No. 07-CV-1406

DISTRICT OF COLUMBIA COURT OF APPEALS

CLAUDIA TREADWELL,

Appellant,

v.

JUDITH TEFFERA and ANDREW B. KERNS,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* SUPPORTING REVERSAL

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RULE 28(a)(2)(B) DISCLOSURE STATEMENT

The Legal Aid Society of the District of Columbia is a District of Columbia nonprofit corporation. It has no parents, subsidiaries, or stockholders.

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STATEMENT OF ISSUES PRESENTED

As requested by the Court in its August 18, 2009 order, the Legal Aid Society of the District of Columbia ("Legal Aid"), as *amicus curiae*, will address the following questions:

(1) Whether, and if so when, an assignment of TOPA [Tenant Opportunity to Purchase Act] rights expires; and

(2) Whether a tenant, or his or her assignee, who has previously been provided with but failed to take advantage of a first right to purchase certain property, is entitled to a Notice of First Refusal to purchase that same property in the event that the owner subsequently receives a third-party contract.

In addition, Legal Aid will address the following question because it is integral to the questions posed by the Court:

(3) Whether the owner breached the sales contract with the tenant's assignee by attempting to terminate the contract, effective immediately, without having previously provided a notice setting a reasonable deadline for performance, when the contract did not make time "of the essence," and if so, whether the tenant's assignment of TOPA rights survives the ineffective termination of the sales contract.

INTEREST OF AMICUS CURIAE

The Legal Aid Society of the District of Columbia was founded in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II, § 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Housing law is among Legal Aid's principal practice areas.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court invited Legal Aid to submit an amicus brief addressing questions arising under the Tenant Opportunity to Purchase Act ("TOPA"), D.C. Code § 42-3404.02, *et seq.*

In this case, Tomara Bowleg, the tenant of a single-family rental accommodation, received an offer of sale from the owner, defendant-appellee Andrew Kerns. The tenant assigned her TOPA rights to her mother, plaintiff-appellant Claudia Treadwell. Treadwell and Kerns signed a sales contract but did not go to settlement. Kerns ultimately terminated that sales contract and on the same day entered into a sales contract with a third party, defendant-appellee Judith Teffera. Kerns closed on the sale with Teffera without providing Treadwell or her daughter a right of first refusal. Teffera later sold the unit to defendants Ronald and Rielle Montague. Treadwell sued. The Superior Court entered judgment in favor of all defendants. Treadwell appealed the judgment as it relates to Kerns and Teffera.

As discussed in Part I below, the failure—for whatever reason—of a tenant (or assignee) to take advantage of an owner's initial offer of sale does not extinguish that tenant's (or assignee's) independent right of first refusal on a third-party contract. Thus, the fact that Treadwell and Kerns did not close on the sale within 150 days, as contemplated by the contract, did not eradicate Treadwell's right of first refusal. Bowleg's assignment to Treadwell encompassed all of her rights under TOPA, including the right of first refusal on a third-party contract, and all of her rights described in Kerns's initial Offer of Sale, which stated that the tenant had a right of first refusal. That Treadwell and Kerns failed to close on the sale did not cause the assignment to lapse. Nor had the assignment expired on its own terms by the time Kerns entered into the third-party contract with Teffera. Accordingly, Kerns violated TOPA when he sold his unit to Teffera without affording Treadwell a right of first refusal.

In addition, as discussed in Part II, by terminating his sales contract with Treadwell, effective immediately, and selling the property to Teffera without first providing notice to Treadwell fixing a reasonable deadline for her to perform, Kerns breached his sales contract with Treadwell, and his termination of the contract was a nullity. Kerns and Teffera cannot rely on

that ineffective termination of the contract as putting an end to the assignment of TOPA rights to Treadwell. Treadwell also has an independent breach of contract claim. Although specific performance is no longer available, Treadwell is nonetheless entitled to damages for these breaches of her statutory and contractual rights. Legal Aid therefore respectfully urges this Court to reverse the judgment below and remand for a determination of an appropriate remedy.

STATEMENT OF THE CASE

1. Statement of Facts

a. TOPA affords "two distinct sets of rights" when an owner decides to sell his property. *Green v. Gibson*, 613 A.2d 361, 362 (D.C. 1992). Both are relevant to this case. First, before an owner of a rental accommodation may sell it to a third party, "the owner shall give the tenant an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale." D.C. Code § 42-3404.02(a); *see also id.* § 42-3404.09 (negotiation of sales contract with a tenant of a single-family accommodation). Second, a tenant has a "right of first refusal during the 15 days after the tenant . . . has received from the owner a valid sales contract to purchase by a third party." *Id.* § 42-3404.08. TOPA authorizes a tenant to assign or sell her rights under the statute to any party. Such an assignment "may be for any consideration which the tenant, in the tenant's sole discretion, finds acceptable" and "may be structured in any way the tenant, in the tenant's sole discretion, finds acceptable." *Id.* § 42-3404.06.[1]

Appellee Andrew Kerns was the previous owner of a single-family studio condominium unit at 700 7th Street, S.W., Apartment 141, Washington, D.C. 20024. On July 27, 1998, Kerns entered into a written lease agreement with Tomara Bowleg to rent out his unit. Appendix ("App.") 37-45. On or around July 31, 2000, Kerns provided Bowleg an Offer of Sale & Tenant

[1] Subsequent to the sale of the condominium unit at issue, TOPA was amended in respects not relevant to this case.

Opportunity to Purchase Without a Third Party Contract ("Offer of Sale"), pursuant to TOPA. *Id.* at 47-48. Among other terms, Kerns's Offer of Sale stated that the selling price for the unit was $54,500. App. 47, ¶ 4. The Offer of Sale represented that Kerns had not accepted a third-party contract and informed the tenant that in addition to her rights in the Offer of Sale, she was entitled (as required by TOPA), to "a fifteen (15) day right of first refusal to match a third party contract, even if you do not submit a written statement of interest or if you reject this offer to negotiate. Therefore, if I accept a third party contract, I will send you a Right of First Refusal Notice and a copy of the sales contract. . . ." *Id.* at 48, ¶ 8.

