

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Docket #217-2023-CV-00285

Jon Swan

**PLAINTIFF'S REPLY TO DEFENDANT'S OBJECTION TO  
MOTION TO DISMISS COUNTERCLAIMS**

The plaintiff, Casella Waste Systems, Inc. ("Casella"), respectfully submits the following reply to the defendant's, Jon Swan ("Swan"), objection to Casella's motion to dismiss defendant's counterclaims.

Swan's objection seeks to preserve counterclaims which fail to state a claim on which relief may be granted. The objection clarifies the nature of Swan's breach of contract counterclaim, which alleges that Casella's initiation of this suit to enforce its rights under the agreement constituted a breach of the same. Adjacent to that claim is the hypothesis that Casella *may* have breached the confidentiality agreement in "less public contexts," but Swan fails to adequately support that allegation to state a claim. The counterclaim must therefore be dismissed. Swan then tries to preserve his good faith and fair dealing claim by arguing that the court permitted a good faith and fair dealing claim to proceed against Swan, so it should allow Swan's claim against Casella. Swan's claim, however, fails to invoke any of the three narrow instances in which the supreme court has recognized this doctrine, and thus it must be dismissed.

Swan's objection establishes that his counterclaim for breach of contract claim apparently has two bases: first, that initiating a lawsuit to enforce the settlement agreement on May 25, 2023 is, by itself, a material breach of that agreement; second, that Casella may have disclosed

the agreement to unnamed third parties prior to filing the lawsuit in violation of the contract's confidentiality clause. Objection (7/3/24) at 5-6; *see also* Counterclaims (4/25/24) at ¶¶13 and 28.

As to the first argument, characterized in the objection as the “central” breach, Swan cites case law from other jurisdictions to support the conclusion that violation of a confidentiality clause may be a material breach of a contract. Objection at 5. That is undoubtedly true. But what is missing from Swan's objection is any authority stating that an action to enforce a confidential agreement constitutes a *per se* breach of confidentiality. That, of course, is because the premise of the argument defies logic. Parties do not enter into contracts as an expression of their best intentions. They do so to create enforceable mutual rights and obligations, and to be enforceable the parties must have resort to the courts (or, if they agree, to an arbitrator) when there has been a breach. Swan's suggestion that parties waive this fundamental predicate of contract law by agreeing to keep their agreement confidential – particularly when nothing in the agreement says that they intend such a draconian outcome – would give confidentiality clauses a broadly disruptive meaning that the courts of New Hampshire have never given them. Unless the court is prepared to hold that an action for breach of an agreement with a confidentiality clause is a *per se* breach of confidentiality, Swan's counterclaim must be dismissed.

The cases Swan does cite are distinguishable. *Norris v. Ford Motor Credit Co.*, 198 F. Supp. 2d 1070 (D. Minn. 2002) is irrelevant as, unlike the defendant in that case, Casella filed the parties' actual agreement under seal, rather than in the public record, concurrently with the filing of the complaint, demonstrating Casella's efforts to comply with the terms of the agreement while also seeking the remedies to which it is entitled. *See* Mot. to File Under Seal (5/25/23). *GDL Masonry* is also of limited application, as it concerns a case in which the

defendant's performance under the agreement was excused where the plain language of a confidentiality clause indisputably described it as a material provision of the agreement. *GDL Masonry Supply, Inc. v. Lopez*, No. 05-15-01200-CV, 2016 WL 6835719, at \*3 (Tex. App. Nov. 2, 2016). No such language is included in the agreement at issue in the instant matter. As for the *Rivera* matter, that case also included a settlement agreement indisputably stating that confidentiality is a material term. *Rivera v. Sharp*, No. CV 2008-0020, 2021 WL 2228492, at \*9 (D.V.I. June 1, 2021), *aff'd*, No. 21-2254, 2022 WL 2712869 (3d Cir. July 13, 2022). Swan's citation overlooks the court's ultimate conclusion after determining that filing an unsealed motion to enforce a settlement agreement constituted a breach of the same. The court determined that the defendants "waived any right to be relived of their obligations under the [agreement] based on the . . . breach." *Id.* at \*10. The court noted that the defendants continued to negotiate the terms of the agreement after the breach and represented that settlement funds were available, demonstrating that defendants "accepted the steps [plaintiff] took to cure her breach." *Id.*

Here, the case has been pending for over a year. Swan has filed papers, including a motion for summary judgment, which also acknowledge the existence of the agreement – the "central" breach that he seeks to hold against Casella. A similar waiver argument would defend against Swan's claims in this case, but it demonstrates the inequity of his argument. Casella commenced this case when Swan published a link to a news article that he knew created the false impression that Casella unilaterally "dropped" its case against him. Complaint (5/25/23) at ¶8. Casella alleged that this violated his obligations negotiated between counsel regarding what he could say about the conclusion of the case. *Id.* at ¶9. By claiming Casella's effort to hold him accountable for breaching the agreement is, in itself, a breach of the contract, he seeks to leverage the confidentiality provision of the contract to insulate himself from any liability. This

would deprive Casella of the value of the confidentiality clause while rewarding him for breaching the agreement in the first place. In this regard, then, his claim must fail.

