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IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. SC14-1293
LT Nos. 3D13-2326 & 3D13-2690

SUNSHINE GASOLINE DISTRIBUTORS, INC.,

Petitioner,

v.

BISCAYNE ENTERPRISES, INC.,

Respondent.

BRIEF ON JURISDICTION OF
SUNSHINE GASOLINE DISTRIBUTORS, INC.

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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JURISDICTIONAL STATEMENT

Petitioner, Sunshine Gasoline Distributors, Inc. (“Sunshine”), pursuant to Article V, section 3(b)(3), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), has invoked the Court’s discretionary jurisdiction to review the Third District Court of Appeal’s June 11th decision (the “Decision”), which expressly and directly conflicts with several decisions of other district courts of appeal on the applicability of the implied covenant of good faith and fair dealing (the “Covenant”).

The First, Second and Fourth Districts have held that the Covenant exists in *all* contracts when a term reposes in one party discretion without standards, effectively to serve as a “gap-filling” default rule that imposes on that party a duty to act in good faith and not to act capriciously to contravene the reasonable commercial expectations of the other party. *E.g.*, *Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012); *Speedway SuperAmerica. LLC v. Tropic Enters. Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007); *Publix Super Mkts., Inc. v. Wilder Corp. of Delaware*, 876 So. 2d 652, 654-55 (Fla. 2d DCA 2004); *Avatar Dev. Corp. v. De Pani Constr. Inc.*, 834 So. 2d 873, 875-76 (Fla. 4th DCA 2002); *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234-35 (Fla. 4th DCA 2001); *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000); *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092 (Fla. 1st DCA 1999).

But the Third District, in its June 11th Decision (Appendix 1), has held that the Covenant does not apply in *all* contracts, but rather only in a contract “when a

broad range of authority is reposed in one of those parties,” and not where “a contract simply provides a binary choice.”

And this Court has never addressed the Covenant.

The decisional conflict warrants the Court’s intervention to restore consistency across the district courts on the application of the Covenant to contracts under Florida law.

STATEMENT OF THE CASE AND FACTS (as set out in the Third District’s Decision)

Sunshine, in consolidated appeals, brought for review a partial final judgment in favor of the Respondent, Biscayne Enterprises, Inc. (“Biscayne Enterprises”), on its eviction action against Sunshine, and an order directing the disbursement of rental payments from the court’s registry. *See* Decision at 2.

I. The Lease and its Extension Options.

The lease provided for “an initial five-year lease term with the option of seven additional five-year lease extensions.” *Id.* at 2. The “Extension Option” in the lease stated that Sunshine “shall have the option of extending this Lease ... subject to the written approval of [Biscayne Enterprises],” and required that Sunshine, at least 90 days before the lease’s expiration, “shall provide [Biscayne Enterprises] written notice of [Sunshine’s] election to exercise or not to exercise the extension option.” *Id.* (quoting the Extension Option). In the absence of such written notice from Sunshine, the Extension Option provided that Biscayne Enterprises “shall provide [Sunshine] written notification advising [Sunshine] that

notice of [Sunshine's] election has not been received.” *Id.* (quoting the Extension Option).

A subsequent modification (not deletion) of the Extension Option provided that “any extension period ... shall, in order to be binding upon the parties, require written approval of [Biscayne Enterprises], which approval shall be within the sole discretion of [Biscayne Enterprises].” *Id.* at 3 (quoting the Extension Option modification).

II. The Litigation Following Biscayne Enterprises’ Refusal to Extend.

“Sunshine contacted Biscayne Enterprises seeking an additional five-year extension, but Biscayne Enterprises refused to renew the lease,” without reason. *Id.* at 3. In the consolidated litigation that followed, “Sunshine claimed it had an absolute right to renew based on the terms of the contract, and filed for declaratory relief adjudging its absolute right to remain on the property,” after having timely exercised its extension option, while “Biscayne Enterprises filed an eviction action, claiming that the clear and unambiguous terms of the contract gave it full discretion to refuse the lease extension.” *Id.* at 3-4. The trial court, in a bifurcated proceeding, “granted summary judgment in favor of Biscayne Enterprises regarding the eviction” only. *Id.* at 4.

III. The Third District’s Decision.

The Third District, following its recitation of the Extension Option as modified, found it to be “abundantly clear and unambiguous,” and that it “could not be any clearer,” in its grant of “sole discretion” to Biscayne Enterprises with

respect to the renewal exercise. *Id.* at 2-3, 4-5. And the Third District explained that it so concluded because the renewal reposed in Biscayne Enterprises “sole discretion” as to the Extension Option, which the Third District found effectively allowed Biscayne Enterprises to exercise its discretion (to renew or reject the renewal) “for any reason.” *Id.* at 4-5.

