THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0648

THE SKINNY PANCAKE-HANOVER, LLC

v.

CROTIX, ET AL.

Mandatory Appeal Pursuant to Rule 7 of the Decision on the Merits of the Grafton Superior Court

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BRIEF FOR THE APPELLEES

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STATEMENT OF THE CASE

On September 23, 2016, the Appellant, The Skinny Pancake-Hanover, LLC ("SPH"), filed a verified six-count complaint in Grafton Superior Court against Crotix, a New Hampshire general partnership, and its partners, James M. Rubens and Susan P. Rubens (a/k/a Susan P. Locke) (collectively, "Crotix"). The gravamen of SPH's claim was that Crotix did not honor SPH's attempt to exercise a purchase option contained in the parties' commercial lease agreement. SPH sought specific performance of the option to purchase, damages, and attorney's fees. App. Vol. I at 13.[1] The complaint alleged claims for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), intentional misrepresentation (Count III), negligent misrepresentation (Count IV), violation of the Consumer Protection Act (Count V), and attorney's fees (Count VI). App. Vol. I at 9-13. Shortly after Crotix filed its answer to the complaint, the parties filed cross-motions for summary judgment. *Id.* at 28-177. Following a hearing, the superior court (Bornstein, J.) denied both motions because the motions raised material issues of fact. SPH Br. at 43-51.

In Count II of the complaint, SPH alleged that Crotix violated the implied covenant of good faith and fair dealing during the formation *and performance* of the purchase option in the lease. App. Vol. I at 10, ¶41. The sole alleged factual predicate for Count II was that Crotix was obligated by

[1] Citations to the record are as follows: "App. Vol. I" and "App. Vol. II" respectively refer to Volumes I and II of SPH's appendix, filed contemporaneously with its brief. "SPH Br." refers to SPH's brief filed with this court on February 12, 2019.

contract to convey the property to SPH upon exercise of the option and its failure to do so brought "into question whether . . . Crotix was negotiating and performing under the Lease in good faith." *Id.* Because bad faith in contract performance is premised on the existence of discretion on the part of the defendant under the parties' agreement (see *post* at 23), and the complaint did not allege that Crotix had such discretion, Crotix moved to dismiss Count II on August 30, 2017. App. Vol. I at 247-253.

SPH objected that, notwithstanding its allegation that Crotix had acted in bad faith in contract performance, it was *not* alleging that Crotix had discretion in performance. Rather, it contended that its bad-faith claim was based on conduct occurring during contract formation. *Id.* at 256.[2] The superior court denied Crotix's motion to dismiss Count II, explicitly relying upon SPH's representation that it was not alleging bad faith in discretionary contract performance. SPH Br. at 54. On November 2, 2017, Crotix moved to dismiss Count II for its failure to state a claim of bad faith in contract formation as well as Counts III, IV, and V. App. Vol. I at 262-277. SPH objected. The superior court granted the motion to dismiss Counts III and V but denied the motion to dismiss Counts II and IV on January 11, 2018. SPH Br. at 63.

On February 15, 2018, Crotix filed a motion for partial summary judgment on Count I, SPH's breach of contract claim. The motion argued that SPH's attempted exercise was conditional and equivocal as a matter of

[2] The implied covenant of good faith and fair dealing has been recognized in "three distinct categories of contract cases: 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).

law and therefore ineffective. App. Vol. II at 32-100. SPH objected and raised many of the arguments set forth in its brief in this court. *Id.* at 101-122. On July 27, 2018, the superior court granted Crotix's motion for partial summary judgment, holding that SPH never unequivocally and unconditionally exercised the option. SPH Br. at 72-74. The superior court denied SPH's motion to reconsider this order. *Id*. at 82. SPH waived Count IV in its pretrial statement. *Id.* at 83.

Because Count II was predicated on the allegation that SPH properly exercised the purchase option, Crotix filed a motion to dismiss Count II after the superior court granted summary judgment on the breach of contract claim in Count I. App. Vol. II at 269-273. The superior court granted the motion to dismiss Count II over SPH's objection. SPH Br. at 92. This appeal followed.[3] SPH's brief seeks reversal of the superior court's entry of summary judgment on Count I and its dismissal of Count II. *Id.* at 40.

