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Am I My Brother's Keeper? The Supreme Court Addresses the Duty of Altruism

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The adversarial system has long been the hallmark of American jurisprudence, particularly where each party to a dispute is represented by competent counsel. The corollary in the business world is, as recognized by the New Jersey Supreme Court, that "sophisticated business entities operate according to the impersonal laws of the marketplace in which self-interest, not altruism, is the dominating principle." While the law has created certain boundaries of good faith and fairness, never has there existed any affirmative duty to act altruistically toward your adversary.

These long-standing principles were recently addressed by the Supreme Court in *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Associates*, No. A-86-03, 2005 N.J. LEXIS 7 (N.J. Sup. Ct. Jan. 25, 2005). After this decision, attorneys now must be cognizant of the possibility that assisting one's adversary, even when contrary to the client's best interest, may be necessary to avoid a client's breach of the amorphous duty of good faith and fair dealing.

Brunswick Hills involved a commercial tenant, operating under a 25-year lease, which contained an option to purchase or create a 99-year lease upon termination of the original lease term. The lease outlined two specific conditions precedent to the successful exercise of the tenant's option: 1) that the tenant notify the landlord of the tenant's intent to exercise the option and 2) that the tenant tender payment in a specified amount to the landlord. The option terms required that both conditions be satisfied no later than 180 days before the end of the original lease.

Approximately 19 months before the option deadline, the tenant satisfied the first requirement by notifying the landlord of its intention to exercise the 99-year lease option. The tenant, however, failed to make a timely payment of the required sum within the stipulated time period. When the landlord declared that the option had become null

and void, the tenant brought suit to enforce the option. Both the trial court and the Appellate Division held in favor of the landlord.

In a unanimous opinion, the Supreme Court agreed that the tenant did not properly fulfill the option terms. The Court recognized the strict terms of the option agreement could not be ignored, and that the tenant, "ordinarily, would suffer the consequences of its default." After all, as the Court emphasized, "courts generally should not tinker with a finely drawn and precise contract entered into by experienced business people that regulates their financial affairs."

The Court, however, refused to enforce the option terms because it found the landlord's actions "lulled" the tenant into inaction, and thereby constituted a breach of the implied covenant of good faith and fair dealing. Writing for the Court, Justice Barry Albin recounted the history of communications between the tenant and landlord over a 19-month period in which the tenant repeated its desire to execute the option, while the landlord and its attorney "played possum." While for the most part the landlord ignored the tenant's communications, the landlord or its attorney responded several times with vague and non-committal statements, such as "we will be in touch." Justice Albin characterized these actions as "demonstrable conduct, a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly."

What is interesting about this conclusion is that at no time did the landlord or its attorney make any false statement or material omission with regard to the nature of the option, or what was required for its exercise. As the Court recognized, the option terms were clear on their face. The tenant's attorney apparently "mistakenly believed that the purchase price was not due until the time of closing," rather than 180 days before the expiration of the lease term. Although this mistaken belief was not attributable to any statement or mischaracterization by the landlord, the Court apparently considered it the landlord's responsibility to correct the tenant's misunderstanding of the option terms.

While, to be sure, the landlord cagily did not accept or reject the option exercise, there was no evidence that the landlord interfered with the tenant's ability to exercise its right. The tenant merely needed to unilaterally tender payment to the landlord by the required date to perfect the option. The landlord's failure to respond to the tenant's inquiry in no way hindered the tenant's ability to tender payment, nor suggested that the payment would not be required. The landlord simply did not alert the tenant to the clear time limitation contained in the option agreement.

The Court equated the defendant's evasive communications to the factual circumstances of another good faith and fair dealing case, *Back-a-Lum Corp. of Am. v. Alcoa Bldg Prods., Inc.*, 69 N.J. 123 (1976). There, the defendant franchisor decided to terminate the plaintiff's exclusive rights under a franchise agreement and appoint four other

distributors in the region. The franchisor withheld this intention from the distributor, however, while the distributor undertook a major expansion of its facilities and signed a 5-year lease for additional space. The defendant franchisor was not only aware of the expansion but actually encouraged it before finally terminating the exclusive distributorship. The Court determined that the franchisor's "selfish withholding" of information was a violation of the covenant of good faith and fair dealing.

Although the Court characterized the *Brunswick Hills* defendant as having similarly withheld vital information "with the purpose of exploiting the terms of the contract without regard to the harm caused to plaintiff," there appear to be significant differences in the factual circumstances of each case. First, the defendant in *Back-a-Lum* withheld information that was not otherwise accessible to the plaintiff; that is, its intention to terminate the exclusive nature of their agreement. Second, and more importantly, the franchisor in *Back-a-Lum* induced the plaintiff distributor's damages by encouraging it to expand its facilities. It is easy to see how, on these factual circumstances, the plaintiff may have been "lulled" into believing that it would retain its exclusive rights.

