THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0648

THE SKINNY PANCAKE-HANOVER, LLC

V.

CROTIX, et al.

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7
OF THE DECISION ON THE MERITS OF THE SUPERIOR COURT
FOR GRAFTON COUNTY

OPENING BRIEF FILED BY APPELLANT THE SKINNY PANCAKE-HANOVER, LLC

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Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

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(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, implied warranties may be excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

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QUESTIONS PRESENTED

1. Whether a landlord satisfies its obligation to act in good faith and deal fairly with an option holder when the landlord intentionally omits from its communications defects the landlord perceives in the option holder's exercise of an option to purchase. The Superior Court improperly excused Appellees from this obligation when it dismissed Count II of Appellant's Complaint.

This question was raised below in the pleadings that can be found in the Appendix Vol. I at 96, 156, 178, 227, 238, 254, 278 and Vol. II at 101, 184, 194, 198, 257, 274.

2. Whether all four of Appellant's exercises of the subject option to purchase were ineffective. The Superior Court improperly found all four to be ineffective as a matter of law when it granted Appellee's Motion for Partial Summary Judgment as to Count I of Appellant's Complaint (for breach of contract) and then relied upon those findings to dismiss Count II of Appellant's Complaint (for breach of the implied covenant of good faith and fair dealing). The Superior Court compounded this error in focusing on an absence of factual allegations in Appellant's Complaint when it previously denied Appellant's motion to amend the Complaint to add the very facts the Court found to be lacking.

This question was raised below in the pleadings that can be found in the Appendix at Vol I at 96, 156, 178, 238, 254, 278, and Vol. II at 5, 10, 101, 184, 194, 198, 257, 274.

STATEMENT OF THE CASE AND FACTS

I.
The Parties' Lease and the Option to Purchase

On October 15, 2015, the parties entered into a lease ("Lease") for Appellant, the Skinny Pancake-Hanover, LLC ("SPH"), to lease Unit 10 within a building owned by Appellee Crotix ("Crotix")[1] located at 3 Lebanon Street, Hanover, New Hampshire ("Premises") for the purpose of operating a restaurant. Appx. Vol. I at 47.[2] The Lease included an option granting SPH the opportunity to purchase Unit 10 as well as the rest of the condominium units Crotix owns in the building ("Units"). The option in the Lease provides as follows:

> 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.

Appx. Vol. I at 52 ("Option"). There is no "time is of the essence clause" in the Lease.

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[1] Appellees consist of Crotix, formerly a New Hampshire general partnership, and Jim and Susan Rubens, Crotix's partners. Appellees will be referred to collectively as "Crotix".

[2] Citations to the record are as follows:

"Appx. Vol. I" refers to Appendix Volume I

"Appx. Vol. II" refers to Appendix Volume II

The Lease Commencement Date is defined in Art. I(g) to mean "the later of the date the Premises are fully demised and available for possession by Tenant or October 1, 2015." *Id.* at 49. Art. I(g) goes on to provide that "Fully demised and available for possession in this paragraph means the date one calendar day after Landlord has completed Premises reconfiguration under Article I (h) below." *Id.* Article I(h), in turn, lists reconfigurations to the leased space for which Crotix was responsible. *Id.* All of Crotix's work had to be "compliant with Town of Hanover building code." *Id.* The parties dispute the timing of when Crotix completed its reconfiguration obligation under the Lease, and the trial court did not make any factual findings as to the completion of that work or the commencement date of the Lease.

Some of the fit-up work was also SPH's responsibility. After signing the Lease, SPH promptly commenced the substantial work required to transform the space into a working restaurant, spending approximately $1,000,000 making repairs and improvements to the building, including upgrading utility services, and readying to open.

II.
First Discussions Between the Parties Regarding Exercising the Option

In March 2016, SPH's commercial real estate broker, Chip Brown, communicated to Crotix that SPH intended to exercise the Option. A meeting occurred between Brown and Crotix on or about March 15, 2016, during which Crotix conveyed its belief that the Lease commenced on October 1, 2015 and that the Option would expire in a few weeks. Locke Depo. Tr. at 74, Appx. Vol. II at 214. This view was based on Crotix's illogical belief that the Lease commenced two weeks ***before*** the parties

signed it and before Crotix finished its required construction work. In discovery, Crotix contended that during the March 15th meeting with Brown, it also made a passing reference to a desire for an "as-is" closing, although it admits it never defined or explained that term and admits it was not a focus of the meeting. Locke Depo. Tr. at 74, Appx. Vol. II at 214. Crotix subsequently forwarded due diligence information and the month of March 2016 closed without any expression by Crotix that the Option was about to expire. Nor did Crotix communicate to SPH a desire for a closing without contingencies. This was the first of many instances in which Crotix had the chance to express its position and correct any misunderstanding between the parties but chose to remain silent.

III.
Appellant's First Exercise of the Option (5/20/16)

On May 20, 2016, SPH's attorney, Susan Manchester, sent a letter to Crotix's attorney, Barry Schuster (copied directly to Crotix), in which Attorney Manchester gave "formal notice of Tenant's intent to exercise its purchase option under Section I(v) of the Lease." May 20, 2016, Letter, Appx. Vol. I at 81. Given that the Option language contemplates executing a purchase and sale agreement, the May 20 letter "[e]nclosed a ***proposed*** Purchase and Sale Agreement, as called for in Section I(v)." *Id.* (emphasis added) (hereinafter, "P&S"). The May 20th letter also reflected that the Skinny Pancake "would like to close on or before July 1," well within 90 days. *Id.*

Crotix, through its attorney, wrote back on May 26, 2016, refusing to recognize the exercise of the Option. May 26, 2016, Letter, Appx. Vol. I at 120. The ***only*** issue Crotix communicated was that the exercise was

untimely. *Id.* Even though it had a draft P&S from SPH in hand and even though it already harbored objections to it (Jim Rubens Aff. ¶ 8, Appx. Vol. I at 44), Crotix chose to keep to itself its opposition to any of its terms. May 26, 2016 Letter, Appx. Vol. I at 120.

IV.
Appellant's Second Exercise of the Option (5/28/16)

In response to Crotix's refusal to honor SPH's exercise of the Option, the parties and their counsel engaged in email correspondence concerning their disagreement over the Lease Commencement Date—the only reason Crotix articulated for not honoring the Option.

On May 28, 2016, Jonny Adler, one of SPH's two co-founders, emailed Attorney Schuster stating unequivocally that SPH would close on the transaction without any contingencies:

> "I'm hoping we can avoid a lengthy argument over this as the evidence is so overwhelmingly in favor of our position and ***we are absolutely committed to whatever means necessary to exercise our option***."

Appx. Vol. II at 118 (emphasis supplied).

Crotix chose not to respond to this exercise of the Option in any substantive way, foregoing another opportunity to tell SPH of any objections to the exercise of the Option. When asked why they did not respond to the three emails Jonny Adler sent to Attorney Schuster on May 28, 2016, Appellees claim they were unaware those communications were sent to their attorney until after this litigation commenced. Rubens Depo. Tr. at 276, Appx. Vol. II at 234.

V.
Telephonic Communications Between Counsel

SPH's counsel, Susan Manchester, spoke by telephone with Crotix's counsel, Attorney Schuster, between May 26 and July 29, 2016. Susan Manchester Aff. at ¶ 4, Appx. Vol. I at 164. One purpose of the call was to "gain a better understanding of Crotix's reasons for declining to accept [SPH's] exercise of the Option." *Id.* Attorney Manchester stated by affidavit that when she asked if Crotix harbored any objections other than timeliness, Crotix's counsel declined to identify any:

> During at least one phone conversation with Attorney Schuster, I asked Attorney Schuster if Crotix was basing its rejection of the Plaintiff's exercise of the Option on anything other than timeliness. Attorney Schuster did not indicate that Crotix's rejection of Plaintiff's exercise of the Option was based on anything other than timeliness. At no point prior to the initiation of the above-captioned matter did Attorney Schuster indicate to me that the terms of the Purchase and Sale Agreement attached to my letter of May 20, 2016 were problematic.

Id. at ¶ 5.

Attorney Schuster filed his own affidavit in the Superior Court, but he did not deny the conversation occurred as Attorney Manchester indicated. All he could muster was "With all due respect to Attorney Manchester, I have no recollection or any record that any such specific inquiry was made whether the [Appellees'] rejection of the [Appellant's] contract and counterproposal was 'based on anything other than timeliness.'" Schuster Aff. at ¶ 4, Appx. Vol. I at 170. Attorney Schuster

went on to provide his speculation that if he had been asked, his "response would have required reference to the nature of the counter-offer as well as the timeliness of the proposal." *Id.* at ¶ 5.

VI.
Appellant's Third Exercise of the Option (7/19/16)

Not having received a substantive response from Crotix, SPH's counsel wrote a four-page letter on July 19, 2016, to address timeliness, the only alleged "defect" Crotix communicated. July 19, 2016 Letter, Appx. Vol. I at 123. Again, SPH expressed its willingness to close on the sale without any contingencies: "I write to demand that your client, Crotix, specifically perform its obligations under Article I (v) of the Lease Agreement (the "Lease") to sell units 10, 33, and 39 of the Hanover Park Condominium (the "Property") to my client for the price of $5,553,570." *Id.* Noticeably absent is any demand that Crotix accept any of the terms of the P&S that was proposed on May 20th.

Crotix responded one week later with a four sentence response. July 29, 2016 Letter, Appx. Vol. I at 134. It again refused the exercise, focusing only on timeliness and saying vaguely "[t]he terms of the option to purchase are clearly set forth in the Lease, and, in order for your client to benefit from the terms of that option, it was required to perform according to those terms." *Id.* Once again, Crotix did not communicate any objections to the previously proposed P&S or any other problem Crotix had with the exercise of the Option.

VII.
Appellant's Fourth Exercise of the Option (9/28/16)

SPH filed suit in Superior Court on September 28, 2016, seeking an order of specific performance—an order compelling Crotix to transfer ownership of the Units in exchange for the payment of $5,553,570. *See* Complaint ¶¶ 37, 44, 68 and Prayer for Relief "B", Appx. Vol. I at 5. Importantly, SPH ***did not*** seek an order compelling transfer of the Units in accordance with the proposed P&S first transmitted on May 20, 2016; it simply sought the exchange of deeds for money without any further contingencies. *Id.*

It was not until Crotix answered the Complaint that it explained that it rejected the exercises because it perceived the May 20th exercise to be conditional and equivocal due to the terms of the proposed P&S. Answer ¶23, Appx. Vol. I at 15.

VIII.
The Superior Court's Rulings on Motions to Amend, Dismiss, and for Summary Judgment

Shortly after the Complaint was filed, the parties filed cross-motions for summary judgment. The Superior Court denied these cross-motions finding there was a genuine dispute as to when the Lease commenced and therefore when the Option expired. June 16, 2017, Order, *infra* at 44, 51. After that, Crotix resorted to serial partial dispositive motions filed over the course of sixteen months.[3]

In connection with Crotix's Second Motion for Partial Dismissal, SPH moved to amend its Complaint to add more factual allegations

[3] The parties' pleadings are included in the Appendix and the Court's orders are attached *infra*.

regarding Crotix's bad faith conduct. Appx. Vol. II at 5. The proposed amended complaint alleged that Crotix failed to disclose it objected to the proposed P&S agreement and acted in bad faith in 2016 in connection with the exercises of the Option. Appx. Vol. II at 10. The Superior Court denied the motion to amend finding that the amendment included a new cause of action that would prejudice Crotix. April 25, 2018, Order, *infra* at 64. On the same day, the Superior Court granted Crotix's motion to extend the close of discovery several months, which would have mitigated any perceived prejudice Crotix would have suffered by the amendment. April 25, 2018, Order, *infra* at 66.

Just over a month later, Crotix filed yet another motion, this time a Motion for Partial Summary Judgement in which it sought to dispose of Count I (breach of contract). Appx. Vol. II at 32. Crotix made no arguments as to the timeliness of any of the exercises but focused solely on the effectiveness of them. *Id.* Crotix argued that the May 20, 2016, exercise was conditional, and therefore ineffective. *Id.* It argued that the subsequent exercises "referred to" the May 20th exercise and were therefore tainted by the conditions of the proposed P&S. *Id.*

In granting Crotix's motion, the Superior Court concluded that all four exercises were ineffective because they were all dependent upon the P&S proposed with the first exercise. July 27, 2018, Order, *infra* at 68, 73–74. Even though Crotix never communicated any objection to the P&S, the Court was critical of SPH for not "withdrawing" it. *Id.* at 74. The Superior Court also refused to apply *Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619 (2009), on the basis that the motion before it was limited to the count alleging breach of contract. *Id.*

Crotix then filed a Motion to Dismiss Count II of the Complaint, which alleged that Crotix breached the implied covenant of good faith and fair dealing. Appx. Vol. II at 269. Crotix argued that because none of SPH's exercises were effective, it could not possibly have breached the implied covenant. *Id*. The Superior Court granted Crotix's motion, finding all four exercises to be ineffective, and dismissed the last count of the Complaint. *See* October 22, 2018, Order, *infra* at 83.

SPH timely filed this appeal.

SUMMARY OF THE ARGUMENT

When SPH exercised the Option on May 20, 2016, the only reason Crotix articulated for refusing to honor it was the timeliness of the exercise, even though it internally, subjectively harbored objections to the proposed P&S. When SPH explicitly communicated it was "absolutely committed to whatever means are necessary to exercise our option," Crotix did not respond at all. When SPH's counsel asked if Crotix objected to the exercises on any basis beyond timeliness, Crotix's counsel did not identify any other objection. In response to SPH's July 19, 2016, letter demanding specific performance, Crotix chose not to express any objection to the P&S and relied on vague and cryptic statements such as "the terms of the option to purchase are clearly set forth in the lease, and, in order for [SPH] to benefit from that option, it was required to perform according to those terms." It was not until after SPH filed suit demanding specific performance—another exercise of the Option—that Crotix revealed its opposition to the proposed P&S.

