THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0648

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THE SKINNY PANCAKE-HANOVER, LLC

v.

CROTIX, et al.

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

# REPLY BRIEF FILED BY APPELLANT THE SKINNY PANCAKE-HANOVER, LLC

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(15 Minute Oral Argument - Attorney Harris)

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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

The Skinny Pancake—Hanover, LLC ("SPH") relies on the Statement of the Case and Facts set forth in its opening brief. It files this reply brief to address the following issues in response to the opposing brief: (1) Crotix[1] mistakenly relies on *Elderkin v. Carroll*, 941 A.2d 1127 (Md. 2008), to support its position that it did not act in bad faith by failing to disclose any perceived defects in the exercises; (2) Crotix notably did not address the trial court's misapplication of the summary judgment standard; and (3) Crotix cherry picked facts from the record in an attempt to create a misimpression about peripheral issues, to include exaggerating the significance and evidentiary value of certain communications between SPH and its legal counsel.

[1] Appellees are referred to collectively as "Crotix."

## ARGUMENT

### I. CROTIX MISTAKENLY RELIES ON A MARYLAND CASE TO SUPPORT THEIR POSITION THAT THEY DID NOT ACT IN BAD FAITH

As thoroughly discussed in SPH's opening brief, the principles enunciated in *Livingston* apply to this case. *Livingston v. 18 Mile Point Drive, Ltd*, 158 N.H. 619 (2009). And, in its opposing brief, Crotix failed to offer any sound reason to support its narrow interpretation of *Livingston*'s application. As a result, this Court should reverse the trial court's ruling, enforce the implied covenant of good faith and fair dealing to find that Crotix waived its right to challenge at trial the effectiveness of each exercise for any reason beyond timeliness, and remand the case to the trial court to allow a fact finder to decide timeliness of SPH's exercises.

Specifically, Crotix now contends that it had "no obligation to correct defects in the optionee's attempted exercise or otherwise guide the optionee to proper performance." AB at 17[2] (citing *Elderkin v. Carroll*, 941 A.2d 1127, 1138–40 (Md. 2008)). Crotix's position is contrary to New Hampshire law.

Prior to the trial court's erroneous summary judgment ruling, SPH intended to present evidence at trial that Crotix acted in bad faith in refusing to honor the Option. Specifically, SPH intended to show that, sometime between executing the lease and the attempted exercises, Crotix

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[2] Citations to the record are as follows:
"AB" refers to Appellees' Brief.
"OB" refers to SPH's opening brief.
"App. Vol. I" refers to the Appendix Volume I filed with SPH's opening brief.
"App. Vol. II" refers to the Appendix Volume II filed with the SPH's opening brief.
"Addendum" refers to the Addendum attached to this reply brief.

changed its mind, no longer desired to sell the property and honor the Option, and therefore refused to communicate to SPH its supposed objections in an effort to run out the clock on SPH. In doing this, Crotix misled SPH by communicating only its belief that each of the exercises was untimely—Crotix *never* raised any other issue prior to SPH filing the underlying Complaint.

After the Complaint was filed, however, Crotix quickly realized its timeliness argument lacked merit, and manufactured a new basis for refusing to honor the exercise. Specifically, it dilatorily objected to certain conditions contained within the proposed P&S despite the fact the P&S was transmitted to Crotix nearly five months earlier. None of these manufactured reasons was disclosed to the SPH during the Option period. As a result, Crotix acted in bad faith and waived its right to challenge the exercises beyond timeliness. A narrow holding from the Court of Appeals of Maryland does not effect this conclusion.

> Under Maryland state law, parties to a contract must
>
> > Cooperate in good faith to carry out the intention the parties had in mind when it was made; and that he should not be permitted to engage in any subterfuge or devious means to prevent the other party from performing, and the use that as an excuse for failing to keep his own commitment.

*Elderkin*, 941 A.2d at 1138 (quoting *David A. Bramble, Inc. v. Thomas*, 914 A.2d 136, 147 (Md. 2007)). The *Elderkin* Court discussed certain cases involving noncompliance with the good faith requirements, to include *Brewer v. Sowers*, 86 A. 228 (Md. 1912), which involved a seller that "resisted the performance of the contract in every possible way." *Elderkin*, 941 A.2d at 1138.

In sum, the *Elderkin* Court held that:

> The good faith requirement does not impose upon the seller an additional duty to make the sale easier for the buyer, *but rather that a seller cannot act in a manner that improperly attempts to defeat the exercise of the purchaser's contract rights*.

*Id*. at 1139 (emphasis added). This is exactly what Crotix did in this case: it resisted the performance in every possible way and acted in a manner that improperly defeated the exercise of SPH's contract rights.

