THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham County | Rockingham Superior Court

Hate To Paint, LLC
v.
Ambrose Development, LLC and
John Flatley d/b/a John J. Flatley Company

218-2020-CV-0585

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This action centers on a contract pursuant to which Plaintiff Hate To Paint, LLC, was hired by Defendant Ambrose Development, LLC ("Ambrose") to perform painting services at a property owned by Defendant John Flatley d/b/a John J. Flatley Company ("Flatley") (collectively, "Defendants"). See Doc. 1 (Compl.) (arguing Defendants unlawfully terminated the contract). Plaintiff now moves for partial summary judgment as to Defendants' liability on Plaintiff's breach of contract and Consumer Protection Act ("CPA") claims. See Doc. 9. Defendants object. See Doc. 11.

The crux of Plaintiff's breach of contract claim is whether Defendants properly invoked the contract's termination for convenience clause, which provides:

> **TERMINATION FOR CONVENIENCE:** The General Contractor may terminate the Contract for convenience upon three (3) days prior written notice. In the event of such termination, the Contractor shall be entitled to receive payment for labor and materials furnished through the date of termination. Contractor shall not be entitled to receive payment for any lost profits.

See Doc. 12 ¶ 3. Defendants invoked this clause after Flatley's accounting department "pointed out" that the contract price was 15 percent higher than the price Plaintiff recently charged Defendants to perform nearly identical work. See id.; see also id.

Ex. 1 (Defs.' Interrog. Answs.). After recognizing the price difference, Defendants obtained new bids from other contractors and "invited" Plaintiff to re-bid at a reduced price. See Doc. 10. The work was then awarded to another contractor. See id.

The parties disagree as to whether Defendants' discretion to terminate the contract for convenience was restricted by the implied covenant of good faith and fair dealing. See Docs. 9, 14. The parties agree, however, that this is an issue of first impression under New Hampshire law. See id.

It is well-established that under New Hampshire law, "[e]very contract contains an implied covenant of good faith and fair dealing." Albee v. Wolfeboro R. Co., Inc., 126 N.H. 176, 179 (1985) (citation omitted). The New Hampshire Supreme Court has acknowledged that this covenant may be applied "to contradict an express contractual grant of discretion when necessary to protect an agreement which would otherwise be rendered illusory and unenforceable . . . ." Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 629–32 (2000). Specifically, the Hobin court adopted the reasoning set forth in Third Story Music, Inc. v. Waits, which

> distinguished between the proper implication of a covenant of good faith and fair dealing "to contradict an express contractual grant of discretion when necessary to protect an agreement which otherwise would be rendered illusory and unenforceable," and situations in which a court may not imply such a covenant because "regardless of how such [discretionary] power [is] exercised, the agreement [is] supported by adequate consideration."

Hobin, 144 N.H. at 630–31 (citing Third Story Music, 48 Cal.Rptr.2d 747, 752–53 (Cal. Ct. App. 1995)). In applying the reasoning of the Third Story Music court, the New Hampshire Supreme Court held that the contract in Hobin was supported by adequate consideration and thus the implied covenant of good faith and fair dealing did not limit Coldwell Banker's exercise of its contractual discretion:

> In consideration of Hobin's agreement to purchase and operate a Coldwell Banker franchise, his business accrued numerous benefits stemming from its association with a nationally recognized real estate marketing organization . . . . Hobin was also eligible for cash awards based on his franchise's performance. Regardless of the extent of Coldwell Banker's exercise of its discretion—whether it chose to place competing franchises next door to Hobin or to leave the territory free of competitors—Hobin retained the right to the contractual benefits set forth above. Importantly, Coldwell Banker also incurred costs in providing its programs and assistance to Hobin. Even were we to adjudge the benefits accruing to Hobin to be worthless, the detriment Coldwell Banker incurred in providing its programs and assistance to Hobin was sufficient to constitute consideration. In sum, the consideration provided was more than the peppercorn of consideration the law requires to save the contract from unenforceability.

Hobin, 144 N.H. at 629–31 (citations and quotations omitted). In summarizing its reasoning, the Hobin court observed that "courts cannot make better agreements for parties than they themselves have been satisfied to enter into," and thus courts will not "read into contracts anything by way of implication except upon grounds of obvious necessity." Id. at 631 (citation omitted).

In the Court's view, this case is factually distinguishable from Hobin. Here, Plaintiff did not receive any benefits from the contract prior to its own performance, and Defendants did not incur any expenses which benefitted Plaintiff.[1] This set of circumstances is akin to the facts presented to the Maryland Court of Appeals in the case of Questar Builders, Inc. v. CB Flooring, Inc., 978 A.2d 651 (Md. 2009). The Questar court was also tasked with determining whether the covenant of good faith and fair dealing limited a party's discretion to terminate for convenience. See id. at 670–74. In responding to Questar's argument "that other consideration supported its assertedly

[1] Defendants apparently reimbursed Plaintiff $1,360.00 for paint it had purchased for the project, see Doc. 7, but the Court does not conclude that this represents consideration: there is no evidence that Plaintiff received more than it had expended in obtaining the paint, and thus the payment merely reduced the amount of damage resulting from Defendants' actions and returned Plaintiff to the status quo ante.

unfettered right to terminate," the Questar court held that because "there was no appreciable time . . . before which Questar was prohibited from exercising its right to terminate," Questar's contractual obligation to pay for the reasonable value of CB Flooring's partial performance (if any) was not sufficient consideration to prevent the contract from being illusory. See id. at 673–74. Rather, because the contract permitted Questar to terminate at any time, Questar could have avoided making any payments to CB Flooring at all by terminating "before CB Flooring began performing . . . ." Id. at 673.