In response to the Offer of Sale, Bowleg assigned her TOPA rights to her mother, Claudia Treadwell, the plaintiff-appellant. Bowleg notified Kerns of the assignment in a letter dated August 4, 2000. The letter reads in part:

> I received your Offer of Sale Notice for the condominium unit number 141 at 700 7th Street, S.W., by hand delivery on August 3, 2000. Please be advised that in accordance with Section 45-1635 of the *Rental Housing Conversion and Sale Act of 1980*, as amended, D.C. Law 3-86 [now codified at D.C. Code § 42-3404.06], I am assigning my rights under this Offer of Sale to my mother, Claudia Treadwell. I understand that by doing this, she has all the rights and privileges afforded under the above referenced law.

App. 50. As Bowleg testified at trial, she assigned her rights to her mother because "as far as . . . buying property . . . I just wasn't ready at the time." Trial Transcript 83 (Oct. 22, 2007) ("Tr.").[2] Bowleg visited the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs to learn "how to properly go about giving my rights over to somebody else." *Id.*; *see also id.* at 81 ("I transferred my rights over to my mom . . . ."); Deposition of Tomara Bowleg ("Bowleg Dep.") at 36 ("After I wrote the [August 4, 2000] letter, I transferred all my rights to [my mother].") (Montagues' Motion for Summary

[2] The transcript of trial proceedings on October 22, 2007 was prepared in two separately paginated parts. References to "Tr." are to the transcript of trial proceedings starting at 9:35 a.m.

Judgment, Exh. H (Docket No. 175)).

On May 23, 2001, Treadwell and Kerns entered into a written contract of sale for the condominium unit. App. 52-56. The contract provides for a purchase price of $54,500 and a deposit of $500. With respect to the date of settlement, the contract states:

> Within 150 days from the date of final ratification of this contract, or as soon thereafter as a report on the title can be secured if promptly ordered, and survey obtained, if required, and loan processed, all if promptly applied for, Seller and Purchaser agree to make full settlement in accordance with the terms hereof.

Id. at 52. The contract contains no "time is of the essence" clause. Although it is not clear from the contract itself, Kerns signed the contract on June 22, 2001. *Id.* at 58.[3]

b. Treadwell and Kerns did not close on the sale within 150 days for reasons that were disputed at trial and not resolved by the trial court. Treadwell testified that the parties did not go to settlement because there was a "cloud" over the title. Tr. 23. She stated that she had received a mortgage loan commitment and that, as a veteran of the armed forces, she also had received a certificate of eligibility stating that the federal government would guarantee her mortgage. *Id.* at 37-39, 52. Treadwell admitted, though, that she had filed for bankruptcy protection in the fall of 2000. *Id.* at 53. Treadwell maintained nonetheless that she could have purchased the property under the terms of the contract. *Id.* at 38. Kerns, on the other hand, testified that he did not "recall it ever coming up" that a cloud over the title had prevented settlement on the sale with Treadwell, although he admitted "a problem with title" when he sold the property shortly thereafter to Judith Teffera. *Id.* at 165-66. Kerns testified that his "understanding" regarding why he and Treadwell had not closed on the sale was that Treadwell

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[3] Treadwell and her daughter testified at trial that at the time Treadwell signed the sales contract, Treadwell was living in the unit with her daughter and paying rent to Kerns. Whether or not Treadwell was entitled to invoke TOPA in her own right as a tenant, in addition to as an assignee, was hotly contested at trial and resolved against her by the trial court. *See* App. 94-100. This brief does not address whether Treadwell was a tenant (other than as an assignee) and accordingly does not discuss the facts relating to that issue.

"could not get financing." *Id.* at 165, 167.

In his Findings of Fact and Conclusions of Law, delivered from the bench on October 23, 2007, Judge Melvin R. Wright noted the dispute over why the settlement had not occurred and observed that neither party's testimony was "supported by outside evidence." App. 91. "As a result, the Court is not able to determine, based on this record, what the cause of the failure of the settlement to go forward was. The Court can only merely conclude—and this is undisputed by both parties—that settlement did not occur." *Id.*

c. The record contains no correspondence between Kerns and Treadwell after the settlement failed to occur in November 2001 until, in a letter dated June 20, 2002, Kerns (through counsel) terminated the sales contract. After citing the lapse of more than 150 days after ratification of the contract, the letter concluded:

> As a result of the failure of settlement to occur as required by the express terms of the Contract, this letter shall serve as formal notice that the Contact [sic] is hereby rescinded, terminated, and declared null and void. Pursuant to paragraph 12(a) the deposit of $500.00 is forfeited to the Seller. You will have no further liability to the Seller.

App. 58.[4] Treadwell testified that, at that time, she did not receive the termination letter, which was addressed to her in the N.W., rather than S.W., quadrant of the District of Columbia. *See id.* at 58, 92; Tr. 24, 42, 46-47.

On June 20, 2002, the same date as the termination letter, Kerns signed a sales contract with a third party, appellee Judith Teffera. App. 64. That sales contract, dated and signed by Teffera on June 5, 2002, *id.* at 60, 64, provided for the sale of Kerns's condominium unit to Teffera for a price of $59,500, *id.* at 60—$5,000 higher than the price Kerns agreed to accept in his contract with Treadwell. Kerns and Teffera closed on the contract on August 21, 2002. *Id.* at

[4] Kerns's counsel stated in the letter that he represented the listing broker for the property. It is undisputed that the contract was terminated at Kerns's behest. *E.g.*, App. 33, ¶ 7 ("The Defendant [Kerns] terminated the Contract by written letter . . . ."); Tr. 156.

93; Tr. 89-90, 98, 109.[5]

It is undisputed that neither Treadwell nor her daughter received notice of the third-party contract or a right of first refusal. Tr. 24; App. 81, 100. Treadwell first learned of the sale when Teffera "knocked on [her] door and said she was the new owner." Tr. 58, 104.

Not long after she became the unit's new owner, Teffera filed two actions for possession—one against Bowleg for nonpayment of rent, No. 2002 LTB 035282, and one against Bowleg and Treadwell claiming that Teffera intended to occupy the unit personally, No. 2002 LTB 44846. *See* Tr. 25-28, 97-99, 104; *see also id.* at 26 (taking judicial notice of the landlord-tenant actions). These two actions for possession were tried together before Judge Blackburne-Rigsby, who entered judgment for possession in favor of Teffera in both actions on February 26, 2003. Treadwell and Bowleg were evicted from the condominium on June 30, 2003. App. 93; Tr. 87-88. But Teffera never moved into the unit. Tr. 99. She sold it to Ronald Montague and his daughter, Rielle Montague, for $115,000 on September 24, 2003. App. 93; Tr. 95.