Whether SPH's exercises were timely is irrelevant for this appeal, because the Superior Court did not construe the deadlines in the Option language and made no determination as to whether any of the four exercises were timely. The Superior Court erred, however, by excusing Crotix from: (1) the independent obligation to express its position as to the proposed P&S (or any perceived deficiencies); and (2) its obligation to act in good faith and deal fairly with SPH in the new contract that was formed upon the exercise of the Option. The Superior Court improperly flipped the causation analysis on its head and faulted SPH for not addressing an issue Crotix failed to articulate. The Superior Court's inappropriate use of

causation led it to conclude that SPH's Complaint lacked sufficient detail as to Crotix's wrongdoing in connection with the exercises even though SPH tried to amend its Complaint months earlier to add such allegations and the Superior Court refused to allow the amendment. While the record shows SPH complied with the terms of the Option, even if this Court concludes otherwise, Crotix failed to fulfill its obligations under the implied covenant of good faith and fair dealing and the Superior Court should be reversed.

This Court has already held in *Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619 (2009), that a party to an option has an affirmative legal duty to correct misunderstandings in connection with the exercise of an option. Even though that plaintiff failed to follow that option precisely, this Court affirmed an award of specific performance. Here, the Superior Court refused to apply the holding of *Livingston*. This case presents an opportunity for this Court to explicitly apply the principles established in *Livingston* where a landlord expresses some, but not all, of its objections to the manner in which an option is exercised. The proper result is to hold that the landlord has waived the unexpressed objections.

The Superior Court also overlooked the case of *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387 (N.J. 2005), in which the New Jersey Supreme Court found that the option holder failed to properly exercise the option but still awarded specific performance because the landlord obfuscated and stonewalled, just as did Crotix in this case. It is hardly a controversial proposition that parties to an option have a duty to communicate with each other to allow the option holder to address (or at least deliberately choose not to address) whatever defects in the exercise the seller perceives.

Regardless as to whether Crotix satisfied its obligations under the implied covenant, the Superior Court erred in finding that SPH's exercises were contrary to the Option. The Superior Court improperly concluded that the proposed P&S rendered the first exercise ineffective. Then, the Superior Court erred in finding the subsequent exercises were somehow tainted by the proposed P&S. In so doing, the Superior Court overlooked the express language of those exercises. Specifically, that SPH indicated unequivocally that it was "absolutely committed" to exercising (May 28, 2016, email), and that SPH demanded specific performance without any requirement that Crotix comply with the P&S (July 19, 2016, letter and September 26, 2016, Complaint). At the very least, the Superior Court improperly applied the summary judgment and motion to dismiss standards when it made findings of fact related to these subsequent exercises that were not in the light most favorable to SPH, the non-moving party.

This Court should reverse the Superior Court and find that Crotix failed to honor its obligations under *Livingston*, reverse the Superior Court's invalidation of all four of SPH's exercises of the Option, and remand for trial as to whether any of them was timely.

ARGUMENT

I.
Standard of Review

In reviewing a trial court's granting a motion to dismiss, this Court examines whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. *Garod v. Steiner Law Office, PLLC*, 170 N.H. 1, 5 (2017). This Court assumes the truth of all well-pleaded facts alleged by the plaintiff, construing all inferences in the light most favorable to it. *Id.*

In reviewing a trial court's grant of summary judgment, this Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. This Court reviews the trial court's application of the law to the facts *de novo*. *Bennett v. ITT Hartford Grp.*, 150 N.H. 753, 756 (2004) (citing *In re Estate of Raduazo*, 148 N.H. 687, 688 (2002)); RSA 491:8-a, III.

II.
The Law Regarding Options to Purchase

The Option in the subject Lease 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); *see also Trefethen v. Amazeen*, 96 N.H. 160, 161 (1950). The seller's agreement is irrevocable for the period of time stated in the option. Once the option holder elects to do so, a new contract is created separate from the lease itself. *190 Elm St. Realty, LLC v. Beaudoin*, 151 N.H. 205, 206 (2004). The Superior Court found that to trigger the unilateral contract and the seller's duty to sell, the option holder must exercise the option

unequivocally, unconditionally, and in accord with the terms of the option. July 27, 2018. Order, *infra* at 72–73.

That said, if the option holder attempts to exercise the option, but does so in a fashion that is either equivocal, conditional or contrary to the terms of the option, the option does not evaporate; the option remains until the option holder properly exercises it or it expires on its own terms. In other words, the option holder gets multiple chances to effectively exercise the option until it expires. *See* RESTATEMENT (SECOND) OF CONTRACTS § 37 (1981) ("The power of acceptance under an option contract is ***not terminated by rejection or counter-offer,*** by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty." (emphasis added)); *see also Humble Oil & Refining Co. v. Westside Inv. Corp.*, 428 S.W.2d 92 (Tex. 1968) (option holder exercised but added a condition that utilities be extended to the land, which did not repudiate or terminate the option); *Sunray Oil Co. v. Lewis*, 434 S.W.2d 777, 781 (Kan. Ct. App. 1968) ("If the original offer is an irrevocable offer, creating in the offeree a 'binding option' the rule that a counter offer terminates the power of acceptance does not apply."); Michael J. Cozzillio, *The Option Contract: Irrevocable not Irrejectable*, 39 Cath. U. L. Rev. 491, 515 (1990); *see also id.* at 509-519 & nn. 79-133 (discussing and collecting cases from New Jersey, Connecticut, Missouri, New York, North Carolina, Texas, Minnesota); *see also* 3-11 Corbin on Contracts § 11.8 n.20 (2016 rev.) (collecting additional cases from Arizona, Arkansas, Nevada, and Virginia)*; T-M Oil Co. v. Pasquale*, 388 A.2d 82, 87 & n.11 (Me. 1978); *Shelton v. Sloan*, 977 P.2d 1012, 1017 (N.M. Ct. App. 1999).

III.
Appellees' Legal Obligation to Communicate Real-Time Any Perceived Defects in the Exercises

Crotix acted in bad faith when it failed to articulate its objections to SPH's exercises of the Option. As early as the first exercise, Crotix (incorrectly) harbored objections to the conditions of the proposed P&S. Jim Rubens Aff. ¶ 8, Appx. Vol. I at 44. Crotix therefore recognized, at the least, that SPH "misunderstood" what the Option required. Despite having this objection and recognizing this "misunderstanding," Crotix decided ***not*** to raise them until after SPH's fourth exercise of the Option, the filing of SPH's Complaint. Crotix even declined to articulate them when SPH's counsel asked Crotix's counsel directly on the telephone whether Crotix held any objections other than timeliness. Susan Manchester Aff. at ¶ 4, Appx. Vol. I at 164.

For Crotix to act in good faith, it could have easily voiced its opposition to the proposed P&S or corrected the "misunderstanding." It certainly could have been accomplished in one sentence, but Crotix withheld its view in the hopes the clock would run out on the Option and thereby deprive SPH of the opportunity to "cure" the perceived defects, which, as the deposition testimony reveals, SPH was willing to do.[4]

This Court has already addressed a similar circumstance. In *Livingston*, this Court determined that a party to an option has an affirmative obligation to express its objections to attempted exercises and to

[4] See the deposition testimony and other citations found at pg. 33, *infra*, establishing that SPH would have purchased the Units without any contingencies.

address misunderstandings.[5] In *Livingston*, the plaintiff had an option to retain a 1.5 acre parcel among the 22 acres that he conveyed to the defendant. 158 N.H. at 621, 624. The exercise of the option was technically deficient because it was not accomplished in writing and had taken place too early (at the closing of the original transaction). The plaintiff believed he had exercised the option. *Id.* at 622. In *Livingston*, as in this case, one party was aware of "at least a potential misunderstanding about the status of the option" and made the deliberate decision not to respond to the other. 158 N.H. at 625. That defendant did not point out the defects but "stonewalled" the plaintiff and kept silent until the option period expired. *Id.* at 625. The *Livingston* Court concluded that the defendant had breached its obligations of good faith and fair dealing, relying on Section 205 of the RESTATEMENT (2D) OF CONTRACTS and affirmed the trial court's order of specific performance, despite the technical infirmity plaguing the exercise.

The lesson of *Livingston* is that a party cannot remain silent about defects in the exercise that the option holder could easily cure, and then later use those defects to defeat the exercise. That is exactly what Appellees did here. Crotix only objected to the timeliness of the exercise, not to the terms of the P&S. If Crotix had pointed out to SPH that it believed the P&S invalidated the exercise of the option, SPH could have easily cured the supposed defect by, for example, sending only a notice of exercise without the P&S, or sending at P&S without the objectionable

[5] As explained, *infra*, SPH in fact complied with the Option's terms. If this Court concludes that SPH fell short of the technical requirements of the Option, Crotix's silence despite its obligations under the implied covenant requires reversal.

terms. Because Crotix never brought up this issue, it was effectively waived and Crotix should be estopped from litigating that issue. Otherwise, *Livingston* has no meaning.

Livingston is not an outlier. The court in *Brunswick Hills,* 864 A.2d 387, held that a party's evasive conduct throughout the attempted exercise of an option violated the implied covenant of good faith and fair dealing and then awarded specific performance. *Id.* at 399. In that case, the tenant entered into a lease and installed one million dollars in capital improvements. The lease afforded the tenant the ability to purchase the property or extend the lease to ninety-nine years, so long as notice was provided and a specific payment was made by the date stated in the lease. The tenant communicated its intention to extend to the ninety-nine year lease nineteen months before the deadline, but it did not include the required payment when it did so. For the next two years, the tenant attempted to work with the landlord and its counsel toward finalizing the lease, but with each overture, the landlord and its counsel delayed and stalled. Not once during that time did the landlord communicate that the tenant failed to provide the requisite payment. After the option deadline passed, the landlord, for the first time, communicated that the exercise was "null and void" because the payment was not made.

The trial court and the appellate court found that the tenant failed to properly exercise the option. The New Jersey Supreme Court agreed—it affirmed the finding that the tenant's exercise was ineffective because it failed to provide the payment required by the lease. The New Jersey Supreme Court went on, however, to address separately whether the landlord violated its independent duty to act in good faith and deal fairly

with the tenant. On this point, the New Jersey Supreme Court reversed, finding that the landlord had violated this independent covenant and it awarded specific performance to the tenant. *Id.* at 398. The Supreme Court was persuaded by the fact that the landlord never requested the required payment finding, "Plaintiff's repeated letters and telephone calls to defendant concerning the exercise of the option and the closing of the ninety-nine-year lease obliged defendant to respond, and to respond truthfully." *Id.* at 399.

The rule of *Brunswick Hills* applies with equal force here and it is based on legal principles that exist under New Hampshire law. Even if the Superior Court determined that SPH failed to properly exercise the Option, it still should have examined whether Crotix satisfied its independent obligation to act in good faith and deal fairly with SPH. The Superior Court skipped this analysis when it concluded that there was no causal link between Crotix's actions and the harm suffered by SPH. October 22, 2018, Order, *infra* at 89. The Superior Court excused Crotix from its obligation to state perceived defects with the exercises and thereby deprived SPH of the benefits of the contract. The Superior Court's orders contradict the logic of *Brunswick Hills* and *Livingston* and encourage deceptive dealings between parties to options.

Crotix attempts to evade the logic inherent in *Livingston*, but it does not adequately explain why the rule affirmed by this Court is inapplicable. While it is true that there are three "series of doctrines" comprising the implied covenant and good faith and fair dealing, each doctrine requires acting consistently with the other party's expectations. *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133 (1989). This Court did not expressly limit

Livingston to cases involving the exercise of discretion in the performance of a contract and Crotix does not explain why the rule should not apply to matters involving contract formation or at-will employment agreements. If the covenant of good faith and fair dealing means anything, this Court should find that Crotix waived its right to argue that the exercises were ineffective, and the case should be remanded for a trial solely as to the timeliness of SPH's exercises.

IV.
Construing This Option

Regardless as to whether Crotix had an affirmative obligation to express its objections to the exercises, the Superior Court erred in finding, as a matter of law, that each of the four exercises was inconsistent with the Lease's Option. The Option expressly contemplated a P&S, and the proposed P&S was in accord with the timeline of the Option and did not contradict the "as is condition" phrase within the Option.

A. The Proposed P&S was Consistent with the Terms of the Option.

The parties agree that the Option allowed for the parties to execute a P&S within 180 days from the commencement of the Lease and that the parties could have, at least, an additional ninety days thereafter to close on the transaction. Rubens Depo. Tr. at 216, Appx. Vol. II at 268.[6] Crotix therefore anticipated that when a purchase and sale agreement was signed,

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[6] Jim Rubens testified that he objected (silently) to the "opt out clause" in the proposed purchase and sale agreement. Rubens Depo. Tr. at 269, Appx. Vol. II at 233. However, under the Option term, SPH would have had an exclusive option for another 90 days from the date of the closing regardless as to the terms included in the P&S. So, if SPH ultimately "opted out," it would have no effect on, or prejudice to, the sellers. This is further evidence of Crotix's unreasonable interpretation of the Option language. The Superior Court failed to weigh properly this evidence in deciding whether SPH properly exercised the Option under its reasonable interpretation of the Option.

there would be an additional period thereafter for the transaction to close. Despite Crotix's own testimony, the Superior Court found the P&S to be inconsistent with and contrary to the Lease and improperly granted Crotix's dispositive motions.

Miranda & Assoc. v. George Abro & Johnny Enters., 2009 Mich. App. LEXIS 2719 (Mich. Ct. App. Dec. 29, 2009), is instructive. There, the option provided that the option holder could purchase leased land for $400,000, with a $120,000 down payment, and "the balance shall be evidenced by a Land Contract payable in one hundred twenty (120) monthly payments with nine (9%) percent interest." 2009 Mich. App. LEXIS 2719, at *3. Like SPH in this case, the option holder sent a letter indicating its intent to exercise the option, informed the owner it would tender the $120,000 down payment, and included a proposed land contract. Like Crotix, the Michigan defendants argued that plaintiffs presented defendants a "Real Estate Purchase Agreement and proposed Land Contract, both of which contain terms and conditions not contained within the Offer/Option to Purchase." The Michigan court rejected the defendant's arguments and ordered specific performance, concluding that, because the parties had mentioned a Land Contract in the option, including a Land Contract with the exercise letter did not vitiate the option.

The exact same result should obtain here, especially since Art. I(v) of this Lease expressly refers to a purchase and sale agreement.

B. An "As-Is" Transaction.

The Option also states that SPH would purchase the Units in "as-is condition," a term not defined in the Lease itself. Discovery confirmed that Crotix never communicated its understanding of "as-is condition" to SPH.

Locke Depo. Tr. at 73-74, Appx. Vol. II at 214 (Susan Locke assumed Mr. Brown's understanding of an "as-is" closing was the same as hers, but she did not articulate her understanding to him). Crotix believed the term meant that SPH could conduct no due diligence after the P&S was signed and under no circumstances could SPH back out of the deal once committed.

