IN THE COURT OF APPEALS

OF MARYLAND

September Term, 2008
No. 153

QUESTAR BUILDERS, INC.
Appellant,

v.

CB FLOORING, LLC,
Appellee.

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY
(The Honorable Susan Souder, Judge)

AMICUS CURIAE BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, AMERICAN SUBCONTRACTORS ASSOCIATION OF BALTIMORE, & THE D.C. METROPOLITAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF APPELLEE C.B. FLOORING, INC.

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ISSUE TO BE BRIEFED

At its core, Appellant Questar Builder's ("Questar") appeal raises only one issue for this Court to resolve:

- **The Law.** Maryland Law recognizes an implied covenant of good faith and fair dealing in all negotiated contracts.
- **The Facts.** Here, the trial court found that Questar improperly exercised the contract's termination for convenience clause when —after it received notice of a possible change order request from CB Flooring— it entered into contract negotiations with another contractor and then terminated CB Flooring in violation of the implied covenant.
- **The Issue.** In Maryland, does the obligation to act fairly and in good faith apply to *all* contract clauses or does a party have freedom to act without regard for good faith and fair dealing in certain instances, such as when terminating contracts under a termination for convenience clause?

Questar misstates the issue on appeal as being whether 'termination for convenience' clauses are enforceable in Maryland. The Circuit Court decision, however, did not find such clauses unenforceable, but only that their use is subject to the implied covenant of good faith and fair dealing.

Given the facts at bar, if this Court were to accept Questar's invitation to reverse the Circuit Court, the resulting decision would be devastating to the numerous small businesses and subcontractors in Maryland who rely on the reasonable application of the good faith and fair dealing covenant to set the boundaries within which contract provisions such as termination for convenience clauses can be used.

Maryland law does not —and as a matter of sound public *should* not— allow one party the right to deprive the other of its reasonable contract expectations. This principle is enhanced when, as here, the

termination of those expectations occurred for reasons a trier of fact determined was unjustified and violated the implied covenant. Given the above, the Amicus Curiae respectfully urge that this Court fully affirm the Circuit Court decision and reject Questar's appeal.

PRELIMINARY STATEMENT

The American Subcontractors Association, the American Subcontractors Association of Baltimore, and the D.C. Metropolitan Subcontractors Association (hereinafter collectively referred to as "ASA"), the *Amicus Curiae* submitting this Brief, are state and national organizations representing the interests of approximately 5,000 subcontractor members who provide labor and materials on construction projects throughout the United States. Approximately 345 businesses located in Maryland and the Metropolitan D.C. area are ASA members.

Subcontractors perform approximately 80-90% of the work on commercial construction projects in the United States, like the residential townhome and luxury apartment complex at the heart of this dispute. ASA's primary focus is the equitable treatment of subcontractors in the construction industry. For approximately 40 years, ASA has acted in the interest of all subcontractors by promoting education, legislative action and by intervening in significant legal actions that affect the industry at large. This is just such a case.

ASA and its members support the Appellee CB Flooring, Inc. in defending the well-reasoned ruling of the Circuit Court for Baltimore County. That Court properly refused to selectively apply the implied covenant and thus its finding that the covenant applies to termination for convenience clauses affirmed long-standing Maryland legal principles, as

did the subsequent award to CB Flooring of its lost anticipated profits arising out of the wrongfully terminated Subcontract.

If this decision is reversed, as urged by the Appellant here, such reversal will give unscrupulous general contractors free rein to engage in bid-shopping and a host of similarly unethical practices that will have the practical effect of rendering a subcontractor or supplier's right to contract virtually illusory. This will make an already difficult business climate toxic to the hundreds of small businesses and thousands of Marylanders who are gainfully employed by specialty trade contractors who conduct business in Maryland.

STATEMENT OF FACTS

ASA relies upon and incorporates by reference the Statement of Facts set forth in Appellee CB Flooring's Brief. The most pertinent facts from the ASA's view are as follows:

A. The Parties and the Project

During the fall of 2005, Questar signed a $1,120,000 subcontract with CB Flooring awarding CB Flooring the carpet and flooring work at a luxury midrise and townhome apartment development in Owings Mills, Maryland. (E. 230 (the "Subcontract")). The Architectural Drawings that Questar provided to CB Flooring —to base its bid on— specified only one brand of carpet, without a border, ("Shaw Custom" brand) for the building corridors. (E. 19, 20; Plaintiff's Ex. 1). The $1,120,000 Subcontract price was thus based on those plans. The bid from the second low bidder for the carpet work, Creative Touch Interiors ("CTI"), was approximately $120,000 higher than CB Flooring's bid for the same work. (E. 65-68, 343).

Almost one year after the Project was bid —and months after the Subcontract was signed— the Interior Designer drafted and Questar distributed new Design Drawings. These new drawings changed the carpet from the type originally specified to two different and more expensive kinds (the "Bentley Custom" brand) than originally required. (E. 27, 114, 596). The evidence below showed that the newly specified Bentley Custom carpets cost significantly more than the carpet on which the Subcontract Price was based. The evidence also showed that the installation costs to CB Flooring to install the Bentley Custom carpets was also greater due to the new carpets requiring a much more expensive adhesive and additional labor to install (because two types of carpet — instead of one— were now being required). (E. 21, 27-29, 397-398.)