2. Procedural History

a. On February 24, 2003, Treadwell filed an action against Kerns and Teffera; she subsequently added the Montagues, who became the new owners of the property after the lawsuit was filed. Docket Nos. 1, 131. Bowleg is not a party to this suit. Treadwell's Third Amended Complaint, the operative version at trial, alleged causes of action based on the violation of Treadwell's rights under TOPA, breach of contract arising out of Kerns's termination of his sales contract with Treadwell, and abuse of process against Teffera. The complaint requested declaratory and monetary relief and specific performance of Treadwell's sales contract with

[5] Under TOPA, "[t]he right of a third party to purchase an accommodation is conditional upon exercise of tenant rights under this subchapter. . . . Third party purchasers are presumed to act with full knowledge of tenant rights and public policy under this subchapter." D.C. Code § 42-3404.04.

Kerns. Docket No. 131. Teffera, Kerns, and Treadwell filed cross-motions for summary judgment. App. 22-82; Docket Nos. 10, 108, 139, 140. The trial court denied these motions without discussion. Docket Nos. 18, 121, 163, 167.

The Montagues likewise moved for summary judgment, contending that they were bona fide purchasers for value who had no notice of an outstanding claim against title. They argued that because a title search of the Recorder of Deeds for the District of Columbia revealed no recorded document, including a Notice of *Lis Pendens*, that would indicate that Treadwell had a claim against the property, specific performance was not an appropriate remedy even if Treadwell prevailed. Docket No. 175.[6] The trial court agreed and on July 3, 2007, granted summary judgment to the Montagues and ordered that the action proceed only with respect to damages and only as to defendants Teffera and Kerns. Docket Nos. 211, 213.

b. The remaining parties went to trial on October 22, 2007 before Judge Melvin R. Wright. Although the trial court had denied the cross-motions for summary judgment on TOPA-related issues, and the pretrial order characterized the action as one "for failure to give right of first refusal & violation of rights under TOPA," *see* Docket No. 199, the testimony at trial did not center on the alleged violation of Treadwell's rights, *as an assignee*, under TOPA. Instead, the testimony focused heavily on whether Treadwell *herself* was a tenant in the unit and thus entitled to invoke TOPA rights, and on whether Teffera had acted in good faith when she filed her landlord-tenant action for possession based on her purported intent to occupy personally with her children the unit she bought from Kerns, along with the unit she already owned in the same building—even though the new unit was not adjacent to the unit she already owned.

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[6] In an affidavit at the time of her sale of the property to the Montagues, in September 2003—six months after she filed an Answer to this lawsuit, Docket No. 4—Teffera stated: "We know of no action or proceeding relating to said property which is now pending in any state or federal court in the United States." Tr. 96.

On October 23, 2007, Judge Wright delivered his findings of fact and conclusions of law from the bench. App. 88-103. The court stated that the "core issue" presented was "whether or not Ms. Treadwell is a tenant as defined by the statute." *Id.* at 94. For various reasons, the court found that Treadwell was not. *Id.* at 95-96, 98-100. Additionally, the court found that Treadwell had "failed to go to settlement pursuant to the contract" because the closing did not occur within 150 days, *id.* at 96, even though Judge Wright had earlier said he was unable to determine the cause of the parties' failure to close. *Id.* at 91. Although specific performance was no longer available, the court found that Treadwell had "the burden of proving that she was ready, willing and able to go to settlement" and that she failed to meet that burden because of insufficient evidence that she had obtained financing. *Id.* at 97. The court did not, however, explicitly address whether Kerns had breached the contract when he terminated it in his June 20, 2002 letter. The court reasoned that "[s]ince the Plaintiff had no independent right to purchase the unit from Mr. Kerns and there was no privity of contract, the rights to purchase were only subject to the rights that Ms. Boleg [sic] had under the Tenant[] Opportunity to Purchase Act." *Id.* at 97-98. The court did not discuss why Treadwell's rights under TOPA, as assigned to her, had not been violated when Kerns sold the unit without providing Treadwell a right of first refusal. Evidently assuming that his determination that Treadwell was not a tenant resolved the matter, Judge Wright concluded that Kerns was entitled to judgment on all counts. *Id.* at 100.

With respect to Teffera, the court noted that a housing provider may recover possession of a rental unit where, in good faith, he has contracted in writing to sell the unit for the personal use and occupancy of another person so long as the provider has notified the tenant in writing of the tenant's right and opportunity to purchase. *Id.* at 94-95; *see* D.C. Code § 42-3505.01(d) & (e). The court determined that no notice was given to the tenant, but that the tenant was Bowleg, not Treadwell, and Bowleg was not a plaintiff. App. 100. "Since the Court has found that Ms.

Treadwell is not a tenant, no notice is required to be given to her." *Id.* Finally, Judge Wright determined that Teffera had made a prima facie showing of a good-faith intent to occupy the unit with her children, that Treadwell failed to rebut that showing, and that Teffera accordingly was entitled to judgment on all counts. *Id.* at 101-02. The court entered judgment in favor of Teffera and Kerns that same day. Docket No. 227. Treadwell's appeal of the October 23, 2007 judgment as to Teffera and Kerns followed. Docket No. 231.

ARGUMENT

I. A TENANT'S FAILURE TO TAKE ADVANTAGE OF AN INITIAL OFFER OF SALE DOES NOT EXTINGUISH THE RIGHT OF FIRST REFUSAL, AND BECAUSE THE ASSIGNMENT OF TOPA RIGHTS TO TREADWELL WAS STILL IN EFFECT WHEN KERNS ENTERED INTO THE THIRD-PARTY CONTRACT, TREADWELL WAS ENTITLED TO THAT RIGHT OF FIRST REFUSAL.

TOPA requires an owner to provide a tenant (or assignee) a right of first refusal when he enters into the third-party sales contract, even when the tenant (or assignee) has failed—for whatever reason—to take advantage of an initial offer of sale. Because, in this case, Bowleg assigned all of her TOPA rights to Treadwell, and that assignment had not expired when Kerns signed the third-party sales contract with Teffera, Treadwell is entitled to relief.

