STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
NORTHERN DISTRICT

Fisher Cat Development, LLC

v.

Stephen Johnson

218-2021-CV-0880

Order on Motion for Summary Judgment

Defendant Stephen Johnson moves for summary judgment on Plaintiff Fisher Cat Development, LLC's complaint concerning the termination of a purchase and sale agreement (the "P&S"). For the reasons stated below, the Court DENIES Defendant's motion.

Undisputed Facts

The following facts are undisputed unless otherwise noted.

On or about August 7, 2020, the parties entered into the P&S for Plaintiff's purchase of land located at 00 Ledgewood Road, Conway, New Hampshire (the "Subject Property"). The plaintiff limited liability company was created for the purpose of purchasing the Subject Property, subdividing it, and developing a residential community.

The P&S contained two provisions that spoke to the deadline for closing on the purchase. Paragraph 5 of the P&S stated in its entirety: "Transfer of Title: on or before 2/12/21 at TBD or some other place of mutual consent as agreed to in writing." Paragraph 19, subparagraph 3, of the P&S stated in its entirety: "Final Closing will

take place after municipal entitlements for subdivision have been approved / received."

The parties executed two addendums. The first delayed the deadline for the second earnest money deposit to October 27, 2020.[1] The second addendum, dated on or about January 28, 2021, stated, "Closing date extended to no later than 4/28/21." The second addendum also stated, "All other aspects of the aforementioned Purchase and Sales Agreement small remain in full force and effect."

The parties are in sharp disagreement as to whether they agreed to a third addendum that would further extend the closing deadline in paragraph 5. Plaintiff claims that Defendant's realtor and later his counsel reported that he had signed an extension agreement that was proposed by Defendant's counsel and that would extend the closing deadline to August 2021. In response, however, Plaintiff's counsel proposed some additional language for the extension agreement, a response that Defendant argues was effectively a counteroffer and, therefore, a rejection of Defendant's offer of an extension.

At some point, Defendant claimed that Plaintiff breached the requirement to provide engineering information. Plaintiff then provided that information and claims now that it provided all required materials. Plaintiff also claims that it was under the impression during the first half of the summer of 2021 that the parties had agreed to an extension and that it continued working on the project during that time.

In August 2021, Defendant took the position that Plaintiff materially breached the P&S by failing to close by April 28, 2021. Under the original terms of the P&S,

[1] The P&S established October 8, 2020 as the deadline for the payment of $40,000 as a second earnest money deposit (within four days of the effective date of the P&S, Plaintiff was required to pay an initial earnest money deposit of $10,000).

Defendant was entitled to keep the engineering plans if Plaintiff failed to close. Plaintiff, thereafter, filed suit with claims of breach of contract, breach of the implied covenant of good faith, and unjust enrichment. Defendant has moved for summary judgment, arguing that there is no material dispute that Plaintiff failed to close by April 28, 2021 and that this breach of contract effectively bars all three claims.

Analysis

Summary judgment shall be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed" by the parties. *Id.* The Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. See *Stewart v. Bader*, 154 N.H. 75, 85 (2006). The movant bears the burden of proving that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. *See id.* at 86. "A dispute of fact is 'genuine' if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party." *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 739 (2005) (quotation and brackets omitted). A fact is material if it affects the outcome of the litigation. *See Bond v. Martineau*, 164 N.H. 210, 213 (2012).

"The party opposing summary judgment must set forth specific evidence of a genuine issue of material fact." *Pennichuck Corp.*, 152 N.H. at 739 (citing RSA 491:8-a, IV). "Conclusory assertions do not satisfy the burden in opposing summary judgment." Id. (quotation omitted). Indeed, RSA 491:8-a states clearly that if the party opposing summary judgment does not submit contradictory affidavits, the facts

contained in the moving party's affidavits are deemed admitted. "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed admitted for purposes of the motion." *New Hampshire Div. of Human Servs. v. Allard*, 141 N.H. 672, 674 (1997). Although the Court cannot weigh the contents of the parties' affidavits and resolve factual issues, the Court "must determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." *Iannelli v. Burger King Corp.*, 145 N.H. 190, 193 (2000).