CB Flooring gave notice to Questar that the change in specifications would have a price impact. Several weeks later CB Flooring submitted a Change Order request to Questar for the increased costs represented by the changes at issue. (E. 31-32, 42, 265-270). Meanwhile, the evidence showed, and Questar now admits, that when Questar received CB Flooring's notice of a pending change order request it promptly initiated negotiations with another contractor (the second low bidder CTI) to perform Questar's Subcontract work. (E. 69, 127, 145). Indeed, the trial court found that Questar and CTI exchanged drafts of a proposed subcontract in February 2006, weeks before CB Flooring submitted the Change Order request Questar claimed justified the termination. In its appeal brief, Questar calls this highly unethical conduct a "precautionary step[] to have CTI ...resubmit pricing information." Appellant Brief, at 13.

Ultimately, CTI submitted a bid of $1,119,000, an amount that, suspiciously, was $1,000 *less* than the Subcontract Price and $121,000 less

than its original bid for the work one year earlier. (E. 71-73, 81-82, 369.) This action strongly indicated unethical bid shopping by Questar to obtain a 'better' price than the price in the negotiated Subcontract. Questar then sent CTI a subcontract to sign, terminated CB Flooring and argued that because it had not yet provided any carpet to the Project, it had not suffered any compensable damages. (E. 74-75, 150, 257-258; Plaintiff's Ex. 20). Questar claimed the termination was for cause, based on its "subjective belief" —a belief the Circuit Court found lacked merit— that CB Flooring would not perform unless its Change Order request was approved. Alternatively, Questar asserted that its aforementioned subjective belief justified a termination "for convenience," with CB Flooring's only recovery being limited to Work actually performed.

The Circuit Court for Baltimore County heard the evidence and weighed the credibility of the witnesses. It determined that: (a) Questar's stated justifications for its unethical actions lacked merit and were not credible; and (b) CB Flooring's testimony was credible. In entering judgment, the Court stated that it "did not find [Questar's Vice President] credible in many respects in his testimony" and that it "did not find [Questar's V.P. of construction's] testimony credible in some significant respects" relating to the issues at the core of the case. E. 227-228, Trial Transcript, p. 122—123, & 125 (emphasis added)).

The Court thus held that Questar could not properly rely on the termination for convenience clause, which was subject to the implied covenant of good faith and fair dealing. It thus entered judgment for CB Flooring, awarding it lost profits on the wrongfully terminated contract.

LAW AND ARGUMENT

A. Standard of Review

Review of the legal questions decided by the Circuit Court is de novo but those legal conclusions remain "based on the Circuit Court's sustainable findings of fact." See *In re Anthony W.*, 388 Md. 251, 260, 879 A.2d 717, 722 (2005). What constitutes good faith (or fair dealing) is a question of fact. See *Wright v. Mattison*, 59 U.S. 50, 15 L. Ed. 280, 282 (1856); *Clancy v. King*, 405 Md. 541, 571, 954 A2d 1092 (2008) ("Good faith is ordinarily a question of fact."); *Tanenbaum v. Federal Match Co.*, 189 N.Y. 75, 81 N.E. 565, (1907)(Noting that "[t]here was evidence to support a finding of fact that the plaintiff was guilty of unfair dealings in his relations with this defendant.") In addition, when reviewing a case tried without a jury the appellate court must consider the evidence "in the light most favorable to the prevailing party" and "decide not whether the trial judge's conclusions of fact were correct, but only whether they were supported by a preponderance of the evidence." *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 393-94, 761 A.2d 899, 911 (2000) (quoting *Urban Site Venture II Ltd. P'ship v. Levering Assocs. Ltd. P'ship*, 340 Md. 223, 229-30, 665 A.2d 1062, 1065 (1995)(internal citations omitted)).

The Circuit Court's findings of facts thus must be reviewed under the 'clear error' standard to give "due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131(c). This is important here, where the Circuit Court found that Questar's stated reasons for the termination were not credible and, given the implied covenant, could not justify termination under the termination for convenience clause. Questar has not appealed the Circuit Court's findings

of fact. This means the only substantive question on appeal is whether Maryland law allows a party to act in bad faith and unfair dealing in the exercise of certain contract clauses, here a termination provision.

B. The Implied Covenant of Good Faith and Fair Dealing Applies to all clauses in Maryland contracts, not just a select few.

1. Maryland law and public policy support affirming the judgment below.

The concept of good faith and fair dealing is basic to the law of contracts. Maryland Law recognizes the existence of the implied covenant, which is one not only of good faith, but of fair dealing as well. *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735, 739 (1990). ASA has long educated its subcontractor members on the importance of equitable treatment of others in the construction industry. The implied covenant of good faith and fair dealing, as recognized and affirmed by Maryland courts, is a vital legal doctrine that supports the ASA's mission and principles, and the well-being of the entire construction industry.

Importantly, the good faith covenant is Maryland is one of good faith *and* fair dealing. *Julian*, 575 A.2d at 739. Questar's brief discusses good faith but largely ignores the 'fair dealing' aspect of the covenant. The *Restatement (Second) of Contracts* § 205 (1990) notes, consistent with Maryland law, that the phrase "fair dealing" suggests that the covenant can be breached by unreasonable or imprudent conduct. In short, 'fair dealing' imposes on the parties an affirmative obligation to deal forthrightly. Comment (d) to § 205 explains that "[s]ubterfuges" violate the obligation of good faith, "and fair dealing may require more than honesty." Comment (e) continues that the fair dealing duty "is violated by dishonest conduct

such as conjuring up a pretended dispute ... and abuse of power to determine compliance or terminate the contract." (Emphasis added).

At its core, Questar's appeal seeks to have this Court announce what would be a new exception to the implied covenant of good faith and fair dealing. The exception would give Questar and similarly situated contractors a shield of unconstrained discretion even for reasons amounting to bad faith to use a 'termination for convenience' clause to undermine the legitimate contract expectancies of subcontractors, suppliers, and others doing business in Maryland.

