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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.

BISCAYNE'S AMENDED BRIEF ON JURISDICTION

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

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JURISDICTIONAL STATEMENT

The Third District Court of Appeal's June 11th decision (the "Decision") does not expressly and directly conflict with decisions rendered by the First, Second and Fourth Districts. Jurisdiction should thus be denied.

STATEMENT OF THE CASE AND FACTS

I. THE THIRD DISTRICT'S DECISION

The key provisions relied upon by the Third District were: Lessee shall have the option of extending this lease...**subject to the written approval of Lessor** (§3 of Lease); the parties acknowledge...**that any extension period...shall, in order to be binding upon the parties require written approval of Lessor, which approval shall be within the sole discretion of Lessor. The parties further agree that the purpose of subparagraphs (a) and (b) hereof serve to provide the parties with an efficient mechanism if desired by both Lessor and Lessee** (§2 of Modification); and; In the event of a conflict...the terms of the First Modification shall prevail. (§6 of Modification).

SUMMARY OF ARGUMENT

Jurisdiction can only be invoked if there is an opinion that "expressly and directly" conflicts with a decision of another district court of appeal. In the cases out of the First, Second and Fourth Districts, the offending parties had some sort of contractual obligation to affirmatively act but, there were no parameters to guide those actions. Here, Biscayne had no obligation to take any action in favor of

Sunshine. The opposite was true. Biscayne had a binary choice – to renew the Lease or not. Since there is no express and direct conflict, this Court should not exercise its discretionary review jurisdiction.

ARGUMENT

Florida law is clear that “written provisions of contracts entered into by ordinary men should be construed in the light of common understanding” and “where there is no facial ambiguity in the portion of the subject contract, the provision must be afforded its plain meaning.” *Bradley v. Sanchez*, 943 So.2d 218, 221 (Fla. 3 DCA 2006). *See also, Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc.*, 541 So.2d 738 (Fla. 3 DCA 1989)(“it is well settled that the actual language used in the contract is the best evidence of the intent of the parties and the plain meaning of that language controls.”); *Razin v. Milestone, LLC*, 67 So.3d 391 (Fla. 2d DCA 2011)(“indeed, where there is an unambiguous contractual provision...a trial court **cannot** give it any other meaning beyond that expressed and **must** construe the provision in accord with its ordinary meaning.”) (emphasis added)

The covenant of good faith and fair dealing **cannot** be used to vary or override the express terms of a contract. *Terranova Corporation v. 1550 Biscayne Associates Corp.*, 847 So.2d 529 (Fla. 3d DCA 2003). Courts do not utilize [the covenant] to alter or add to negotiated obligations defined in contracts. *Enola*

Contracting Services, Inc. v. URS Group, 2008 WL 1844612 (N.D. Fla.), citing *Hosp. Corp. of Am. v. Florida Med. Ctr.*, 710 So.2d 573, 575 (Fla. 4th DCA 1998). The *Enola* court noted: “It is well settled that when the terms of a voluntary contract are clear and unambiguous...the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.” *Enola* at *3.

Finally, the covenant is not a limitless duty or obligation but rather is an interpreting, gap filling tool of contract law. *Shibata, M.D. v. Lim*, 133 F.Supp. 2d 1311 (M.D. Fl. 2000). When, however, the express terms of the contract determine the permissibility of the conduct, no gap filler is needed and the covenant does **not** apply. *Shibata* at 1319. The *Shibata* court held that a claim for breach of the covenant cannot be maintained in derogation of the express terms of the underlying contract. Citing, *Chrysler Credit Corp. v. Marino*, 63 F.3d 574, 579 (7th Cir. 1995) (holding that the covenant is a gap-filling tool and is not applied to block terms that actually appear in the contract).

The Third District, properly ruled that the covenant does not apply to the binary choice Biscayne had in deciding to extend the Lease term or not. Any application of the covenant herein would serve to vary and/or override the plain and unambiguous terms of the Lease. Biscayne had sole discretion and negotiated

right to extend or not. Since Biscayne's conduct in refusing to extend was permissible, no gap filler is needed.¹

The cases relied upon by Sunshine are not in conflict. In *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092 (Fla. 1st DCA 1999), Cox, a truck owner, entered into a contract with CSX to haul freight to and from the CSX terminal. Significantly, the contract provided that CSX **shall** make commodities available from time to time for transport by Cox, but the specific amount of freight or number of loads was not specified in the contract. *Id.* at 1094. Thus, while CSX was obligated to provide freight to be transported, CSX had the power to decide when and how much.