Crotix's construction of "as-is" differed from the term's common meaning in commercial real estate as well as from SPH's subjective understanding. The summary judgment record provided to the Superior Court included an affidavit from Chip Brown, an non-retained expert, commercial real estate broker with approximately thirty years' experience, and SPH's broker involved in the drafting and negotiation of the Lease and the Option. Brown stated in an affidavit that this Option is "a market-based option," and it is "contemplated in all market-based transactions that the buyer will have a commercially reasonable amount of time to conduct due diligence, to include sufficient time to evaluate title, environmental, engineering, financing, and other items that would allow an informed investment decision." Brown Aff., Appx. Vol. II at 223. Brown further stated that the Option at issue allows for such a commercially reasonable amount of time—90 days, which was calculated from the date the P&S is executed to the date of the closing. *See id.*

Further, Brown explained:

> This market-based Option includes the phrase "as is condition." Based on my experience as a commercial real estate broker and having worked on many commercial real estate transactions involving "as-is condition" sales,

> the meaning and interpretation of the terms "as is" relates to the physical condition of the property. It implies the seller is not expected to make improvements to the property prior to sale (other than any items that might be specified in prior agreements). It is no way implicates the buyer in waiving its right to complete its due diligence and make an informed investment decision.
>
> It is unreasonable for a seller in an "as is" transaction to expect a closing without allowing any form of due diligence. Such an approach is contrary to commercially reasonable market-based transactions.

Id., Appx. Vol. II at 224. Brown further indicated that the proposed P&S submitted by SPH in this case contained "commercially reasonable terms and, based on [his] experience, is a market-based purchase and sale agreement." *Id.*

SPH also presented the Superior Court with deposition testimony from Erik Hoekstra, a consultant and business partner of SPH. He is a partner at the commercial real estate firm Redstone, one of the most active commercial real estate development firms in Vermont. According to Hoekstra, "it is not customary at all," and in fact "extraordinary," for a buyer to acquire commercial real estate without conducting some measure of due diligence. Hoekstra Depo. Tr. at 50, Appx. Vol. II at 228.

Hoekstra consulted with SPH in exercising the Option and drafting the proposed P&S attached to the May 20, 2016 letter. Hoekstra testified that in his experience the Option allowed for "fairly reasonable timelines" to complete due diligence. *See id.* at 53, Appx. Vol. II at 229. Further, he

testified that the proposed P&S contained commercially reasonable terms. *Id.* Hoekstra also indicated that, in his experience, he has been involved in many sales that refer to as "as is," and that in each of those transactions as buyer he had the opportunity to conduct due diligence and "the ability to walk away." *Id.* at 68, Appx. Vol. II at 230. Further, Hoeksta testified that his observations lead him to conclude that SPH was "dealing with uncooperative sellers that didn't really want to honor the option that they had agreed to." *Id.* at 55, Appx. Vol. II at 229.

Combining the contemplated use of a P&S with the proper construction of the term "as-is" should have led to the conclusion that the P&S's allowance for due diligence and the right to cancel the transaction was ***consistent*** with the Option's terms. The Option's stagger between the deadline for a P&S (180 days) and the length of the Option (nine months) must have a meaning and purpose. The term "as-is" must be construed in light of the commercial marketplace, which means SPH could perform due diligence after the signing of the P&S but discover something about the Units it did not like and decide not to purchase them, even if it could not force the seller to ameliorate the condition discovered during due diligence. Even under the circumstance in which SPH decided not to consummate the purchase, the Units are temporarily encumbered for a total of nine months, the period explicitly carved out by the Option, so there is no undue prejudice to Crotix.

C. The Superior Court's Construction.

Despite Crotix's deposition testimony as well as the perspective of commercial real estate practitioners, the Superior Court gave the Option another meaning. It held that "as-is" is an unambiguous term and therefore

refused to consider the evidence of how practitioners use the term. August 20, 2018, Order, *infra* at 79-81 The Superior Court then found "as-is" had a "common meaning" that would have prohibited SPH from any due diligence and prohibited SPH from opting out of the transaction if it uncovered something untoward. *Id.* To find this "common meaning," the Superior Court improperly relied upon the Uniform Commercial Code and case law regarding chattel. *Id.*

The concepts applicable to chattel are inappropriate in the context of a real estate transaction. Nonetheless, as the cornerstone of its interpretation, the Superior Court cited an obsolescent, inapplicable interpretation of "as is" from a 1944 case involving the sale of a used shovel for $75. *Johnson v. Waisman Bros.*, 93 N.H. 133, 136 (1944)) ("The Court rules that the term 'as is' is unambiguous and has a commonly understood meaning."). The *Johnson* Court's nearly 75-year-old decision involving the terms of the sale of a used shovel is certainly neither controlling nor applicable to the more complicated understanding of "as is condition" when read in conjunction with all the provisions in the Option language and in the context of a modern, sophisticated commercial real estate transaction with a strike price of over $5.5 million.

In the same vein, in concluding the "as is condition" language was unambiguous, the Superior Court misapplied inapplicable statutory provisions and case law surrounding the sale of goods. *See* August 20, 2018, Order, *infra* at 80 (citing RSA 382-A:2-316(3)(a) and Comment 7; *Payne v. Berry's Auto, Inc.*, 301 P.3d 804, 809 (Mont. 2013) (sale of used vehicle); *Raze Int'l, Inc. v. Se. Equip. Co.*, 69 N.E.3d 1274 (Ohio App. Ct. 2016) (sale of excavator); *New Tex. Auto Auction Servs. v. Hernandez*, 249

S.W.3d 400, 407 (Tex. 2008) (sale of vehicle) ; *Silver v. Porsche of the Main Line*, 2015 WL 7424848 (Pa. Super. Ct. Mar. 10, 2015) (sale of vehicle)). These cases refer to "as is" for purposes of any warranties or guarantees related to the physical or mechanical condition of the chattel or goods. The cases certainly do not provide any assistance in analyzing the option language in this case, and do not support, in any meaningful way, the Court's erroneous conclusion that "[t]here can be no reasonable disagreement as to the meaning of the contract language." In sum, "[w]hatever the phrase 'as is' has come to mean in contracts dealing with the sale of personalty, it has no similarly accepted meaning when the subject of the contract is realty." *Partrich v. Muscat*, 270 N.W.2d 506, 510 (Mich. Ct. App. 1978).

The Superior Court crafted a construction of the Option that was contrary to: (1) its express terms; (2) practitioners' use of the terms; (3) the law applicable to real estate transactions; and (4) even Crotix's understanding of the provision. The Superior Court made all these findings contrary to SPH, even though the standards applicable to the motions to dismiss and for summary judgment required the Court to take inferences in the light most favorable to SPH.

V.
Appellant's Four Valid Exercises of the Option Were Consistent with the Option

The Superior Court improperly found, as a matter of law, that each of SPH's four exercises was ineffective. Instead, each of the four exercises was consistent with the Option language and effectual. The Superior Court's findings should be reversed.

A. Appellant's May 20, 2016, Letter Exercising the Option.

The Superior Court found SPH's May 20, 2016 exercise to be conditional, equivocal and therefore ineffective. This finding contradicted Crotix's own testimony, as its principals understood that the May 20, 2016, exercise of the Option was ***not*** dependent upon the proposed P&S. Susan Locke testified that SPH's use of the word "proposed" in connection with the P&S indicated SPH might be willing to negotiate its terms and was not a rigid demand. Locke Depo. Tr. at 96, Appx. Vol. II at 215. She also testified that Crotix was not concerned it or the building would fail any of the contingencies stated in the proposed P&S, so she could not reasonably have been apprehensive of the deal falling apart. *Id.* at 97-99, Appx. Vol. II at 216. The Superior Court therefore elevated the proposed P&S to a status it did not hold at the time.

SPH also presented the Superior Court with evidence that although SPH believed the proposed P&S contained commercially reasonable terms and complied with the terms of the Option, it prudently understood that certain terms may have to be negotiated—as is expected in most commercial real estate transactions. More importantly, the record was clear that if Crotix insisted on a sale without contingencies, SPH would have purchased the Units ***without contingencies***. Benjamin Adler Depo. Tr. at 139-40, Appx. Vol. II at 243 ("We knew at the time of the exercise that the attempted exercise with the P&S -- that they could reject some or all of the P&S. And that we might have to buy the building as it is without contingencies."); *see also id.* at 189-90, Appx. Vol. II at 244-45 (The Adlers were prepared to do a "naked closing"); Jonathan Adler Depo. Tr. at 194-95, Appx. Vol. II at 255; *see also id.* at 165-66, Appx. Vol. II at 253-

54 ("And were you and your brother prepared to have what amounts to a naked closing, if you have to? A. ***Yes. Absolutely 100 percent prepared for that.***") (emphasis added).

The Superior Court disregarded all of this evidence, including Crotix's subjective view that the P&S was just a proposal, and nevertheless locked in on the conclusion that the P&S was fatal to the May 20, 2016 exercise (and those that followed, too). As explained *supra*, the proposed P&S was in fact consistent with the Option, so Crotix's objection was unfounded and the Superior Court's finding warrants reversal.

B. Appellant's May 28, 2016, Email Exercising the Option.

Jonathan Adler's May 28, 2016, email to Attorney Schuster makes no reference whatsoever to the May 20, 2016, letter or the proposed P&S, and yet again the Superior Court wrongly characterized it as a "conditional" exercise and not in accord with the Option terms. In the May 28th email, Mr. Adler unequivocally states SPH's intention to purchase the units, "***we are absolutely committed to whatever means necessary to exercise the option***." May 28, 2016, Email, Appx. Vol. II at 118 (emphasis added). Despite this, the Superior Court found Mr. Adler's statement to be equivocal as a matter of law, which mandates reversal. *See* July 27, 2018, Order, *infra* at 73-74.

Mr. Adler's email also refutes Crotix's position regarding the timeliness of the exercise, which was the ***only*** objection to the exercise Crotix articulated. The Superior Court improperly found that Mr. Adler's effort to refute the only criticism expressed by Crotix (timeliness) transformed what was otherwise an independent expression of commitment to a conditional exercise. The Superior Court rendered the May 28th email

a nullity, which is an inappropriate finding based on the language of the May 28th email, particularly when the Superior Court was supposed to take inferences in SPH's favor.

Further, the deposition testimony provided to the Superior Court makes clear that SPH intended that the May 28, 2016, emails, and all subsequent exercises, were ***not*** dependent upon compliance with the proposed P&S. Benjamin Adler Depo. Tr. at 137-38, 140, Appx. Vol. II at 242 (the subsequent efforts to exercise the Option did not include the P&S). Given the explicit statement that SPH was "absolutely committed to whatever means necessary" and the absence of any expression of dissatisfaction with the proposed P&S, summary judgment could not properly have been grounded on a finding that the May 28, 2016, exercise required Crotix to perform in accordance with the proposed P&S.

For their part, Susan Locke and Jim Rubens testified that they were unaware of Jonny Adler's May 28, 2016, exercise of the Option until documents were exchanged in discovery in this litigation. In other words, they claim that their attorney did not forward Mr. Adler's May 28, 2016, emails to them and, at the time, they operated based on incorrect or at least incomplete information. Locke Depo. Tr. at 117, Appx. Vol. II at 219. Mr. Rubens testified that he did not see Jonny Adler's expression of willingness to close without contingencies until well after litigation commenced. Rubens Depo Tr. at 276-77, Appx. Vol. II at 234 More importantly, Mr. Rubens went on to testify that had he been made aware of Jonny Adler's May 28, 2016 exercise, Crotix would have sat down with SPH to finalize the sale. *Id.* at 284-85, 292-93, 302, Appx. Vol II at 235-37.

The Superior Court improperly concluded as a matter of law that the statement "we are absolutely committed to whatever means necessary to exercise the option" was equivocal even though Crotix testified the same phrase would likely have led to a sale.

C. Appellant's July 19, 2016, Letter Exercising the Option.

The Superior Court similarly mischaracterized the July 19, 2016, letter from Attorney Manchester as "equivocal." The July 19, 2016 letter makes no reference to the proposed P&S whatsoever and yet the Superior Court found that this exercise was dependent upon Crotix's agreeing to its terms. July 19, 2016, Letter, Appx. Vol. I at 123. Rather, the July 19, 2016, letter concludes by insisting on specific performance ***without*** any reference to the proposed P&S. *Id.* While the July 19, 2016, letter references the fact that the Option was first exercised on May 20, 2016, that was necessary only to refute Crotix's baseless position regarding the timeliness of the exercise, which was the ***only*** objection Crotix raised at the time.

Beyond the text of the July 19, 2016, letter itself, the deposition testimony shows that Crotix understood the letter to be an exercise of the Option. Susan Locke testified:

> Q. Did you interpret this letter as an expression that The Skinny Pancake intended to purchase the units?
> A. ***I think they expressed that they were wanting to buy them, yes.***"

Locke Depo. Tr. at 128-29, Appx. Vol. II at 220 (emphasis added).

Despite this, the Superior Court concluded as a matter of law the July 19, 2016, letter did not express an intention to purchase the Units. Neither the text of the letter nor the deposition testimony, however, supports such a conclusion. The Superior Court found that by advocating for the timeliness of the first exercise, the July 19, 2016, demand for specific performance became a nullity. This is illogical and contrary to the standard that should have applied to the motions decided by the Superior Court, which required taking inferences in the light most favorable to SPH.

D. Appellant's September 28, 2016, Complaint Exercising the Option.

Courts have held that the filing of a complaint seeking specific performance constitutes an exercise of an option. *Miranda & Assoc. v. George Abro & Johnny Enters*., No. 287230, 2009 Mich. App. LEXIS 2719, at *20 (Ct. App. Dec. 29, 2009) (an option may be exercised by a suit for specific performance); *Jenkins v. Thrift,* 469 So. 2d 1278, 1279-80 (Ala. 1985).

In this case, the Superior Court determined that SPH's Complaint—a document in which SPH sought specific performance—somehow sought to compel adherence to the proposed P&S transmitted on May 20, 2016. The text of the Complaint itself belies this contention. Paragraph 44 of the Complaint requests "specific performance of the Option to Purchase," ***without*** any request that the sale occur per the terms of the proposed P&S. Appx. Vol. I at 11; *see also id*. at ¶ 68, Appx. Vol. I at 13. SPH's Prayer for Relief B in the Complaint reads, "Award Plaintiff specific performance of the Option to Purchase." Appx. Vol. I at 13. For the Superior Court's characterization of the Complaint to be correct, this prayer for relief would

have to say "Award Plaintiff specific performance of the Option to Purchase ***per the May 20, 2016 Purchase and Sale Agreement***," but it does not.