This is wholly inappropriate. If this Court were to decide as Questar urges it would of necessity be announcing a judicially carved limit to the reach of the duties of fair dealing and good faith. This would establish within Maryland State lines a virtual no man's land of contractual bad faith where anything goes and a party could frustrate contract performance of its partners with impunity. Fortunately, this is not the law.

Maryland courts have consistently found that the implied covenant of good faith and fair dealing applies to *all* negotiated contracts. *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 200 A.2d 166, 173-174 (1964)("In every contract there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others.")(emphasis added).[1] To such contracts, there is no area where the implied covenant should not reach. And here, the Subcontract not only carried the implied covenant but had an express provision that obligated Questar to act in "good faith"

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[1] Employment contracts that are terminable at will by both parties are considered different from commercial contracts of the kind at issue here, given the unique nature of employment contracts and the mutuality with which they can be terminated.

with respect to "any dispute between Contractor and Subcontractor." (E. 233, ¶ 13(a)).

The duty to act fairly and in good faith is not a particularly difficult burden. Indeed, under Maryland law it does nothing more than "simply prohibit[] one party to a contract from acting in such a manner as to prevent the other party from performing his obligations under the contract." *Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. Partnership*, 213 F.3d 175, 182-183 (4th Cir. 2000) (quoting *Parker v. Columbia Bank*, 91 Md.App. 346, 366, 604 A.2d 521, 531 (1992)). In other words, "under the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them." *Eastern Shore Markets*, 213 F.3d at 184 (citations omitted). As such, the obligation is an implied promise by one party not to unjustly deprive the other of its lawful contract expectations.

This is ***precisely*** why Questar's appeal lacks merit. It also pinpoints why it is vital that the implied covenant remain applicable to all provisions in commercial contracts, particularly those dealing with the right to terminate. The trier of fact here determined that Questar's conduct did not clear the low bar of fair dealing and good faith. Rather than adjust its conduct in the future, Questar now seeks to have ***any constraints*** on its duty to act fairly and in good faith simply wiped away by judicial fiat.

But this effort is misplaced. If a party can contract away any duty of good faith and fair dealing – particularly as applied to clauses dealing with the fundamental right to perform your contract – this would eviscerate any meaningful right to contract in Maryland. This would also lead to a slippery slope of additional litigation as contractors would,

clause-by-clause, attempt to chip away at the duty of good faith and fair dealing until the covenant effectively disappeared. No legitimate public policy would be served by such a holding, and great damage would be done to the aforementioned long-standing principles of law prohibiting unwarranted injury to a party's rights to enjoy the fruits of its contract.

C. Beyond Maryland, the implied covenant of good faith and fair dealing and private construction contracts.

Almost all common law jurisdictions in the United States recognize an implied duty of good faith and fair dealing that binds the parties to a contract. *See* Steven J. Burton & Eric G. Anderson, *Contractual Good Faith: Formation, Performance, Breach, Enforcement* (1995), at 21-22 ("Burton & Anderson"). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance *and execution.*" *Restatement (Second) of Contracts*, § 205 (1990) (emphasis added). "Generally, in every contract, there is an implied covenant of good faith and fair dealing." 17A Am. Jur. 2d *Contracts* § 370 (2008). Indeed, it has been said that contracts impose on the parties a duty to do *everything necessary* to carry them out. *Beech Creek Coal Co. v. Jones*, 262 S.W.2d 174 (Ky 1953). Under the implied covenant, each party has the duty to do: (1) nothing destructive of the other party's right to enjoy the fruits of the contract; and (2) everything that the contract presupposes it will do to accomplish its purpose. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 728 (7th Cir. 1979).

Questar erroneously argues that a 'termination for convenience' clause gives it the "absolute" (i.e., unfettered) right to cancel a contract for any reason. *See*, e.g., Appellant Brief, at 12. This obviously includes the situation here, where the Circuit Court noted with surprise that: (a) well after the Subcontract was signed Questar contacted a CB Flooring

competitor to obtain a 'better' price; and (b) couldn't provide "any good reason why that had happened." (E. 226-228, Trial Transcript, p. 128).

Even if the phrase "for convenience" was read as broadly as Questar demands it could not exercise the clause free from the minimal restraints of good faith and fair dealing. This is because, as the Court of Special Appeals of Maryland noted in *Electronics Store, Inc. v. Cellco Partnership*, 127 Md. App. 385, 732 A.2d 980 (1999):

> [E]ven though the express terms of a contract appear to permit unreasonable action, the duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations.

Electronics Store, Inc.,127 Md. App. at 402 (quoting 3A Arthur L. Corbin, *Corbin on Contracts*, § 654A(B), at 106 (Cum. Supp. 1999)).

This is only logical. While Questar devotes several pages of its Appeal Brief to arguing the straw man that unambiguous language is enforced as written, it ignores the indisputable fact that contracting parties have the right to expect that the other party's actions will be governed by duties of fair dealing and good faith. Indeed, a key component that emerges from the many good faith cases in the past 30 years is the broad consensus of courts that the duties of good faith and fair dealing "*serve[],* rather than rewrite[], the intent of the parties as expressed in their contract document." Frederick W. Claybrook, Jr. , *Good Faith in the Termination and Formation of Federal Contracts*, 56 Md. L. Rev. 555, 558 (1997)(emphasis added)(citing Burton & Anderson, at 62-63); See also *Interboro Packaging Corp. v. Fulton County Schools*, 2006 WL 2850433 (N.D. Ga. 2006)(noting that under Florida law "a termination for convenience clause cannot shield the terminating party from liability for bad faith or fraud.")

