

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 13 AM 9:13
STATE OF WASHINGTON
No. 46914-6-II
BY *[Signature]*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NEW VISION PROGRAMS INC, a Washington corporation,
Appellant

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, an agency of the State of Washington;
and RANDY ROBERTS, individually,
Respondents

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. Argument	1
A. The Contract only states that Respondent is not required to place children in Appellant’s homes; it does not give Respondent <i>carte blanche</i> to remove those children once they are placed.	2
B. The duty of good faith applied to Respondent’s placement decisions and Respondent has failed to address the full implications of its argument.	4
C. A number of contract provisions vested discretion in Respondent and, therefore, required Respondent to act in good faith.	7
II. Conclusion	10

TABLE OF AUTHORITIES

Page

Cases

Rekhter v. Dep't of Soc. & Health Servs.

180 Wn.2d 102 (2014)..... 4, 5

I. ARGUMENT

Respondent State of Washington Department of Social and Health Services (“DSHS” or “Respondent”) has failed to provide a valid basis for this Court to find that Respondent is permitted to act in bad faith in its dealings with contractors such as Appellant. Respondent continues to stretch a single contractual provision stating that it is not required to place children in homes operated by Appellant into an argument that it may remove children from homes—and take any other action that it pleases—without a good faith basis.

As an initial matter, it bears noting that Respondent has misstated the issue before this Court. Respondent claims that the trial court dismissed Appellant’s claims because no duty of good faith existed and because “no genuine issues of material fact were raised as to whether DSHS breached such an obligation if it did arise.” Brief of Respondent, at 2.

However, the trial court never considered whether, if a duty of good faith applied, there existed genuine issues of material fact precluding summary judgment. To the contrary, the only issue

considered by the trial court—and presented to this Court—was whether any of Respondent’s actions were governed by any duty of good faith. If such a duty exists, the trial court’s decision must be reversed and the case should be remanded. For the reasons discussed in Appellant’s opening brief and below, Respondent was required to comply with the duty of good faith and the trial court erred in granting summary judgment.

A. The Contract only states that Respondent is not required to place children in Appellant’s homes; it does not give Respondent *carte blanche* to remove those children once they are placed.

Throughout Respondent’s brief, it repeatedly conflates the contractual language stating that it is not obligated to place children in Appellant’s homes with its argument that it can remove children that it has already placed for any reason whatsoever. For example, after quoting the contractual language—which is “DCFS may request services from the contractor on an as-needed basis. This Contract does not obligate DFCS to authorize services from the Contractor”—Respondent states, “Under this plain language, New Vision did not have a right to have children placed in its facilities

nor was DSHS prohibited from removing youth from its facilities.”

Brief of Respondent, at 3.

Contrary to Respondent’s framing, this provision only addresses the placement of children, not their removal. There is nothing in this provision—or any other provision of the Contract—that states that Respondent can remove children that it has placed in Appellant’s homes whenever it wants.

In fact, the removal of such children is specifically addressed by Washington regulation, which requires at least 72 hours’ notice to the child care provider prior to removal, unless an emergency situation exists. WAC 388-25-0035. There is no dispute that Respondent failed to follow that regulation here.

Appellant does not argue that Respondent’s failure to follow that regulation, in and of itself, constitutes a breach of the Contract, as Respondent claims. Brief of Respondent, at 27. However, that regulation shows that Respondent’s position—that it must be allowed complete flexibility to remove children whenever it wants—is without merit and contrary to law.

Respondent supports its position with a number of examples of reasons that it may need to remove a child: “being hospitalized, going on the run, running away, being placed in juvenile detention, or returning home.” *Id.*, at 19. However, these are all examples of legitimate, good faith reasons for removal and are not at all contrary to Appellant’s position. Appellant is only arguing that there must be *some* good faith reason for removal.

This duty of good faith is rooted in the Contract, which gives Respondent discretion over each child’s appropriate exit date. (CP 543). Because there are questions of fact about whether Respondent acted in good faith in removing children, summary judgment was improperly granted and the trial court’s decision should be reversed.

B. The duty of good faith applied to Respondent’s placement decisions and Respondent has failed to address the full implications of its argument.

This Court recently found that the duty of good faith applied in a very similar case that also involved a contract signed by Respondent. *Rekhter v. Dep’t of Soc. & Health Servs.*,

180 Wn.2d 102, 108 (2014). Respondent's attempts to distinguish this case from *Rekhter* are unavailing.

Respondent argues that, because it did not have an obligation to place children in Appellant's homes, there was no obligation to which a duty of good faith could apply. However, the sole purpose of the Contract was to govern Respondent's placement of children in Appellant's homes. If Respondent did not have an obligation of any kind, the Contract would be illusory and lack consideration.