The Superior Court improperly read words into the Complaint and thereby transformed the Complaint into something other than an unequivocal attempt to obtain title to the Units. Although the Complaint references the May 20, 2016, exercise, it does so only to satisfy the notice pleading standard, tell the story, and address Crotix's position that the first exercise was untimely. The fact that the May 20, 2016, exercise is mentioned in the Complaint cannot reasonably support a conclusion that the Complaint is equivocal as to the relief sought: SPH filed suit to purchase the Units for the agreed-upon price – period. As such, the Superior Court improperly determined that the Complaint constituted an ineffectual exercise of the Option.

The Superior Court also based its dismissal of SPH's claims on the absence of factual allegations in the initial Complaint regarding Crotix's obfuscation after May 20, 2016. Of course, SPH did not know Crotix objected to the P&S until after the Complaint was filed. SPH attempted to amend its Complaint to add factual allegation regarding Crotix's 2016 misconduct (Appx. Vol. II at 5), but the Superior Court denied that motion (April 25, 2018,Order, *infra* at 64) even though it simultaneously extended the close of discovery at Crotix's request (April 25, 2018,Order, *infra* at 66). Six months later, the Superior Court faulted SPH for not including such facts in its Complaint. October 22, 2018, Order, *infra* at 90. These two decisions, seen in conjunction, reveal that the Superior Court must be reversed.

VI.
The Superior Court's Errors

The Superior Court erred in several fundamental ways. First, *Livingston* and the implied covenant of good faith and fair dealing imposed an affirmative obligation on Crotix to communicate perceived defects in and correct "misunderstandings" impacting SPH's exercises of the Option. Crotix apparently desired a transaction without contingencies and without due diligence. When Crotix received the P&S, it, at the very least, perceived a "misunderstanding" between the parties. Under *Livingston*, Crotix had an affirmative obligation to raise that issue. Crotix had no less than five opportunities to do so and deliberately chose to obfuscate, which cannot be compliant with the implied covenant of good faith and fair dealing. The Superior Court improperly faulted SPH for not including more specific facts in its Complaint after it had previously denied SPH's request to add those very facts. For the implied covenant and *Livingston* to have any meaning, Crotix should be estopped from litigating whether the exercises were compliant with the Option and all that should remain is a trial on the issue not decided by the Superior Court—whether the exercises were timely.

Second, even if the Superior Court properly determined that Crotix had no affirmative duty to express its objections to the manner in which the Option was exercised, the Superior Court improperly found each of the four exercises to be ineffective as a matter of law. Specifically, the Superior Court improperly found that each exercise was ***conditional***, even though the words used by SPH and the circumstances confirm that SPH demanded specific performance, with or without the terms of the P&S. The May 20,

2016, exercise and its proposed P&S did not contradict the Option; instead, it was consistent with the Option language as the language expressly contemplated a P&S. And the Superior Court's construction of "as-is" was contrary to the record below. Alternatively,even if the May 20, 2016, exercise is deemed to be conditional or contrary to the Option, the Superior Court improperly found that the May 28, July 19, and September 19, 2016, exercises were "related to" the May 20, 2016, exercise such that they were conditional or ineffective.

CONCLUSION

For these reasons, this Court should reverse the Superior Court and find that Crotix failed to satisfy its obligations under the implied covenant of good faith and fair dealing when it deliberately withheld information necessary to clear up the perceived "misunderstanding" about the Option. The consequence of that failure is that the only issue to be litigated on remand is whether the exercises were timely (and not whether the exercises were effective, conditional, or equivocal). To accomplish this, this Court should reverse the Superior Court's order granting Crotix summary judgment as to Count I of the Complaint (for breach of Contract) and the order dismissing Count II of the Complaint (for breach of the implied covenant of good faith and fair dealing). This Court should remand with instructions to litigate the timeliness of SPH's exercises of the Option.

Respectfully submitted,

The Skinny Pancake-Hanover, LLC

By Its Attorneys,

SHEEHAN PHINNEY BASS &
GREEN, P.A.

Dated: February 12, 2019

By: */s/ James P. Harris*
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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests 15 minutes of oral argument. Attorney James P. Harris will argue on behalf of Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to New Hampshire Supreme Court Rule 26(7), I served the foregoing document upon the attorneys of record for all parties by electronically filing the foregoing document with the Clerk of Court using the Court's electronic filing system, which will automatically send email notification of such filing to registered attorneys of record.

Dated: February 12, 2019

/s/ James P. Harris
James P. Harris

CERTIFICATION AS TO WORD COUNT

The undersigned certifies that the above brief consists of 9,058 words, exclusive of the Table of Contents and Table of Authorities.

/s/ James P. Harris
James P. Harris

TRIAL COURT DECISIONS

Copies of the Superior Court's Orders are attached commencing on the following page.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Grafton Superior Court
3785 D.C. Highway
North Haverhill NH 03774

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **The Skinny Pancake-Hanover, LLC v Crotix, et al**
Case Number: **215-2016-CV-00276**

Enclosed please find a copy of the court's order of June 12, 2017 relative to:

Order on the Parties' Cross-Motions for Summary Judgment

June 16, 2017

David P. Carlson
Clerk of Court

(409)

C: James F. Ogorchock, ESQ; Barry Charles Schuster, ESQ

NHJB-2503-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-00276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al

**ORDER THE PARTIES'
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The plaintiff, The Skinny Pancake-Hanover, LLC, alleges that it properly executed a purchase option contained within its lease with the defendants, Crotix, James Rubens, and Susan Rubens, and that the defendants failed to sell the underlying property. Both parties now seek summary judgment. (Index # 8, 13.) The Court held a hearing on this matter on April 24, 2017. Based on the record, the parties' arguments, and the applicable law, the Court finds and rules as follows.

I. Background

The parties entered into a lease on October 15, 2015, pursuant to which the defendant rented to the plaintiff a single unit in the Hanover Park Condominium building, wherein the plaintiff was to operate a restaurant and live music venue. Article I (v) of the lease states as follows:

> 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. . . .

(Obj. & Mot. Summ. J. Ex. 1 at 6 [hereinafter the "Lease Agreement"].) The "Lease Commencement Date" is defined in Article I (g) as follows:

> Term: A period of ten (10) years and three months, commencing on the later of the date the Premises are fully demised and available for possession by Tenant or October 1, 2015 (the "Commencement Date"), and ending on December 31, 2025 (this period hereinafter referred to as the "Initial Term"). Tenant may take possession of the premises on or after the Commencement Date and upon execution of this Lease and payment of the Security Deposit. Fully demised and available for possession in this paragraph means that date one calendar day after Landlord has completed Premises reconfiguration under Article I (h) below. Landlord may notice Tenant by written letter, text or email as to such completion.

(Lease Agreement at 3.) In turn, Article I (h) states:

> Reconfiguration: Landlord, at Landlord's expense, shall reconfigure the Premises and Common Area corridor by demolishing existing walls where required and installing new metal stud, prime painted drywall, doors, door hardware, and associated sprinkler head changes, all compliant with Town of Hanover building code at door and wall locations marked in red on Exhibit A. Landlord shall also make available vents as needed to provide fresh water, propane gas from utility room, waste water disposal, cooking hood and bathroom venting, electrical service, propane gas service, telephone land line service, electronic data service, potable water supply, and sanitary sewer service. Tenant may waive required construction of the drywall surface facing its Premises.

(Id.) According to the plaintiff, the above "activities did not conclude until early April [2016] at the earliest, and [the plaintiff] did not secure a Certificate of Occupancy until late May [2016]." (Obj. & Mot. Summ. J. at 14; see also Adler Aff. ¶¶ 7–15.)

On May 20, 2016, the plaintiff's attorney, Susan Manchester, sent a letter to the defendants captioned "RE: Exercise of Option to Purchase Units 10, 33, and 39 — Hanover Park Condominium," and which stated in relevant part:

> I have been asked on behalf of our client, The Skinny Pancake – Hanover, LLC, and pursuant to Section I(v) of the lease between you to give formal notice of Tenant's intent to exercise its purchase option under Section I(v) of the Lease.
>
> Enclosed is a proposed Purchase and Sale Agreement, as called for in Section I(v). Our client would like to close on or before July 1. I look

forward to working with your attorney, Barry Schuster, who is copied on this, toward a successful conclusion of this acquisition.

(Pl.'s Hearing Ex 2 [hereinafter the "May 20 Letter"].) Section 3(a) of the attached Purchase and Sale Agreement is entitled "Buyer's Closing Conditions" and reads in relevant part:

> Buyer's obligation to close shall be conditioned upon the following (the "Buyer's Closing Conditions"): a. Buyer's investigation, review and acceptance, of the Existing Leases, and of an appraisal of the Property, and of the condition of the Property, including without limitation the physical and environmental condition of the Property and any applicable use and development limitations, in accordance with the following: For a period of ninety (90) days after the Effective Date, Buyer may perform due diligence relating to the Property (the "Due Diligence Period"). During the Due Diligence Period, Buyer and its architects, engineers and other representatives (collectively, "Buyer's Agents") may 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. . . .
>
> If the results of Buyer's due diligence are not acceptable to Buyer, Buyer may, in Buyer's sole discretion, on or before the expiration of the Due Diligence Period elect to: (x) terminate this Agreement by providing written notice of termination to Seller . . . .

(Defs.' Mot. Summ. J. Ex. 3 at 2 [hereinafter the "Purchase and Sale Agreement"].)

On May 26, 2016, the defendants' attorney, Barry Schuster, responded to the plaintiff's May 20 Letter as follows:

> Under the terms of the lease between [the parties], the tenant had an option to purchase as set forth in Section I(v) of the Lease. The option, however, was exercisable only if a purchase and sale agreement were executed within 180 days of the commencement date of the Lease. The "Commencement Date" of the Lease is defined as "the later of the date the Premises are fully demised and available for possession by Tenant or October 1, 2015." Section I(g) further states that "[f]ully demised and available for possession in this paragraph means the date one calendar day after Landlord has completed Premises reconfiguration under Article I(h) below."
>
> Prior to the signing of the Lease and continuing after the Lease was signed on October 15, 2015, Crotix undertook its obligations to make the premises fully demised and available. The work by the Landlord to fully

> demise the premises and make it available for possession by the Tenant was completed no later than November 13, 2015. As early as November 5, 2015, Mr. Rubens notified Benjamin Adler that the work would be completed the following week.
>
> The notice provided by means of your letter dated on May 20, 2016 is more than 180 days after the Commencement Date of the lease and, therefore, the option has expired and the request to exercise the option is declined. If you have any questions, please do not hesitate to contact me.

(Pl.'s Hearing Ex. 3 [hereinafter the "May 26 Letter"].)

On July 19, 2016, Attorney Manchester sent a second letter to Attorney Schuster, in which she wrote: "I write to demand that your client, Crotix, specifically perform its obligations under Article I(v) of the Lease Agreement (the 'Lease') to sell units 10, 33, and 39 of the Hanover Park Condominium (the 'Property') to my client for the price of $5,553,570." (Pl.'s Hearing Ex. 4 at 1 [hereinafter the "July 19 Letter"].) Attorney Manchester went on to state that "[i]t is my understanding that your client's reason for refusing to sell is that your client believes that my client's exercise was untimely and that the exercise should have been on or before May 12, 2016 based upon an e-mail sent by Mr. Rubens to Jon and Benjamin Adler on November 5, 2015 in which your client states completion would occur on November 13, 2015." (Id. at 2.) In the remainder of the letter, Attorney Manchester discussed the basis for her belief that her clients had timely executed the option and that the defendants were therefore in breach.

On July 28, 2016, Attorney Schuster replied to the July 19 Letter as follows:

> Thank you for your letter of July 19, 2016. Crotix has reviewed your letter and declines to accept your client's offer and demand.
>
> The terms of the option to purchase are clearly set forth in the Lease and, in order for your client to benefit from the terms of that option, it was required to perform according to those terms. Your client did not do so and Crotix is, therefore, not obligated to proceed with a sale to your client.
>
> Crotix understands that the parties have opposing views of the events over the last months but believes that those demonstrate that your client's actions regarding the option are ineffective and untimely.

If you would like to discuss this further, please let me know.

(Pl.'s Hearing Ex. 5 [hereinafter the "July 29 Letter"].)

The plaintiff subsequently brought suit on September 28, 2016, alleging that the "[p]laintiff's formal notice to exercise the Option to Purchase was timely provided on May 20, 2016, evidencing that [the plaintiff] was ready, willing, and able to purchase the Property for the agreed upon sales price of $5,553,570 from the Lease on or before July 1, 2016," and that the defendants' refusal to sell the property constituted, *inter alia*, a breach of contract entitling the plaintiff to specific performance. (Compl. ¶¶ 32–37.)

In their Answer, the defendants renewed their assertion that "the Commencement Date associated with the Option to Purchase began to run as of November 13, 2015." (Answer ¶ 22.) The defendants also maintained that "the plaintiff's formal 'notice' was not an election of the Option but a proposed purchase offer containing extensive terms and conditions entitling the plaintiff to terminate the proposed contract in its sole discretion, all set forth in the proposed purchase offer submitted to the defendants." (Id. ¶ 32.)

In their Motion for Summary Judgment, the defendants clarified that the Buyer's Closing Conditions provision of the Purchase and Sale Agreement cited above contained conditions that "contrast with those in the Purchase Option and amount to [a] counter-offer." (Defs.' Mot. Summ. J. at 9.) Specifically, the defendant argues that this provision "set forth terms for purchase that included detailed investigations and the right to terminate the agreement if those investigations were not satisfactory" and that these terms "demonstrate that the plaintiff was not accepting the 'AS IS condition' in the Purchase Option." (Id. at 12.)

The plaintiff counters that "the Court should reject [the defendants'] argument that inclusion of a proposed purchase and sale agreement in [the plaintiff's] May 20, 2016 exercise letter somehow terminated or repudiated the option" because the defendants' "exercise-as-counteroffer-theory goes against the overwhelming majority of authority," and, as the defendants "never raised this supposed defect earlier, when [the plaintiff] was in a position to cure it, . . . they cannot hide behind it now." (Obj. & Mot. Summ. J. at 1 (citing Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 621, 972 (2009)).) Alternatively, the plaintiff argues that its "subsequent exercises (in a July 19 letter and the September filing of this lawsuit) were clear and unequivocal and not in any way dependent on acceptance of the P&S." (Id.)

