VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-03365

Belvedere Academy v. Addison Northwest School District et al

DECISION ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff Belvedere Academy, LLC ("Belvedere"), has sued several Vermont school districts seeking payment for the 2019-2020 school year. On the strength of contract provisions that allow increases in the contract amount only "if the approved rate is increased during the contract term," the school districts moved for judgment on the pleadings. After argument on the motion, Belvedere moved to amend its Complaint to allege that the circumstances surrounding the making of the contract create ambiguity, and to add a claim for breach of the implied covenant of good faith and fair dealing. The court grants the motion to amend in part and denies the motion for judgment on the pleadings.

Facts Alleged in Original Complaint

Belvedere is a Vermont entity doing business as The Mill School: A Belvedere Academy, an approved independent therapeutic school in Winooski. Each defendant is a public school district or supervisory union that contracted with Belvedere to educate one or more of its students who were in need of special education services during the 2019–2020 academic year (July 1, 2019–June 30, 2020). The Mill School was approved by the State Board of Education in February 2019, and started educating students in March 2019.

Belvedere applied to the Agency of Education for a tuition rate of $72,457.22. Just before the beginning of the 2019-2020 school year, the Agency approved an amount of only $44,995. Belvedere immediately appealed the Agency's approved tuition rate, first through the internal Agency administrative process, and then to the State Board of Education. Due to the COVID-19 outbreak, however, Belvedere and the Agency were not able to meet to discuss the appeal until late July and early August 2020. They settled the tuition rate appeal on August 12, 2020, on the eve of the contested hearing. The State Board of Education approved that agreement at its August 19, 2020 monthly meeting, resulting in an annualized rate of $66,783.24 for the 2019-2020 school year.

In the interim, Belvedere signed substantively identical agreements with each of the Defendants. Those agreements included the following provision: "If the approved rate is increased during the term of the agreement, The Mill School will notify the LEA[1] and an amendment to the agreement will be issued to the new rate with an effective date based on the Agency of Education's approved date, which may be retroactive to the initial enrollment date for the school year." Belvedere alleges that each district was aware, both from conversations with Belvedere staff and through the contract in place for each student, that it would be required to reimburse Belvedere for the tuition underpayment if and when the rate appeal was resolved in Belvedere's favor.

Shortly after the settlement agreement was approved by the State Board, Belvedere billed each school district for the tuition underpayment amounts that were due. Each of Defendants refused. Each cited the contract language above as justification for its refusal.

Proposed Amended Complaint

In its proposed amended complaint, Belvedere alleges additional facts which, it contends, show the existence of ambiguity and impossibility. It alleges that each school district, through email, was aware that Belvedere was in the process of appealing the tuition rate and would notify the district about the tuition increase if it won its appeal. Proposed Am. Compl. ¶¶ 13–14. Belvedere alleges that "[t]he parties' understanding of Article VI at the time the contracts were signed was that the phrase 'during the term of the agreement' meant '*for* the term of the agreement,' " and that none of the parties' communications or other contractual provisions suggested that there would be any cutoff date for a rate increase. *Id*. ¶¶ 15, 17. It further alleges that "all the parties[] expected that the rate appeal would be concluded before the end of the [contract term]." *Id.* ¶ 18.

Belvedere also adds a claim for breach of the implied covenant of good faith and fair dealing. It alleges that the "parties were aware that the contracted tuition rate was under appeal and likely to increase," that the "contracts and surrounding communications at least implicitly obligate the Districts to reimburse [it] for additional tuition if it won its [] appeal," and that the districts "breached their duty . . . by accepting the full benefit of the contract, and then refusing to pay the increased rate afterwards, thereby depriving [Belvedere] of the expected benefit of the bargain." Proposed Am. Compl. ¶¶ 47–49.