[3] Count VI sought attorney's fees on the assumption that SPH would be the prevailing party on its breach of contract claim. App. Vol. I at 13. The superior court's entry of summary judgment on Count I therefore mooted Count VI.

STATEMENT OF FACTS

Crotix owns a commercial condominium complex in Hanover, New Hampshire, known as Hanover Park. App. Vol. I at 44. On October 15, 2015, Crotix executed a lease with SPH. *Id*. at 44 and 70. The lease agreement contained an option to purchase the leasehold property and certain other units in the condominium:

> Tenant Purchase Option. Within the first nine (9) months from Lease Commencement Date, Tenant shall have the exclusive option to purchase all Hanover Park Condominium units then owned by Landlord (i.e., Units 10, 33 and 39, with Landlord committed to complete purchase of Unit 33 by Commencement Date) in AS IS condition for $5,553,570 . . . . After 180 days from Commencement Date, this Purchase Option shall expire if there is no signed Purchase & Sale Agreement. . . .

Id. at 52 (capitalization in original). Thus, the option agreement contemplated that SPH would have nine months from the "Commencement Date" to exercise the option but only if a purchase and sale agreement were signed within one hundred and eighty days of the Commencement Date. The plain intent of these provisions was that SPH would have up to nine months to exercise the option, provided that the transaction was sufficiently mature within six months that the parties had entered into a purchase and sale agreement. This sequencing enabled SPH to propose conditions to closing in the purchase and sale agreement that could be satisfied before SPH had to decide whether to exercise the option. The sooner there was a mutually acceptable purchase and sale agreement in place, moreover, the greater the portion of the nine-month period SPH would have to satisfy any conditions.

The principals of SPH are brothers Benjamin and Jonathan Adler. At some time before the Fall of 2015, the Adlers engaged commercial real estate broker Chip Brown to locate suitable space for SPH's planned crêperie restaurant in Hanover. App. Vol. II at 223. After SPH took possession of their space at Hanover Park and the Adlers began to give serious consideration to exercising the purchase option, they contacted their acquaintance Erik Hoekstra at Redstone Property Management ("Redstone") in Vermont and asked him to help line up the financing for the $5,553,570 purchase price. *Id.* at 245 (192:20-193:12). The Adlers and Hoekstra contemplated that after the acquisition SPH would convey its interest in the property to Redstone which would manage the property. *See id.* at 170-171. SPH withheld Redstone's role in the acquisition from Crotix until it had to divulge it in discovery below. *Id.* at 149.

On March 11, 2016, Mr. Brown notified the Adlers and Hoekstra that he had made Mr. Rubens aware that SPH "would like to start [the] due diligence process" preparatory to the exercise of the purchase option. *Id.* at 183. Two months later Mr. Hoekstra instructed Redstone's counsel to draft a purchase and sale agreement for SPH's acquisition of the optioned property[4] and to "include as much due diligence time as we can get" to permit Redstone "to kick the tires on the building, review the existing leases, get an appraisal, etc." for the acquisition. *Id.* at 170-71.

[4] Each of the communications between SPH, Redstone, and their respective lawyers cited in this brief were part of SPH's document production in discovery. App. Vol. II at 144. It appears that the clients shared those communications with persons outside the attorney-client relationship, thereby waiving the privilege.

On May 20, 2016, SPH's attorney sent Crotix a letter stating that SPH intended to exercise the purchase option and enclosing "a proposed purchase and sale agreement, as called for in Section I(v) [of the lease]." App. Vol. I at 81. The purchase and sale agreement proposed several "closing conditions," including a ninety-day due diligence period during which SPH could "inspect the Property and conduct such reviews, tests and studies and take such actions as Buyer shall deem appropriate in connection with its investigation of the Property." *Id*. at 83. The draft agreement also permitted SPH in its "sole discretion . . . to terminate this Agreement by providing written notice of termination to Seller" if the results of this due diligence were not acceptable. *Id*. Shortly thereafter Crotix rejected the exercise as noncompliant with the terms of the option. *Id*. at 120.

The Adlers are sophisticated businessmen, and they were represented throughout their dealings with Crotix by one of the largest and most capable law firms in New Hampshire, Sheehan, Phinney, Bass & Green. Attorney Susan Manchester of Sheehan Phinney had principal responsibility for the transactional work the firm performed for SPH, and she is a recognized expert in real estate transactions. It was Ms. Manchester who signed the May 20, 2016, letter to Crotix. *Id.* at 81.