Finally, both Attorney Manchester and Attorney Schuster have submitted affidavits discussing the content of conversations they had between late May and late July, 2016. According to Attorney Manchester:

> 4. Between my receipt of Attorney Schuster's letters of May 26, 2016 and July 29, 2016, I spoke to Attorney Schuster on the telephone about the Plaintiff's exercise of the Option in an effort to gain a better understanding of Crotix's reasons for declining to accept Plaintiff's exercise of the Option.
>
> 5. During at least one phone conversation with Attorney Schuster, I asked Attorney Schuster if Crotix was basing its rejection of the Plaintiff's exercise of the Option on anything other than timeliness. Attorney Schuster did not indicate that Crotix's rejection of Plaintiff's exercise of the Option was based on anything other than timeliness. At no point prior to the initiation of the above-captioned matter did Attorney Schuster indicate to me that the terms of the Purchase and Sale Agreement attached to my letter of May 20, 2016 were problematic.
>
> 6. Having already fully explored this issue on the telephone with Attorney Schuster, I did not interpret Attorney Schuster's invitation to 'discuss this further' in his July 29, 2016 letter to be an invitation to discuss additional objections to Plaintiff's exercise of the Option, nor did I interpret that invitation to indicate that another discussion on that topic would yield a different response to the question I had asked on the telephone.

(Pl.'s Hearing Ex. 9 ¶¶ 4–6.) Conversely, according to Attorney Schuster:

> 4. With all due respect to Attorney Manchester, I have no recollection or any record that any such specific inquiry was made whether the defendants' rejection of the plaintiff's contract and counter-proposal was 'based on anything other than timeliness.'
>
> 5. Had such a direct question been posed, my response would have required reference to the nature of the counter-offer as well as to the untimeliness of the proposal.
>
> 6. Defendants' counsel stated in his July 29, 2016, letter, that not only were the plaintiff's actions 'ineffective and untimely,' but that '[i]f you would like to discuss this further, please let me know.' The failure by plaintiff's counsel to 'interpret that invitation' as inviting communication rests with the plaintiff.

(Pl.'s Hearing Ex. 10 ¶¶ 4–6.)

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2010 & Supp. 2013). The moving party has the burden of proving both elements. Concord Group Ins. Co. v. Sleeper, 135 N.H. 67, 69 (1991). A "material" issue of fact is one that "affects the outcome of the litigation." Weeks v. Co-Operative Ins. Cos., 149 N.H. 174, 176 (2003) (citation omitted). To demonstrate a genuine dispute regarding a material fact, the non-moving party "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV.

When considering the evidence, the Court must draw all inferences "in the light most favorable to the non-moving party." Sintros v. Hamon, 148 N.H. 478, 480 (2002) (citation omitted). The Court may not "weigh the contents of the parties' affidavits and resolve factual issues," but must simply "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) (citations omitted).

III. Discussion

In this case, the Court need not determine whether the Buyer's Closings Conditions provision of the Purchase and Sale Agreement attached to the May 20 Letter constituted a counter-offer because neither party would be entitled to summary judgment regardless of the Court's determination on this issue. For example, assuming that the May 20 Letter constituted a proper exercise of the option, there remains a genuine dispute as to what date constituted the Commencement Date and whether the May 20 Letter, the July 19 Letter, or the September lawsuit were timely.

Alternatively, assuming that the May 20 Letter was timely but constituted a counter-offer, there remains a genuine dispute as to whether equity nevertheless entitles the plaintiff to specific performance. See Livingston, 158 N.H. at 625 (affirming order of specific performance in favor of the plaintiff where the defendant breached the implied covenant of good faith and fair dealing because the defendant knew the plaintiff likely believed he exercised an option to purchase land and the defendant "stonewalled" instead of clarifying the plaintiff's misunderstanding until the end of the option period).

IV. Conclusion

For the foregoing reasons, the parties' Motions for Summary Judgment are DENIED.

SO ORDERED.

Dated: 3/12/12

Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Grafton Superior Court
3785 D.C. Highway
North Haverhill NH 03774

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **The Skinny Pancake-Hanover, LLC v Crotix, et al**
Case Number: **215-2016-CV-00276**

Please be advised that on July 19, 2017 Judge Bornstein made the following order relative to:

Plaintiff's Motion for Reconsideration - Denied

July 19, 2017

David P. Carlson
Clerk of Court

(285)

C: James F. Ogorchock, ESQ; Barry Charles Schuster, ESQ

NHJB-2501-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake—Hanover, LLC

v.

Crotix, et al

ORDER ON DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

The plaintiff, The Skinny Pancake—Hanover, LLC, alleges that it properly executed a purchase option contained within its lease with the defendants, Crotix, James Rubens, and Susan Rubens, and that the defendants failed to sell the underlying property. Among other claims, the plaintiff brought an action against the defendants for breach of the implied covenant of good faith and fair dealing. (Compl. Count II, ¶¶ 38–44.) The defendants move to dismiss this count only. (See Defs.' Mot. Dismiss.)

The New Hampshire Supreme Court has recognized an implied duty of good faith and fair dealing "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). Category one cases concern "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. Category two cases "limit[] the power of an employer to terminate a wage contract by discharging an at-will employee." Id. at 139–40.

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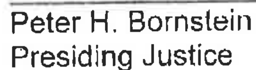
10/12/17
CC: B. Gould; M. Carrier; J. Ogorchock; B. Schuster

Category three claims deal with limiting parties' discretion in performing under the contract so as to "observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting." Id. at 143.

The defendants' motion for partial dismissal is based solely on the premise that Count II of the Complaint asserts a category three claim. The plaintiff, however, explained in its objection that its claim against the defendants for breach of the implied covenant of good faith and fair dealing is a category one claim (contract formation) rather than a category three claim (discretion in performance). In their Reply in Support of Motion for Partial Dismissal, the defendants do not contend that Count II of the Complaint fails to state a category one claim but merely reiterate that it does not state a category three claim. Because the plaintiff is not bringing a category three claim, the motion is denied.

So Ordered.

Dated: 10/12/17



Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake, LLC

v.

Crotix, James M. Rubens, and Susan P. Rubens

ORDER ON DEFENDANTS' SECOND MOTION TO DISMISS

The plaintiff, The Skinny Pancake—Hanover, LLC ("Skinny Pancake"), alleges that it properly executed a purchase option contained within its lease with the defendants, Crotix, James Rubens, and Susan Rubens, and that the defendants failed to sell the underlying property. The plaintiff's complaint contains five counts and a request for attorney's fees and costs: (I) breach of contract, (II) breach of implied covenant of good faith and fair dealing, (III) intentional misrepresentation (fraud), (IV) negligent misrepresentation, and (V) violation of RSA chapter 358-A. The defendants now move for dismissal of Counts II, III, IV, and V. (Index #32.) The plaintiff objects. (Index #33.) Based on the pleadings and the applicable law, the Court finds and rules as follows.

I. Factual background

On October 15, 2015, Skinny Pancake and Crotix entered into a lease whereby the plaintiff rented from the defendant a single unit in the Hanover Park condominium building. The lease agreement included a purchase option that would allow Skinny Pancake to purchase the leased premises along with other units in the condominium:

> Within the first nine (9) months from Lease Commencement Date, Tenant shall have the exclusive option to purchase all Hanover Park

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1/11/18
CC: J. Cyorchuck; B. Schuster; B. Gunidy; M. Comier; C. Arayo

Condominium units then owned by Landlord...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.

(Compl. ¶ 9.) The "Commencement Date" is defined in the Lease as:

[T]he later of the date the Premises are fully demised and available for possession by Tenant or October 1, 2015....Fully demised and available for possession in this paragraph means the date one calendar day after Landlord has completed Premises reconfiguration.

(Id. ¶ 10.) Crotix's lease configuration obligation under the lease is:

Landlord, at Landlord's expense, shall reconfigure the Premises and Common Area corridor by demolishing existing walls where required and installing new metal stud, prime painted drywall, doors, door hardware, and associated sprinkler head changes, all compliant with Town of Hanover building code at door and wall locations marked in red on Exhibit A. Landlord shall also make available within the building, all necessary connections and utilities for pipes, conduits, and vents as needed to provide fresh water, propane gas from utility room, waste water disposal, cooking hood and bathroom venting, electrical service, propane gas service, telephone land line service, electronic data service, potable water supply, and sanitary sewer service. Tenant may waive required construction of the drywall surface facing its Premises.

(Id. ¶ 11.) On May 20, 2016, the plaintiff sent Crotix a notice of intent to exercise the purchase option. (Id. ¶ 23.) The plaintiff alleges that the required reconfiguration work in the Lease was not completed by Crotix until April 2016 and, therefore, the Commencement Date associated with the purchase option would have been in April 2016. (Id. ¶ 21.) On May 26, 2016, Crotix "refused to sell the property." (Id. ¶ 27.)

II. Legal Standard

When ruling on a motion to dismiss, the court must determine whether the plaintiff's allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel Co. v. JGI Eastern, Inc., 154 N.H. 791, 793 (2007) (quoting Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 152 N.H. 407, 410 (2005)) (internal quotations omitted). In doing so, the Court

must "assume all facts pled in the plaintiff's writ are true[] and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (quoting Berry, 152 N.H. at 410) (brackets omitted). The court need not "assume the truth of statements . . . that are merely conclusions of law" not supported by "predicate facts." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611–12 (2010). The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." Starr v. Governor, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts alleged in the complaint do not constitute a basis for relief. See Jay Edwards, Inc. v. Baker, 130 N.H. 41, 46–47 (1987) (finding that dismissal was appropriate where the plaintiff's complaint failed to plead sufficient facts supporting the elements of the claims).

III. Discussion

A. Count II—Implied Covenant of Good Faith and Fair Dealing

The defendants move to dismiss the plaintiff's implied covenant of good faith and fair dealing claim, arguing that this implied covenant "does not apply where there is an alleged breach of the express contract terms." (Defs.' Mot. to Dismiss 6.) The New Hampshire Supreme Court has recognized an implied duty of good faith and fair dealing "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). The plaintiff explained in its objection to the defendants' first motion to dismiss that its claim against the defendants for breach of the implied covenant of good faith and fair dealing is a category one claim (contract formation). Category one cases

concern "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 defendant argues that the purpose of the implied covenant of good faith and fair dealing in contract formation "is to provide a remedy to a plaintiff *where there has been no breach of the explicit terms of the contract.*" (Defs.' Mot. to Dismiss 5.) The Court disagrees. The cases on which the defendants rely do not stand for this proposition, nor is the Court aware of any case law that does. Instead, the Court in Balsamo v. University System of New Hampshire explained that the plaintiff must make "allegations that are separate and distinct from those underlying [its] breach of contract claim." 2001 WL 4566111, *4 (D.N.H. 2001). "[T]he implied good faith obligations of a contracting party are 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." Centronics Corp., 132 N.H. at 139. This "obligation requires that if one party makes a representation of a material fact to another party for the purpose of inducing the other party to change his position or enter into a contract, the party making the representation must tell the truth." Bursey v. Clement, 118 N.H. 412, 414 (1978). Under the facts of the particular case at hand, this would mean that if the defendants promised that they would sell the property pursuant to a purchase option in order to convince the plaintiff to enter into a contract with them, then the defendant must have been telling the truth. If the defendants never intended to

honor the purchase option, then that would be a breach of the implied covenant of good faith and fair dealing. Id.

The plaintiff alleges in its Complaint that "Defendant Crotix's representation to honor the Option to Purchase induced Plaintiff to execute the Lease." (Compl. ¶ 50.) Although this allegation is not within the specific section titled "Count II: Breach of Implied Covenant of Good Faith and Fair Dealing," it is within the Complaint. The plaintiff alleges that Crotix's agreement to provide an option to purchase was for the purpose of inducing the plaintiff to enter into the contract. This allegation is separate and distinct from the plaintiff's breach of contract claim because it alleges an issue regarding how the contract was formed, not whether it was breached. For this reason, the Court DENIES the defendants' motion to dismiss Count II—Breach of Implied Covenant of Good Faith and Fair Dealing.

B. Counts III and IV—Intentional Misrepresentation (Fraud) and Negligent Misrepresentation

The defendants move to dismiss the plaintiff's fraud and negligent misrepresentation claims, arguing that (1) the plaintiff's claims are barred by the economic loss doctrine, (2) the contractual promise cannot be a misrepresentation, and (3) the plaintiff has failed to allege fraud with particularity. (Defs.' Mot. to Dismiss 7–10.)

The defendants, relying on Wyle v. Lees, 162 N.H. 406 (2011), argue that the economic source doctrine bars the plaintiff's misrepresentation claims because the plaintiff's claims are just recharacterizations of its breach of contract claim. (Defs.' Mot. to Dismiss 7.) The plaintiff's Complaint, however, makes clear that its misrepresentation claims are based on a misrepresentation by Crotix intending to induce the plaintiff to

enter into the contract. As the defendants observe, the New Hampshire Supreme Court distinguished between misrepresentations intended to induce a party to enter into a contract and negligent claims based on a contractual duty. Wyle, 162 N.H. at 411–12 (affirming the trial court's award of economic loss damage for negligent misrepresentation that was intended to induce the plaintiff to enter into the real estate contract). The defendants' motion to dismiss the plaintiff's misrepresentation claims on the ground that the economic source doctrine bars these claims in DENIED.

The defendants next argue that "[a] contractual promise cannot be a misrepresentation." (Defs.' Mot. to Dismiss 8.) Again, the defendants rest their argument on their interpretation of the plaintiff's claims: that the defendant breached the contract. As the plaintiff has pointed out, its argument is not only that the defendants breached the contract but also that the defendants made a promise that they never intended to honor that induced the plaintiff to enter into the contract. The defendant relies on Hydraform Products Corp. v. American Steel & Aluminum Corp., asserting that "[a] 'promise is not a statement of fact and hence cannot, as such, give rise to an action for misrepresentation.'" Id. (quoting Hydraform Products Corp., 127 N.H. 187, 200 (1985). The relevant language in Hydraform, however, does not end there: "a promise can imply a statement of material fact about the promisor's intention and capacity to honor the promise." Hydraform Products Corp., 127 N.H. at 200. The Hydraform case concerned a company that built and sold wood stoves and a company that supplied steel to the wood stove company. The two companies formed an agreement whereby the steel company would supply enough steel to the wood stove company for manufacturing 400 wood stoves. The steel company was unable to provide the necessary amount of steel.