On May 3, 2022, this Court held a hearing on Defendant's motion. During that hearing, counsel for Defendant agreed that the original P&S contained two inconsistent provisions as to when the closing must occur (one provision stated that closing must occur by February 12, 2021 and another stated that closing would not occur until after the Town granted subdivision approval). He further agreed that the inconsistency between these two provisions in the original P&S created ambiguity on the issue of a closing deadline. *See Oliva v. Vermont Mut. Ins. Co.*, 150 N.H. 563, 566 (2004) (in insurance context, inconsistent provisions create ambiguity).

Defendant's argument for summary judgment thus boils down to his contention that the January 28, 2021 second addendum removed the ambiguity established by the competing closing date provisions in the P&S. The second addendum stated, "Closing date extended to no later than 4/28/21." Defendant argues that this language essentially extinguished any rights provided in Paragraph 19, subparagraph 3.

The Court is not persuaded. The second addendum does not refer to the rights provided by Paragraph 19, subparagraph 3, nor does it discuss in any way the concept of extending the closing until the town approved Plaintiff's subdivision plan.

Defendant's argument also tends to overlook the additional language in the second addendum that all other aspects of the P&S remain in "full force and effect." Because the second addendum incorporated all other provisions of the P&S including Paragraph 19, subparagraph 3, it simply continued the tension between these two competing provisions. It did not in any way resolve that tension and certainly not to the point where this Court can resolve the issue by way of a summary judgment order.

Accordingly, the Court finds that the closing date provisions are ambiguous. Under New Hampshire law, therefore, this Court may look to extrinsic evidence in interpreting the P&S. *Behrens v. S.P. Constr. Co., Inc.*, 153 N.H. 498, 501 (2006). In interpreting a contract, or in this case determining when the parties were obligated to close on the transaction, the "inquiry focuses on the intent of the contracting parties at the time of the agreement." *Foundation for Seacoast Health v. HCA Health Services of New Hampshire*, 157 N.H. 487, 492 (2008).

In its Statement of Material Facts, Plaintiff points to an August 6, 2020 communication from Defendant's real estate broker. Statement of Material Facts, ¶ 14; Affidavit of Peyton Vaillancourt, Ex. 1. In an email, the broker stated:

> I believe that we should put a deadline of February 2021 (6 months) on it with extensions not being unreasonably withheld should they be needed, just so there is an end date to the agreement.

Vaillancourt Aff., Ex. 1. Plaintiff's Statement of Material Facts also referenced the Affidavit of Kyle McManus, the manager and sole member of Plaintiff. In his affidavit, McManus states:

> It was critical to me that the closing be contingent upon obtaining municipal approvals for the development; without the permission of the Town to move forward with the anticipated Project, the purchase of the land would not be worth the price. That is why the closing was made

> contingent upon receiving those municipal entitlements. While negotiating, Mr. Johnson indicated he wanted some closing date as a place holder. I agreed because the contingency on entitlements remained in place, and because of his express representation that extensions would not be withheld.

McManus Aff. ¶¶ 5, 6.

In his response to Plaintiff's Statement of Material Facts, Defendant repeated his assertion that the P&S establishes the parties' rights and denied in a general way the existence of any terms not expressly included in the P&S. Plaintiff's Reply at 7. Defendant did not otherwise respond to these additional factual contentions or, more specifically, address how these extrinsic facts would not be sufficient to establish a material disputed fact.

The Court finds that these asserted facts are sufficient to prevent an award of summary judgment on both the contract and covenant of good faith claims. On the contract claim, these facts create a material dispute as to (1) whether the parties agreed to a provision that required Defendant to agree to reasonable extensions caused by a delay in receiving subdivision approval from the Town and (2) whether Defendant breached that agreement by refusing to agree to an extension beyond April 2021. These disputes are factual in nature and clearly prevent an award of summary judgment to Defendant on Plaintiff's contract claim.