Here, the Circuit Court found that Questar materially breached the contract by failing to meet its obligations of the covenant of good faith and fair dealing, and that Questar's breach deprived CB Flooring of its full contract expectations. Under Maryland law parties are entitled to seek the full benefits of their bargain, and the award to CB Flooring of its reasonably anticipated profits was fully appropriate. *Winslow Elevator Co. v. Hoffman,* 107 Md. 621, 635-636, 69 A. 394 (1908) (breach of contract damages are those that "fairly and reasonably" arise from the breach, or, which may reasonably have been contemplated at the time of contracting as arising from a breach (quoting *Hadley v. Baxendale,* 9 Exch. 341 (1954)).

D. Questar's requested relief would have damaging consequences for the construction industry and elevate Maryland to a uniquely hostile business climate for subcontractors.

Termination for convenience clauses have their origin in government contracts. The clauses were formulated to help prevent government waste. Special considerations thus apply to the government, which has greater latitude than private entities to abort contracts (given the perceived necessity of protecting taxpayer funds) and also is presumed to act in good faith. *Torncello v. United States,* 231 Ct. Cl. 20, 45, 681 F.2d 756, 771 (1982) ("[T]he government's obligation to act in good faith hardly functions as the meaningful obligation that it may be for private persons. Since good faith is presumed ... the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff.") See also *Squirrel Creek Assoc. v. United States,* 11 Cl. Ct. 212 (1986); *Penner Installation Corp. v. United States,* 116 Ct. Cl. 550, 89 F. Supp. 545 (1950).

Termination for convenience clauses have spread to the private sector. The primary limitation on the exercise of a termination for

convenience clause is the implied covenant of good faith and fair dealing in all contracts. The covenant prohibits the parties to a contract from relying on a termination for convenience clause to terminate a contract unfairly or in bad faith. Put another way, the clauses are neither meant to allow the upper tier to avoid contractual responsibilities nor to excuse unfair dealing. Any contrary interpretation would render contract rights illusory and meaningless.

In the real world of contracting, subcontractors typically base (and adjust) their bidding plans for future projects on the amount of work they have under contract. This is necessary for the obvious reason that it allows subcontractors to avoid either getting "spread too thin" or not having enough work to keep their employees busy and receiving paychecks.

Against this reality, Questar's request (that this Court find that no obligation of good faith and fair dealing applies to a termination for convenience clause) becomes particularly sinister. A holding carving such an exception to the reach of the good faith and fair dealing covenant would not only poison business relationships and eliminate business certainty, but also do great damage to the ability of subcontractors to rely on their signed contracts as a reliable indicator of future work and expected revenues.

1. *Industry treatment of termination for convenience clauses in private contracts reflect the understood fair dealing constraint on the exercise of such clauses by providing for lost profits on uncompleted work for any convenience termination.*

Subcontractors are no different from other private businesses in that without profit their business will ultimately fail. In the industry form contracts published by the American Institute of Architects ("AIA") the

termination for convenience clauses provide that a terminated party is entitled not only to be paid for the reasonable value of any work in place, but also for its expected profit on the *uncompleted* work.

Under the A201 Standard Form of General Conditions, for example, if a termination is for convenience, "the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, ***along with reasonable overhead and profit on the Work not executed.***" A201-2007, at § 14.4.3 (emphasis added). In a similar vein, the AIA's standard form Subcontract Agreement provides that when the Subcontract is terminated for convenience "the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, ***along with reasonable overhead and profit on the Work not executed.***" A401-2008, at § 7.2.4 (emphasis added).

The widely used and accepted AIA trade association forms thus reflect the common sense principle that a good faith obligation is inherent to the legitimate exercise of such clauses. Thus, while a termination for convenience clause may properly be used to cancel a contract in good faith if the owner determines that full performance is not feasible, the use of the clause will not render the contract illusory because the terminated party will still recover its contract expectations.

If Questar's appeal is sustained, it will encourage a host of anti-competitive practices and justify Questar's search for a lower price after having signed a contract with CB Flooring. This puts Questar (and its requested relief in this appeal) directly at odds with the principle of law endorsed by this Court in *Levin v. Rendler* when it stated that:

> The applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be

> financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts.

Levin v. Rendler, 272 Md. 1, 12, 320 A.2d 258, 264 (1974)(citation omitted)(quoting *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282, 244 N.E.2d 37, 42 (1968)).

2. ***Without meaningful constraints of good faith in the exercise of termination clauses, subcontractors and suppliers would not be able to place any reliance on a signed contract as creating an enforceable business interest.***

Questar makes much of its contractual obligation to pay for work "furnished and delivered to the job site" before the termination. It misguidedly claims that this obligation is "consideration" that makes enforceable what it otherwise declares is the unfettered right to terminate for reasons that include its actions here, where it simply terminated after negotiating a better deal with its subcontractors' competitor.

Questar's argument is yet another in a series of red herrings, as it has nothing to do with whether the implied covenant restrains a party seeking to terminate a contract in Maryland. And in the context of the construction industry, Questar's argument is absurd as the "consideration" it trumpets is functionally illusory.

First, subcontractors incur substantial costs well before any labor or materials are furnished to the job site. By the time the first labor or materials arrive on site, a subcontractor will have already spent significant resources to review the plans and specifications applicable to its work, prepare estimates and bid proposals for the work. It will also have to typically prepare follow-up shop drawings and related documents based on the project specifications and needs.