In Hydraform, the promise that the defendant made to the plaintiff implied that it "had the capacity and the intention to sheer and store the amount of steel in question and to provide more if requested." Id. at 201. The Court found that these statements "could have supported the conclusion that the defendant made a factual representation." Id. The case at hand is similar: the plaintiff is arguing not only that the defendants made a promise and did not honor it but also that the defendants never intended to honor it. The defendants have only argued that their promise to honor the purchase option could not be a misrepresentation. The argument is unpersuasive. Accordingly, the Court DENIES the defendants' motion to dismiss the plaintiff's misrepresentation claims on this ground.

Finally, the defendants argue that the plaintiff has not alleged fraud with particularity. "The party seeking to prove fraud must establish that the other party made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. In addition, the party seeking to prove fraud must demonstrate justifiable reliance." Van Der Stok v. Van Voorhees, 151 N.H. 679, 681–82 (2005) (quotations and citation omitted). Furthermore, "[i]n order to withstand a motion to dismiss, the plaintiff must specify the essential details of the fraud, and specifically allege the facts of the defendant's fraudulent actions. It is not sufficient for the plaintiff merely to allege fraud in general terms." Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 449 (2002). Construing all reasonable inferences in a light most favorable to the plaintiff, the plaintiff claims that Crotix represented that it would honor the agreed upon purchase option, which induced the plaintiff to execute the Lease, and that at the time of making this promise, Crotix knew the promise was false. (Compl. ¶ 47–50.) The plaintiff does not, however, assert that or explain how it was justifiable for it

to rely on Crotix's promise when executing the Lease. The plaintiff, therefore, has not stated a claim upon which relief can be granted. Accordingly, the Court GRANTS the defendants motion to dismiss Count III—Intentional Misrepresentation (Fraud).

C. Count V—Violation of RSA 358-A

The defendants contend that the plaintiff's claim under RSA chapter 358-A, the New Hampshire Consumer Protection Act ("CPA"), should be dismissed, arguing that (1) the CPA does not apply here because the real estate agreement between the parties was a "purely private transaction[]" and (2) the plaintiff does not allege egregious enough conduct to meet the rascality standard. (Defs.' Mot. to Dismiss 10.) The CPA makes it "unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." RSA 358-A:2 (2009); see also Barrows v. Boles, 141 N.H. 382, 390 (1996). "Although RSA 358-A:2 is broadly worded, not all conduct in the course of trade or commerce falls within its protection." Barrows, 141 N.H. at 390. RSA 358-A:2 includes a non-exhaustive list of unfair and deceptive practices that may give rise to a claim, but the CPA also encompasses commercial conduct not specifically listed in the statute. Becksted v. Nadeau, 155 N.H. 615, 619 (2007). When a CPA claim is based on conduct not specifically enumerated in RSA 358-A:2, the Court must apply the "rascality" test to distinguish between acceptable and prohibited commercial conduct. Id. Under the rascality test, "the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Id. (quoting State v. Moran, 151 N.H. 450, 452 (2004)).

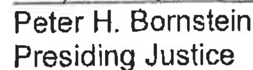
In this case, the plaintiff's claim is not within one of the enumerated unfair and

deceptive practices in RSA 358-A:2 and, therefore, the Court must apply the rascality test. Because the plaintiff's fraud claim has been dismissed, the only remaining claim that could fall under RSA chapter 358-A is the plaintiff's negligent misrepresentation claim. See Moran, 151 N.H. at 453 (observing that "an ordinary breach of contract claim does not violate the CPA"). Assuming the truth of the allegations in the plaintiff's Complaint, the plaintiff's negligent misrepresentation claim does not rise to the level of reprehensible commercial conduct proscribed by the statute. Even if the defendant "failed to verify the truth of [its] representation at the time it executed the lease," such conduct would not "raise an eyebrow of someone inured to the rough and tumble of the world of commerce." (Compl. ¶ 56); Moran, 151 N.H. at 452. For this reason, the Court GRANTS the defendants' motion to dismiss the plaintiff's claim under RSA chapter 358-A.

For the foregoing reasons, the defendants' second motion to dismiss is GRANTED as to Counts III and V and DENIED as to Counts II and IV.

So Ordered.

Dated: 1/5/18



Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al

ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

The plaintiff filed its complaint in this case on September 28, 2016. This matter is now before the Court on the plaintiff's Motion to Amend Complaint (Index #47), to which the defendants object. (Index #48.) The plaintiff thereafter filed a Reply. (Index #53.)

"RSA 514:9 . . . allows the trial court to permit a substantive amendment to pleadings in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice." Coan v. N.H. Dep't of Envtl. Servs., 161 N.H. 1, 10–11 (2010) (quotations omitted). "Whether to allow a party to amend his or her pleadings rests in the sound discretion of the trial court." Id. at 11. RSA 514:9 permits the liberal amendment of pleadings "unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." Id.

In light of the foregoing principles, the procedural history and procedural posture of this case, the particular circumstances, and the nature of the proposed amendments, the Court concludes that the proposed amendments should not be permitted. The Court finds that the proposed amendments would introduce a new cause of action that the plaintiff

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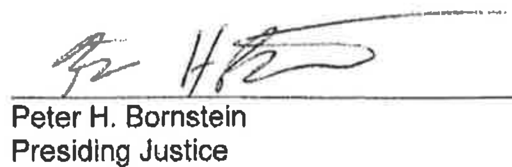
5/3/18
CC: C. Arroyo; M. Comer; P. Queenan; J. Ogorchok; B. Schuster

has repeatedly disclaimed until now and that the proposed changes would surprise and prejudice the defendants. Accordingly, the Court denies the plaintiff's Motion to Amend. See Defs.' Obj., 2–7.

SO ORDERED.

Dated: April 25, 2018



Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. SUPERIOR COURT

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al

ORDER ON DEFENDENTS' MOTION TO AMEND CASE STRUCTURING AND ADR ORDER

This matter is before the Court on the defendants' Motion to Amend Case Structuring and ADR order (Index #50), which is accompanied by a proposed Case Structuring and ADR order (Index #51), to which the plaintiff objects. (Index #52.) Having considered the parties' pleadings and the procedural history and posture of this case, the Court makes the following orders:

1. The Court grants the motion to the extent that the deadline for completing ADR is extended to June 15, 2018, the deadline for completing discovery is extended to July 31, 2018, the trial management conference shall be scheduled for September 20, 2018, at 9:00 a.m., jury selection shall occur on October 2, 2018, at 9:30 a.m., and the three-to-four day trial shall commence on October 9, 2018;
2. The deadline for filing dispositive motions, which has already passed, is not extended;
3. The deadline for filing all pretrial motions, other than dispositive motions,

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CC: C. Arroyo; M. Carrier; P. Queenan; J. Ogorchock; B. Schuster

is 60 days prior to the trial management conference;

4. The motion to extend is otherwise denied.

SO ORDERED.

Dated: April 26, 2018

Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In this civil action, the plaintiff, The Skinny Pancake-Hanover, LLC ("Skinny Pancake"), alleges that it properly executed a purchase option contained within its lease with the defendants, Crotix, James Rubens, and Susan Rubens, and that the defendants failed to sell the underlying property. The plaintiff's complaint contained five counts: (I) breach of contract, (II) breach of implied covenant of good faith and fair dealing, (III) intentional misrepresentation (fraud), (IV) negligent misrepresentation, and (V) violation of RSA chapter 358-A. On January 5, 2018, the Court dismissed counts III and V. On September 11, 2017, the plaintiff clarified that "Count II asserts a violation based on the first category of cases outlined in Centronics—those relating to standards of conduct in contract formation." (Pl.'s Obj. Defs.' Mot. Dismiss ¶ 10.) On February 16, 2018, the defendant filed a motion for summary judgment on Count I—breach of contract. (Index #41.) The plaintiff objects. (Index #42.) The defendant filed a reply (Index #44), to which the plaintiff filed a request to file a surreply. (Index #45.) The Court granted the plaintiff's request to file a surreply but the plaintiff did not file one.

Drawing all reasonable inferences in the non-moving party's favor, the Court finds that the record supports the following material facts. On October 15, 2015, Skinny Pancake and Crotix entered into a lease whereby the plaintiff rented from the defendant a single unit in the

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Hanover Park condominium building. The lease agreement included a purchase option that would allow Skinny Pancake to purchase the leased premises along with other units in the condominium:

> 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 . . . 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.

(Compl. ¶ 9.)

On May 20, 2016, plaintiff's counsel sent to defendants' counsel a letter to "give formal notice of Tenant's intent to exercise its purchase option under Section I(v) of the Lease." (Defs.' Ex. A-2, at 1.) Along with the letter, plaintiff's counsel sent a "proposed Purchase and Sale Agreement, as called for in Section I(v)" of the lease. (Id.) The terms of the Purchase and Sale Agreement provided for certain conditions, including a 90-day due diligence period during which the buyer could perform inspections, and providing that the "Buyer may, in Buyer's sole discretion, on or before the expiration of the Due Diligence Period elect to: (x) terminate [the] Agreement by providing written notice of termination to Seller . . . , in which case all of the rights and obligations of the parties to this Agreement shall cease and terminate." (Id. at 3.) On May 26, 2016, the defendant "declined" Skinny Pancake's "request to exercise the option." (Pl.'s Ex. A.) Two days later on May 28, one of the plaintiff's co-founders, Jonathan Adler, emailed defendants' counsel stating, "I'm hoping we can avoid a lengthy argument over this as the evidence is so overwhelmingly in favor of our position and we are absolutely committed to whatever means necessary to exercise our option." (Pl.'s Obj., 3–4; Pl.'s Ex. 1.) On July 19, 2016, plaintiff's counsel wrote another letter to defendants' counsel, demanding that Crotix sell the property to Skinny Pancake, asserting that Crotix was "obligated to sell the Property upon [Skinny

Pancake's] exercise of its option to purchase" and that "[t]he option was exercised by my letter dated May 20, 2016." (Defs.' Ex. A-3, at 1.) On September 28, 2016, Skinny Pancake filed its Complaint with the Court.

The defendant now moves for summary judgment on the plaintiff's breach of contract claim, arguing that the plaintiff's attempt to exercise the option to purchase was ineffective because it was conditional and equivocal. The plaintiff argues that summary judgment should be denied on the grounds that (1) the principles articulated in Livingston v. 18 Mile Point Drive, LTD, 158 N.H. 619 (2009), preclude granting the defendants summary judgment and (2) the plaintiff's attempts to exercise the option were not dependent on the proposed Purchase and Sale Agreement and, therefore, were not conditional or equivocal. The plaintiff also argues that it attempted to exercise the option on multiple different occasions, including through the May 20 letter accompanied by the proposed Purchase and Sale Agreement, Jonathan Adler's May 28 email, plaintiff's counsel's July 19 letter, and the filing of its Complaint.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. The moving party has the burden of proving both elements. Concord Grp. Ins. Co. v. Sleeper, 135 N.H. 67, 69 (1991). The party opposing summary judgment, however, "has the burden of contradicting the [moving party's] affidavits." Arsenault v. Willis, 117 N.H. 980, 983 (1977). A "material" issue of fact is one that "affects the outcome of the litigation." Weeks v. Co-Operative Ins. Cos., 149 N.H. 174, 176 (2003) (citation omitted). To demonstrate a genuine dispute regarding a material fact, the non-moving party "may not rest upon mere allegations or denials of his pleadings, but

his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV.

When considering the evidence, the Court must draw all inferences "in the light most favorable to the non-moving party." Sintros v. Hamon, 148 N.H. 478, 480 (2002). The Court may not "weigh the contents of the parties' affidavits and resolve factual issues," but must simply 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) (citations omitted).

The plaintiff alleges in its complaint that Crotix breached the contract between the parties when it failed to sell the property upon the plaintiff's exercise of the option to purchase. The defendants do not dispute that there was an option agreement between the parties and that Crotix would have been obligated to sell the property if the plaintiff unconditionally and unequivocally exercised the option within the time provided in the lease. The defendants argue, however, that the plaintiff's attempt to exercise the option on May 20 was ineffective because it included a proposed Purchase and Sale Agreement that listed conditions, including due diligence inspection conditions that were plainly inconsistent with the terms of the option, and provided the plaintiff with the ability to terminate the agreement if not satisfied with its due diligence results. The defendants also argue that each time the plaintiff mentioned that it wanted to exercise the option, it referred to its May 20 letter, which included the proposed Purchase and Sale Agreement with conditions. The defendants characterize the conditions within the proposed Purchase and Sale Agreement as Skinny Pancake's attempt to "eliminate the as-is clause in the option." (Defs.' Mot., 3.)

As an initial matter, the Court finds that there is no dispute as to any material facts. The plaintiff's arguments either are not factual in nature, but merely legal, or relate to non-material facts.

"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). For the exercise of the option to be effective, it must be unequivocal, unconditional, and in accord with the terms of the option. See Howard-Arnold, Inc. v. T.N.T. Realty, Inc., 109 A.3d 473, 477 (Conn. 2015) ("With respect to the actual exercise of the option, to be effective, an acceptance of an offer under an option contract must be unequivocal, unconditional, and *in exact accord with the terms of the option.*" (brackets omitted and italics in original)); see also 49 Am. Jur. 2d Landlord and Tenant § 316 ("In order to determine whether a binding contract was formed through the exercise of a purchase option in a lease, courts review the terms of the applicable agreements to determine whether the exercise was unequivocal, unconditional, and in exact accord with the terms of the applicable agreements."). The requirement that the exercise of an option be unconditional is a specific application of principles governing the formation of contracts generally: "[f]undamental in the making of a valid contract by offer and acceptance is the requirement that an offer be accepted unconditionally," and a conditional acceptance is deemed a counteroffer that does not result in a binding agreement unless accepted by the offeror. Arapage v. Odell, 114 N.H. 684, 686 (1974). Without requiring the exercise of the option to be in exact accord with the terms of the option, an offeree would have the ability to exercise the option on any terms it sees fit. Acceptance must be in strict accordance with the option because otherwise the purported acceptance would equate to a counteroffer.