Discussion

On a motion for judgment on the pleadings under Rule 12(c), the question "is whether, once the pleadings are closed, the movant is entitled to judgment as a matter of law on the basis of the pleadings." *Island Indus., LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 10 (quotation omitted). When

[1] In the agreements, "LEA" refers to the school districts.

deciding such a motion, "all well pleaded factual allegations in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." *Id*. (quotation omitted). "A defendant may not secure judgment on the pleadings if contained therein are allegations that, if proved, would permit recovery." *Id*. (quotation omitted).

The central issue in this case is interpretation of the contract provision quoted above—specifically, the term, "during the term of the agreement." Generally, the proper interpretation of a contract is a question of law, and the goal is to give effect to the parties' intent as expressed in their writing. *Rounds v. Malletts Bay Club, Inc.*, 2016 VT 102, ¶ 16, 203 Vt. 473. "[C]ontractual terms are to be interpreted based on their plain meaning," and courts "look to the plain meaning of individual terms, but contract provisions must be viewed in their entirety and read together." *In re Cole*, 2008 VT 58, ¶ 19, 184 Vt. 64 (quotation and citation omitted). "When the contract language is unambiguous, we take these words to represent the parties' intent. We assume that parties included contract provisions for a reason, and we will not embrace a construction of a contract that would render a provision meaningless." *Rounds*, 2016 VT 102, ¶16 (quotations and citations omitted).

Here, on its face, the contract language is unambiguous: only "[i]f the approved rate is increased *during* the term of the agreement" is Belvedere entitled to "an amendment to the agreement . . . to the new rate with an effective date based on the Agency of Education's approved date, which may be retroactive to the initial enrollment date for the school year." Belvedere would construe the word "during" as meaning "for." As a matter of "plain meaning," this dog will not hunt. All commonly available dictionaries define "during" to include a temporal limitation. *See*, *e.g.*, Black's Law Dictionary (5th ed. 1979) ("Throughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of"); American Heritage Dictionary ("Throughout the course or duration of" or "At some time in"); Webster's ("throughout the duration of" or "at a point in the course of"); Oxford Languages ("throughout the course or duration of (a period of time)"). It would torture the "plain meaning" requirement to interpret "during" in this context to mean "for," as in, "if the approved rate is increased *for* the term of the agreement, ...". *See Rounds*, 2016 VT 102, ¶ 16 ("We assume that parties included contract provisions for a reason."); *In re Kelley*, 2018 VT 94, ¶ 14, 208 Vt. 303 ("When a contract is not ambiguous, its provisions will be enforced in their 'plain, ordinary[,] and popular sense.' "); 11 Williston on Contracts § 32:3 (4th ed.) ("The plain, common, or normal meaning of language will be given to the words of a contract."). Had the parties intended to use the word "for" instead of "during," they could have explicitly done so in the contract.

They did not. Their use of "during" rather than "for" in that sentence appears to have been intentional, given that they used "for" in the preceding sentence: "The currently approved tuition rate *for* the academic year is $44,995." While the court is neither a linguist nor a lexicographer, it is nevertheless abundantly clear that there is no commonly accepted definition of "during" that makes it a synonym of "for." Under the guise of determining "plain meaning," the court cannot and will not conjure up a nonexistent definition. On its face, the contract is unambiguous.

Nevertheless, the Vermont Supreme Court has made clear that it is "appropriate, when inquiring into the existence of ambiguity, for a court to consider the circumstances surrounding the making of the agreement. Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." *Isbrandtsen v. N. Branch Corp.*, 150 Vt. 575, 579 (1988). The allegations of the initial Complaint fall short of setting forth any circumstances that would suggest a need to look beyond the plain language of the agreements for their interpretation. In its Proposed Amended Complaint, however, Belvedere has alleged circumstances that, at least viewed, as they must be, in the light most favorable to Belvedere, suggest another plausible interpretation. Particularly if Belvedere can prove that "[t]he parties' understanding of Article VI at the time the contracts were signed was that the phrase 'during the term of the agreement' meant '*for* the term of the agreement,' " Proposed Am. Compl. ¶ 15, it may be able to prevail. The circumstances alleged in paragraphs 13, 14, 17, and 18 of the Proposed Amended Complaint could buttress this conclusion. This may yet leave Belvedere with a steep hill to climb; for example, even if it can demonstrate an ambiguity, it may run squarely into the doctrine of *contra proferentem*, as it appears from some of the materials submitted that Belvedere was the author of the disputed provision. Nevertheless, these allegations are sufficient, at this stage of the litigation, to overcome the plain language defense. Accordingly, the court will allow the amendment, at least as to Count 1: Breach of Contract, and so deny the motion for judgment on the pleadings.