Under the unique and complicated facts of *Elderkin*, the court, however, ultimately found that the sellers did not act in bad faith. Unlike this case, in *Elderkin*, the seller's attorney responded to the initial exercise with a detailed letter outlining the deficiencies within the attempted exercise. *Id.* at 1131–32. The buyer attempted to correct the communicated deficiencies, and, again, submitted a proposed contract in an attempt to exercise the option. *Id.* at 1132. For a second time, the seller's attorney issued a detailed response letter outlining a few of the remaining deficiencies—which included "unacceptable additional terms." *Id.* Ultimately, the buyer submitted six contracts in an effort to properly exercise but the buyer failed to correct deficiencies that the seller explicitly communicated to them. *Id.* at 1133. Primarily, the buyer repeatedly failed to tender the requisite $50,000 cash deposit to the seller. *Id.* The *Elderkin* Court found this to be a material defect and not a proper exercise. *Id.*

Here, unlike the seller's in *Elderkin*, Crotix failed to communicate to SPH that it believed the initial exercise (containing the proposed P&S) and the subsequent exercises were deficient. Therefore, if Crotix truly harbored objections to the proposed P&S at the time it was offered it deliberately

misled SPH into believing the only issue with the exercise was timeliness. This is far more egregious than merely not informing SPH of the perceived defects. As a result of this deception, SPH worked diligently to produce evidence to Crotix that it had in fact timely exercised. But without Crotix disclosing any other perceived defects in the exercise, SPH was denied the opportunity to cure any of the undisclosed defects.

In sum, *Elderkin* is factually distinct from this case as the seller in *Elderkin* did not deliberately mislead the buyer in an effort to run out the clock. Contrary to Crotix's argument that *Elderkin* supports its position, the case actually supports SPH's argument: that Crotix acted in bad faith, and therefore, effectively waived its right to challenge the effectiveness of SPH's exercises on grounds beyond timeliness.

## II. CROTIX FAILED TO ADDRESS THE TRIAL COURT'S MISAPPLICATION OF THE SUMMARY JUDGMENT STANDARD

The trial court erred in misapplying the proper summary judgment standard. Specifically, the trial court failed to construe the affidavits, deposition testimony, other evidence, and all inferences properly drawn in the light most favorable to SPH. Instead, the trial court construed such evidence in a light favorable to the moving party (Crotix), held that the P&S "contained certain conditions that directly contradicted the terms of the option," and further found each subsequent exercise were "tethered" to the initial exercise. OB at 74. In its opposing brief, Crotix notably failed to address the trial court's misapplication of the standard.

Under RSA 491:8-a, summary judgment is granted only when "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 facts and that the moving party is entitled to judgment as a matter of law."

Here, the trial court misapplied this standard, construed material facts in dispute in the light most favorable to the moving party (Crotix), and, in doing so, erred when it found that each of SPH's exercises of the Option was ineffective.

The question as to whether SPH properly exercised the Option involves reconciling material facts in dispute, such as the meaning of the "as is condition" clause. Therefore, the trial court should have denied summary judgment and permitted the fact finder to reconcile the disputed facts to determine whether the exercises were timely and effective.

At the time the trial court misapplied the standard, the following factual issues, among others, remained unsettled: whether the proposed P&S attached to the May 20th Option contradicted the Option language; Crotix's interpretation of the Option language at the time of each exercise; the meaning of the "as is condition" provision; and whether Crotix truly harbored objections to the P&S at the time it repeatedly refused to honor the exercise.

At the time the trial court improperly granted summary judgment, SPH was also on the cusp of discovering additional evidence directly related to a key issue in the case: whether the defendants acted in bad faith in refusing to honor the exercise. Specifically, there were two separate upcoming discovery events to unveil such evidence: (1) the trial court had recently ordered the limited deposition of Attorney Barry Schuster, *see*

Addendum at 39[3]; and (2) SPH had filed a motion to compel the Rubenses to testify about the content of the couple's conversations surrounding SPH's exercises—despite being business partners, co-member/managers of a limited liability company, and co-owners of commercial real estate they improperly extended the marital privilege beyond its natural bounds depriving SPH of essential discovery. Addendum at 40.

In sum, this was clearly not a summary judgment case. This Court should reverse, finding the trial court misapplied the summary judgment standard, and allow SPH to present these factual issues to a jury.

## III. CROTIX CHERRY PICKED FACTS UNRELATED TO ISSUES ON APPEAL IN AN EFFORT TO CREATE A MISIMPRESSION ABOUT PERIPHERAL ISSUES

In its opposing brief, Crotix cherry picked certain facts unrelated to the issues on appeal in an obvious attempt to confuse this Court and somehow establish two false premises: (1) that SPH was unable to purchase the property at the time it exercised the Option; and (2) that SPH was on notice that the proposed P&S did not comport with the terms of then Option language. Both premises are untrue.