While SPH's brief suggests that it was simply trying to comply with the option's terms and that it was a hapless victim of Crotix's silence about the defects in the exercise, the truth is that SPH knowingly took the risk of a rejection of the exercise despite the advice of its counsel. Sheehan Phinney advised SPH that the purchase and sale agreement drafted by Redstone's counsel "should be as simple as possible, so as to give [Crotix] as little as possible to disagree with" and recommended that SPH "drop" a

provision for inspections "so [Crotix] can't argue that there was no provision for inspection, and you must take the units as is." App. Vol. II at 147. The following day, Sheehan Phinney again cautioned against including inspections and contingencies in the purchase agreement. Attorney Sean Gorman told SPH, "We should be ready for pushback from [Crotix] that there cannot be any contingencies (*including inspection*) *since the option calls for you to purchase AS IS.*" *Id.* at 173 (emphasis supplied; capitalization in original). He asked whether SPH and its "investors" were "prepared to waive all contingencies, and have what amounts to a 'naked' closing if you have to – they deliver good title, you deliver a check." *Id.* at 173. Ms. Manchester advised SPH that, "in [her] experience, most options are 'take it or leave it.' " *Id.* at 175. SPH decided, however, that "what we submit is ultimately up to [Redstone]." *Id*. at 175-176.

Redstone could not waive contingencies in the purchase and sale agreement because it needed to "line up financing, get an appraisal to support the financing," and take other steps to execute the proposed transaction. *Id*. at 180. As a result, the purchase and sale agreement accompanying the May 20, 2016, letter included due-diligence contingencies as well as a unilateral right to terminate the transaction at SPH's discretion. App. Vol. I at 83.

After Crotix rejected the attempted exercise, Ms. Manchester sent a letter to Crotix's counsel demanding that Crotix convey the property to SPH based on the alleged exercise "by my letter dated May 20, 2016." *Id*. at 123. Crotix's attorney rejected this demand and informed SPH's counsel that the lease set forth the terms of exercise and that SPH was "required to perform according to those terms." *Id*. at 134.

SPH filed its complaint on September 23, 2016. The complaint identifies the May 20, 2016, letter as the exercise of the option. App. Vol. I at 9, ¶33 ("Defendant Crotix was obligated to sell the Property upon Plaintiff's May 20, 2016 exercise of the Option to Purchase . . .") and at 10, ¶37 ("Plaintiff is thus entitled to specific performance of the Option to Purchase . . ."). Count I of the complaint alleged that Crotix breached the parties' lease agreement when it failed to sell the property to SPH after it sent its letter of May 20, 2016. *Id.* at 9-10. Count II of the complaint alleges that Crotix breached the implied covenant of good faith and fair dealing because SPH "justifiably expected that [ ] Crotix would fulfill its obligation to sell the Property upon exercise of the Option to Purchase" but that Crotix "refused" to do so after the alleged exercise of the purchase option. *Id.* at 10, ¶41. SPH claimed the "breach of the Option to Purchase *brings into question* whether Defendant Crotix was negotiating and *performing* under the Lease in good faith" and that the breach "further suggests that it never intended to fulfill its obligations" when it entered the lease. *Id*. (emphasis supplied).

The parties filed cross-motions for summary judgment in December 2016 and January 2017. *See, generally, id.* at 28-177. The superior court denied both motions, holding that there were material facts in dispute precluding summary judgment. SPH Br. at 51. One such disputed fact was whether the defendants had exercised their discretion in contractual performance in good faith. *Id.*, *citing Livingston v. 18 Mile Point Drive, Ltd.,* 158 N.H. 619, 625 (2009) (applying one of the three good faith and fair dealing doctrines recognized by New Hampshire law).

In response to this ruling, Crotix moved to dismiss Count II because the complaint did not allege that Crotix had discretion in performance of its obligations under the lease and option to purchase. App. Vol. I at 247-253. SPH's objection argued that Crotix misapprehended its claim and that Count II was a claim for breach of the covenant of good faith and fair dealing in the context of *formation* of the lease and purchase option, not its performance. *Id.* at 256. Relying expressly on this representation, the court denied Crotix's motion to dismiss Count II. SPH Br. at 54. When SPH later attempted to amend its complaint to include a claim of bad faith in contract performance, the court denied the motion on the ground that SPH was, in essence, judicially estopped from asserting such a claim. *Id.* at 64-65 (SPH had "repeatedly disclaimed" such a cause of action and Crotix would be prejudiced by an amendment).