Cox claimed that CSX assigned loads with the intent to withhold better-paying loads from Cox and by assigning only low-paying loads to him. CSX argued that the contract gave them complete discretion. *Id.* at 1094. The First District noted the covenant is designed to protect the contracting parties' reasonable expectations. *Id.* at 1097. The Court stated "Of course, the implied obligation of good faith cannot be used to vary the express terms of a contract." *Id.* at 1098. Finally, the Court stated, "In the instant case, however, the written

¹ Consistent with the foregoing law, on June 6, 2014, the Trial Court granted Biscayne's Motion for Partial Summary Judgment on Sunshine's claim for breach of the implied covenant of good faith and fair dealing as it pertained to Biscayne's discretion to not renew/extend Sunshine's lease.

contracts between CSXI and Appellants [Cox] are silent with regard to the methodology or standards to be used by CSXI in exercising its discretion to assign loads for transport.” *Id.* at 1098. While CSX had an affirmative obligation to do something, e.g. assign loads to Cox, there was no governing language in the agreement as to how much had to be assigned. A gap filler was necessary in Cox. No gap filler is required here. Here, Biscayne had no obligation to do anything for the benefit of Sunshine. CSX had an affirmative obligation to provide freight (e.g., “CSX **shall** make commodities available from time to time”) and in carrying out that affirmative obligation, was required to act in good faith consistent with the parties’ expectations. Conversely, Biscayne simply and only had to make a binary choice – whether to renew the lease or not. Not only is the Cox case not in conflict, it actually is supportive in that the First District recognized that the covenant cannot be used to vary the express terms of a contract.

In *Sepe v. City of Safety Harbor*, 761 So.2d 1182 (Fla. 2d DCA 2000), Sepe, entered into a contract with the City to perform audits of utility companies to determine whether they were paying all of the fees that were due the City. Sepe agreed to do the work for a percentage of all recovered underpayments. *Id.* at 1183. In the contract, the City agreed it **shall vigorously pursue**, at the City’s sole cost and expense, the recovery of all underpayments identified by the audits, using all reasonable means, including legal action, if necessary. (emphasis added).

Sepe's compensation in connection with his associated audit work, was directly tied to the City's pursuit and recovery of the underpayments. The contract went on to state "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." *Id.* at 1185. Sepe located underpayments from several utility companies, including approximately \$822,000 from Florida Power Corporation and \$157,000 from Clearwater Gas. Following negotiation, the City agreed to settle with Florida Power Corporation ("FPC") for \$120,000, \$702,000 less than what was due. Sepe argued the City was in breach because it failed to vigorously pursue the claim against FPC and totally failed to pursue the claim against Clearwater Gas at all. The City argued that it had sole discretion not to pursue the action against either utility. The Second District noted the covenant is designed to protect the contracting parties' reasonable expectations. *Id.* at 1185. The Court further noted "as a result, the force of this obligation varies with the context in which it arises." *Id.* at 1185.

Similar to CSX, there was specific contractual language requiring the City to take affirmative action. Specifically, the City agreed that it **shall vigorously pursue** the recovery of all underpayments identified. Again, Biscayne had no affirmative obligation to do anything. While the Second District in Sepe recognized that the covenant is designed to protect the contracting parties'

reasonable expectations, as noted by the Third District here, imposing the duty of good faith in this case would actually frustrate the parties' expectations, not protect them. (Decision at p. 5). Since the language simply provided a binary choice – to renew the lease or not – the covenant was unnecessary to protect the parties' expectations, particularly when the lease terms made it clear that the renewal provisions exist to simply provide an efficient mechanism for extension of the lease **if desired by both lessor and lessee**.

In *Publix Super Mkts., Inc. v. Wilder Corp. of Delaware*, 876 So.2d 652 (Fla. 2d DCA 2004), there was a dispute as to the meaning of the parties' reciprocal easement agreement. Wilder agreed that it would not construct improvements without the express written consent of Publix. Wilder's requested consent to allow development on the north parcel. Publix withheld consent. *Id.* at 653. The Second District noted that the covenant is a gap-filling default rule. The Publix provision is strikingly different than the language in the Biscayne lease. In Publix, the provision provided that Wilder could not construct any improvements without the express written consent of Publix. The language stops short there. Unlike in Biscayne, it does not say that Publix could say yes or no in its sole discretion. It also does not contain language stating that Wilder could construct its improvements only if desired by Publix. Because the Publix language falls short

of the language utilized in the Biscayne lease, there is no express and direct conflict between the two cases.