Specifically, Crotix cited communication between SPH and its legal counsel, as well as between SPH and one of its business partners, a real estate development firm, Redstone. AB at 9–11. As to Redstone, Crotix attempts to create the misimpression that SPH was unable to finance the deal without their backing. AB at 11. That is not the case. Both of the Adlers testified at deposition that they had a deep network of investors and

[3] See also Crotix's Motion for Protective Order in attached Addendum at 1–12 and SPH's Partial Objection to Defendants' Motion for Protective Order (Attorney Schuster Deposition) at 13–38.

other financing options—to include tapping other funding sources and even their own personal wealth—to finance the purchase of the premises. App. Vol. II at 209–10, 240–41, 243, 248–253. As a result, Redstone's willingness to partner in the purchase of the premises is not relevant to whether Crotix acted in bad faith, whether the trial court applied the proper standard, whether the exercises were effectual, or any other issue on appeal. Indeed, the trial court explicitly stated it made no finding whatsoever regarding SPH's ability to close, and yet Crotix included this information. OB at 78.

Crotix introduced these facts in an effort to establish this false premise but then slyly contended that the trial court "did not consider this fact in granting summary judgment." AB at 19, fn 5. It likely did so as it understands that these facts further highlight that, at the time the trial court improperly granted summary judgment, there were many genuine issues of material fact for a fact finder to reconcile.

Similarly, the communication between SPH and its legal counsel has no relevance to the issues on appeal. During the Option Period, the Adlers shared certain communications with their business partner Redstone. Those communications contained legal advice, not legal conclusions. In some of those communications, Attorneys Susan Manchester and Sean Gorman informed their clients of the potential risks associated with taking a certain approach. App. Vol. II at 147, 173, 175–76. These communications have no bearing on whether the exercises were effectual or whether Crotix acted in bad faith. Instead, the fact that "one of the largest and most capable law firms in New Hampshire" was actively involved in exercising the Option

further demonstrates the level of Crotix's deceptive and misleading efforts to resist fulfilling its legal obligations under the Option. AB at 10.

Further, SPH knew there was a risk that Crotix—having already proven to be unreasonable landlords—*might* have an issue with the P&S and its standard terms. But recognizing a potential risk did not mean Crotix would actually object to the proposed P&S, and indeed, Crotix did not express any concerns with the proposed P&S until after the Complaint was filed and it realized its timeliness argument was anemic. Because Crotix remained silent, the perception of a risk did not, and should not, affect the validity of an otherwise effective exercise of the option.

## CONCLUSION

Crotix should not be permitted to benefit from its failure to communicate meaningful information to SPH. When SPH timely sought to exercise on the Option, Crotix breached the parties' contract and acted in bad faith by refusing to honor the exercises. In doing so, Crotix relied ***only*** on the objection that the exercises were untimely, and repeatedly failed to communicate any other perceived deficiencies with the exercises. As a result, SPH was denied notice and the ability to cure any unknown alleged defects. As such, Crotix effectively waived its right to later argue the four exercises were ineffectual for other reasons.

The trial court should have applied the principles set forth in *Livingston*. This Court has already held in *Livingston* that a party to an option has an affirmative legal duty to correct misunderstandings in connection with the exercise of an option. This case presents an

opportunity for this Court to explicitly expand its holding in *Livingston* and apply its rationale to all phases of contracts.

Each one of the four exercises of the Option was effective and *consistent with* the terms of the Option language. The Option language explicitly contemplated—and arguably required—an executed P&S. So, SPH proposed a standard P&S with its initial exercise. The trial court erred in finding this was ineffectual.

Alternatively, even if the trial court correctly found the initial exercise was ineffectual, it nonetheless erred in holding that the three subsequent exercises were somehow tainted by the initial exercise. In doing so, the trial court overlooked the express language of those exercises.

Finally, the trial court: (1) applied the improper standard of review and failed to construe the facts in the light most favorable to SPH as the non-moving party; and (2) overlooked material facts in dispute—such as the modern interpretation of the "as-is condition."

In conclusion, this Court should: (1) reverse the trial court's decision denying partial summary judgment and enter a judgment that Crotix breached its obligation to act in good faith and deal fairly with SPH; (2) reverse the trial court's finding that all four of Appellant's exercises of the Option were ineffectual; (3) reinstate the claims of breach of contract and breach of the implied covenant of good faith and fair dealing; and (4) remand the case to the trial court to allow SPH to present its case to a jury.

Respectfully submitted,

The Skinny Pancake-Hanover, LLC

By Its Attorneys,

SHEEHAN PHINNEY BASS & GREEN, P.A.

Dated: April 3, 2019

By: */s/ Patrick J. Queenan*

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**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: April 3, 2019

*/s/ Patrick J. Queenan*
Patrick J. Queenan

## CERTIFICATION AS TO WORD COUNT

The undersigned certifies that the above brief consists of less than 3,000 words, exclusive of the Table of Contents and Table of Authorities.

*/s/ Patrick J. Queenan*
Patrick J. Queenan