Nonetheless, when Crotix moved to dismiss Count II in October of 2018, SPH argued – as it does in this appeal – that Crotix violated its obligation of good faith and fair dealing under *Livingston.* App. Vol. II at 276-280. That case, however, is explicitly one dealing with good faith in the exercise of discretion in contract performance, a cause of action SPH expressly disavowed and was precluded from asserting by the superior court.

SUMMARY OF THE ARGUMENT

At its most basic level, this case presents a question to which the answer is self-evident: Is an exercise of an option unequivocal and unconditional when it proposes that the optionee can cancel the purchase for any reason in the ensuing ninety days? The superior court held that the reservation of a right to terminate the acquisition makes an attempted exercise of an option conditional and equivocal and therefore ineffective. Nothing in SPH's brief supports a reversal of this eminently sensible ruling.

An option is essentially an offer by the party granting the option (the "optionor") to enter into an agreement with the holder of the option (the "optionee") if the optionee accepts the offer within a prescribed period of time. Acceptance of the offer is accomplished through the "exercise" of the option. To be effective, the exercise must be unequivocal and unconditional, and the optionee must be ready to perform. Five words would have been sufficient to exercise the option successfully in this case: "SPH hereby exercises its option."

Here, however, SPH purported to exercise the option while reserving to itself the right to terminate the transaction at its discretion. Discovery revealed that the reason for this paradoxical approach was because Redstone was not yet prepared to finance the acquisition, but the superior court did not rely on this fact in granting summary judgment on Count I. Instead, the court ruled simply that a unilateral right of termination is irreconcilable with the requirement of unequivocal and unconditional acceptance by the optionee. New Hampshire law plainly supports this ruling.

Nor did the superior court err in dismissing Count II. That cause of action alleged that *because* Crotix did not convey the property when SPH exercised the option, Crotix must have acted in bad faith in entering into an agreement to make such a conveyance upon the exercise. As the court noted, Count II was premised on the assumption that SPH properly exercised the option, and the court's entry of summary judgment on Count I meant that SPH had not done so. Given that the explicit premise of Count II was invalid as a matter of law, Count II was properly dismissed.

The superior court's orders granting summary judgment on Count I and dismissing Count II should be affirmed.

ARGUMENT

I. As a matter of law, SPH failed to exercise the purchase option unconditionally and unequivocally.

When reviewing a trial court's grant of summary judgment, this court "consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Belhumeur v. Zilm*, 157 N.H. 233, 235 (2008) (citation omitted). If the court identifies no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the court will affirm the superior court's decision. *Id*. The court reviews the superior court's application of law to facts *de novo*. *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248 (2006) (citation omitted).

This court has held that an "option to purchase real estate" is a "unilateral contract by which the owner of the property agrees to sell if the holder of the option chooses to buy." *Barclay v. Dublin Lake Club*, 89 N.H. 87, 89 (1937). To be effective, an exercise of such an option "must be *unequivocal* and in accordance with the terms of the option." *Katz v. Pratt St. Realty Co.*, 262 A.2d 540, 547 (Md. 1970) (emphasis supplied); *see also Smith v. Hevro Realty Corp.*, 507 A.2d 980, 984 (Conn. 1986) (acceptance must be "unequivocal, unconditional, and in exact accord with the terms of the option," *citing* 1A Corbin, Contracts §264 and other authorities). The exercise of a purchase option is thus analogous to the acceptance of an offer in contract formation. *See Arapage v. Odell*, 114 N.H. 684, 686 (1974) (acceptance of offer must be unconditional).

An effective exercise of a purchase option transforms the unilateral option contract into a bilateral contract under which the optionee is bound

to perform. *Howard-Arnold, Inc. v. T.N.T. Realty, Inc.,* 109 A.3d 473, 477 (Conn. 2015). An "exercise" that enables the optionee to escape performance is by definition both conditional and equivocal, and therefore ineffective. *See Carroll's Warehouse Paint Stores, Inc. v. Rainbow Paint and Coatings, Inc.,* 824 S.W.2d 147, 151 (Mo. Ct. App. 1992) (a letter "disclaim[ing] an obligation to purchase the building until the feasibility of the purchase had been established" was not an exercise of the purchase option).