A. A Tenant (or Assignee) Who Has Not Taken Advantage of an Offer of Sale Is Nonetheless Entitled to a Right of First Refusal on a Third-Party Contract.

As this Court has recognized, TOPA gives tenants "two distinct sets of rights" when an owner decides to sell. *Green*, 613 A.2d at 362. First, the owner must "give the tenant an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale." D.C. Code § 42-3404.02(a). Second, a tenant has a "right of first refusal" for fifteen days after the owner has furnished the tenant with a contract to purchase by a third party:

> In addition to any and all other rights specified in this subchapter, a tenant or tenant organization shall also have the right of first refusal during the 15 days after the tenant or tenant organization has received from the owner a valid sales

> contract to purchase by a third party. If the contract is received during the negotiation period pursuant to § 42-3404.09(2), § 42-3404.10(2), or § 42-3404.11(2), the 15-day period will begin to run at the end of the negotiation period. In exercising rights pursuant to this section, all rights specified in this subchapter shall apply except the minimum negotiation periods specified in §§ 42-3404.09(2), 42-3404.10(2), and 42-3404(11)(2).

D.C. Code § 42-3404.08.[7] As indicated by the statutory text providing that the right of first refusal is "*[i]n addition to any and all other rights specified in this subchapter*," *id.*, the right of first refusal and the right to an initial bona fide offer of sale are separate and independent of each other. As the Court has recognized, "the tenant's right to receive a bona fide offer of sale does not render it in conflict with, or redundant of, the right of first refusal also granted by TOPA." *1836 S St. Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 839 (D.C. 2009). Rather, the rights are "conceptually and legally 'distinct.'" *Id.* at 840; *see also Wilson Courts Tenants Ass'n v. 523-525 Mellon St.*, 924 A.2d 289, 292 (D.C. 2007) ("In addition to the right to notice and opportunity to purchase, the Act commands that 'a tenant or tenant organization shall also have the right of first refusal . . . .'") (quoting D.C. Code § 42-3404.08). Thus, *regardless* of whether or a not a tenant (or her assignee) takes advantage of an initial offer of sale from the owner, the tenant (or her assignee) still is entitled to a right of first refusal on a sales contract to purchase by a third party. Indeed, the initial Offer of Sale Kerns made to Bowleg in this case explicitly recognizes that Bowleg was entitled to a 15-day right of first refusal to match a third-party contract in the event that she did not purchase the unit under that Offer of Sale. App. 48, ¶ 8.

The right of first refusal is important for several reasons. For starters, a tenant may have more compelling reasons to match a third-party offer to avoid a sale that might result in her eviction (if the third party wants to occupy the unit personally, as Teffera purportedly did).

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[7] TOPA requires only "substantial conformity, rather than absolute identity or perfect match, between the tenant's exercise of the right [of first refusal] and the third party offer." *Green*, 613 A.2d at 366.

Second, in some instances an owner may set too high a price in the initial offer to the tenant. A financially unsophisticated tenant who believes herself incapable of negotiating the price with the landlord nevertheless may be willing to match an offer from a third party once a fair price has been negotiated by that third party. Indeed, it may be easier for a tenant to obtain financing to match a third-party offer (because that offer would afford some evidence of the property's fair market value) than to fund a private sales transaction between the tenant and the owner.

The failure of a tenant (or assignee) to consummate a purchase pursuant to a contract does not extinguish the independent statutory right of first refusal, any more than does the tenant's (or assignee's) failure to enter into any contract at all in response to the owner's first offer of sale. That a tenant's failure to take advantage of a first offer of sale does not negate a tenant's right to first refusal on a third-party contract was confirmed by this Court in both *Lealand Tenants Ass'n v. Johnson*, 572 A.2d 431 (D.C. 1990), and *Green*, 613 A.2d 361.

In *Lealand*, the owners of a six-unit apartment building provided their tenants an offer of sale, accepted a third-party contract, and ultimately rejected two contracts offered by the tenant organization formed by the tenants. The tenant organization sued. *Id.* at 432-33. This Court rejected its challenge. The Court ruled in relevant part that the owners by their actions had extended the negotiation period beyond the minimum statutory period but then terminated negotiations when they rejected the tenant organization's second contract. When the tenant organization did not thereafter exercise its 15-day right of first refusal, the owners became free to sell the apartment building to the third party. *Id.* at 433-34. The Court's ruling in *Lealand* establishes that, regardless of whether and why a tenant or tenant organization fails to take advantage of an initial offer of sale, the tenant or tenant organization nonetheless retains a right of first refusal on a third-party contract. As the Court explained, "[i]f the owners, acting in good faith, and the tenant organization are still unable to reach an agreement at the end of the

negotiation period, the third-party contract becomes primary, but the tenant organization has the protection of a 15-day right of first refusal." *Id.* at 434. When the tenant organization failed to exercise that right, the owners were free to proceed with the sale of the apartment building to the third-party. *Id.*

Likewise, in *Green*, the owner and tenant failed to successfully negotiate a contract in response to the owner's initial statutorily required notice of opportunity to purchase. 613 A.2d at 363. Nonetheless, this Court reversed and remanded for determinations both of whether the owner had negotiated in good faith and whether the tenant's subsequently attempted exercise of his right of first refusal should have been accepted by the owner. *Id.* at 365-66. Thus, a tenant's failure—for whatever reason—to take advantage of an initial offer of sale is no obstacle to the tenant's exercise of her separate right of first refusal guaranteed by TOPA.

Similarly, here, regardless of why Treadwell was unsuccessful in her initial effort to purchase the unit, either she or her daughter were entitled to a right of first refusal on the Kerns-Teffera contract. If the assignment of TOPA rights to Treadwell encompassed the statutory right of first refusal and if that assignment had not expired at the time Kerns contracted to sell his unit to Teffera, then it was *Treadwell* who was entitled to a 15-day right of first refusal following receipt of the third-party sales contract—even though Treadwell had not availed herself of the initial offer of sale. Section B, *infra*, addresses the duration of assignments under TOPA generally, and Section C, *infra*, addresses the scope and duration of the assignment in this case.