In this case, the plaintiff's first attempt to exercise the option was ineffective because it proposed new conditions, contrary to the option in the lease. The lease provided an option to purchase specific property for a specific amount of money in "as is" condition. The plaintiff instead included a proposed Purchase and Sale Agreement with its May 20 letter that contained certain conditions that directly contradicted the terms of the option, such as a 90-day due diligence period for the plaintiff to inspect the property and also an ability to terminate the agreement "[i]f the results of Buyer's due diligence are not acceptable to Buyer." (Defs.' Ex. A-2, at 3.) Because the plaintiff did not exercise the option unconditionally and in accordance with its terms, the plaintiff's May 20 attempt to exercise the option was ineffective and, therefore, the defendants were not obligated to sell the property to the plaintiff at that time.

The plaintiff argues that even if the May 20 letter was ineffective as an exercise of the option, it exercised the option on three other occasions. On May 28, 2016, Jonathan Adler emailed defendants' counsel stating that they "are absolutely committed to whatever means necessary to exercise" the option. (Pl.'s Ex. B). Then, on July 19, 2016, plaintiff's counsel wrote a letter to defendants' counsel regarding the option, explaining that the plaintiff had exercised the option by its attorney's May 20 letter. (Defs.' Ex. A-3.) In response to the July 19 letter, the defendants wrote: "The terms of the option to purchase are clearly set forth in the Lease and, in order for your client to benefit from the terms of that option, it was required to perform according to those terms." (Pl.s' Ex. C.) Finally, on September 28, 2016, the plaintiff filed a complaint, alleging that the defendants failed to perform after the plaintiff exercised the option to purchase the property on May 20, 2016. (Compl. ¶¶ 32–33.)

The Court rules that the plaintiff's three subsequent alleged exercises of the option were ineffectual. On none of these occasions did the plaintiff exercise or attempt to exercise

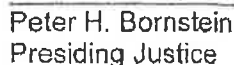
the option unconditionally, according to its terms, and independent of the proposed Purchase and Sale Agreement that accompanied the May 20 letter. Nor did the plaintiff ever withdraw the proposed Purchase and Sale Agreement from consideration in its purported exercises of the option. On the contrary, the plaintiff repeatedly referred to the May 20 letter, which the proposed Purchase and Sale Agreement accompanied, as its exercise of the option. The relevant provisions of the July 19, 2016 letter and the plaintiff's complaint are explicitly tethered to the May 20 letter. The May 28 email, sent eight days after the plaintiff had attempted to exercise the option conditionally, as a matter of law did not constitute an unconditional exercise of the option in accord with its terms. The Court concludes that the plaintiff's attempted exercises of the option after the May 20 letter were all ineffective because none of them were unequivocal, unconditional, and in accord with the terms of the option agreement.

The plaintiff's reliance on Livingston is misplaced. Livingston involved a party's breach of a contract's implied covenant of good faith and fair dealing concerning limits on discretion in contractual performance. 158 N.H. at 623–28. In this case, however, the defendants' pending motion for summary judgment is not directed at the plaintiff's Count II claim for breach of the implied covenant of good faith and fair dealing but relates only to its Count I breach of contract claim. Consequently, Livingston is inapplicable to the defendants' motion.

For the foregoing reasons, the Court GRANTS the defendants' motion for partial summary judgment on Count I—Breach of Contract.

So Ordered,

Dated: 7|27|18



Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Grafton Superior Court
3785 Dartmouth College Highway
North Haverhill NH 03774

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **The Skinny Pancake-Hanover, LLC v Crotix, et al**
Case Number: **215-2016-CV-00276**

Enclosed please find a copy of the court's order of August 20, 2018 relative to:

Order on Plaintiff's Motion to Vacate the Court's July 27, 2018 Order on Defendant's Motion for Partial Summary Judgment

August 21, 2018

David P. Carlson
Clerk of Court

(285)

C: James F. Ogorchock, ESQ; Barry Charles Schuster, ESQ; Megan C. Carrier, ESQ; Bryan K. Gould, ESQ; Cooley A. Arroyo, ESQ; Patrick J. Queenan, ESQ

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al

ORDER ON PLAINTIFF'S MOTION TO VACATE THE COURT'S JULY 27, 2018 ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff moves to vacate the Court's July 27, 2018 order on the grounds that the plaintiff was "deprived of [the] opportunity" to file a surreply. (Pl.'s Mot. ¶ 6.) On February 16, 2018, the defendants filed a motion for partial summary judgment on Count I, the plaintiff's breach of contract claim (Index #41), to which the plaintiff objected. (Index #42.) On March 29, 2018, the defendants filed a reply to the plaintiff's objection. (Index #44.) On April 2, 2018, the plaintiff filed its Motion for Leave to File Surreply or in the Alternative, to Strike Defendants' March 28, 2018 Reply. (Index #45.) On April 25, 2018, the Court granted the plaintiff's motion to file a surreply. (Id.) The parties agree that none of their attorneys received notice of this order (Pl.'s Motion 1–2; Defs.' Obj. 2), and the plaintiff did not file a surreply before the Court issued its July 27 order. On July 27, 2018, the Court granted the defendants' motion for partial summary judgment. (Index #65.) In the first paragraph of the Court's order, the Court laid out the procedural posture of the case stating, among other things, that it had granted the plaintiff's request to file a surreply but that the plaintiff had not filed one. Following issuance of the July 27 order, the plaintiff filed the motion to vacate now before the Court. (Index #67.) The defendants object. (Index #70.)

The plaintiff argues that the Court should vacate the July 27 order because the plaintiff did not have an opportunity to respond to the defendants' Reply and "present its position to the Court" before the Court ruled on the defendants' motion for partial summary judgment. (Pl.'s Mot. ¶¶ 1, 6.) The plaintiff asks the Court to vacate the order, accept its Surreply and "apply the summary judgment standard to the [defendants' motion] in light of the positions articulated in both the Surreply and at hearing, as requested in the Surreply." (Id., ¶ 1.)

As an initial matter, the Court addresses the plaintiff's request for a hearing on the defendants' motion for partial summary judgment. RSA 491:8-a does not require a hearing in summary judgment proceedings but contemplates that summary judgment motions may ordinarily be ruled on without a hearing. "According to RSA 491:8-a, a motion for summary judgment may be rendered upon 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits filed.'" Furbush v. McKittrick, 149 N.H. 426, 430 (2003). The Court is not required to hold a hearing before ruling on a motion for summary judgment but has "discretion to grant or deny" a request for hearing. Id. Both parties have filed extensive summary judgment pleadings, to which they have attached supporting affidavits and numerous exhibits, and have fully briefed the issues relating to the defendants' motion for partial summary judgment. The Court concludes that a hearing is unnecessary in the circumstances presented.

In its motion to file surreply the plaintiff requested leave to file a surreply or, in the alternative, to strike the defendants' reply. The plaintiff asserted that the defendants raised three new arguments "for the first time" in their reply and that "[t]o the extent the Court is inclined to consider any of Plaintiff's new arguments, a surreply will aid the Court in understanding and then denying the Motion for Partial Summary Judgment." (Pl.'s Mot. to File Surreply ¶¶ 2, 4.) The plaintiff also asserted that the defendants "mischaracterized" the

plaintiff's claims and that a "surreply would allow Plaintiff to untangle Defendants' twisted and contorted logic and refocus the inquiry to the actual claims in the case." (Id. ¶ 6.) In its recently filed 13-page Surreply, however, the plaintiff devotes just over one page to addressing one of the three "new arguments" that the defendants raised in their Reply and devotes almost seven pages to expanding on and reiterating the arguments it made in its objection concerning the plaintiff's purported exercises of the option and almost four pages to an argument that it raises for the first time in the summary judgment proceedings regarding the interpretation of the language in the option provision.

The fundamental premise of the plaintiff's Motion to Vacate is that the Court "did not get the benefit" of its surreply "when deciding the Defendants' Motion for Partial Summary Judgment." (Pl.'s Mot. ¶ 1.) That premise, however, is fundamentally flawed. In its July 27, 2018 order, the Court did not rely on, or even refer to, any of the assertions and arguments presented in the defendants' Reply. As a practical matter, the plaintiff received the benefit of the alternative relief that it requested in its Motion to File Surreply—that the Court not consider the defendants' Reply when ruling on their motion for partial summary judgment. Because the Court did not consider or rely on the defendants' Reply in deciding their motion for partial summary judgment, the fact that the Court ruled on the motion without having "the benefit" of the plaintiff's Surreply did not prejudice the plaintiff in any way.

Moreover, the plaintiff did not suffer any such prejudice for an additional reason; even if the Court had had the "benefit of" the plaintiff's Surreply before ruling on the defendants' motion for partial summary judgment, it still would have reached, and having considered the Surreply still reaches, the conclusion that the defendants are entitled to judgment as a matter of law on the plaintiff's breach of contract claim. The plaintiff's Surreply addresses three issues. The third issue, whether the plaintiff "lacked the financial ability to pay the purchase

price" (Pl.'s Surreply 12), was not considered by the Court and was (and remains) irrelevant to the Court's ruling on the defendants' motion for partial summary judgment. As to the second issue, whether any of the plaintiff's attempted exercises of the option were effectual, the Court finds the contentions in the plaintiff's Surreply unpersuasive. The Court still concludes that the undisputed material facts establish that none of the plaintiff's attempted exercises of the option were unequivocal, unconditional, and in accord with the terms of the option agreement and, consequently, all were ineffectual.

The first issue that the plaintiff addresses in its Surreply concerns the interpretation of the parties' contract. The plaintiff maintains that the "AS IS condition" language in the option provision is ambiguous, that the Court therefore must consider extrinsic evidence in ruling on the defendants' motion for partial summary judgment, and that such extrinsic evidence creates "a genuine issue of material fact regarding the meaning of the Option language, and specifically the effect of the 'as is condition' language." (Pl.'s Surreply 1, 4.) The plaintiff raises this argument in its Surreply for the first time in these summary judgment proceedings. The plaintiff did not present it in its objection, and the defendants did not raise it in their reply. This issue is not properly the subject of a surreply because it does not respond to anything in the defendants' reply. Apart from the untimeliness and procedural impropriety of now presenting this entirely new contention, the Court finds that it is without merit.

"The interpretation of a contract is a question of law." Lassonde v. Stanton, 157 N.H. 582, 594 (2008). When interpreting a written contract, the Court gives "the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Birch Broad., Inc. v. Capitol Broad. Corp., 161 N.H. 192, 196 (2010). The Court "give[s] an agreement the meaning intended by the parties when they wrote it." Id. In the absence of

an ambiguity, "the parties' intent will be determined from the plain meaning of the language used in the contract." Id. (quotations omitted). "The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language." Found. for Seacoast Health v. Hosp. Corp. of America, 165 N.H. 168, 172 (2013).

The Court rules that the term "as is" is unambiguous and has a commonly understood meaning. See Johnson v. Waisman Bros., 93 N.H. 133, 136 (1944) ("The defendant sold it 'as is' and this term, when contained in a memorandum of purchase and sale, means that the seller sells and the purchaser buys the specific chattel in its then existing physical and mechanical condition and without warranty as to the quality or fitness for a particular purpose."). RSA 382-A:2-316(3)(a) provides, in the context of transactions in goods, that "unless the circumstances indicate otherwise, implied warranties may be excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." See RSA 382-A:2-316(3)(a), Comment 7 ("Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved.") and Comment 6 ("The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.").

Additionally, courts in other jurisdictions have routinely ascribed the same meaning to the term "as is." See e.g. Payne v. Berry's Auto, Inc, 301 P.3d 804, 809 (Mont. 2013) ("[A]n implied warranty may also be disclaimed by use of colloquial language of common understanding, such as a product is being sold 'as is,' which 'makes plain' that there is no

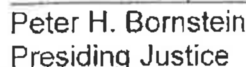
implied warranty, unless the circumstances indicate otherwise."); Dutchmen Mfr., Inc. v. Reynolds, 849 N.E.2d 516, 523 (Ind. 2006) ("Generally, a sale of property 'as is' means that the property is sold in its existing condition."); Raze Int'l, Inc. v. Se. Equip. Co., 69 N.E.3d 1274 (Ohio App. 2016) ("The phrase 'as is' describes the quality of the goods sold and in ordinary commercial usage it means that the buyer takes the entire risk as to the quality of the goods sold."); New Tex. Auto Auction Servs. v. Hernandez, 249 S.W.3d 400, 407 (Tex. 2008) ("Generally, those who buy a product 'as is' accept the risk of potential defects."); Silver v. Porsche of the Main Line, 2015 WL 7424848 (Pa. 2015) ("It is clear that the words 'as is' disclaim any implied warranties."). There can be no reasonable disagreement as to the meaning of the contract language. The Court rules that the option contract and its "as is" provision are unambiguous and that the defendants are entitled to judgment as a matter of law on the plaintiff's breach of contract claim based on the plain meaning of the language used in the contract.

To the extent that the plaintiff's Surreply may be considered a motion to reconsider, the Court concludes that it has not overlooked or misapprehended any point of fact or law. The Court still concludes that none of the plaintiff's attempted exercises of the option were effective because none of them were unequivocal, unconditional, and in accord with the terms of the option agreement.

For the foregoing reasons, the Court DENIES the plaintiff's Motion to Vacate.

So Ordered.

Dated: 3/20/18



Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. SUPERIOR COURT

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

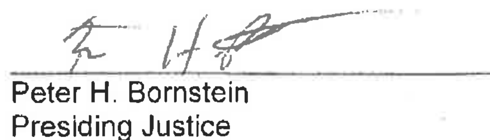
Crotix, et al.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

The plaintiff has filed a motion for reconsideration (Index #79), in which it asks the Court to reconsider its prior orders granting the defendants' motion for partial summary judgment on the plaintiff's breach of contract claim. The defendants object. (Index #82.) Having considered the parties' pleadings and the applicable law, the Court concludes that it has not overlooked or misapprehended any point of law or fact. Accordingly, the plaintiff's motion for reconsideration is DENIED.

So Ordered.

Dated: 9/11/18



Peter H. Bornstein
Presiding Justice

CLERK'S NOTICE DATE
9/12/18
CC: C. Arroyo; B. Gould; M. Carrier; J. Harris; P. Quenan; J. Ogorchock; B. Schuster

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2016-CV-276

The Skinny Pancake-Hanover, LLC

v.

Crotix, et al.