To do this, full-time estimators are needed, as are support staff. On top of this, reproduction and document delivery costs are incurred along with other home office overhead expenses. It is only once the visible on-site work commences that any of these "up front" costs will finally be reimbursed. Only an award of lost anticipated profits to an unfairly terminated party can adequately compensate for these costs.

Second, on any new construction project, certain trades will by necessity be "later performing" trades. Site excavation, for example, will always occur before the concrete work. The concrete foundation will necessarily need to be poured before the carpenters and other trades can erect the building shell. The building shell must be up before the roof can go on, and roof must be up before such things as the electrical, drywall, plumbing, flooring and carpeting work can commence.

Carpet and flooring contractors will virtually always be among the last trades to perform on any given new construction building (together with electricians, plumbers, HVAC contractors, painters, drywall subcontractors, and interior systems subcontractors). If this Court accepts Questar's argument that a "promise" to pay for services and materials delivered to the job site inoculates a general contractor from any good faith and fair dealing constraints in its exercise of a termination for convenience clause, such decision would have disastrous practical ramifications for the majority of specialty trade contractors, particularly the late finishing trades. In fact, not even earlier performing trades, such as demolition, site excavation, or steel contractors would be secure in any reasonable contract expectancy where there was any lag between signing the contract and the required performance of the work.

This is because given the typical time lag between bidding a job, signing a contract, and performing the work, contractors such as Questar could with impunity "shop" contracts unconstrained by duties of good faith and fair dealing. Unscrupulous contractors could do so secure in the knowledge that: (a) the subcontractor or supplier was bound to perform for its negotiated price; but (b) there would be no meaningful limitation on the ability to unilaterally abrogate the subcontract if it would be financially advantageous to do so. They could do so, moreover, with no liability to the subcontractors in question, who necessarily would not be performing work on site until well into the project, giving the general contractor weeks, months, or even years to "shop" for a better deal under absolutely no obligation to its contract partner.

Questar's radical request must be denied not only to avoid the undesirable consequences to the many Maryland businesses affected by such ruling, but as contrary to the very essence of the implied covenant of good faith and fair dealing. That covenant exists to prohibit one party from frustrating the right of the other party to receive the fruits of the contract between them. *Automatic Laundry Svc., Inc. v. Demas*, 216 Md. 544, 141 A.2d 497, 500-501 (1958); See also *Restatement (Second) of Contracts* § 205, (1990); *cf.* Md. Code Ann. Com. Law (U.C.C.) § 1-203.

Given the damage to the legitimate interests and expectations of the numerous business interests who rely on good faith contracting practices, —and who use their signed contracts as a reliable indicator of future work and revenues— both current Maryland law and sound public policy support the conclusion that the principles of good faith and fair dealing must be affirmed for all businesses contracting in Maryland.

CONCLUSION

For the reasons stated above and in accordance with the foregoing authority, Maryland law does not and should not allow for carving exceptions to the implied covenant of good faith and fair dealing. It is not too much ask businesses in Maryland to deal with their contract partners justly and fairly. Similarly, Maryland courts should not hesitate to hold parties responsible to the full extent of their liability when they violate this common sense covenant.

Amicus Curiae American Subcontractors Association, American Subcontractors Association of Baltimore, and the D.C. Metropolitan Subcontractors Association thus respectfully ask that this Court fully affirm the judgment entered by the Circuit Court for Baltimore County for Appellee CB Flooring, Inc.

Respectfully submitted,

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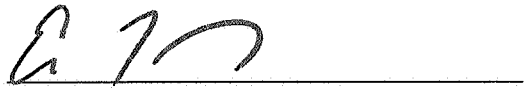
STATEMENT OF FONT TYPE AND SIZE

Pursuant to Maryland Rule 8-504(a)(8), this brief was prepared with proportionally spaced Book Antiqua font, font size 13.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via ordinary U.S. mail, postage prepaid, upon the following this 16th day of February, 2009:

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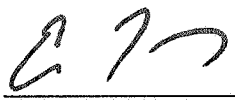

Eric B. Travers

APPENDIX

United States District Court, N.D. Georgia, Atlanta Division.

INTERBORO PACKAGING CORPORATION, Plaintiff,

v.

FULTON COUNTY SCHOOLS, Defendant.

Civil Action File No. 1:05-CV-1838-TWT.

Oct. 2, 2006.

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ORDER

THOMAS W. THRASH, JR., District Judge.

*1 This is a diversity action for breach of contract and fraud. It is before the Court on the Defendant's Motion for Summary Judgment [Doc. 44]. For the reasons set forth below, the Defendant's Motion for Summary Judgment is GRANTED.

I. *BACKGROUND*

This case arises out of a contract dispute between the Plaintiff, Interboro Packaging Corporation ("Interboro"), a New York corporation engaged in the sale and distribution of garbage bags and related products, and the Defendant, Fulton County School District ("FCSD"). On September 16, 2004, FCSD issued a bid solicitation inviting vendors to bid on a requirements contract for plastic garbage bags. The garbage bags were to conform to detailed specifications. For example, one of the specifications was for a "32-gallon container, low density, 1.5 mil thickness, Size 33" wide x 54" deep, GUSSETED LINER, 200/case. Color: Black."(Joint Ex. 6.) The invitation to bid was accompanied by an attached "Bid Conditions," which detailed the terms of the contract.