B. TOPA Does Not Provide for Expiration of an Assignment of TOPA Rights.

TOPA does not provide for the expiration of assignments of rights under the Act. And indeed, this Court has held that intervening circumstances do not cause an assignment, if valid and complete when made, to lapse. An assignment's duration is dictated by its own terms, not by any limitation under TOPA.

One of TOPA's purposes is "[t]o discourage the displacement of tenants through . . . sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law." D.C. Code § 42-3401.02(1); *see also Malik Corp. v. Tenacity Group, LLC*, 961 A.2d 1057, 1062 (D.C. 2008). Accordingly, TOPA permits the assignment of rights conferred by Subchapter IV:

> The tenant may exercise rights under this subchapter in conjunction with a third party or by assigning or selling those rights to any party, whether private or governmental. The exercise, assignment, or sale of tenant rights may be for any consideration which the tenant, in the tenant's sole discretion, finds acceptable. Such an exercise, assignment, or sale may occur at any time in the process provided in this subchapter and may be structured in any way the tenant, in the tenant's sole discretion, finds acceptable.

D.C. Code § 42-3404.06. Subchapter IV includes both the right to purchase in response to a bona fide offer of sale, *id.* § 42-3404.02(a), and the right of first refusal on a third-party contract, *id.* § 42-3404.08. A tenant may assign both of these rights. As this Court noted, "[i]n apparent recognition of the reality that individual tenants . . . may lack the financial resources to match the terms offered by third party purchasers, the statute permits a tenant, *without limitation*, to . . . assign his or her rights." *Allman v. Snyder*, 888 A.2d 1161, 1166 (D.C. 2005) (emphasis added).

Nothing in TOPA limits the duration of an assignment. As the statute provides, a tenant may assign her rights under TOPA "for any consideration which the tenant, in the tenant's sole discretion, finds acceptable" and may structure an assignment "in any way the tenant, in the tenant's sole discretion, finds acceptable." D.C. Code § 42-3404.06. In other words, TOPA contemplates that a tenant has the power to condition an assignment on the occurrence of a particular event, to restrict an assignment's scope or duration, and to dictate the consideration received. *See Allman*, 888 A.2d at 1168 (TOPA leaves the choice of assignee and consideration "in the assigning tenant's absolute and unfettered discretion"); *id.* (legislature deliberately included in TOPA "the unrestricted right of a tenant to assign his or her rights").

In construing other provisions of TOPA, this Court has consulted the common law to flesh out the meaning of terms that are widely used in other contexts. *See, e.g.*, *1836 S St.*, 965 A.2d at 839 ("When a legislature borrows common law terms of art in writing legislation, 'it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word.'") (footnote omitted); *Wallasey Tenants Ass'n v. Varner*, 892 A.2d 1135, 1138, 1141 (D.C. 2006) (recognizing that TOPA "creates a statutory right of first refusal similar to that which exists in contract law" and that both rights of first refusal "follow the same principles and are subject to the same analyses"). It is similarly appropriate here for the Court to consider the common law on assignments.

The Restatement (Second) on Contracts states: "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." *Id.* § 317(1). "On proof of an unconditional assignment, the assignee can recover on an assigned right; the assignor cannot." *Id.* § 331, cmt. a.; *see, e.g.*, *Flack v. Laster*, 417 A.2d 393, 400 (D.C. 1980) ("Once property or rights have been assigned, the assignee 'stands in the shoes of the assignor' and can sue in his own name to enforce the rights assigned.") (footnote omitted); *see also Sanders v. Int'l Soc'y for Performance Improvement*, 740 A.2d 34, 36 (D.C. 1999) ("[A] valid assignment confers upon the assignee standing to sue in place of the assignor."). "Where the circumstances of a transaction demonstrate an intent to effect an assignment, the law will presume the assignment to be complete in nature and scope in the absence of express limitations on the rights and duties to be assigned." 6 Am. Jur. 2d Assignments § 147; *see, e.g.*, *Centex Constr. v. ACSTAR Ins. Co.*, 448 F. Supp. 2d 697, 704 (E.D. Va. 2006) (Virginia law presumes an assignment "to be complete in nature and scope in the absence of express limitations on the rights and duties to be assigned").

Bowleg's assignment of her rights under TOPA was unconditional and thus put Treadwell "in the shoes" of the tenant for purposes of enforcing any rights under the statute. *See Medrano v. Osterman*, 885 A.2d 310, 312 (D.C. 2005) (the assignee, "although not a tenant of the rental accommodation, effectively became one for purposes of the Act by his assignment of rights" from the tenant). If the assignment to Treadwell were to expire, it would only be by virtue of "express limitations on the rights and duties to be assigned," 6 Am. Jur. 2d Assignments § 147—not because of any restriction imposed by TOPA itself.

Although *Allman* does not resolve this case, the Court's decision there upholding the continued validity of an assignment of TOPA rights, despite a significant intervening event, buttresses the view that a valid assignment completely transfers the rights at issue to the assignee and does not "lapse" when a change in circumstances occurs. In *Allman*, the owner had entered into a contract with a third-party purchaser to sell a four-unit apartment building. Pursuant to TOPA, the owner notified the tenants and provided them with an offer of sale. 888 A.2d at 1163-64. The McGlincheys, who were then tenants, assigned their TOPA rights to Todd Bissey. Bissey, as their assignee, and Elizabeth Allman, another tenant, made competing offers for the property, and the owner accepted Bissey's offer. *Id.* at 1164. Allman sued. She argued, in part, that the assignment to Bissey had "lapsed" when the McGlincheys moved out of the property (after the owner had accepted Bissey's offer), *id.* at 1165, 1170, because a tenant's "right to negotiate a purchase contract under TOPA does not continue once he has vacated a rental property and is no longer a tenant." *Id.* at 1170. Because, Allman argued, an assignee can have no greater rights than an assignor, Bissey could not be deemed a tenant. *Id.*

This Court rejected Allman's argument, explaining that the validity of an assignment contract neither "depends upon" nor may be "affected by[] subsequent events." *Id.* Nor did TOPA, the Court continued, state or imply that the end of the assignor's tenancy would cause the

assignment to lapse. *Id.* The only dispositive fact was that, when the McGlincheys assigned their rights to Bissey, they were still tenants legally residing in the apartment with valid TOPA rights. Accordingly, upon their assignment, their rights were extinguished and passed on to their assignee. *See id.* ("[T]he only fair reading of the statute is that a tenant's assignment of his rights under TOPA is immediate and complete upon the execution of the assignment document.").