The party holding the option is responsible for exercising it properly. *Pargar, LLC v. CP Summit Retail, LLC*, 730 S.E.2d 136, 139 (Ga. App. 2012). If the optionee does not exercise an option unconditionally and unequivocally, the optionor has no obligation to perform because no contract has been formed. *Id*. at 140. The optionor has no obligation to correct defects in the optionee's attempted exercise or otherwise guide the optionee to proper performance. *Elderkin v. Carroll*, 941 A.2d 1127, 1138-40 (Md. 2008) (citing cases) ("optionor [has no] duty to inform the optionee of his failure to adequately exercise the contract"). Accordingly, a defective exercise is of no effect and gives rise to no obligation on the part of the optionor. *Alexander's Land Co. v. M & M & K Corporation*, 703 S.E.2d 207, 214-215 (S.C. 2010).

SPH argues that it exercised the option on four occasions and that the superior court erred in finding that none of these purported exercises was unequivocal and unconditional. SPH Br. at 32-39. In fact, on each occasion SPH relied on the May 20, 2016, letter as the exercise of the option and never withdrew the proposed conditions and termination right in the purchase and sale agreement.

Ms. Manchester's May 20, 2016, letter simultaneously expressed SPH's intent to exercise the option and proposed terms that conditioned SPH's performance on satisfactory due diligence and gave SPH the right to terminate the acquisition. It structured its "exercise" in this way even though it had the right under the purchase option to propose and negotiate a purchase and sale agreement three months or more before its option expired. *Ante* at 8. By presenting an "exercise" with a purchase and sale agreement that contained conditions and an escape clause, it failed to exercise the option unequivocally and unconditionally, rendering it legally ineffectual.

The superior court ruled that the letter and purchase and sale agreement package "contained certain conditions that directly contradicted the terms of the option" such as ninety days for due diligence and the right of termination. SPH Br. at 73. SPH contends that the purchase and sale agreement was merely a proposal and that Crotix understood that SPH might negotiate its terms. *Id.* at 10, 33-34. Even if this is true, it overlooks the fact that an option is not properly exercised where the optionee proposes new terms or offers to enter into negotiations. The optionor is entitled under the law to an unambiguous and unequivocal commitment from the optionee to acquire the property at the time of the exercise, and absent such a commitment, the optionor is not bound. *Ante* at 16-17.

SPH also cites the deposition testimony of the Adler brothers for the proposition that SPH "would have" purchased the property "without contingencies" if Crotix had insisted on it. SPH Br. at 33-34. What SPH fails to recognize, however, is that the law requires the optionee to make an unconditional exercise to bind the optionor to convey the property. The fact

that the optionee has an unexpressed intent to close without conditions[5] if the optionor objects does not transform a conditional exercise into an effectual one.

Eight days after Ms. Manchester sent the letter and purchase and sale agreement to Crotix, and two days after Crotix had rejected it as untimely (App. Vol. II at 116), Benjamin Adler sent a lengthy email to Crotix's counsel arguing that the May 20, 2016, exercise was timely. *Id.* at 118. In the midst of this argument, Mr. Adler included the clause ". . . and we are absolutely committed to whatever means necessary to exercise our option." *Id.* SPH contends that even if Ms. Manchester's communication was conditional or equivocal, Mr. Adler's was not.

According to SPH, Mr. Adler's statement that he and his brother were "absolutely committed" to exercising the option was an unequivocal statement "that SPH would close on the transaction without any contingencies." SPH Br. at 11. Had Mr. Adler's email actually said that SPH would close without contingencies, the outcome may well have been different, assuming for the sake of argument that the email was timely. As the superior court held, however, Mr. Adler's email did not purport to be an exercise. SPH Br. at 73-74. Rather, the email asked Crotix to reconsider its rejection of the May 20, 2016, exercise. App. Vol. II at 118 ("We're hopeful that we can get a very swift and different response in the near

[5] SPH's document production demonstrates that it could not have closed without contingencies on May 20, 2016, because Redstone had not undertaken due diligence or obtained financing. App. Vol. II at 228-229 (52:10-53:25). The superior court, however, did not consider this fact in granting summary judgment on Count I. SPH Br. at 78.

future."). Nothing in the Adler email, moreover, withdrew the proposed purchase and sale agreement or any of its conditions.[6] SPH Br. at 74.