As noted above, Belvedere also seeks to add a new claim for breach of the implied covenant of good faith and fair dealing. "An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 161 Vt. 200, 208 (1993). The covenant of good faith and fair dealing is "implied in every contract" and "acts to protect the parties to a contract, and to ensure that they act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Tanzer v. MyWebGrocer, Inc.*, 2018 VT

124, ¶ 32, 209 Vt. 244 (citing *Carmichael v. Adirondack Bottled Gas Corp. of Vt.*, 161 Vt. 200, 208 (1993)) (quotation omitted).

"[W]hether conduct breaches the covenant is a question of fact that depends heavily on the context of the conduct alleged to have breached the covenant." *Id*. ¶ 34. The Supreme Court has, however, outlined several broad categories of behavior that may fall within the covenant:

> The implied promise by its nature protects against "a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Id.* As the Restatement points out,
>
> > [a] complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.
>
> [Restatement (Second) of Contracts] § 205 comment d. Further, bad faith inheres in "harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract." *Id.* § 205 comment e. Additionally, "[s]ubterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." *Id.* § 205 comment d. Finally, the covenant of good faith "also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party." *Id.* § 205 comment e.

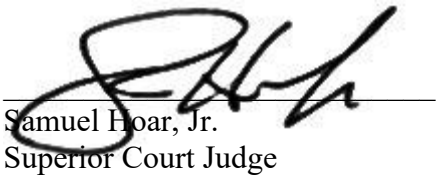
Carmichael, 161 Vt. 200, 208–09. Simply put, the allegations here come nowhere close to the type of conduct recognized in judicial decisions and the Restatement to implicate the implied covenant. The only recognized conduct that arguably comes close is "taking advantage of the necessitous circumstances of the other party." That type of conduct, however, is not what has been alleged here. *See*, *e.g.*, *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 44, 179 Vt. 167 (damages for breach of covenant upheld where defendant breached terms of home insurance agreement, took advantage of plaintiff's financial distress due to loss of rental income, and initiated foreclosure proceedings against plaintiffs as retaliation for settlement disputes between the parties); *Barton Solar, LLC v. RBI Solar, Inc.*, No. 5:21-CV-25, 2022 WL 2526993, at *3 (D. Vt. July 7, 2022) (observing that "intentionally harmful, malicious, or retaliatory conduct [] has supported independent claims for breach of the covenant of good faith and fair dealing" and requiring that plaintiff "intentionally or maliciously" take

advantage of other party's "necessitous circumstances"). Thus, the court denies the motion to amend with respect to Count 2 of the Proposed Amended Complaint on the grounds that the amendment is futile. *See Vasseur v. State*, 2021 VT 53, ¶ 7 ("Amendment is futile if the amended complaint cannot withstand a motion to dismiss.").

Order

The court grants Plaintiff's motion to amend the complaint to assert Count 1: Breach of Contract and all underlying factual allegations. As those allegations set forth surrounding circumstances that could, if proven, support a claim of ambiguity, they are sufficient to state a claim. Accordingly, the court denies the motion for judgment on the pleadings. The court denies the motion to amend the complaint to assert Count 2: Breach of the Covenant of Good Faith and Fair Dealing. Plaintiff shall file and serve a corrected amended complaint, to which Defendants shall respond per rule. The parties shall then confer and submit a proposed discovery/ADR stipulation for the court's consideration.

Electronically signed pursuant to V.R.E.F. 9(d): 8/29/2022 9:38 AM



Samuel Hoar, Jr.
Superior Court Judge