Allman's logic strongly suggests that a TOPA assignment, if unconditional and effective when made, has no expiration date—at least, apart from whatever limitations a tenant includes in the assignment. As discussed in Section C, *infra*, under its terms, Bowleg's assignment to Treadwell had not expired at the time Kerns contracted to sell his property to Teffera.

C. The Assignment to Treadwell Encompassed the TOPA Right of First Refusal and Was Still in Effect When Kerns Contracted to Sell His Unit to Teffera.

As discussed above in Section A, *someone*—either Bowleg or Treadwell—was entitled to a right of first refusal on the Kerns-Teffera contract, but Kerns and Teffera closed on the sale without providing a right of first refusal to *either* of them. Instead, Kerns took the position that his termination of the contract with Treadwell eliminated any remaining TOPA rights, thus extinguishing *both* the tenant's and the assignee's rights to purchase the property, but that "[t]he aggrieved party, if any, was Ms. Bowleg, not the plaintiff."[8] Whatever might be the case if Kerns had afforded a right of first refusal to Bowleg rather than to no one, or if *Bowleg* had disputed the duration of her assignment to Treadwell or whether it included the TOPA right of

[8] As Kerns argued in his summary judgment motion: "Upon the failure of the Plaintiff to go to settlement, her right to purchase the premises expired. The same would have been true had Ms. Bowleg failed to go to settlement had she not assigned her rights. Upon the expiration of the right to purchase due to the Plaintiff's failure to go to settlement, the right to purchase no longer existed. In order to renew the rights, new circumstances would have to arise, allowing the tenant, Ms. Bowleg, to re-exercise her rights and then assign them if she wished. That did not occur." App. 28; *see also* Docket No. 140 (Kerns's second summary judgment motion).

first refusal,[9] on this record Kerns and Teffera lack standing—or at least should be estopped—from challenging whether the assignment to Treadwell remained valid at the time they executed the third-party sales contract.[10]

Even assuming, however, that Kerns and Teffera may challenge whether the assignment to Treadwell remained in force and whether Treadwell was thereby entitled to a right of first refusal on the third-party contract, the answer to both of those challenges is yes.

First, the assignment from Bowleg to Treadwell was broad enough to encompass the TOPA right of first refusal. The key portion of the assignment letter invoked the statute and stated: "I am assigning my rights under this Offer of Sale to my mother, Claudia Treadwell. I understand that by doing this, *she has all the rights and privileges afforded under the above referenced law*." App. 50 (emphasis added). Although it is possible to read the first sentence as assigning only the first statutory right—to negotiate a contract in response to an initial offer of sale by the owner—the second sentence indicates an unrestricted assignment of TOPA rights, which include the right of first refusal. This reading of the assignment to encompass the right of first refusal is reinforced by the Offer of Sale Kerns sent to Bowleg, which recites that Bowleg is entitled to a right of first refusal. App. 48, ¶ 8. Read together, the two sentences make clear that Bowleg intended to assign *all* of her TOPA rights to her mother, including the right of first refusal. The evidence of Bowleg's intent is consistent with that reading. *See* Bowleg Dep. at 36 ("I transferred all my rights to [my mother].") (Docket No. 175, Exh. H); *see also* Tr. 81.

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[9] Bowleg believed that she was "giving [her] rights" to her mother, Tr. 83; *see also id.* at 81, and thus, instead of participating in this case as a plaintiff, she testified as a witness for Treadwell at trial.

[10] *See Brandenburger & Davis, Inc. v. Estate of Lewis*, 771 A.2d 984, 989 n.10 (D.C. 2001) (noting that "ordinarily," challenges to the validity of an assignment "may only be brought by the parties to the agreement"); *Flack*, 417 A.2d at 399 (assignor, not obligors, "alone has standing to challenge" validity of assignment on statute of frauds grounds because only assignor "was a party to that agreement").

If the negotiations on Kerns's initial offer of sale had come to naught and after 180 days, Kerns had started the process anew and provided a second bona fide offer of sale pursuant to D.C. Code §§ 42-3404.09(4) & 42-3404.02(a), the tenant(s), and not Treadwell as an assignee, would have been entitled to that second offer of sale.[11] In this case, of course, the process did *not* start anew and Kerns did *not* provide a second offer of sale. Indeed, Kerns specifically argued in his motions for summary judgment that "[i]n order to renew the rights, new circumstances would have to arise, allowing the tenant, Ms. Bowleg, to re-exercise her rights and then assign them if she wished. That did not occur." App. 28; *see also* Docket No. 140. Because the assignment included the right of first refusal under TOPA and because Kerns did not restart the process with a second offer of sale, the assignment to Treadwell was still in effect when Kerns entered into his third-party contract with Teffera. Therefore, Kerns violated TOPA by failing to provide Treadwell a right of first refusal, which would have given her the opportunity to match the deal with Teffera.

As discussed in Part II, *infra*, however, Kerns's termination on June 20, 2002 of his sales contract with Treadwell was premature and ineffective—an important consideration that

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[11] We read the limitation implied by the assignment's reference to "*this* Offer of Sale," App. 50 (emphasis added), to address whether the assignment covers the *present* offer of sale versus *all* (present and future) offers of sale. The assignment's wording (proposed by the RACD, *see* Tr. 82-83) suggests that Bowleg did not intend the assignment to Treadwell to be permanent, and a reasonable person would likely understand the assignment to cover the TOPA rights associated with Kerns's initial offer of sale and to expire if and when a second offer of sale were made. *Cf. 1010 Potomac Assocs. v. Grocery Mfrs. of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984) ("The first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant.").

Treadwell argued below that, because 180 days elapsed after the initial offer of sale without Kerns having sold the property, she was entitled to a new offer of sale pursuant to D.C. Code § 42-3404.09(4) ("If 180 days elapse from the date of a valid offer under this subchapter and the owner has not sold or contracted for the sale of the accommodation, the owner shall comply anew with the terms of this subchapter."). Given that Kerns and Treadwell contracted for the sale of the unit after 180 days from the initial offer of sale had elapsed, this provision is inapplicable. And, in any event, the assignment to Treadwell would not have remained in effect for a second offer of sale, unless Bowleg reassigned her TOPA rights to her.

underscores that Bowleg's assignment to Treadwell had *not* expired when Kerns signed the third-party contract with Teffera.

