

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

WIPRO LIMITED, LLC,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

CASE NO. CI 19-676

ORDER

LANCASTER COUNTY
2021 APR -1 PM 12:09
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DISTRICT COURT

This matter came before the court on January 27, 2021, for hearing on the State's motion for partial judgment on the pleadings, Filing No. 6. Plaintiff was represented by Andre Barry. The State was represented by Patrick Cooper and Mark Laughlin. Arguments were heard and the matter was submitted on written arguments. The court, being fully advised in the premises, finds and orders as follows.

FACTUAL BACKGROUND

Plaintiff is a global information technology consulting and outsourcing company that provides a variety of services, including digital strategy, product engineering, cognitive computing, hyper-automation, robotics, cloud, analytics, and emerging technologies. Complaint ¶ 1.

On or about July 22, 2014, plaintiff entered into a written contract with the State to provide software and services to replace the functionality of the Medicaid Eligibility and Enrollment System with an Eligibility and Enrollment Solution that met the Center for Medicaid Services standard and conditions for the State (the "Contract"). *Id.* at ¶ 7. Section Y.2 of the ADDENDUM ONE to the Contract provided, "The State, in its sole discretion, may terminate the contract for any reason upon 30 days written notice to the contractor." *Id.* at ¶ 10, Ex. B at 17.



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On September 7, 2018, the State sent plaintiff a cease and desist letter telling plaintiff to effectively suspend work under the Contract. *Id.* at ¶ 22. On December 12, 2018, following several exchanges not relevant to the current motion, the State provided notice to plaintiff that it was exercising its discretion to terminate the Contract without cause pursuant to Section Y.2 of ADDEDUM ONE, effective 30 days from the date of the notice. *Id.* at ¶ 34.

On March 4, 2019, plaintiff filed a Complaint against the State, alleging three claims: (1) breach of contract – for failure to pay outstanding balance, (2) breach of contract – for suspension of contract, and (3) breach of contract of good faith and fair dealing.

On April 19, 2019, the State moved to dismiss the Complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief may be granted. On August 5, 2019, this court overruled the State’s motion to dismiss. On September 5, 2019, the State filed its Answer and Counterclaim.

On December 10, 2020, the State moved for partial judgment on the pleadings pursuant to Neb. Ct. R. Pldg. § 6-1112(c) with respect to plaintiff’s third cause of action for breach of the implied covenant of good faith and fair dealing. The State argues that since the court’s denial of the initial motion to dismiss, the Nebraska Supreme Court has clarified the scope of the implied covenant of good faith and fair dealing and the State believes that Nebraska law now requires dismissal of plaintiff’s third cause of action.

STANDARD OF REVIEW

“A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.” *Denali Real Estate, LLC v. Denali Custom Builders, Inc.*, 302 Neb. 984, 993, 926 N.W.2d 610, 620 (2019). “[A] motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party’s pleadings,

together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.” *Id.* at 996, 926 N.W.2d at 622. “On such a motion the court may consider all the pleadings and give judgment for the party entitled thereto.” *Mueller v. Union P. Railroad*, 220 Neb. 742, 745, 371 N.W.2d 732, 735 (1985).

ANALYSIS

The State argues that plaintiff’s third cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed because Nebraska law is now clear that such a claim is not tenable. In making this argument, the State relies on two recent decisions of the Nebraska Supreme Court: *Dick v. Koski Prof’l Grp., P.C.*, 307 Neb. 599, 950 N.W.2d 321 (2020) and *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 944 N.W.2d 297 (2020). Thus, the question before the court is whether plaintiff’s third cause of action for breach of the implied covenant of good faith and fair dealing is foreclosed by the Nebraska Supreme Court’s recent decisions in *Koski* and *Acklie*.

In *Koski*, the Nebraska Supreme Court recognized that an implied covenant of good faith and fair dealing “exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.” 307 Neb. at 648–49, 950 N.W.2d at 360. The Court, however, pointed out that “the scope of conduct prohibited by the covenant of good faith is **circumscribed by the purposes and express terms of the contract.**” *Id.* at 649, 950 N.W.2d at 360 (emphasis added). The Court continued on to state:

“The law does not allow the implied covenant of good faith and fair dealing to be an everflowing cornucopia of wished-for legal duties; indeed, **the covenant cannot give rise to new obligations not otherwise contained in a contract’s express terms.**” Instead, a violation of the covenant of good faith and fair dealing occurs only when a

party violates, nullifies, or significantly impairs any benefit of the contract.