Here, as in Questar, the contract purportedly allowed Defendants to completely avoid their performance obligations by terminating the contract before Plaintiff purchased materials and/or began work. As such, unlike the contract in Hobin—pursuant to which Hobin received a benefit regardless of how Coldwell Banker exercised its discretion—the contract here rendered Plaintiff's receipt of consideration totally dependent on the manner in which Defendants exercised their discretion to terminate the contract. See Hobin, 144 N.H. at 629–31. Under these circumstances, the Court shares the Questar court's view that a contractual obligation to pay for partial performance, if any, does not cure the illusory nature of a contract. See Questar, 978 A.2d at 673–74. As such, the Court concludes that the covenant of good faith and fair dealing must limit Defendants' discretion to terminate the contract for convenience. See Hobin, 144 N.H. at 630–31 (citing Third Story Music, 48 Cal.Rptr.2d at 752–53).

The next question, then, is whether terminating the contract to obtain a better price was a permissible use of Defendants' discretion. Plaintiff has cited a number of state and federal cases which hold that a party generally may not invoke a termination for convenience clause in order to obtain a better price elsewhere. See Doc. 9

(collecting cases). The Court finds it noteworthy that even the federal government may not terminate for convenience to acquire a better bargain. See Krygoski Const. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996). This is noteworthy because public policy supports a broader termination power for the government than for private citizens. See Questar, 978 A.2d at 663–70 (explaining the history of termination for convenience clauses, and noting that "the federal government stands in a position entirely uncomparable to that of a private person").

The federal government can terminate based on an error in the bidding process, see Custom Printing Co. v. United States, 51 Fed. Cl. 729, 732–33 (2002), but even if that power extends to private parties, no such error occurred in this case. Instead, Defendants obtained bids for the work and awarded the contract to Plaintiff because Plaintiff had the lowest bid. See Doc. 14 Ex. 1. Once Defendants realized that Plaintiff had previously agreed to accept a lower amount in exchange for nearly identical work, Defendants terminated the contract. See id. In the Court's view, Defendants' failure to review the prior contract price before accepting Plaintiff's bid on this contract is not akin to an error in the bidding process. As such, the Court concludes that Defendants breached the contract by invoking the termination for convenience clause in order to obtain a better bargain. Plaintiff's motion for partial summary judgment is thus **GRANTED** as it relates to Defendants' liability for Plaintiff's breach of contract claim.

The Court notes that in responding to Plaintiff's statement of material facts, Defendants contend that Flatley was not a party to the contract. See Doc. 12. However, Defendants' joint objection to Plaintiff's motion for summary judgment contains no argument with respect to this issue. See Doc. 11. Moreover, it is

undisputed that Flatley owns the property where the contract work was to occur, and that Flatley manages Ambrose. See Docs. 1, 5 (Flatley's Answ.), and 6 (Ambrose's Answ.). Indeed, the January 3, 2020 letter to Plaintiff invoking the termination for convenience clause was sent on Flatley's letterhead. See Doc. 9 Exs. On the record presented, the Court concludes that both Defendants are liable in connection with Plaintiff's breach of contract claim. See Restatement (Second) of Agency § 292 (1958) (explaining that "an agent may make a contract between the principal and a third person if he is authorized or apparently authorized to do so"); see also Bradley Real Estate Tr. By & Through Lumbermens Mut. Cas. Co. v. Plummer & Rowe Ins. Agency, Inc., 136 N.H. 1, 3–4 (1992) (applying Restatement (Second) of Agency § 292).

The Court now turns to Plaintiff's CPA claim, in which Plaintiff argues that Defendants violated the CPA by terminating the contract, asking Plaintiff to re-bid at a lower price, and then accepting a competing bid. See Doc. 1; see also Doc. 9. Although Defendants' objection does not substantively address this claim, see Docs. 11, 14, the Court concludes that the evidence in the summary judgment record is insufficient to enter judgment in Plaintiff's favor at this time, see Super. Ct. Civ. R. 13(b) ("Failure to object shall not, in and of itself, be grounds for granting the motion.").

The New Hampshire Supreme Court has previously held that "an ordinary breach of contract claim . . . is not a violation of the CPA." See Axenics, Inc. v. Turner Const. Co., 164 N.H. 659, 675–76 (2013) (explaining that in analyzing CPA claims, New Hampshire courts apply the rascality test, pursuant to which "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" (citations omitted)). While Plaintiff

suggests that Defendants never intended to pay the contract price, there is conflicting evidence in the summary judgment record on that point. See Doc. 14 Ex. 1 (indicating Defendants did not solicit additional bids until they recalled that Plaintiff's prior bid on similar work was significantly lower). In addition, given Plaintiff's acknowledgment that its breach of contract claim raises an issue of first impression in New Hampshire, Defendants could have reasonably but mistakenly believed that the termination for convenience clause rendered their conduct permissible. On the record presented, the Court is not convinced that Plaintiff is entitled to judgment as a matter of law with respect to its CPA claim. Accordingly, that aspect of Plaintiff's motion for partial summary judgment is **DENIED**.

In sum, for the reasons set forth above, Plaintiff's motion for partial summary judgment is **GRANTED** to the extent it seeks a ruling that Defendants are liable in connection with Plaintiff's breach of contract claim, but **DENIED** to the extent it seeks such a ruling as to Plaintiff's CPA claim.

So ordered.

February 26, 2021
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 02/26/2021