II. KERNS BREACHED HIS SALES CONTRACT WITH TREADWELL WHEN HE TERMINATED IT WITHOUT FIRST PROVIDING NOTICE FIXING A REASONABLE DATE FOR PERFORMANCE.

The termination of the Kerns-Treadwell contract did not cause the lapse of Bowleg's assignment of her TOPA rights to Treadwell for the additional reason that Kerns's termination of the contract in his letter dated June 20, 2002, App. 58, was a breach of contract and ineffective. That Kerns was not entitled at that time—so far as this record reflects—to repudiate the contract with Treadwell is in tension with the premise of the Court's second question to amicus curiae, that Treadwell "failed to take advantage of a first right to purchase certain property." August 18, 2009 Order. In addition, Treadwell pleaded a free-standing breach of contract claim for which she may independently recover damages.[12]

The trial court's findings of fact and conclusions of law addressing Treadwell's breach of contract claim were sparse and focused on Treadwell's purported inability to satisfy an

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[12] Whether Treadwell's claim for breach of contract is preserved for review as an independent claim presents a close question, though we submit that it is preserved. Count III of the Third Amended Complaint alleges that Kerns breached his contract with Treadwell when he terminated the contract, Docket No. 131, at 3, and Judge Wright addressed the breach of contract issue in his findings of fact and conclusions of law. App. 94, 96-97. Her pro se brief on appeal refers to the fact that "Kerns attempted to cancel the sales contract on June 20, 2002," Appellant's Brief at 2, and she argues that the trial court "erred in finding Treadwell was not a tenant for the purpose of receiving a second notice of sale and an opportunity to purchase the subject property either under the assignment *or the sales contract*." *Id.* at 7 (emphasis added).

In any event, because the contractual question is integral to the TOPA questions preserved for appeal, this Court should address it. *Cf. Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.") (quoting Supreme Court R. 14.1 and addressing "threshold inquiry" not specifically framed by the parties); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 & n.12 (1996) (treating implications of one-year statute of limitation as a "predicate to an intelligent resolution of the question presented"—absence of diversity—even though, by not raising the issue in his brief in opposition, respondent could be deemed to have waived it) (citations and internal quotation marks omitted).

inapplicable legal standard. The court first explained that it was unable to determine "the cause of the failure of the settlement to go forward." App. 91. The court did not specifically address whether Kerns breached the contract when he repudiated it in his June 2002 letter, but conflated right with remedy in assuming that Kerns must have been entitled to terminate because Treadwell had not demonstrated that she was "ready, willing, and able" to go to settlement. *Id.* at 97. "Ready, able and willing" is the legal standard a buyer must satisfy to obtain the extraordinary equitable remedy of specific performance. *See Flack*, 417 A.2d at 400; *accord Indep. Mgt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 870 (D.C. 2005). It is not the standard to determine the threshold question whether there has been a breach of contract and is not applicable here, where a damages remedy, not specific performance, is at issue.

The trial court made no specific findings regarding why the settlement did not occur within 150 days and simply assumed that Kerns was entitled to terminate the contract because of the parties' failure to close within that time period. Although a remand for further factfinding would be within this Court's discretion, we submit that the record is sufficient to support the conclusion that Kerns breached the contract when he repudiated it without first providing notice to Treadwell fixing a reasonable date for performance. The sales contract specified:

> Within 150 days from the date of final ratification of this contract, or as soon thereafter as a report on the title can be secured if promptly ordered, and survey obtained, if required, and loan processed, all if promptly applied for, Seller and Purchaser agree to make full settlement in accordance with the terms hereof.

App. 52. No "time is of the essence" clause appears in the contract. Nor does the contract contain any language to suggest that it would become null and void if the sale were not consummated within 150 days.

In the context of contracts for the sale of land, it is settled that "parties to an agreement may make time an essential part of the contract and in such cases, the failure by one of the

parties to perform his part of the obligation within the time prescribed discharges the other from all liability under the contract." *Siegel v. Banker*, 486 A.2d 1163, 1165 (D.C. 1984). "Time will be considered 'of the essence,' where the contract expressly so provides, where definite terms of the contract show that the parties regarded the time of performance to be of vital importance, or where the nature of the property or the exigencies of the transaction make timely performance essential." *Id.* When time is not essential, "[n]either party will be held strictly to the time limit." *Drazin v. American Oil Co.*, 395 A.2d 32, 34 (D.C. 1978); *see also* 17A Am. Jur. 2d Contracts § 567 ("Ordinarily, . . . delay in performance does not automatically terminate a contract.").

Here, nothing in the sales contract, the nature of the property, or exigencies of the sale suggested that time was "of the essence." Quite the opposite: The contract provided for a fairly lengthy period of 150 days to close and even then, by providing for settlement within 150 days "*or as soon thereafter*" as other events occurred, App. 52, the contract built flexibility into the timeline. In *Pagan v. Murray*, 628 A.2d 110 (D.C. 1993), this Court likewise concluded that a similar provision in a contract for sale of a single-family residence, calling for closing "within forty five days 'or as soon thereafter'" as various matters could be resolved, along with other circumstances, reflected flexibility and that time was not "of the essence." *Id.* at 112.

Not only does the Kerns-Treadwell contract use the same kind of language as in *Pagan* and provide for a much longer period before settlement, but the background circumstances of this contract underscore that time was *not* essential: Treadwell and Kerns did not both sign this contract until June 2001—ten months after Bowleg received the Offer of Sale and assigned her TOPA rights to her mother. The record does not contain correspondence reflecting that either party pushed for a speedy settlement after the 150 days elapsed. *See Paradiso v. Mazejy*, 3 N.J. 110, 115, 69 A.2d 15, 17 (1949) ("The dilatory tactics of both parties indicate that neither of them . . . regarded time as of the essence."), *cited with approval in Drazin*, 395 A.2d at 35, 36.

Time can be made of the essence subsequent to a contract, however, when "one party [serves] notice on the other fixing a reasonable time within which the deal must be closed." *Drazin*, 395 A.2d at 35 (citation omitted). The black-letter law rule, as recognized in *Drazin*, is:

> If a definite date for performance is specified in the agreement, but performance on time is not of the essence, either party has the power to make on that date or some subsequent date, performance essential and a condition of his own duty by giving notice to that effect, provided that the notice leaves a reasonable time for rendering performance.