On the covenant of good faith claim, the evidence that Defendant agreed that he would not unreasonably withhold extensions brings this claim within the discretionary contract category. The New Hampshire Supreme Court has identified three categories in which the implied covenant arises: "those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance . . . ." *Centronics Corp. v.*

Genicom Corp., 132 N.H. 133, 139 (1989). In limiting discretion in contractual performance, the implied covenant prohibits "behavior inconsistent with common standards of decency, fairness, and reasonableness, and with the parties' agreed-upon common purposes and justified expectations." *Id.* at 140. Here, the extrinsic evidence creates a factual dispute as to whether Defendant breached the implied covenant by refusing to agree to an extension that was consistent with Plaintiff's justified expectations.

Finally, as for the unjust enrichment claim, under New Hampshire law, "unjust enrichment is an equitable remedy that is available when an individual receives a benefit which would be unconscionable for him to retain." *Axenics v. Turner Constr. Co.*, 164 N.H. 659, 669 (2013) (internal citations omitted). Unjust enrichment claim generally cannot coexist with a valid contract. *Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 211 (2009). "It is a well-established principle that the court ordinarily cannot allow recovery under a theory of unjust enrichment where there is a valid, express contract covering the subject matter at hand." *Id.* at 210–11.

Plaintiff makes two arguments in response to Defendant's observation that both sides agree that the P&S governs the parties' dispute. First, it notes that New Hampshire law permits a party to plead in the alternative. *See Cannata v. Town of Deerfield*, 132 N.H. 235, 241 (1989). ". . . [P]leading in the alternative is an appropriate and effective drafting technique." *Id.* This right under New Hampshire law to present alternative theories, moreover, does not end either at the pleading stage or at summary judgment. *See MacLeod v. Chalet Susse Int'l., Inc*. 119 N.H. 238, 245 (1979) (affirming jury verdict where plaintiff was allowed to present "alternative legal grounds" to jury). At this summary judgment stage, therefore, Plaintiff is entitled to go

forward on its unjust enrichment claim on the ground that it is an alternative theory.

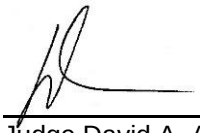
Second, Plaintiff argues alternatively that if Defendant is correct that the P&S terminated in April 2021, it still has an unjust enrichment claim for the ensuing period during which Plaintiff continued to do work on the Subject Property on the understanding that Defendant had agreed to another extension. Claiming that Defendant utilized this and other work provided by Plaintiff under the terms of the P&S, Plaintiff argues that this post-termination work is outside the P&S under Defendant's theory of the case.

Defendant correctly argues that Plaintiff has not identified any benefit conferred upon Defendant after the April 2021 purported termination. Indeed, the supporting affidavits submitted by Plaintiff do not appear to define specific work done in the summer of 2021. The exhibits to the Vaillancourt Affidavit focus on communications concerning the disputed extension and an "Agent Authorization Form" in June 2021 allowing Plaintiff to submit applications to the Town. Nevertheless, the Court can infer from this evidence that Plaintiff was doing at least some work in June 2021 on the Subject Property. This might be sufficient to survive summary judgment. The thrust of Plaintiff's unjust enrichment claim is that it did work in the summer of 2021 on the understanding that Defendant had agreed to an extension in April 2021, that this work provided some benefit to Defendant, and that it would be unjust for Defendant to retain this benefit. Any evidence of work performed in the summer of 2021 would be sufficient to survive summary judgment. However, as the unjust enrichment claim survives as an alternative theory regardless of the resolution of this issue, the Court declines to rule on this issue at this time. If the issue requires a judicial ruling later in the case, it will likely present itself with a clearer factual record.

Conclusion

For the foregoing reasons, Defendant's summary judgment motion is DENIED.

June 15, 2022
Date



Judge David A. Anderson