On September 28, 2004, Interboro submitted multiple bids. In a letter dated November 15, 2004, FCSD awarded Interboro Contract Number 113-05. This letter also stated that the estimated dollar amount of the contract would be $87,000. (Joint Ex. 14.) Echoing language outlined in the "Bid Conditions," the letter stated that this figure was only an estimate, and that individual purchase orders would dictate the actual amount of purchases under the contract.

Almost immediately, Interboro began to quibble over the terms of the contract. On November 17, 2004, in an email from Interboro's Vice-President, Abraham Jeremias, Interboro requested that FCSD provide the "ordering cycle and quantities" for the entire year, and that FCSD change its ordering quantities from "500/case" to "1,000/case" for one of the bags. (Joint Ex. 15.) The next day, Interboro sent another email. First, it indicated that rising oil prices made it imperative that FCSD provide Interboro with the entire quantity it intended to order over the course of the year. Second, Interboro requested "a sample of the bags that Fulton is currently using as to obtain information on the size and seal of the bags."(Joint Ex. 15.) It stated that FCS's request of 33" x 54" and 32 gallon liner needed clarification since "[t]he size does not exactly match the gallon capacity."(Joint Ex. 16, at 3.) Third, it repeated its request that FCSD order in quantities of 1,000 as opposed to 500. (Joint Ex. 5.)

In an email dated November 19, 2004, Lonita B. Collier, FCSD's Chief Purchasing Manager, reminded Interboro that there were "no guarantees as to the amount FCS will purchase ... and therefore, no liability for non-purchase."(Joint Ex. 16.) She dismissed the request for a sample and urged Interboro to "meet the specification outlined in the solicitation."(Joint Ex. 15, at 1.) She also rejected Interboro's request to modify the minimum orders from 500 to 1,000. (Joint Ex. 15, at 2.)

*2 On the same day, Mr. Jeremias responded by asking Ms. Collier to "reread [his] email" so that she would notice that her "response [was] non-responsive and not meritorious."(Joint Ex. 15, at 1.) He repeated the fact that escalating prices made the need for a "realistic estimate" imperative, and described FCSD's refusal to provide an exact order quantity as "bad faith." In the meantime, FCSD requested price quotes

for emergency orders for garbage liners with Central Poly, another firm that participated in the bid for contract number 113-05.

In November, Interboro submitted a letter to Wilma A. Gibbs-Matthews, Director of Purchasing Services for FCSD.[FN1] This letter served as a "formal request to modify the packaging."(Joint Ex. 16.) Insisting that its request for change was not "material," Mr. Jeremias again urged FCSD to change its minimum orders from 500 to 1,000. Mr. Jeremias also repeated his request for further clarification of the bag specifications. He described FCSD's bid specifications as "defective from the outset." (Joint Ex. 16, at 2.)

> FN1. The letter was dated November 22, 2004, but FCSD claims that it was transmitted on November 29.

On November 30, 2004, Ms. Gibbs-Matthews responded in a letter that reiterated FCSD's position. She noted that FCSD would refuse delivery of any shipments in 1,000 packs and that FCSD would stand by its initial contract specifications for the 32 gallon liner. She informed Interboro that a failure to abide by the terms of the contract would render Interboro "non-responsive." (Joint Ex. 22, at 2.) She complained that FCSD had been unable to place orders for garbage liners due to Interboro's continuous requests for changes to the contract. She also referred to the "Bid Conditions" and informed Interboro that it should have clarified these issues before it bid on the contract. She gave Interboro until December 3, 2004 to notify FCSD whether it would be able to move forward with the contract. The letter concluded by warning Interboro that a failure to comply with the contract would put Interboro in default.

On December 2, 2004, Mr. Jeremias responded. His letter stated that Interboro was still willing to supply the goods "pursuant to Bid 'C' and the samples submitted therein and approved by FCS." (Joint Ex. 22, at 2.) His position, as Interboro would later clarify, did not mean that Interboro would supply the goods as described in FCSD's bid solicitation. Rather, Interboro meant that it was willing to supply FCSD with garbage bags that conformed to the samples that it had submitted during the bidding process. Interboro contended that FCSD's acceptance of the September 28, 2004 bid either constituted a waiver of the original terms of the contract or a counteroffer and that as long as its samples conformed to those specifications, Interboro met the requirements of the contract. (Pl.'s Resp. to Def.'s Mot. for Summ. J., at 50.) The September 28 letter stated that:

> All shipments made consistent with the enclosed samples will be deemed in full conformance with bid specifications. We are relying upon approval of these samples for compliance of its bid and will ship only such bags, in the specified size/color. Acceptance of our bid shall conclusively constitute approval of the enclosed samples as conformity with bid specifications.

*3 (Joint Ex. 7.) Thus, according to Interboro, the actual wording of the contract became irrelevant. It would later argue that it was entitled to provide "flat" as opposed to "gusseted" bags, based on FCSD's acceptance of the samples. (Pl.'s Resp. to Def.'s Mot. for Summ. J., at 54-56.)

The very same September 28 letter also stated, however, that the samples submitted would be different than the actual bags that Interboro would ultimately provide in the event that it won the contract. (Joint Ex. 7.) The letter explicitly claimed "Upon approval of our bid *we shall manufacture the bags exactly according to the specified size/color.*The purpose of the samples is to test the strength of the bag and the material we are offering. These samples do serve this purpose."(Joint Ex. 7.) Although Interboro professed its willingness to perform under the contract in its December 2, 2004 letter, it was not willing to perform as FCSD had originally envisioned.

