STATE OF NEW HAMPSHIRE
SUPREME COURT

PRO DONE, INC.,

v.

TERESA BASHAM, TIMOTHY JOHN HOOPER, TERRENCE LEE HOOPER, JOHN C. RANSMEIER, TRUSTEE OF PAUL R. HOOPER 1997 TRUST AND TERESA BASHAM AS NON-INDEPENDENT TRUSTEE OF THE PAUL R. HOOPER 1998 GST EXEMPT TRUST.

Case No. 2018-0060

APPEAL FROM DECISION ON THE MERITS
MERRIMACK COUNTY SUPERIOR COURT PURSUANT TO
NEW HAMPSHIRE SUPREME COURT RULE 7

REPLY BRIEF FOR THE PLAINTIFF-APPELLANT PRO DONE, INC.

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INTRODUCTION

The trial court's decision violated basic tenants of contract law by granting Defendants' motion to dismiss. The trial court rendered contract terms a nullity and deprived Plaintiff of traditional contract remedies in violation of this Court's contract law jurisprudence. Defendants brief fails to address these arguments. Instead, Defendants' brief suggests that the American rule played no role in this case as if any other principle would justify the trial court's departure from traditional contract law doctrine. Defendants thus fail to offer a justification the trial court's ruling that is grounded in a rational articulation of principle. The trial court's decision granting Defendants' motion to dismiss therefore should be reversed and Plaintiff's contract rights should be affirmed by this Court

ARGUMENT

I. NO PRINCIPLE OTHER THAN AN EXPANSIVE APPLICATION OF THE AMERICAN RULE COULD JUSTIFY THE TRIAL COURT'S DECISION.

Defendants argue that the trial court's decision did not turn on an application of the American rule. Def. Br. at 1.[1] If that is the case, then the trial court's decision rested on no principle at all and cannot be justified with reference to any standard identified by any authority. Indeed, the principles articulated in the authorities governing contract principles in New Hampshire and throughout the nation, and in particular the principle that contract terms will be given full force and effect and that parties are entitled to reasonably foreseeable damages for a breach of contract, apply to Plaintiff's action in this case. *See, e.g.,* Pl. Br. at 13-14 (citing cases and contract doctrines directly contrary to the trial court decision). [2]

[1] "Def. Br." means Brief of Sibling Defendants.

[2] "Pl. Br." means Brief for the Plaintiff-Appellant Pro Done, Inc.

Those principles were persuasive to the Maryland federal district court in *Cook v. SCI Md. Funeral Servs.*, Civil Case No. 14-3770-GLR, 2016 U.S. Dist. LEXIS 117887, *5 (D. Md. Aug. 31, 2016), a case authorizing a suit for damages in order to ensure that contract terms would not be rendered a nullity.

In their brief, Defendants challenge Plaintiff's citation to *Cook* by claiming that *Cook* is consistent with the trial court's order and *Kaye v. Wilson-Gaskins*, 135 A.2d 892, 904 (Md. App. 2016), the principle decision relied upon by the trial court in this case. Def. Br. at 9. It is not. In *Cook*, the court refused to follow *Kaye* because the contract at issue in *Cook*, in contrast to the contract at issue in *Kaye*, included express covenant not to sue language in addition to release language. *See Cook,* 2016 U.S. Dist. LEXIS 117887, at *10.

According to *Cook*, "Maryland courts routinely hold that contracts should not be construed in a manner that would render a clause superfluous." *Id. Cook* therefore found that a ruling equating a covenant not to sue with a release denies a plaintiff the benefit for which he bargained, the promise not to be subjected to litigation.

The facts of this case justify the same ruling. The contracts at issue contain not only releases but also explicit language covenanting not to sue as well as explicit language agreeing not to enforce any claim or cause of action. *See* App. 6 ("Seller . . . hereby releases . . . *and* covenants not to sue *and* otherwise agrees not to enforce any claim [or] cause of action . . . .") (emphasis added). Interpreting the contract language of these latter two promises to have the same meaning as the first promise, as the trial court has done, renders the second two promises meaningless and unnecessary.

Such a reading is in direct conflict with the opinions of this Court holding that "[w]hen interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole." *Gen. Linen Servs. v. Franconia Inv. Assocs.*, 150 N.H. 595, 597 (2004).

"Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used." *Id.* Here, there is nothing ambiguous about the contract's language. Thus, the defendants' "covenant not to sue" and agreement "not to enforce any claim or cause of action" should be given its reasonable meaning and Plaintiff's suit for violation of those promises should be allowed to proceed.

Defendants claim that the terms "covenant not to sue" and "agrees not to enforce any claim or cause of action" are not rendered null and superfluous because the court has "interpreted those terms in accordance with the law." Def. Br. at 10. Defendants point to no other authority for the rule that, when parties negotiate a release plus a covenant not sue and an agreement not to enforce any claim or cause of action, they are only agreeing to a release.

Consistent with standard contract law doctrine, an action for breach of a covenant not to sue does not depend upon whether the covenant clearly expresses that the breaching party would be liable for consequential damages. *See, e.g., See Microsoft Corp. v. Motorola, Inc.*, 963 F. Supp. 2d 1176, 1193 (W.D. Wash. 2013) (explaining "when one party agrees not to sue the other but then does anyway . . . . the primary form of damages flowing from the breach will likely be attorney's fees, and it would be inequitable to deprive the aggrieved party of those damages."). Attorneys' fees are the foreseeable damages for such a breach. *See* Pl. Br. at 17-18 (citing

cases). New England courts have recognized that to be the case for over a century and have implied fee clauses in contracts intended to shield the parties from the cost of litigation. *See Ryerson v. Champman*, 66 Me. 557 (1877). Defendants provide no response to these authorities.