Brunswick Hills, however, presents a very different picture. First, the information "withheld" by the landlord regarding the requirements to exercise the 99 year lease was available to the tenant at all times in the terms of the lease itself. Second, the landlord's responses to the tenant throughout the 19 months in no way encouraged the tenant, or suggested to the tenant that strict compliance with the terms of the option would not be necessary. Indeed, it is difficult to understand how the tenant could interpret the evasive actions of the landlord or its attorney as an implicit endorsement of the tenant's exercise of the option. If anything, one would think that the prolonged period of the landlord's evasiveness would have, at the very least, led the tenant to look more closely at the option to ensure strict compliance with its terms.

It would appear that the Court was uncomfortable with the landlord's failure (albeit repeated failure) to inform the tenant that the option would not be properly exercised unless payment was received by the specified date, a requirement that was plain from the face of the option. The Court's determination that this conduct violated the implied covenant of good faith and fair dealing would appear to present a significant extension of the scope of that doctrine. The Court's ruling may also signal a willingness by the Court to one day create a duty of altruism, a duty that could drastically alter our ingrained acceptance of the adversarial system.

Even before *Brunswick Hills*, the covenant of good faith and fair dealing has been a murky concept. The covenant is applied on a case-by-case basis, is "fact-sensitive," and a precise definition has remained somewhat elusive, as the Court acknowledged, "[w]e cannot catalogue the myriad forms of conduct that may constitute a violation."

In general terms, the covenant of good faith and fair dealing requires that neither party shall do anything to destroy or injure the right of the other party to receive the fruits of the contract. *Palisades Props. v. Brunetti*, 44 N.J. 117, 130

(1965). Included within this inquiry has commonly been an element of bad intention or improper motive by the defendant, often embodied in a sense of dishonesty, either by act or omission. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001); *Ricci v. Corporate Express of the East, Inc.*, 344 N.J. Super. 39, 42 (App. Div. 2001) ("Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal consequence."); see also N.J.S.A. 12A:2-103 (1) (b) (defining "good faith" under the UCC as "honesty in fact and the observance of reasonable standards of fair dealing in the trade.").

The element of dishonesty, visible throughout the line of cases implicating the covenant of good faith and fair dealing until now, was looked upon as the touchstone that permitted courts to look beyond the terms of the contract, and inject an element of equity. Presumably, a party could act entirely in its own best interests in any arms-length transaction, so long as it did not mislead an adversary by acts or omissions or otherwise improperly interfere with a party's ability to enforce the rights available under the contract. The Court's recent decision seemingly dispenses with the requirement of dishonesty, suggesting that a party may have exposure even when it engages in no deceptive practices, but allows an adverse party to proceed on an unwise or uneducated path. Without explicitly holding as much, the Court, in effect, has ruled that a party must correct the misunderstandings of its adverse party, even if it did not cause those misunderstandings in the first place. Indeed, the Court held that the "plaintiff's repeated letters and telephone calls to defendant concerning the exercise of the option and the closing of the ninety-nine year lease obliged defendant to respond, and to respond truthfully."

After *Brunswick Hills*, it is now even less clear what actions may violate the covenant of good faith. An attorney cannot confidently advise a client that it can rely on the express terms of a contract if its adversary has a different and mistaken view of those contract terms.

Implications for Attorneys

The *Brunswick Hills* decision impacts not only commercial relationships, but may affect the scope of an attorney's duty to nonclients. The Court takes unusual pains to state in its opinion that it does not "propose that attorneys must watch over and protect their adversaries from the mishaps and missteps that occur routinely in the practice of law." It also declines the invitation to define an attorney's duty of candor to its adversary. But taken at face value, the decision seemingly creates at least the prospect for such a duty.

Given his client's economic interest in allowing the option to expire, the question is what the landlord's attorney could have said to the tenant's attorney without divulging the fact that the tenant had not yet properly exercised the option. The answer, apparently, is that the landlord and its attorney was under an obligation to "spill the beans," and advise the tenant of the landlord's position in order to give the tenant time to properly effectuate its contract rights if it so desired.

Yet, the imposition of such a duty would seemingly run headstrong into the long-standing duty of zealous advocacy

that attorneys owe to their clients. It is this conflict that should give attorneys pause. In the wake of *Brunswick Hills*, advising a client in a commercial transaction will require an attorney to walk a razor thin line. On the one hand, an attorney must counsel the client regarding the potential for liability for breach of good faith, by analyzing whether the client must divulge some pertinent information or strategy. On the other hand, the attorney must zealously pursue the client's direct interests, which likely will not include the disclosure of the client's legal position. With little guidance as to where attorneys should draw the line, and the specter of liability from both clients and nonclients alike, attorneys find themselves in an increasingly difficult position.

This dilemma caused the New Jersey State Bar Association to remark in an amicus brief to the *Brunswick Hills* Court, "*t is imperative to the practicing bar that there is certainty about their professional duties to clients, adversaries, tribunals, and other third parties.*" *Attorneys will respond to whatever their legal obligations happen to be, provided they know the rules of engagement. If we are to be are "brother's keeper," clear rules should be set forth so that attorneys may discharge that obligation without running afoul of the duties we owe to our clients.*

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