On December 17, 2004, Tommie S. Goodgames, a purchasing agent for FCSD, identified various problems with Interboro's bags. He indicated that the bags were the wrong kind (straight bottom seam as opposed to gusseted), the box weights were inconsistent, and that the liners were less than "the required 1.5 mil that were ordered."(Joint Ex. 12, at 2.) He requested that the defective bags be picked up and replaced. Mr. Goodgames gave Interboro until January 3, 2005, to inform FCSD in writing that the problems would be fixed. Mr. Goodgames threatened to terminate the contract for default if the matter was still unresolved by January 5. (Joint Ex. 12, at 2.)

On December 20, 2004, Mr. Jeremias wrote an eight page, line by line response to every problem raised

by FCSD. Mr. Jeremias called FCSD's complaints "baseless and without merit," evidence of "bad faith," and even suggested that an anonymous competitor of Interboro's had "devised, fabricated, and concocted" these complaints. (Joint Ex. 28.) The letter went on to state that Georgia's Attorney General, the District Attorney, and the U.S. Attorney ought to investigate the "false Complaints (sic) and the intervention by Interboro's competitor."(Joint Ex. 28.) It concluded by informing FCSD that Interboro was suspending the manufacturing process until it could be reassured that FCSD would accept the bags in conformity with the samples.

On February 7, 2005, counsel for FCSD submitted a letter to Interboro's counsel requesting that Interboro pick up the defective bags and deliver the gusseted bags requested in the bid solicitation. He further stated that failure to cure the problem would result in termination for default without penalty. (Joint Ex. 31.) On February 9, 2005, Interboro's counsel informed FCSD that it had no choice but to commence litigation. (Joint Ex. 32.) On February 18, 2005, FCSD's counsel informed Interboro that the cure period had passed. It formally terminated the contract, not for default, but for convenience. (Joint Ex. 13.) The letter referenced Section III(6) of the contract between the parties which reads: "TERMINATION FOR CONVENIENCE." According to the contract, this section provides FCSD with the power "to terminate for convenience a contract awarded through this solicitation."(Joint Ex. 5.) On July 13, 2005, the Plaintiff filed a complaint in this Court, alleging the following: (1) breach of the implied duty of good faith and fair dealing; (2) breach of contract; (3) fraud and fraud in the inducement; and (4) a request for specific performance.

II. *MOTION FOR SUMMARY JUDGMENT STANDARD*

*4 Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law.Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. *DISCUSSION*

A. *Breach of the Implied Duty of Good Faith and Fair Dealing*

Interboro alleges that FCSD breached the implied duty of good faith and fair dealing by "wrongfully terminating the Contract under the guise of a Termination for Convenience."(Compl., ¶ 46.) Georgia's Uniform Commercial Code provides that "every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."O.C.G.A. § 11-1-203. Nonetheless, the "failure to act in good faith in the performance of contracts governed by the UCC does not create an independent claim for which relief may be granted." *American Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C.*, 426 F.Supp.2d 1356, 1370 (N.D.Ga.2006) (*citing Stuart Enters. Int'l, Inc. v. Peykan, Inc.*, 252 Ga.App. 231, 234 (2001)). By the same token, "the common law requirement of good faith and fair dealing is not an independent source of duties for the parties to a contract."*Id.* The covenant "modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms *de facto* when performance is maintained *de jure*." *Stuart Enters., Int'l, Inc.*, 252 Ga.App. at 234. Thus, a Plaintiff must allege a violation of an actual term of an agreement. *Id.* "General allegations of breach of the implied duty of good faith and fair dealing not tied to a specific contract provision are not actionable ." *Alan's of Atlanta, Inc. v. Mintola Corp.*, 903 F.2d 1414, 1429 (11th Cir.1990).

In the Eleventh Circuit, "the general rule is that 'termination for convenience' clauses permit one party to terminate a contract, even in the absence of fault or breach by the other party, without suffering the usual financial consequences of breach of contract." *Harris Corp. v. Giesting & Associates, Inc.*, 297 F.3d 1270, 1272 (11th Cir.2002) (*citing Stock Equip. Co. v. Tenn. Valley Auth.*, 906 F.2d 583 (11th Cir.1990). The phrase "termination for convenience" is treated

as the functional equivalent of a provision allowing termination "without cause." *Id.* at 1273 (finding a termination for convenience clause "not ambiguous because the meaning of the phrase is plain on its face insofar as it permits termination without cause").

*5 "There can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give [it] the right to do." Rotech Healthcare, Inc. v. Chancy, 392 F.Supp.2d 1372, 1375 (M.D.Ga.2005) (*quoting Southern Business Machines of Savannah, Inc. v. Norwest Fin. Leasing, Inc.*, 194 Ga.App. 253, 256 (1990)).*See also* Harris Corp., 297 F.3d at 1273 (discussing the "general rule that conduct which is expressly authorized by a contract cannot be said to breach the implied covenant of good faith and fair dealing"). FCSD is not liable for breach of the implied duty of good faith and fair dealing.

B. *Breach of Contract*

Interboro concedes that the contract contained a "termination for convenience" provision. Drawing upon Torncello v. United States, 681 F.2d 756 (Ct.Cl.1982), Interboro argues that a termination for convenience clause (1) cannot be invoked in "bad faith," and (2) can only be used when there has been a "change in the circumstances" of the bargain. (Pl.'s Resp. to Def.'s Mot. for Summ. J., at 4.) Interboro describes the case as "seminal" and invites the Court to treat it as the law of the Eleventh Circuit. The Court, however, declines to treat *Torncello* as binding law. Its major premise rests on shaky ground. The case has been heavily criticized and its scope has been whittled down over the past quarter-century. *See* Salsbury Industries v. United States, 905 F.2d 1518, 1521 (Fed.Cir.1990) ("[*Torncello*] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."); *see also* Custom Printing Co. v. United States, 51 Fed. Cl. 729, 734 (Ct.Cl.2002) ("The 'changed circumstances' test to which the plaintiff alludes, set out by the plurality in *Torncello,* has been explicitly rejected by the United States Court for the Federal Circuit.").

