

Right of First Refusal Must Be In Writing

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The United States District Court for the District of Columbia restated the fundamental principle that in order for a right of first refusal to be enforceable, it must be in writing under the Statute of Frauds. A tenant under a restaurant lease sued its landlord when the latter sold the real property in which the leased premises was located without first notifying the tenant, claiming that during negotiations for the lease, the landlord promised the tenant a right of first refusal in connection with any sale of the property. The tenant claimed that because of this promise, it did not require a lease provision granting this right of first refusal.

The court noted that the lease, like most commercial leases, contained an integration clause, which stated this Lease contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, oral statements, warranties or representations not herein contained. The court applied the writing requirement set forth in the Statute of Frauds, enacted in the District of Columbia as D.C. Code § 28-3502, extending to contracts relating to real estate, which exists to guard against perjury and fraud claims involving real estate. The court cited a District of Columbia Court of Appeals decision holding that a promise to grant a right of first refusal must be in writing to be enforceable.

The court discussed the three exceptions to the writing requirement, ie., where a defendant's own fraud is responsible for the lack of a writing, equitable estoppel, and where both parties admit the contract or obligation, holding that the tenant failed to establish grounds under each. The integration clause in the lease played a central role in the decision, with the court citing prior authority for the proposition that if a party attached great importance to a particular term, e.g., the right of first refusal, he would have insisted upon its inclusion in the final contract, and its absence was evidence of abandonment or excision of any prior representations concerning such term in turn precluding a finding of fraud. In addition, the court held that the tenant could not establish equitable estoppel, because it took no action in reliance upon the alleged promise, other than mere execution of the lease document. Finally, the landlord did not admit a contractual obligation to grant a right of first refusal.

BONFIRE, LLC v. MICHAEL R. ZACHARIA, D.D.C. No. 16-1538 (Decided on April 25, 2017).