Hence, the superior court correctly ruled that the Adler email was not "an exercise or attempt to exercise the option unconditionally, according to its terms, and independent of" the proposed purchase and sale agreement. *Id.* Indeed, the email does not so much as mention the proposed conditions or the termination right. It merely argues that the May 20 letter and purchase and sale agreement constituted a timely exercise and seeks to persuade Crotix to accept it as valid. The superior court properly held, then, that the Adler email "as a matter of law did not constitute an unconditional exercise of the option in accordance with its terms." *Id.*

Both Ms. Manchester's July 19, 2016, letter and SPH's complaint in this case demanded that Crotix convey the property to SPH. Both also explicitly assert that SPH exercised the option on May 20, 2016. The July 19, 2016, letter states that SPH's "option was exercised by my letter dated May 20, 2016" and demands specific performance of the alleged contract formed by the May 20 "exercise." App. Vol. I at 123. The complaint also states that SPH exercised the option on May 20, 2016. *Id.* at 9, ¶¶ 32 (SPH's "formal notice to exercise" the option "was timely provided on May 20, 2016") and 33 (Crotix became "obligated to sell" the property to SPH "upon Plaintiff's May 20, 2016 exercise"). Just as it had with respect to the Adler email, the superior court ruled that Ms. Manchester's July 19, 2016,

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[6] Again, Crotix later learned that SPH could not waive the conditions and termination provision in the purchase and sale agreement because Redstone had not yet performed due diligence or obtained commitments to finance the purchase. App. Vol. II at 156-157.

letter and the complaint sought to *enforce* the May 20, 2016, purported exercise. SPH Br. at 74 (July 19 letter and complaint "explicitly tethered to the May 20 letter" and neither the letter nor the complaint exercised the option unconditionally or "withdrew the proposed Purchase and Sale Agreement from consideration in its purported exercises of the option").

In short, the May 20, 2016, "exercise" was ineffectual because it "proposed new conditions, contrary to the option in the lease." *Id.* at 73. The Adler email, the July 19, 2016, letter, and the complaint merely argued that Crotix unlawfully refused to recognize the May 20, 2016, "exercise" as valid and sought to persuade or compel Crotix to convey the property.

The superior court correctly held that SPH never unequivocally and unconditionally exercised the option; consequently, its entry of summary judgment for Crotix on Count I should be affirmed.

II. The superior court properly dismissed Count II because it is premised on an invalid proposition of law and the authority on which SPH relies applies only to a claim SPH disavowed and is precluded from asserting.

The standard of review of a trial court's order granting a motion to dismiss is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery. *Tessier v. Rockefeller*, 162 N.H. 324, 329 (2011). The court must examine the complaint to determine whether "on its face, it asserts a cause of action," and while it must assume the pleadings to be true and draw reasonable inferences in the plaintiff's favor, it need not assume the truth of statements that are merely conclusions of law. *Id*. at 329-30 (citation omitted).

The implied covenant of good faith and fair dealing is actually a "series of doctrines" arising in New Hampshire common law, "each of

them speaking in terms of an obligation of good faith but serving markedly different functions." *J&M Lumber and Const. Co., Inc. v. Smyjunas*, 161 N.H. 714, 724 (2011) (citation omitted). This court has imposed the duty in just three types of cases:

1. Standards of conduct in contract formation;
2. Termination of at-will employment contracts; and
3. Limits on discretion in contractual performance.

Centronics, 132 N.H. at 139. In this case, there has been no contention that the second strand of the covenant (*i.e.*, termination of at-will employment) has any applicability.

A party's implied obligation under the first category of cases (contract formation) is "tantamount to the traditional duties of care to refrain from misrepresentation and to correct subsequently discovered error, insofar as any representation is intended to induce, and is material to, another party's decision to enter into a contract in justifiable reliance upon it." *Id*. The obligation requires a party making a representation to tell the truth when the purpose of the representation is to induce the party to enter into a contract. *Bursey v. Clement*, 118 N.H. 412, 414 (1978). This strand of the doctrine therefore comprises both the common law concept of fraud in the inducement (*cf. Nashua Trust Co. v. Weisman*, 122 N.H. 397, 400 (1982)) and a duty to correct material mistaken representations of fact.