Id. (quoting *Comprehensive Care Corp. v. RehabCare*, 98 F.3d 1063, 1066 (8th Cir. 1996)) (emphasis added). Because the defendant in *Koski* “failed to identify any express terms of the [contract] tied to the alleged breach of an implied covenant of good faith and fair dealing,” the Court found no merit to the defendant’s argument that the trial court erred by refusing to instruct on the affirmative defense of breach of the implied covenant of good faith and fair dealing. *Id.* at 649, 950 N.W.2d at 360.

In *Acklie*, the Nebraska Supreme Court considered a contractual provision that provided the defendant “sole discretion” to determine the payments under a deferred compensation plan. 306 Neb. 108, 118, 944 N.W.2d 297, 305 (2020). When the defendant exercised its discretion and refused to make payments, the plaintiff filed suit, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.* at 110, 944 N.W.2d at 301. The Court ultimately held that, because the contract clearly granted the defendant the binding and conclusive authority to decide whether or not to pay the plaintiff, the contract did not create a binding obligation, and therefore, was unenforceable. *Id.* at 118, 121, 944 N.W.2d at 305, 309.

The *Acklie* Court further rejected the plaintiff’s good faith and fair dealing argument, holding that the defendant’s “**exercise of rights clearly granted to it cannot constitute bad faith on its part.**” *Id.* at 122, 944 N.W.2d at 308 (emphasis added). In making such holding, the Nebraska Supreme Court cited its prior decision in *De Los Santos v. Great W. Sugar Co.*, wherein the Court stated:

[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance. The plaintiff alleges that the defendant breached that duty by terminating the contract; but **the defendant having the right to do so under the contract, the exercise of that right did not constitute bad faith on its part.**

217 Neb. 282, 287, 348 N.W.2d 842, 846 (1984) (emphasis added).

In this case, the State was allowed to terminate the Contract, in its sole discretion, pursuant to the express terms of Section Y.2 of the ADDENDUM, which provided in part: “The State, in its sole discretion, may terminate the contract for any reason upon 30 days written notice to the contractor.” Complaint ¶ 10. Because the express terms of the Contract specifically allowed the State to terminate the Contract for “any reason” in its “sole discretion,” the State’s exercise of that right “cannot constitute bad faith on its part.” *Acklie*, 306 Neb. at 122, 944 N.W.2d at 308.


It is true, as the plaintiff points out, that where one party is given discretion to act under a contract, that discretion must be exercised in good faith. See Plaintiff’s Brief at n.2, 6–7. Thus, there are circumstances in which the implied covenant of good faith and fair dealing may obligate a party to act in good faith in fulfilling the parties’ expectations. See *Dick v. Koski Profl Grp., P.C.*, 307 Neb. 599, 648–49, 950 N.W.2d 321, 360 (2020) (“[An implied covenant of good faith and fair dealing] exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract”). However, where the contractual provision grants one party the express authority to terminate the contract, for “any reason” in its “sole discretion,” the implied covenant may not be construed to obligate that party to act in good faith in exercising that authority. *Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728, 733 (8th Cir. 2003) (“[I]n no situation can the implied covenant of good faith and fair dealing limit the way in which a party exercises its discretion when the aggrieved party has specifically disavowed any limitations on that discretion[.]”). As the Nebraska Supreme Court stated in *Koski*, the scope of the implied covenant is “circumscribed by the . . . express terms of the contract” and “cannot give rise to new obligations not otherwise contained in a contract’s express terms.” *Koski*, 307 Neb. at 649, 950 N.W.2d at 360.

Because the State terminated the Contract pursuant to an express contractual term, the plaintiff's breach of the implied covenant of good faith and fair dealing claim fails as a matter of law. Accordingly, the court finds that the State is entitled to judgment on the pleadings on the plaintiff's third cause of action.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that defendant's motion for partial judgment on the pleadings, Filing No. 6, is sustained. Plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing is hereby dismissed.

DATED this 1 day of April, 2021.

BY THE COURT:


Jodi L. Nelson
District Court Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 2, 2021, I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

James A Campbell
jim.campbell@nebraska.gov

Andre R Barry
abarry@clinewilliams.com

Date: April 2, 2021

BY THE COURT:

Trey Z. Clark
CLERK