The case of *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So.2d 1 (Fla. 2d DCA 2007) strictly involved a landlord's refusal to grant consent to the assignment of a commercial lease by a tenant. The Speedway provision provides: "Lessee shall not assign or transfer this lease, or any interest therein, without the prior written consent of lessor."

The Second District noted that the covenant comes into play when a question is not resolved by the terms of the contract. *Id.* at *3. The Court noted "in the instant case, the lease provision governing assignments simply requires the prior written consent of lessor to any assignment." The provision contains no standards for exercising discretion by the landlord. The Court further stated the provision presents a circumstance in which one party has the power to make a discretionary decision without defined standards, a circumstance in which a covenant of good faith would be implied to protect the contracting parties' reasonable commercial expectations. *Id.* at *5. The Speedway lease language stops short and does not contain the dagger-in-the-heart language contained within the Biscayne lease. The Biscayne provision does contain defined standards in the form that Biscayne had sole discretion as to whether or not to extend the lease if

desired by Biscayne. The Speedway case actually supports Biscayne's position.

In footnote two of its Speedway opinion, the Second District emphasized that:

“Application of the implied duty in a way that defeats the contractual terms agreed to by the contracting parties has been criticized: Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of good faith. Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the Court to decide whether one party ought to have exercised privileges expressly reserved in the document. Good faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. When the contract is silent, principles of good faith...fill the gap. They do not block use of terms that actually appear in the contract.” Speedway at *2.

The case of *Siewert v. Casey*, 80 So.3d 1114 (Fla. 4th DCA 2012) also involved a landlord's refusal to allow a sublease of residential property. The lease provision at issue provided that the tenant could not assign the lease or sublease all or part of the premises without first obtaining the landlord's written approval and consent. The Fourth District held that 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 the sublease. *Id.* at 1116. The Court went on to state that “this stems from the implied covenant of good faith which exists in virtually all contractual relationships. The implied obligation of good faith performance has been applied in the context of lease provisions requiring the landlord's consent to a

tenant's assignment of a lease." *Id.* at 1116. The Court held a landlord's blanket refusal to consent to any sublease, when the lease provides that the landlord must give approval before a sublease can be created, is by definition unreasonable and therefore a violation of the covenant of good faith." *Id.* at 1116.

Here, we are not dealing with an assignment of a lease. Second, unlike Siewert, Biscayne was not obligated to give approval. Again, the Siewert language is different in that it falls short by not stating that Siewert had the right to not consent to a sublease in its sole discretion.

Finally, the case of *Avatar Development Corp. v. De Pani Const., Inc.*, 834 So.2d 873 (Fla. 4th DCA 2002) is also supportive of Biscayne, not Sunshine. Avatar terminated its subcontractor, De Pani in the middle of the project. Avatar relied on Article 67 of the contract which provided that Avatar could terminate the agreement at any time for any reason by giving at least ten days prior written notice. *Id.* at 875. The Fourth District held that the addenda did not conflict with the termination clause in the master contract and that the language of the termination clause was plain and unambiguous: Avatar could terminate the contract at any time for any reason. *Id.* at 876. The Court went on to state that the contract was a valid contract with an enforceable termination clause and that Avatar's ulterior motive in terminating De Pani had no relevance since the contract provided Avatar with the clear right to terminate De Pani at any time. *Id.* at 876.

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 U.S. Mail in the absence of e-mail address) on this 2nd day of September, 2014 to: Mark Blumstein, Esq., The Blumstein Law Firm, One Turnberry Place, Suite 411, 19495 Biscayne Boulevard, Aventura, Florida 33180, mark@blumsteinlaw.com; and to Elliot B. Kula, Esq. and W. Aaron Daniel, Esq., Kula and Associates, P.A., 11900 Biscayne Boulevard, Suite 310, North Miami, Florida 33181, elliott@kulalegal.com, aaron@kulalegal.com, eservice@kulalegal.com.

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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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