and methods to the facts in question. It therefore granted buyer's motion to exclude Sargeant's expert testimony.

Seller argues on appeal that the court erred in its conclusions regarding the admissibility of this testimony. It contends that Sargeant should have been allowed to testify as to the property's fair market value because such testimony "tends to confirm that Martin's appraisal did not account for all matters having a substantial impact on the value of the [p]roperty."

This appears to be the same topic that the court found Sargeant unqualified to testify to as an expert under Rule 702.[2] In any event, the court did not abuse its discretion in considering such testimony irrelevant. See State v. Hooper, 151 Vt. 42, 46 (1988) (recognizing trial court's "broad discretion in deciding questions of relevancy"). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. As the trial court explained, the fair market value of the property is not at issue in this case given the terms of the parties' contract. The court provided a reasonable basis for its decision and its decision must stand. See Hooper, 151 Vt. at 46 (recognizing that "this Court will not interfere with discretionary rulings that have a reasonable basis," and the party claiming error must show that the trial court's discretion was "withheld altogether, or exercised for some clearly untenable reason" (quotations and alteration omitted). Seller offers no persuasive argument to the contrary.

It does not appear necessary to reach the admissibility of Sargeant's testimony under Rule 702 given our conclusion above. We nonetheless briefly address seller's assertion that the court should have admitted Sargeant's testimony because other courts have held that noncompliance with USPAP does not automatically render expert opinions unreliable and thus inadmissible. The court did not conclude that Sargeant's opinion was automatically unreliable and thus inadmissible. In addition to Sargeant's agreement that any opinion he would have of Martin's appraisal was not based on the industry standard for forming that opinion, the court found that seller offered no other standard whereby Sargeant could assess Martin's appraisal. To the extent that seller argued below that Sargeant was qualified to testify as an expert simply because he had conducted his own appraisal of the property and was thus familiar with the property, the trial court did not err in considering such argument unpersuasive. There is no pure question of law at issue here and we do not engage in de novo review, as seller suggests. We review the court's decision for abuse of discretion, and seller fails to show an abuse of discretion here. See State v. Menize, 2023 VT 48, ¶ 51, 218 Vt. 374 ("The decision of whether to admit expert testimony is committed to the trial court's discretion and will not be disturbed unless it is made to appear from the evidence that it was clearly erroneous or founded on an error of law." (quotations omitted); see also USGen New Eng., Inc. v. Town of Rockingham, 2004 VT 90, ¶ 24, 177 Vt. 193 ("Absent a clear showing of judicial error, we will affirm the trial court's decision to admit or exclude the proffered testimony."). The court did not err in concluding that the expert testimony that seller sought to present from Sargeant was inadmissible under Rule 702.

B. Partial Summary Judgment

Seller next asserts that the court erred in finding that it failed to provide any evidence to support its assertion that buyer breached the covenant of good faith and fair dealing. In support of its position, seller asserts that buyer violated the covenant by "failing to address [seller's]

[2] Seller suggests that Sargeant's testimony about fair market value differs from testimony about the differences between his appraisal and Martin's appraisal. That does not appear to be the case and the trial court did not appear to treat this testimony as distinct. It does not matter, in any event, as we conclude that the trial court did not err in excluding this evidence as irrelevant and inadmissible under Vermont Rule of Evidence 702.

reasonable concerns with regard to the significant disparity between the two appraisals." Seller maintains that it was reasonable to require additional information from buyer about the appraisal before performing under the terms of the contract.

We reject this argument. The covenant of good faith and fair dealing "implements the 'underlying principle implied in every contract . . . that each party promises not to do anything to undermine or destroy the other's rights to receive the benefit of the agreement.' " Langlois v. Town of Proctor, 2014 VT 130, ¶ 58, 198 Vt. 137 (quoting Restatement (Second) of Contracts § 205 cmt. a). It "ensure[s] that parties to a contract act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' " Id. (quoting Restatement (Second) of Contracts § 205 cmt. a).

The parties agreed to a purchase price that was the average of two MAI-certified appraisals, one secured by each party. They further agreed that "[t]he closing shall occur at the parties' mutual convenience, in any event not more than thirty (30) days after the receipt of the appraisal or appraisals." (Emphasis added.) As a matter of law, the plain language of the contract does not give rise to a reasonable expectation on seller's part that it had the right to demand and obtain additional information from buyer about its appraisal before performing under the terms of the contract. Seller did not submit admissible evidence, moreover, of any major defects in Martin's appraisal. The court did not err in rejecting this affirmative defense as a matter of law.[3]

Finally, seller contends that the court erred in awarding buyer damages for rent and insurance payments, and in awarding buyer attorney's fees. This argument rests on seller's assertion that summary judgment was improperly granted to buyer, an argument we rejected above. We thus reject this claim of error as well. Alternatively, seller argues that it was unfair to award damages to buyer for the insurance payments it made. According to seller, it paid a portion of buyer's carrying costs for the property during the relevant timeframe.

As set forth above, the court concluded that seller waived this argument by failing to raise it in a timely way and seller fails to show that it erred in so concluding. Seller fails to show, for example, that it raised this argument in opposition to buyer's motion for summary judgment, and this Court "will not comb the record searching for error." In re S.B.L., 150 Vt. 294, 297 (1988) ("It is the burden of the appellant to demonstrate how the lower court erred warranting reversal."); see also V.R.A.P. 28(a)(4) (explaining that argument on appeal "must contain . . . the issues presented, how they were preserved, and appellant's contentions and the reasons for them—with citations to the authorities, statutes, and parts of the record on which the appellant relies"). Seller does not explain why raising this argument after the court's ruling would preserve this issue for our review, as it suggests in its reply brief, and we consider this argument unpersuasive. See Lane v. Town of Grafton, 166 Vt. 148, 153 (1997) ("Failure to raise a reason

[3] Seller did not argue that the court erred in rejecting its unclean hands defense in its opening brief and we do not consider its argument on this point raised for the first time in its reply brief. See Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 1 n. 2, 176 Vt. 356 (explaining that arguments raised for first time in reply brief need not be considered); see also Gallipo v. City of Rutland, 2005 VT 83, ¶ 52, 178 Vt. 244 (recognizing that issues not raised in original brief may not be raised for first time in reply brief).

why summary judgment should not be granted at the trial level precludes raising it on appeal."); State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994) ("To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it."). We find no basis to disturb the court's decision granting partial summary judgment to buyer.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Christina E. Nolan, Associate Justice