Addressing Sunshine’s breach of the Covenant claim, the Third District “recognize[d] that the term ‘sole discretion’ in some contracts can impose a duty of good faith and fair dealing despite the ostensibly absolute grant of authority in the contract language.” *Id.* at 4, n.1 (citations omitted). And “the duty is imposed in these instances,” the Third District explained, “only to protect the reasonable expectations of the parties to the contract when a *broad range of authority* is reposed in one of those parties.” *Id.* (citation omitted) (emphasis added). But in this case, the Third District continued, because the Extension Option “simply provides a *binary choice* — to renew the lease or not — the duty of good faith and fair dealing is unnecessary to protect the parties’ interests.” *Id.* at 5, n.1 (emphasis added).

Contrary to Sunshine’s assertion, imposing a duty of good faith and fair dealing in this instance would frustrate the parties’ expectations, not protect them. The term “sole discretion,” in this instance, simply means that both parties have the choice whether to renew the contract for any reason.

Id. And so, in its affirmance of the partial final judgment of eviction, the Third District held that “Sunshine’s claimed right to renew the lease under the terms of the contract or under the duty of good faith and fair dealing is incorrect as a matter of law.” *Id.* at 6.

SUMMARY OF ARGUMENT

The Third District's holding that the Covenant is applicable not to *all* contracts when a term reposes discretion in one party, but rather only when a contract term reposes discretion in one party with respect to more than a "binary choice," conflicts with decisions of the First, Second and Fourth Districts, which have held that the Covenant applies in *all* contracts when a term reposes standardless discretion in one party. There is no quantification of the choices. That is, the rule of law announced by the other district courts, and on which this Court has not commented, is that the non-existence of standards by which to apply a discretion afforded in the contract requires the Covenant's import as a gap-filler.

The decisional conflict warrants the Court's exercise of its discretionary review jurisdiction, to resolve the conflict and to restore consistency to the test for determining the applicability of the Covenant under Florida law.

ARGUMENT

THE THIRD DISTRICT'S STATEMENT THAT THE COVENANT APPLIES ONLY IN A CONTRACT PROVIDING A "BROAD RANGE" OF DISCRETIONARY CHOICES, AND NOT MERELY A "BINARY CHOICE," CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS.

I. The Covenant.

The Covenant exists in all contractual relationships, and its purpose is to protect the reasonable expectations of the contracting parties. *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000); *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092 (Fla. 1st DCA 1999). Specifically, when the

term of a contract reposes with one party discretion without standards, effectively to allow for that party to promote its self-interest over that of the other party to the contract, the Covenant is a “gap-filling” default rule that imposes a duty on that party to act in good faith and not to act capriciously to contravene the reasonable commercial expectations of the other party. *E.g.*, *Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012); *Speedway SuperAmerica. LLC v. Tropic Enters. Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007); *Publix Super Mkts., Inc. v. Wilder Corp. of Delaware*, 876 So. 2d 652, 654-55 (Fla. 2d DCA 2004); *Avatar Dev. Corp. v. De Pani Constr. Inc.*, 834 So. 2d 873, 875-76 (Fla. 4th DCA 2002); *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234-35 (Fla. 4th DCA 2001); *Sepe*, 761 So. 2d at 1184-85; *Cox*, 732 So. 2d at 1097.¹

For example: “When a lease contains a boilerplate clause requiring the landlord’s consent for any proposed sublease—without specific standards governing the landlord’s approval—the landlord may not then arbitrarily withhold approval of a sublease.” *Siewert*, 80 So. 3d at 1116. That is, where “the sublease provision in the lease provided no standards which the landlord was to utilize in

¹ To be sure, the Covenant “must relate to the performance of an express term of the contract,” *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998), and it “cannot be used to vary the fully specified, unambiguous terms of a contract because the court is not at liberty to change the parties’ bargain as to those terms.” *Avatar Dev. Corp. v. De Pani Constr. Inc.*, 834 So. 2d 873, 876 (Fla. 4th DCA 2002). *Accord*, *e.g.*, *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001) (holding that there can be no cause of action for a breach of the Covenant “absent an allegation that an express term of the contract has been breached”). And a provision that vests in one party a discretion without standards is definitively ambiguous.

determining whether to approve or reject a sublease ... the implied obligation of good faith performance is applicable....” *Id.*

II. The Decisional Conflict.

The Third District held that the Extension Option, as modified, is “abundantly clear and unambiguous,” and “could not be any clearer,” in its grant of “sole discretion” to Biscayne Enterprises with respect to the renewal exercise, and that such grant of “sole discretion” was the equivalent to discretion to renew or reject the renewal “for any reason.” *See* Decision at 2-3, 4-5. And the Third District so held because the Extension Option “simply provides a binary choice — to renew the lease or not,” so that “the duty of good faith and fair dealing is unnecessary to protect the parties’ interests.” *Id.* at 4-5, n.1. In other words, “standardless discretion” exercised in a “binary choice” is tolerable, and does not reflect a gap requiring fill with the Covenant. That marks a departure from the decisional authority of other district courts.

