State of New Hampshire
Supreme Court

NO. 2023-0076

2023 TERM

OCTOBER SESSION

Hate to Paint, LLC

v.

Ambrose Development, LLC
and John J. Flatley d/b/a John J. Flatley Company

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF

October 5, 2023

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I. Termination Before Performance Shows Good Faith

Hate to Paint's central argument, repeated throughout its brief, is that Ambrose was in violation of the covenant of good faith and fair dealing because Ambrose terminated the contract before performance commenced. Hate to Paint appears to argue that had Ambrose terminated *after* performance commenced, there would have been no such violation because Hate to Paint would have recovered something on its contract.

To the contrary, Ambrose showed its good faith and fair dealing by terminating when it did. Had Ambrose waited to terminate until after Hate to Paint "lifted a roller or a brush," HTP BRF. at 10, Hate to Paint would have had less time to take steps to secure other work for 2020, and to otherwise mitigate its damages. Had Ambrose waited, Hate to Paint would likely now be claiming Ambrose purposely sat on information, and that it purposely delayed until Hate to Paint expended time and money and otherwise committed further resources, all while knowing that it intended to terminate after performance commenced. Such a claim would be well-grounded, as that is the type of conduct that is considered unjustifiably underhanded, as described in Ambrose's Opening Brief. AMBROSE BRF. at 26-27.

Instead, Ambrose terminated as soon as possible after it analyzed information and realized it had overpaid. By terminating *before* performance, Ambrose maximized the time Hate to Paint had to overcome the loss of the contract, and minimized the amount of resources Hate to Paint devoted to it. Ambrose's early termination shows its good faith and fair dealing.

Hate to Paint invokes *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133 (1989), to suggest that a party which has discretion to terminate must "'observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.'" HTP BRF. at 14 (quoting *Centronics*, 132

N.H. at 143). The record shows that once it analyzed its data, Ambrose promptly, reasonably, and transparently exercised its discretion, in compliance with the letter of the contract's termination-for-convenience clause.

Further, Hate to Paint's claim that Ambrose should have terminated after performance commenced, because then Hate to Paint would have realized *some* profit, is contradicted by the language of the termination-for-convenience clause itself. The clause provides that "[i]n the event of such termination, [Hate to Paint] shall be entitled to receive payment for labor and materials furnished through the date of termination. [Hate to Paint] *shall not be entitled to receive payment for any lost profits*." TARA FIELDS CONTRACT ¶7 (Aug. 20, 2019), Exh. 1, *Addendum to Opening Brief* at 45 (emphasis added). Under no termination scenario would Hate to Paint have received any profits.

In its brief, Hate to Paint cites *Sons of Thunder, Inc. v. Borden, Inc.,* 690 A.2d 575 (N.J. 1997). HTP BRF. at 13. That case, which undermines Hate to Paint's position, makes clear that "the implied covenant of good faith and fair dealing cannot override an express termination clause." The dispute in *Sons of Thunder* was factual, determined by a jury, regarding whether the terminating party's conduct was within the terms of the termination clause between commercial parties that shared a lengthy and complex course of dealing. Thus, *Sons of Thunder* has little bearing here.

II. Mutuality is Not Required

In its brief, Hate to Paint suggests that if a termination-for-convenience clause is mutual – presumably meaning exercisable by both parties – then its invocation does not violate any implied covenants. HTP BRF. at 19-20. The distinction is nonsensical in the circumstances presented here. Like all contractors, if Hate to Paint wanted to terminate, all it would have to do is not show up on the day its work was scheduled to commence. *See, e.g., Road & Highway Builders, LLC v. Northern Nevada Rebar, Inc.,* 284 P.3d 377 (2012). Hate to Paint had no need of a termination-for-convenience clause, and thus mutuality is irrelevant.

III. Termination for Convenience Clause Preserves Parties' Opportunities

In its brief, Hate to Paint claims that upon Ambrose signing the contract it "gave up the opportunity to seek a better price." HTP BRF. at 18. While that may be true in the absence of a termination-for-convenience clause, the contract here contains such a clause, meaning that Ambrose retained that opportunity. As noted in Ambrose's opening brief, the purpose of termination-for-convenience clauses in commercial contacts is to allocate risks between the parties. AMBROSE BRF. at 20. Had Hate to Paint wished to allocate the risks differently, its remedy was – before signing – to negotiate and adjust the risks in some other manner, or not sign the contract.

Hate to Paint alleges that Ambrose "wield[ed] the termination for convenience as a club to coerce [Hate to Paint] to bid against itself and lower the agreed-upon price" in bad faith. However, whenever a deal ends, whether via a termination-for-convenience clause or in some other manner, a natural next step for the terminated party is to offer to maintain the contract but at a reduced price. There is nothing malicious when that natural next step is taken.

Hate to Paint also claims that it "could not reasonably have expected that its agreed-to price would continue to be shopped by [Ambrose] after contract signing." HTP BRF. at 15. That should have been reasonably expected. First, Hate to Paint is a sophisticated commercial contractor. Second, it knew or could have known that the Ambrose bid had lingered on BidClerk, the commercial bidding website. *See* AMBROSE BRF. at 12. Third, Hate to Paint was presumably aware of market conditions, developing pricing changes in the area, and the nature of potential competitors. Fourth, and most importantly, Hate to Paint signed a contract with Ambrose that explicitly contained a termination-for-convenience clause. Hate to Paint should have understood that, for Ambrose, a lower price is more convenient.

Hate to Paint cites *Greer Properties, Inc. v. LaSalle National Bank*, 874

F.2d 457, 458 (7th Cir. 1989), for its commentary on terminating for a better price. *Greer*, however, concerned a real estate sales contract that allowed the parties "to terminate the agreement if the soil of the property was contaminated by environmental waste." The allegation of bad faith was a party claiming reliance on the clause in order to sell to another buyer at a higher price. *Greer* did not concern a termination-for-convenience clause, and relied on distinct bad faith intentions of the type canvassed in Ambrose's opening brief. AMBROSE BRF. at 26-27. *Greer* is thus unenlightening.

CONCLUSION

Termination-for-convenience clauses are standard in commercial construction contracts, and are routinely enforced. Here, both parties are sophisticated, and Hate to Paint was free to negotiate different terms or not bid. Ambrose acted in accord with any covenant of good faith and fair dealing, and this court should enforce the contract as the parties agreed.

Respectfully submitted,

John J. Flatley, d/b/a
John J. Flatley Company,
and Ambrose Development, LLC

By their Attorney,
Law Office of Joshua L. Gordon

Dated: October 5, 2023

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CERTIFICATIONS

I hereby certify that the decisions being appealed are addended to this brief. I further certify that this brief contains no more than 3,000 words, exclusive of those portions which are exempted.

I further certify that on October 5, 2023, copies of the foregoing will be forwarded to Frank P. Spinella, Jr., Esq., Wadleigh Starr & Peters, PLLC, through this court's efiling system.

Dated: October 5, 2023

Joshua L. Gordon, Esq.