Id. (quoting 3A Corbin, Contracts § 723, at 383 (1960)). Once one party unilaterally makes time of the essence by explicit notice to the other party, "the notification must provide a reasonable time for that party to tender performance." *Id.*

Here, in his June 20, 2002 letter, Kerns terminated the contract with Treadwell, effective immediately. The only reason given for the termination was that the settlement had not taken place within 150 days. App. 58.[13] As this Court explained in *Drazin*, when time is not originally of the essence, "before declaring a default, [the seller] had to demand performance by a 'clear,

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[13] Although the time set in a contract should be regarded as "an approximation of what the parties regard as a reasonable time under the circumstances of the sale," *Drazin*, 395 A.2d at 34 (citation omitted), the fact that several months elapsed in this case after the target closing date does not mean that Kerns was entitled to terminate the contract. Even if the failure to close was Treadwell's fault—which the factual record is insufficient to support—numerous courts have held that sellers of real property are not entitled to repudiate their contracts without first setting a reasonable time for performance, even where lengthy delays have occurred. *See, e.g.*, *Curley v. Mobil Oil Corp.*, 860 F.2d 1129, 1134 (1st Cir. 1988) (seller not entitled to repudiate without first making time of the essence, even after five-month delay); *Mayfield v. Koroghli*, 184 P.3d 362, 367 (Nev. 2008) (sellers not justified in repudiating contract after three-year delay without first setting a reasonable time for buyer's performance); *Hamburger v. Rieselman*, 615 N.Y.S.2d 143, 144-45 (N.Y. App. Div. 1994) (when there is "an indefinite adjournment" of a closing date, "some affirmative act has to be taken by one party before he can claim the other party is in default; that is, one party has to fix a time by which the other must perform, and he must inform the other that if he does not perform by that date, he will be considered in default") (citation omitted). *But see Peachstate Developers, LLC v. Greyfield Res., Inc.*, 644 S.E.2d 324, 328 (Ga. Ct. App. 2007) (ruling that because time was not of the essence, seller could rescind contract only if it first notified buyer that it would do so unless buyer performed "within a fixed, reasonable time," but remanding for determination whether buyer had abandoned contract).

distinct and unequivocal notice fixing a reasonable time within which [to close].'" 395 A.2d at 36 (citation omitted). Because Kerns's letter to Treadwell set no reasonable time for performance, it was ineffective in terminating the contract. *See id.* at 35 ("If the time provided in the notification is not reasonable, then it is construed to be arbitrary and 'an arbitrary notice of termination may be entirely disregarded.'") (quoting *Paradiso*, 3 N.J. at 116, 69 A.2d at 18). In *Pagan*, for example, a contract action for damages, this Court upheld the trial court's determination that the seller had breached the contract by declaring it void upon the expiration of the forty-five day settlement period. 628 A.2d at 112-13.[14]

Because Kerns failed to provide Treadwell a "clear, distinct and unequivocal notice fixing a reasonable time within which to close," *Drazin*, 395 A.2d at 36 (citation omitted), Kerns breached his contract with Treadwell when he repudiated it and sold his unit to a third party. Accordingly, the Court should reverse and remand for further proceedings on Treadwell's breach of contract claim.[15]

That Kerns's termination of the contract on June 20, 2002 was premature and ineffective buttresses the argument that Bowleg's assignment to Treadwell had not expired when Kerns signed the third-party contract with Teffera. Kerns argued that his termination of the contract, when Treadwell failed to go to settlement within 150 days, extinguished the assignee's right to purchase, and accordingly, that the assignment to Treadwell expired. App. 27-28; Docket No.

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[14] *See also Levine v. Sarbello*, 491 N.Y.S.2d 419 (N.Y. App. Div. 1985) (absent "clear, unequivocal notice" to buyer establishing firm closing date, seller's declaration of default "was a nullity"), *aff'd*, 492 N.E.2d 130 (N.Y. 1986); *Stork v. Felper*, 270 N.W.2d 586, 589 (Wis. Ct. App. 1978) ("Where the contract does not expressly provide that time is of the essence notice fixing a reasonable time for performance must be given. Since the seller did not give such notice to buyers, the contract never terminated.") (citation omitted).

[15] The practical significance of whether Treadwell's breach of contract claim survives independently of her TOPA claim lies in the fact that the purchase price in the Kerns-Treadwell sales contract was $5,000 lower than in Kerns-Teffera contract.

140. However, if Kerns breached the contract with Treadwell by unilaterally terminating it, and if his termination was therefore a nullity, then the Kerns-Treadwell contract was still in effect when Kerns signed the sales contract that same day with Teffera. There was no intervening event, then, that *even arguably* could have ended Treadwell's assignment. In other words, the fact that Kerns's termination of the Kerns-Treadwell contract was ineffective removes any remaining argument that Bowleg's assignment to Treadwell had expired when Kerns signed the third-party contract. Thus, Treadwell was entitled to a right of first refusal under TOPA, to be exercised within fifteen days of receipt of the Kerns-Teffera contract.

* * *

Appellees' violation of Treadwell's right of first refusal under TOPA was not an academic one. Even if Kerns were entitled to terminate his contract with Treadwell, effective immediately, because of the delay in settlement, notice of Kerns's third-party contract with Teffera would have alerted Treadwell that a sale to a third party was imminent and that she needed to act within 15 days, as provided by D.C. Code § 42-3404.08. As it stood, Treadwell did not learn that a third party had bought the unit until Teffera knocked on her door after the sale to Teffera had closed.

At a minimum, whether or not the Court addresses Treadwell's breach of contract claim as an independent ground, the Court should reverse and remand the judgment below for a determination of damages for the violation of Treadwell's rights under TOPA. *See* D.C. Code § 42-3405.03; *Zanders v. Reid*, 2009 D.C. App. LEXIS 456, at *15 (D.C. Sept. 17, 2009).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand for a determination of damages on Treadwell's claims.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of the Legal Aid Society of the District of Columbia as Amicus Curiae Supporting Reversal to be delivered by first-class mail, postage prepaid, this 16th day of November, 2009, to each of the following:

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