Consider the Third District’s suggestion that “sole discretion” means “for any reason.” Decision at 4. That is, as the Third District explained, “[t]he term ‘sole discretion,’ in this instance, simply means that both parties have the choice whether to renew the contract for *any reason*.” *Id.* at 5, n.1 (emphasis added).²

² Notably, the Third District resisted the Covenant’s application, purporting instead to favor the Extension Option’s express repose of “sole discretion,” but in doing so, the Third District then interpreted the Extension Option beyond its term, as effectively reposing discretion “for any reason” (not written into the Extension Options). *See* Decision at 4-5. Of course, if Biscayne Enterprises wanted absolute discretion to arbitrarily reject the Extension Options, it should have included the
(continued . . .)

But that conflicts with the Second District’s holding in *Sepe* that “sole discretion” to exercise choice “does not permit a party to make a discretionary decision that violates the covenant of good faith.” 761 So. 2d at 1185.

And consider the Third District’s explication, distinguishing between discretion reposed in the exercise of a “binary choice” and the discretion reposed in the exercise of choice among a “broad range of authority,” which further reflects on the decisional conflict. The Third District explained:

The duty of good faith, however, is imposed in these instances only to protect the reasonable expectations of the parties to the contract when a *broad range of authority* is reposed in one of those parties.... Where, as here, a contract simply provides a binary choice — to renew the lease or not — the duty of good faith and fair dealing is unnecessary to protect the parties’ interests....

Decision at 4-5, n.1 (citations omitted) (emphasis added). The conflict here is in the Third District’s shift from the *quality* of the discretion to the *quantity* of the choices.

But the Covenant applies because the Extension Option reposed in Biscayne Enterprises “the power to make a discretionary decision,” *i.e.*, reject Sunshine’s exercise of its Extension Option, “without *defined standards*.” *Publix Super Mkts.*, 876 So. 2d at 654-55 (emphasis added). That is, the Covenant fills the gap, giving definition to Biscayne Enterprises’ standardless exercise of discretion, thereby to

(. . . continued)

words “for any reason.” *Compare Avatar*, 834 So. 2d at 876, *with Sepe*, 761 So. 2d at 1185. But that boundless phrase is absent from the Extension Option.

“protect[] contracting parties’ reasonable commercial expectations.” *Id.* And that the standardless discretion reposed is with respect to a “binary choice” does not eliminate the gap that the First, Second and Fourth District have held must be filled with the Covenant, and the Third District’s holding otherwise conflicts.

Consider in particular the Second District’s decision in *Sepe*, which decision the Third District attempted to override with the “binary choice” distinction:

Mr. Sepe entered into a contract with the City to perform audits of several utility companies to determine whether the utilities were paying all of the franchise fees and utility taxes due the City. Mr. Sepe agreed to do this work in exchange for a \$1500 retainer for each review and a percentage of “all recovered franchise fee and/or utility tax underpayments.”

In the contract, the City agreed that it “shall vigorously pursue, at the City’s sole cost and expense, the recovery of underpayments identified by the [audits], using all reasonable means, including legal action, if necessary.” Immediately following this clause, however, the contract states: “If the City in its sole discretion determines that vigorous pursuit of such recovery of underpayments is not a justifiable expense, the City shall not pursue such action.”

761 So. 2d at 1183. This was precisely a “binary choice” (pursue recovery of underpayments or not) that reposed standardless discretion in one party, and the Second District held that resort to the gap-filling Covenant was required.

In *Speedway SuperAmerica*, the Second District explained that where “the lease provision governing assignments simply requires the ‘prior written consent of Lessor’ to any assignment,” and “contains ‘no standards for exercising discretion’ by the landlord ... [n]or does [it] state that the landlord’s discretion to withhold

consent is absolute,” then there is “power to make a discretionary decision without defined standards” that gives rise to the Covenant. 966 So. 2d at 4-5.

And in *Publix Super Markets*, the Second District, while concluding that there was no breach of the Covenant and reversing the trial court’s finding otherwise, nonetheless held that the Covenant applied to fill the gap reflected in the discretion afforded Publix (a “binary choice”) whether to approve or refuse the tenant’s request to complete improvements to the property. 876 So. 2d at 654-55.

The First, Second and Fourth Districts have held that the Covenant applies in *all* contracts when standardless discretion to act, whether a “binary choice” or a “broad range of authority,” is reposed in one party (as it does here). The Third District’s holding that there is a distinction to be drawn between the quantity of options as to which the standardless discretion is to be exercised, reflects a decisional conflict warranting the Court’s resolution.

CONCLUSION

A decisional conflict on the Covenant’s application when a contract reposes in one party a standardless discretion over a “binary choice,” as distinguished from standardless discretion over “a broad range of authority,” presents in the Third District’s Decision. Sunshine respectfully requests the Court to grant discretionary review to resolve this decisional conflict, and to provide clarity across the districts as to the application of the Covenant to contracts under Florida law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, pursuant to and in compliance with Florida Rule of Judicial Administration 2.516, this Brief was e-filed with the Court and mailed (by US Mail in the absence of e-mail addresses) on July 15, 2014, to: Scott D. Kravetz, Esq., Daniels Kashtan, P.A., 4000 Ponce de Leon Blvd., Suite 800, Coral Gables, Florida 33146, skravetz@dkdr.com (*Counsel for Respondent*).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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