ORDER ON DEFENDANTS' MOTION TO DISMISS COUNT II

In this civil action, the plaintiff, The Skinny Pancake-Hanover, LLC ("Skinny Pancake"), alleges that it properly executed a purchase option contained within its lease with the defendants, Crotix, James Rubens, and Susan Rubens, and that the defendants failed to sell the underlying property. The plaintiff's complaint contained five counts: (I) breach of contract, (II) breach of implied covenant of good faith and fair dealing, (III) intentional misrepresentation (fraud), (IV) negligent misrepresentation, and (V) violation of RSA chapter 358-A. On January 5, 2018, the Court dismissed Counts III and V. (Index #38.) In its July 2018 pretrial statement (Index #63) the plaintiff waived its Count IV negligent misrepresentation claim. On July 27, 2018, the Court granted the defendants' motion for partial summary judgment on the plaintiff's Count I breach of contract claim. (Index #65.) This matter is now before the Court on the defendants' Motion to Dismiss Count II (Index #88), to which the plaintiff objects. (Index #89.)[1] Having considered the parties' pleadings and arguments and the applicable law, the Court rules as follows.

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[1] On October 19, 2018, after the Court had drafted this order but before it issued same, the defendants filed a Reply. (Index #93.) The Court has read the Reply but has not considered it or relied on it in this order. It appears that the Court anticipated many of the arguments that the defendants included in their Reply. Nevertheless, the Court has not revised this order in any way as a result of reading the Reply, other than to include these references to it.

CLERK'S NOTICE DATE
10/22/18
CC: C. Arroyo; B. Gould; M. Carrier; J. Harris; P. Queenan; J. Ogorcholk; B. Schuster

The defendants' Motion to Dismiss Count II is based on the Court's rulings in its July 27, 2018 order granting the defendants' Motion for Partial Summary Judgment as to Count I ("the 7/27/18 Summary Judgment Order"). In the 7/27/18 Summary Judgment Order, the Court ruled, as a matter of law, that none of the plaintiff's attempted exercises of the option were effective because none of them were unequivocal, unconditional, and in accord with the terms of the option agreement and that, consequently, the defendants were not obligated to sell the subject property to the plaintiff. (7/27/18 Order, 6–7.) In their motion to dismiss Count II, the defendants contend that "[b]ecause the court has determined, as a matter of law, that Crotix did not breach and had no such obligation to sell the property, the predicate of Count II is invalid, and Count II must be dismissed." (Defs.' Mot. Dismiss, 1.) The defendants maintain that the "principles behind the doctrine of collateral estoppel—if not the doctrine itself—compel the dismissal of Count II" and that "[e]ven if the doctrine of collateral estoppel does not strictly apply to the facts of this case," dismissal of Count II is still required because "[g]iven that the court has ruled that [Skinny Pancake] never exercised the option, . . . as a matter of law, [Skinny Pancake] failed to satisfy its alleged condition precedent to Crotix's duty to convey." (Id., 3–4.)

The plaintiff objects on four grounds. First, it contends that the defendants' motion to dismiss Count II is untimely. (Pl.'s Obj., 2–3.) Second, it argues that its Count II claim is separate and distinct from its Count I claim, that "just because a claim for breach of contract is dismissed does not mean that a separate claim for breach of the implied covenant is also dismissed automatically," and that "[w]hen the Skinny Pancake exercised the Option in the subject Lease, a new contract was formed and Defendants owed duties of good faith and fair dealing in the context of that new agreement." (Id., 1, 3–7.) Next, the plaintiff maintains that "the collateral estoppel doctrine has no bearing on this case." (Id., 2, 7–8.) Finally, the plaintiff

contends that the defendants' motion "requires the Court to make improper findings of fact." (Id., 2, 8–9.)

The Court first addresses the plaintiff's untimeliness argument. Unlike the Court's April 26, 2018 Order on Defendants' Motion to Amend Case Structuring and ADR Order (Index #57), the Court's September 11, 2018 Order on Defendants' Motion to Amend Case Structuring Order (Index #84) did not distinguish between dispositive pretrial motions and other pretrial motions but extended the deadline "for filing **all** pretrial motions . . . to 20 days from the date of the Clerk's notice of this order." (Id. ¶ 1) (emphasis added). The Clerk's notice date on that order is September 12, 2018, and the defendants' October 2, 2018 Motion to Dismiss Count II was timely filed under that order. The Court also rejects the plaintiff's contention that "[i]f Defendants believed they had a basis on which the [Count II] claims should be dismissed, they needed to raise it" earlier in the proceedings. (Pl.'s Obj., 2–3.) The 7/27/18 Summary Judgment Order is the basis for the defendants' Motion to Dismiss Count II and that motion could not be filed before the parties received that order and unless and until the Court extended the deadline for filing further pretrial motions, which the Court did only on September 11, 2018. The Court concludes that the defendants timely filed their Motion to Dismiss Count II.

Turning to the parties' substantive arguments, when ruling on a motion to dismiss, the Court must determine whether the plaintiff's allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel v. JGI E., Inc., 154 N.H. 791, 793 (2007) (quoting Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 152 N.H. 407, 410 (2005)) (internal quotations omitted). In doing so, the Court must "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (quoting Berry, 152 N.H. at 410).

However, the court need not "assume the truth of statements . . . that are merely conclusions of law" not supported by "predicate facts." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611–12 (2010). The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." Starr v. Governor, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts alleged in the complaint do not constitute a basis for relief. See Jay Edwards, Inc. v. Baker, 130 N.H. 41, 46–47 (1987) (finding dismissal was appropriate where plaintiff's complaint failed to plead sufficient facts supporting the elements of the claims).

In Count II of its Complaint, the plaintiff asserts:

> Plaintiff justifiably expected that Defendant Crotix would fulfill its obligation to sell the Property upon exercise of the Option to Purchase. Only seven months after negotiating the Lease, however, Defendant Crotix refused to do so. This breach of the Option to Purchase brings into question whether Defendant Crotix was negotiating and performing under the Lease in good faith. Defendant Crotix's breach further suggests that it never intended to fulfill its obligations when it signed the Lease.

(Compl. ¶ 41.) The plaintiff further asserts that "Crotix has thus breached the Lease's implied covenant of good faith and fair dealing" and that defendants James Rubens and Susan Rubens "are personally liable for [that breach] . . . as general partners of Defendant Crotix." (Id. ¶¶ 42, 43.)

The New Hampshire Supreme Court has recognized an implied duty of good faith and fair dealing "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). In the context of contract formation in category one claims, "the implied good faith obligations of a contracting party are 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. Category two cases "limit[] the power of an employer to terminate a wage contract by discharging an at-will employee." Id. at 139–40. In category three claims, which pertain to limits on discretion in contractual performance, the "common rule" is that "under 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." Id. at 143.

In its September 8, 2017 Objection to Defendants' Motion for Partial Dismissal as to Count II, the plaintiff explained that its claim against the defendants for breach of the implied covenant of good faith and fair dealing is a category one claim concerning contract formation. Specifically, in that Objection (Index #29), the plaintiff, citing to paragraphs 41 to 43 of its Complaint, argued that the plaintiff's Complaint had "alleged that Defendants represented during contract formation they would fulfill their obligation to sell the Property upon exercise of the Option, that Plaintiff relied on that representation in entering into the Lease, and that Defendants never intended to fulfill that obligation," and that "[u]nder the well-settled law summarized above, these allegations adequately state a claim for breach of the implied covenant of good faith and fair dealing in the context of contract formation." (Pl.'s Obj. ¶¶ 10, 12, 13.)

The plaintiff is correct in several of its contentions. The Court agrees that the plaintiff's Count II claim is separate and distinct from its breach of contract claim. See Centronics Corp., 132 N.H. at 139 (observing that "the continuing good faith bar to misrepresentation is antecedent to the agreement itself"). The Court also agrees that the collateral estoppel doctrine is inapposite and, therefore, rejects the defendants' invitation to view the issue presented through the prism of collateral estoppel principles. Instead, the Court examines the allegations in the plaintiff's Complaint, which the Court assumes are true and from which the Court construes all reasonable inferences most favorably to the plaintiff, in light of the rulings in the 7/27/18 Summary Judgment Order and principles of causation. These rulings, however, do not lead inexorably to the result—denial of the defendants' motion to dismiss—for which the plaintiff advocates.

Actions for breach of the implied covenant of good faith and fair dealing, like actions for breach of contract, include an element of causation. See Indep. Mech. Contractors v. Gordon T. Burke & Sons, Inc., 138 N.H. 110, 115 (1993) (observing that "[i]n order to establish liability the plaintiff must . . . show that the defendant's breach was a substantial factor in causing the injury") (quotations omitted); New Hampshire Civil Jury Instructions § NS 32.117 (2016) (instructing the jury that the "implied promise of good faith and fair dealing . . . means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract"). As the plaintiff observes, an action for breach of the implied covenant provides a remedy where the bad faith or unfair dealing of one party to a contract has "deprived the other party of the benefit of the contract." (Pl.'s Obj., 5.) A causal link between the breach and the alleged harm or loss is required in category three contract performance cases. See Birch Broad., Inc. v. Capital Broad. Corp., 161 N.H. 192,

199 (2010) (upholding the trial court's finding that the defendants had "breached the implied covenant of good faith and fair dealing . . . thereby disrupting the plaintiffs' justified expectations and depriving them of the benefit of the parties' bargain"); Centronics Corp., 132 N.H. at 143 (imposing "reasonable limits in exercising" discretion in contract performance where the agreement invests "one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value"); Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387, 396 (N.J. 2004) (observing that the "party claiming a breach of the covenant of good faith and fair dealing" must establish "that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties"). Such a causal connection is likewise necessary in category one contract formation claims. See Dawe v. Am. Universal Ins. Co., 120 N.H. 447 (1980); Bursey v. Clement, 118 N.H. 412, 415 (1978) (upholding the trial court's determination that the defendants' breach of the implied covenant of good faith and fair dealing in contract formation "affected the very essence of the transaction insofar as the plaintiff's purposes were concerned").

In this case, the requisite causal link between the alleged breach of the implied covenant of good faith and fair dealing and the alleged harm or loss is, as a matter of law, absent. Count II of the Complaint does not even allege such a causal connection. (See Compl. ¶¶ 38–44.) The plaintiff now asserts that the defendants' bad faith conduct in the contract formation stage "deprived [the plaintiff] of the benefit of the contract." (Pl.'s Obj., 5.) The plaintiff also acknowledges, however, that the defendants' obligation to sell the subject property to the plaintiff is contingent "upon Plaintiff's proper exercise" of the "Option to Purchase." (Compl. ¶¶ 41, 47, 55.) In the 7/27/18 Summary Judgment Order, the Court

determined, as a matter of law, that the plaintiff did not properly exercise the option and that, therefore, the defendant is not obligated to sell the property to the plaintiff pursuant to the option. (7/27/18 Order, 6–7.) As a matter of law, it was the plaintiff's own actions in 2016—its ineffectual attempted exercises of the option to purchase—that deprived the plaintiff of the benefit of the option to purchase, not any bad faith conduct or unfair dealing of the defendants in 2015 during the contract formation stage. As a matter of law, the defendants' contract formation conduct described in Count II of the Complaint is not the cause of the loss or harm about which the plaintiff complains.

The plaintiff appears to recognize the absence in Count II of a causal link between the defendants' alleged conduct in 2015 and the alleged harm because the plaintiff now focuses on the defendants' actions in 2016 in arguing that the defendants breached the implied covenant of good faith and fair dealing. The plaintiff now contends that "[w]hen the Skinny Pancake exercised the Option in the Lease that is the subject of this litigation, a new contract was formed under which Defendants were obligated to deliver deeds to the units," that "this newly formed contract carries with it the implied covenant of good faith and fair dealing," and that the defendants breached the implied covenant during the contract formation stage of this "new contract" in 2016 by "failing to disclose their view that the presence of the proposed Purchase and Sale Agreement somehow nullified the exercise, and failing to communicate with the Skinny Pancake and its attorneys about the exercise." (Pl.'s Obj. 4, 7.) This reasoning is flawed for two reasons. First, in the 7/27/18 Summary Judgment Order the Court determined, as a matter of law, that the plaintiff did not properly exercise the option and, consequently, no new contract was formed in 2016. Moreover, the defendants' actions in 2016 are **not** the subject of Count II of the Complaint. The defendants' alleged bad faith and

unfair dealing in 2016 are not what the plaintiff pleaded in Count II and are not what Count II asserts constituted a breach of the implied covenant of good faith and fair dealing. Rather, Count II asserts that the defendants breached the implied covenant in 2015, when it "was negotiating . . . the Lease" and "when it signed the Lease." (Compl. ¶ 41.) That 2015 breach of the implied covenant of good faith and fair dealing is "the theory on which the plaintiff . . . [is] proceeding" and of which the defendants have been informed. Signal Aviation Servs., Inc. v. City of Lebanon, 169 N.H. 162, 174 (2016) (quoting Morency v. Plourde, 96 N.H. 344, 346 (1950)).

The decisions in Livingston v. 18 Mile Point Drive, 158 N.H. 619 (2009), and Brunswick Hills, on which the plaintiff relies heavily, are distinguishable from the present case. In both of those cases, the defendants' conduct in the contract performance stage prevented the plaintiff from properly or successfully exercising the option and, therefore, deprived the plaintiff of the benefit of the contract. Livingston, 158 N.H. at 624–26; Brunswick Hills, 864 A.2d at 399 (concluding that "the breach was a demonstrable course of conduct, a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly"). In other words, in both of those cases, the defendants' breach of the implied covenant of good faith and fair dealing caused the harm or loss for which the plaintiff sought a remedy. In this case, the plaintiff's own actions in 2016, not the defendants' conduct during the contract formation stage in 2015, caused the loss or harm.

The plaintiff's contention that the defendants' motion to dismiss requires the Court to make improper findings of fact is without merit. The Court has not made any factual findings but simply has applied the rulings in its 7/27/18 Summary Judgment Order and other relevant legal principles to the assumed–to–be–true factual allegations in the plaintiff's Complaint.

Assuming that all facts pleaded in the plaintiff's Complaint are true and construing all reasonable inferences drawn from those facts in the plaintiff's favor, the Court rules that the facts as alleged do not constitute a basis for legal relief. Accordingly, the Court GRANTS the defendants' Motion to Dismiss Count II.

So Ordered.

Dated: 10/19/18

Peter H. Bornstein
Presiding Justice