Indeed, *Microsoft* and the other authorities cited in Plaintiff's brief are in line with this Court's precedent that the availability of consequential damages hinges on whether or not those damages "are reasonably foreseeable at the time of the contract" and not on whether the parties expressly indicated that consequential damages were contemplated at the time of the contract. *See, e.g., Salem Eng'g & Construction Corp. v. Londonderry School Dist.*, 122 N.H. 379, 383-384 (1982). Defendants fail to describe why the same rule should not apply in this case with reference to any credible authority on the matter.

II. THE TRIAL COURT'S DECISION NECESSARILY RELIED ON IMPLICIT FINDINGS OF FACT AS TO THE EXISTENCE OF BAD FAITH OR OBVIOUSNESS OF BREACH.

The trial court's decision refused even to consider whether Plaintiff is entitled to relief on a theory that Defendants breached in bad faith or engaged in obvious breaches of contracts. Even the cases Defendants cite in their briefs, which are outdated and have never been adopted or cited in this jurisdiction, affirmed suits for attorneys' fees as damages in cases of bad faith or when the breach is obvious. *See Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966); *Bellefonte Reinsurance Co. v. Argonaut Insurance Co., et al.*, 586 F. Supp. 1286, 1288 (S.D.N.Y. 1984). In refusing to consider these alternative theories, the trial court engaged in implicit fact finding in violation of the motion to dismiss standard.

In response to Plaintiff's allegations that Defendants had breached their contracts in bad faith, Sibling Defendants, in moving to dismiss Plaintiff's lawsuit, argued in their memorandum of law that they breached the covenants not to sue in good faith, representing to the trial court:

"Because Defendants have brought a good-faith claim against the validity of the covenant itself, the initiation of that action cannot serve as grounds for a breach of contract claim." *See* App. 245.

Thus, the factual question as to the motive of Defendants in breaching the covenants not to sue was plainly before the trial court and, in dismissing Plaintiff's breach of contract action, the trial court implicitly had to make some finding of fact regarding that allegation, i.e., that Defendants' factual allegation to have brought their breach of contract claim in good faith was somehow more credible than Plaintiff's factual allegation that the breach was in bad faith. Absent such an implicit finding, the trial court's decision is unsupportable by the case law it and the Defendants cite.

This determination of the credibility of allegations is in clear violation of the legal standard for ruling on a motion to dismiss. *See, e.g., Bohan v. Ritzo*, 141 N.H. 210, 212 (1996) (holding the trial court is required to assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff when determining whether the plaintiff has plead allegations that are reasonably susceptible of a construction that would permit recovery).

III. THE TRIAL COURT'S DECISION DEPRIVED PLAINTIFF OF THE OPPORTUNITY TO SEEK EQUITABLE RELIEF.

Defendants argue that the trial court justifiably ignored Plaintiff's request for equitable relief and seek to distinguish this Court's ruling in *City of Keene v. Cleveland*, 167 N.H. 731, 743 (2015). The trial court's decision in *City of Keene*, like the trial court's decision in this appeal, simply dismissed the request for injunctive relief without comment or rationale. *See id.* at 733 ("The trial court also denied the City's petition for a preliminary and permanent injunctive relief.").

As this Court stated in that decision, "[t]he question before us . . . is whether the trial court erred when, solely because it had dismissed the underlying tortious interference claim, it denied City's request for injunctive relief without considering the particular circumstances of the case." *Id.* This Court found that the trial court had erred in not considering the facts underlying a request for injunctive relief in *City of Keene*. The trial court did so in this case as well.

IV. THE QUESTION OF WHETHER THE TRIAL COURT IMPROPERLY DISMISSED THIS ACTION NOTWITHSTANDING THE ALLEGATION OF BAD FAITH WAS PRESERVED.

Defendants also claim that the question of bad faith was not preserved for this Court. *See* Def. Br. at 1. That claim is baseless. The question of whether Defendants breached the relevant contract provisions in bad faith or in obvious breach was squarely before the trial court on several occasions. It was first raised before the trial court in Sibling Defendants' Memorandum in Support of Sibling Defendants' and Trustee Defendants' Motion to Dismiss Complaint with Jury Demand. *See* App. 243-247.

There, Defendants, citing *Artvale*, argued that a covenant not sue does not give rise to a claim for breach of contract unless the covenant is breached in bad faith or in obvious breach. *See* App. 243-247. Plaintiff also preserved this issue in its Objection to Sibling Defendants and Trustee Defendants' Motion to Dismiss Complaint with Jury Demand and Supporting Memorandum. *See* App. 262-264.

In that briefing before the trial court, Plaintiff argued that "the Second Circuit held that litigation expenses were within the proper scope of damages for such a breach where the covenant so stated, and, even where it was not clearly stated, litigation expenses were within the proper scope of damages where a suit was brought in bad faith." Id. The issue was preserved

again in Plaintiff's objection to Ransmeier's Motion to Dismiss, *see* App. 319, and again in Plaintiff's Motion for Reconsideration. *See* App. 591-592.

CONCLUSION

For the reasons set forth herein and in its opening brief, Plaintiff respectfully requests that this Court reverse the trial court's ruling and remand the case for further proceedings.

Respectfully submitted,

Pro Done, Inc.

By its Attorneys,

RATH, YOUNG AND PIGNATELLI, P.C.

Dated: July 19, 2018

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CERTIFICATION OF SERVICE

I, Michael S. Lewis, hereby certify that I caused the foregoing to be hand delivered on this 19th day of July 2018 to the following counsel of record.

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