In cases applying the third strand of the doctrine (discretionary performance), its function is to "prohibit behavior inconsistent with the parties' agreed-upon common purpose and justified expectations . . . as well as 'with common standards of decency, fairness and reasonableness.' "

Livingston, 158 N.H. at 624 (citation omitted). Cases comprising this third category of cases reflect a "common rule":

> [U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

Centronics, 132 N.H. at 143.

As a threshold matter, the superior court's dismissal of Count II was simply a consequence of how SPH pled that count. As alleged in the complaint, Crotix's bad faith lay in its refusal to convey the property once SPH exercised the option.[7] App. Vol. I at 10, ¶¶ 41-42. Because the court determined that SPH "did not properly exercise the option," as a matter of law it was SPH that deprived itself of its rights under the option, "not any bad faith conduct or unfair dealing of [Crotix] during the contract formation stage." SPH Br. at 90.

In its brief and its papers below SPH relies heavily on the superficial similarities between this case and *Livingston* to salvage Count II. *Livingston*, however, has no application here. To begin with, *Livingston* is a discretionary performance case, not a contract formation case. *Livingston,* 158 N.H. at 624 ("This case deals with the third category."). It was SPH's repeated reliance upon *Livingston* in its motion for partial summary

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[7] The court will note that such a claim is functionally indistinguishable from a garden-variety breach of contract claim. In New Hampshire's federal district court, at least, this would make a bad-faith claim subject to dismissal. *See Balsamo v. Univ. Sys. of N.H.*, 2011 WL 4566111, No. 10-CV-500-PB (D.N.H. 2011).

judgment and its related papers (App. Vol. I at 96, 102, 111, 156-160) and the superior court's citation to *Livingston* in its order denying summary judgment (SPH Br. at 51) that led Crotix to seek dismissal of Count II in August of 2018. App. Vol. I at 247-253. To make out a "third category" claim, the plaintiff must allege that the contract "invest[ed] [the defendant] with a degree of discretion in performance sufficient to deprive" the plaintiff of the benefit of the bargain. *Id.* at 251, *citing Centronics*, 132 N.H. at 143. Nowhere in its complaint did SPH allege that Crotix had discretion in performance, so Crotix moved for dismissal of Count II. App. Vol. I at 252-253.

In its objection to this motion to dismiss, SPH disavowed any claim under the discretionary performance variant of the good faith and fair dealing doctrine. *Id.* at 254 ("Defendants misconstrue the basis of Count II, which adequately alleges breach of the covenant . . . in the context of contract formation."). The superior court denied the motion to dismiss in express reliance upon this representation. SPH Br. at 54. When SPH later attempted to amend the complaint to add a discretionary performance claim (App. Vol. II at 5-21), the court denied it because the amendment "would introduce a new cause of action that the plaintiff has repeatedly disclaimed until now" and the changes would prejudice Crotix. SPH Br. at 64-65.

SPH now seeks to jettison this procedural history and effectively disregard the superior court's order estopping SPH from amending its complaint to include a discretionary performance claim. Indeed, the facts alleged in SPH's brief with respect to Count II mirror those set forth in the proposed amended complaint that was rejected by the superior court. *Compare* SPH Br. at 22-26 *and* App. Vol. II at 16-17.

Even if this court were to decide at some point to extend *Livingston* in some fashion to contract formation claims, this is not the case in which to do it. SPH's complaint alleged that Crotix had acted in bad faith in contract performance. Its cross-motion for summary judgment explicitly relied upon *Livingston,* and the superior court denied Crotix's motion for summary judgment based on SPH's *Livingston* argument. When Crotix sought dismissal of SPH's discretionary performance claim under *Livingston* in Count II, however, SPH disavowed that claim and the court denied dismissal. When SPH later tried to amend the complaint to add a discretionary performance claim, the court denied the motion to amend because of SPH's repeated disclaimers of such a cause of action. SPH has not appealed these rulings. To allow SPH to argue for extension of *Livingston* to contract formation claims under these circumstances would enable it to circumvent the consequences of its tactical decisions below as well as the superior court's denial of its motion to amend. SPH Br. at 64-65. The superior court's dismissal of Count II was not error, and Crotix respectfully requests that this court affirm that decision.