Swan's breach of contract claim incorporates by reference the other allegations set forth in his counterclaims. Counterclaim at ¶27. To the extent his breach of contract claim is intended to include the conjecture in ¶13 of the Counterclaim, stating that Casella may have disclosed the existence or terms of the agreement to third parties prior to commencing the lawsuit, the claim must be dismissed. Swan's objection further demonstrates that he lacks actual knowledge to support any "information and belief" that Casella made a disclosure prior to commencing the lawsuit. *See* Motion to Dismiss at 5 (describing legal standard for assertions made on "information and belief"). Swan's discussion of the *Ahern* case does not save his claim. Whether Casella made disclosures "to third parties prior to the commencement of this action," as Swan alleges, is – by its nature – a claim that would *not* be "peculiarly within Casella's knowledge," as it requires disclosure to a third party. Objection at 6. Swan does not identify any such person or even basis for making this claim "on information and belief." Beyond that, he asserts that the filing of the lawsuit makes it "more than plausible to infer that [Casella] violated [its confidentiality obligations] in less public contexts." *Id.* Swan must rely on something more than bare assertions to state a claim on which relief may be granted. *See Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44-45 (1987) (conclusions of law need not be accepted as true, and facts alleged must be tested against applicable law on a motion to dismiss). Absent an actual allegation, his counterclaim must be denied.

Swan's claim for breach of the covenant of good faith and fair dealing also fails to state a claim on which relief may be granted. It is well-established that this doctrine arises in only three narrow contexts in New Hampshire: claims relating to contract formation, employment

agreements, or a party's discretion in performing its obligations under the contract. *See Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619, 624 (2009). The only category relevant here is a party's discretion in performance. In the context of the covenant of good faith and fair dealing, discretion in performance must arise under the contract. The purpose of the doctrine is to prevent a party, who is given discretion as to how to perform under the contract, from using that discretion to deprive the other party of the benefit of the bargain. *See Centronics Corp. v. Genicom Corp.*, 132 N.H. 133, 144 (1989). Notably absent from the allegations in the counterclaims is any citation to any language in the parties' agreement giving Casella discretion in its performance.

Swan argues that he should be permitted to pursue a good faith and fair dealing claim against Casella because this court permitted such a claim to proceed against him. To begin with, this is a non sequitur. In so arguing, Swan implies that whether to comply with a confidentiality provision is enough discretion to support a good faith and fair dealing claim. Swan's allegation against Casella, however, presents an entirely different question. The central allegation of this counterclaim states: "Casella's use of the provisions of the settlement agreement that are favorable to Casella while violating the provisions of the settlement agreement that it chooses to ignore is a breach of the covenant of good faith and fair dealing." Counterclaim at ¶33. A party's decision as to whether to perform its obligations under an agreement is not, as a matter of law, the form of "discretion" within the ambit of the implied covenant of good faith and fair dealing. Otherwise, every breach of contract claim would give rise to a claim for breach of the implied covenant. The purpose of the covenant is not to slap a new label on garden-variety breaches of contract; it is to provide a standard for performance where the contract gives a party discretion in performing (such as through a "reasonable efforts" clause). Swan's counterclaim is silent as to

any exercise of discretion by Casella and instead amounts to a breach of contract claim styled under a different heading. It fails to state a claim under the limited categories of claims for good faith and fair dealing, and thus it must be dismissed.

Finally, Swan is incorrect that Rule 10(a) does not apply to his untimely claims. Rule 10(a) requires that “a pleading *shall* state as a counterclaim any claim *which at the time of serving* the pleader has against any opposing party.” N.H. Sup. Ct. R. 10(a) (emphasis supplied). Generally, the use of “shall” is a command indicating that the rule is mandatory. *In re Russell C.*, 120 N.H. 260, 264 (1980). Casella has not argued, as Swan suggests, that there is a specific time limit in Rule 10(a) for a party to assert a counterclaim. The case Swan cites, *Winnepesaukee Marine Construction, Inc. v. Patricia Scribner, et al.*, is inapposite because the focus of Casella’s argument is not on a specific time frame within which a counterclaim must be raised, but on the events precipitating the requirement to raise a counterclaim. *Winnepesaukee Marine Construction, Inc. v. Scribner*, Case No. 211-2021-CV-00216 (N.H. Super. Belknap County June 27, 2022) (Leonard, J.). Indeed, Rule 10(a) requires that a “pleader” *must* state any counterclaim it has against an opposing party when it serves a pleading. Here Swan’s counterclaim arose prior to any pleading he submitted. Subsequently, Swan answered the complaint, brought a counterclaim, moved for summary judgment, answered the amended complaint with the same counterclaim, and has filed several more pleadings. After the significant amount of motion practice that has occurred, Swan waited nearly a year before asserting new counterclaims which allege completely new causes of action, all without seeking leave of this court.

For these reasons and those set forth in its motion, Casella respectfully moves the court to dismiss the defendant’s counterclaims.

Respectfully submitted,

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By Its Attorneys,

Date: 7/22/24

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's ECF system upon counsel of record and all other parties who have entered electronic service contacts in this case.

Date: 7/22/24

/s/ Cooley A. Arroyo  
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