In this diversity case, the Court must follow Georgia law. There are no Georgia cases applying *Torncello* to a requirements contract between a governmental entity and a private contractor. Applying Florida law, the Eleventh Circuit has said that a termination for convenience clause cannot shield the terminating party from "liability for bad faith or fraud."*Id.* at 1272-73.It is well established in Georgia that there is a presumption that public officials "perform their duties lawfully, and in good faith." Butts v. State, 193 Ga.App. 824, 826 (1989). Interboro has not overcome this presumption. It is undisputed that the contract went sour very quickly. It is undisputed that there were serious disagreements between the parties before FCSD terminated the contract. Rather than identify any facts which raise an inference of "bad faith," Interboro relies upon a series of wild speculations regarding the motives for FCSD's desire to terminate the contract and labels these speculations as "inferences" of bad faith that a jury could make.[FN2] Indeed, Interboro has failed to put forth any principled definition of what might constitute "bad faith," or why the facts it has isolated demonstrate bad faith in the use of the termination for convenience provision.

> FN2. Interboro alleges that: (1) it was treated "differently" than Central Poly, another bidder; (2) Ms. Collier warned Interboro of the consequences of failing to meet its obligation under the contract; (3) Ms. Collier "flatly refused to clarify her specifications;" (4) FCSD disagreed with Interboro's interpretation of the September 28, 2004 letter as an amendment to the terms of the contract; (5) FCSD requested emergency price quotes from Central Poly before it determined that Interboro sold defective bags; (6) FCSD did not want garbage bags that conformed to Interboro's samples; (7) speculation, based on the absence of any evidence, that FCSD withheld information from its own purchasing agents; and (8) FCSD's request from its school for feedback on the quality of Interboro's bags.

*6 If Interboro's laundry list of grievances amounts to "bad faith," then any termination for convenience "will almost always be *characterizable* as bad faith." Corenswet, Inc. v. Amana Refrig., Inc., 594 F.2d 129, 138 (5th Cir.1979) (emphasis added).

The evidence, even viewed in the light most favor-

able to Interboro, does not demonstrate "bad faith" or show that FCSD entered into the contract knowing full well that it would not honor the agreement. As is obvious from the correspondence, the parties bickered over the meaning of the contract from its inception, and their relationship appeared to deteriorate almost immediately. *See Embrey v. United States*, 17 Cl.Ct. 617, 624 (Ct.Cl.1989) (upholding "deterioration in business relationship" as good faith evidence of "changed circumstances"). Evidence of business disputes, or even personal disputes, does not raise an inference of "bad faith." To the contrary, the facts of this case show that termination for convenience "clauses can have the salutary effect of permitting parties to end a soured relationship without consequent litigation." *Corenswet, Inc.*, 594 F.2d at 139. FCSD's legitimate use of the termination for convenience clause warrants summary judgment for the Defendant on the issue of whether FCSD breached the contract with Interboro.

C. *Fraud*

Interboro's remaining claim is fraud. It alleges, in essence, that FCSD acted fraudulently by: (1) inducing Interboro to enter into the contract even though FCSD never intended on honoring the agreement; (2) inducing Interboro, through written and oral statements, into purchasing a year's worth of garbage liners; and (3) cancelling the contract when "there would be no reason that Interboro should think that after winning the bid in a competitive bidding process that its contract would be terminated."(Pl.'s Resp. to Def.'s Mot. for Summ. J., at 61.)

"Under Georgia law, the elements of fraud are (1) false representation, (2) scienter, (3) intention to induce plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." *Option One Mortgage Corp. v. Allstate Ins. Co.*, 2006 WL 2285358, at *9 (N.D.Ga. Aug. 3, 2006).*See also Cramp v. Georgia-Pacific Corporation*, 266 Ga.App. 38, 40 (2004). Proof of fraud requires more than merely breaking a promise, inaccurately predicting an event, or engaging in erroneous conjecture. *Fuller v. Perry*, 223 Ga.App. 129, 132 (1996).

The Plaintiff has failed to produce any evidence to support this claim. There is no evidence suggesting that FCSD entered into the contract without any intention of honoring it. In fact, FCSD explicitly notified Interboro that it would only pay for garbage bags that were delivered pursuant to a purchase order. Interboro was not entitled to rely upon any estimate of the number of garbage bags to be ordered by the FCSD. FCSD made clear that Interboro was not to rely upon any projections, oral or written, regarding the number of bags that FCSD might order. Although the November 15, 2004 letter awarding the contract to Interboro provided an estimate of the year's purchases it also emphasized that "[c]ontract performance on this contract, i.e., delivery of items will be as per specific purchase orders."(Joint Ex. 14.) In addition, the termination for convenience clause should have notified Interboro that the contract was subject to cancellation. The Defendant's Motion for Summary Judgment on Interboro's fraud claims should be granted.

IV. *CONCLUSION*

*7 For the reasons set forth above, the Defendant's Motion for Summary Judgment [Doc. 44] is GRANTED.

SO ORDERED, this 27 day of September, 2006.

N.D.Ga.,2006.
Interboro Packaging Corp. v. Fulton County Schools
Not Reported in F.Supp.2d, 2006 WL 2850433 (N.D.Ga.)

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