Even if this were a discretionary performance case, moreover, *Livingston* would not support the relief SPH seeks. In *Livingston*, at the closing on the defendants' acquisition from plaintiff of twenty-two acres of land, the plaintiff orally notified the defendants that he wanted to exercise his option on 1.5 acres of the acquired parcel and paid the one-dollar purchase price for the optioned land. *Livingston*, 158 N.H. at 621-622. The parties' option agreement, however, required the plaintiff to give defendants *written* notice of the exercise, which the plaintiff neglected to do. *Id.* For almost four years the defendants led the plaintiff to believe that

they would convey the 1.5-acre parcel to plaintiff upon subdivision approval. When, by defendants' reckoning, the option term had expired, they informed the plaintiff that they would not convey the 1.5 acres to him. *Id.* at 623. Defendants' counsel also failed to respond to plaintiff's inquiries in the hope that the plaintiff would not timely exercise. *Id. Livingston* held that there was a breach of the implied covenant where there was concededly a defect in the exercise and defendants "failed to correct any misunderstanding that the plaintiff had about the status of the option." *Id*. at 624-625.

Here, however, SPH has not conceded that there was a defect in its exercise. In fact, it has maintained throughout the litigation that its original exercise was proper and effective. The parties simply disagree as to whether the option was properly exercised. SPH did not have any "misunderstanding" of "the status of the option" or the quality of its alleged exercise as the plaintiff did in *Livingston* and there is no suggestion here that Crotix ever led SPH to believe it had properly exercised the option or that Crotix was planning on conveying the property. *Livingston* does not stand for the proposition that the implied covenant is a means to rescue sophisticated parties from commercial risks they knowingly encounter.[8]

[8] The New Jersey Supreme Court's decision in *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387 (N.J. 2005), is inapplicable here for the same reasons that *Livingston* does not apply to this case. *Brunswick Hills* was a case where the court provided judicial relief for an unwitting optionee who was unaware of the flaws in its purported exercise. As described in this section, these facts are readily distinguishable from those of the instant case.

SPH's communications were not met with silence like the plaintiff's inquiries in *Livingston*; Crotix, through counsel, responded to each communication concerning the exercise. An extensive paper trail, moreover, establishes that SPH assumed the risk of rejection of the exercise on grounds its lawyers had explained in multiple communications beforehand. SPH was not naively confused as to why its purported exercise was problematic; it was represented by an experienced law firm, and two attorneys at that firm cautioned SPH against moving forward with additional, nonconforming terms in the proposed purchase and sale agreement. *Ante* at 10-12. SPH and its investors intentionally built as much time as possible into the transaction schedule for due diligence, thus enabling the investor to secure necessary financing. The inclusion of nonconforming terms in the agreement was, in essence, a strategy of SPH's, not an innocent misunderstanding. *Id*.

Finally, SPH revisits a last-ditch argument it raised for the first time in its papers opposing Crotix's motion to dismiss Count II. App. Vol. II at 277. There, SPH argued that its good faith and fair dealing claim under Count II arose from the "formation" of the "contract" allegedly created by the May 20, 2016, letter and purchase and sale agreement. See SPH Br. at 17 (Crotix had the "obligation to act in good faith and deal fairly with SPH in the new contract" formed by the "exercise of the Option"). As the superior court held, however, Count II alleges bad faith in the formation of the *lease* in 2015, not during the abortive exercise of the option in 2016. *Id.* at 91. The court properly considered Count II as written in the complaint in deciding to dismiss that claim.

CONCLUSION

Crotix respectfully requests that the court affirm the superior court's orders granting summary judgment on Count I and dismissing Count II.

STATEMENT REGARDING ORAL ARGUMENT

The defendants respectfully request 15 minutes of oral argument to be presented by Bryan K. Gould, Esq.

Respectfully submitted,

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March 14, 2019

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that the within document is being served electronically upon counsel listed below through the court's electronic filing system:

James P. Harris, Esq. and Patrick J. Queenan, Esq.

March 14, 2019 /s/ Bryan K. Gould
Bryan K. Gould, Esq.

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify that the within document complies with the word limit for opening briefs and contains 6,417 words, exclusive of tables of contents and cases.

March 14, 2019 /s/ Bryan K. Gould
Bryan K. Gould, Esq.