While Respondent was required to consider placement of children at Appellant's homes, it did possess discretion as to how many children it placed there. This is the exact situation presented in *Rekhter*, in which the contract at issue stated that Respondent would "only pay for authorized services" and gave Respondent discretion as to the quantity and type of services that it could choose to authorize. *Id.*, at 108, 113-14. Just as the Court in *Rekhter* found that these circumstances gave rise to the duty of good faith, this Court should find that Respondent's exercise of discretion in determining whether to authorize services from Appellant were governed by the duty of good faith.

Further, Appellant argued at length in its Opening Brief that the discretion that Respondent possessed in the placement of children in Appellant's homes was limited by the duty of good faith. Central to this argument was the fact that, if Respondent's position were accepted, it would be able to make decisions based on such improper factors as Appellant's race. This concern was supported by the trial court's statement that "there could maybe be an issue" if decisions were based on skin color. (RP 29:19-22).

Respondent ignores this issue and continues to maintain that it should be able to make placement decisions for any reasons whatsoever, even if they are rooted in bad faith. Further, just as Respondent cannot defend the full implications of its position, it also cannot provide any support to justify the trial court's apparent application of varying levels of good faith.

The Contract gave discretion to Respondent to decide whether to authorize services from Appellant. That discretion was governed by the duty of good faith. Any contrary holding would allow Respondent to make placement decisions for any number of improper reasons. Because there are questions of fact about whether

Respondent complied with that duty of good faith, the trial court's decision should be reversed.

C. A number of contract provisions vested discretion in Respondent and, therefore, required Respondent to act in good faith.

In addition to those detailed above, Appellant has identified a number of other provisions of the Contract that give discretion to Respondent and, therefore, required Respondent to act in good faith. Respondent's contentions with respect to those provisions are unconvincing.

First, the Contract gives Respondent the discretion to issue stop placement orders if it determines that certain circumstances exist. (CP 535). Respondent argues that this is not implicated because performance of the Contract was never suspended. However, this is a separate issue; there is no question that a stop placement order was put in place. (CP 684). Because there are questions of fact about whether the stop placement order was issued in good faith, summary judgment was inappropriate.

Second, the Contract gives Respondent discretion to institute a Corrective Action Plan and follow certain procedures to ensure

compliance. (CP 535). With respect to this provision, Respondent acknowledges that “[t]o the extent there is an implied obligation of good faith, it related to the creation and execution of a corrective action plan....” Brief of Respondent, at 24. Appellant’s argument goes directly to Respondent’s execution of the Corrective Action Plan, however. Contrary to Respondent’s position that it “repeatedly offered New Vision numerous opportunities to fix its deficient performance,” the evidence shows that Appellant had corrected any deficiencies and it was Respondent’s employees who were upset that Appellant appeared to be meeting expectations. Brief of Respondent, at 24; CP 665:16-19; CP 666. If Respondent had executed the Corrective Action Plan in good faith, it would have accepted Appellant’s compliance as resolving those issues; instead, due to its bad faith mistrust of Appellant, it ignored that apparent compliance and moved forward with taking further action against Appellant. Because there are, at the very least, questions of fact as to whether Respondent acted in bad faith in ignoring Appellant’s compliance with the Corrective Action Plan, summary judgment was inappropriate.

Finally, the Contract gives Respondent discretion to terminate the Contract if it determines that certain conditions are present. (CP 525-526). Respondent argues that the Contract was never terminated because performance continued until “right before its expiration” and a few children remained at one of Appellant’s homes until “two days before the contract period ended.” Brief of Respondent, at 28. Setting aside the fact that the vast majority of children were removed well before the Contract was set to expire, the fact that Respondent terminated the Contract two days before it was set to expire does not mean that the Contract was not terminated. It may affect the damages that may be claimed, but it does not mean that it was not an improper breach. Because there are questions of fact as to whether the Contract was improperly terminated, summary judgment was inappropriate.

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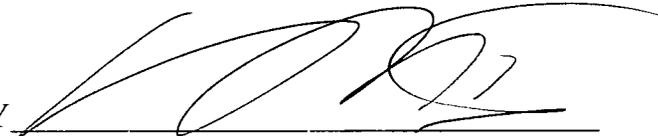
II. CONCLUSION

For the reasons discussed herein, the trial court erred in granting summary judgment and its decision should be reversed.

DATED: July 7, 2015

KELL, ALTERMAN & RUNSTEIN, L.L.P.

BY



Thomas R. Rask, III, WSBA No. 39212
Of Attorneys for Appellant

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CERTIFICATE OF SERVICE

I certify that on July 7, 2015, I caused to be served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF on the following recipient:

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by having placed a copy in an envelope addressed to said recipient at the above-listed address and depositing the envelope, with postage prepaid, in the mails of the United States Postal Service in Portland, Oregon.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

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