STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. BCD-25-18

H.A.T., LLC

Appellant

v.

GREENLEAF APARTMENTS, LLC, et al.

Appellees

On Appeal from the Business and Consumer Docket

BRIEF FOR APPELLEE GREENLEAF APARTMENTS, LLC

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STATEMENT OF FACTS

I. Factual background

Appellant H.A.T., LLC ("HAT") raises a number of perplexing arguments in its brief, but this case boils down to nothing more than a routine, failed commercial real estate venture. In early 2008, HAT and Appellee Greenleaf Apartments, LLC ("Greenleaf") entered into a bond-for-deed[1] arrangement (the "Contract") in which Greenleaf sold HAT three buildings containing 15 apartment units on Greenleaf Street in Portland (the "Property"). HAT repeatedly defaulted on its contractual obligations, and Greenleaf terminated the Contract in 2016.

A. The Contract

The purchase price of the Property was $1,000,000.[2] HAT paid only $30,000 at the closing, with Greenleaf seller-financing the remaining 97 percent.[3] HAT executed a $970,032.07 promissory note ("the First Note") in favor of Greenleaf,[4] which HAT had to pay in full before it would receive the deed conveying title to the Property. The Contract specified that HAT's failure to make any payment due under the First Note no later than 15 days after the due date constituted a default.[5] The Contract did not include payment defaults in the notice and right-to-cure

[1] Also known as a land installment contract.
[2] Appendix ("A.") 118.
[3] Exh. 2 (a little over $10,000 of the $40,000 down payment went to closing costs).
[4] A. 137-45.
[5] *Id*. 126.

clauses that govern other types of defaults.[6] HAT was represented by an attorney in this transaction.[7]

Fifteen months after signing the Contract, HAT and Greenleaf tweaked the default language. In April 2009, they executed a memorandum of agreement establishing a procedure for terminating the Contract after a default by HAT, which would include recording a document in the Cumberland County Registry of Deeds evidencing the termination.[8] HAT and Greenleaf also reaffirmed that for payment defaults, "[n]o notice need be given by Greenleaf to H.A.T. prior to release of the Agreement [for Termination] for recording in the event of any default in making timely payments …."[9] The only substantive change to the payment default terms was to reduce the grace period from 15 days to 10 days.[10]

B. HAT struggled from the beginning to fulfill its obligations under the Contract.

HAT was part of a much larger business enterprise operated by HAT's managing member, David O'Donnell. Between late 2007 and spring of 2008, O'Donnell and his entities, including HAT, purchased at least 232 rental units.[11] But this venture was undercapitalized and overleveraged, and by the summer of

[6] *Id.* 126-27; Trial Transcript ("Trial Tr.") vol. 3, 73:4-9 & 75:2-8 (Apr. 10, 2024).
[7] A. 28; Trial Tr. vol. 1, 68:16-19 & 168:22-15 (Apr. 8, 2024).
[8] A. 154-65.
[9] *Id.* 155.
[10] *Id.* 154.
[11] Trial Tr. vol. 1, 174:7-177:9 (Apr. 8, 2024)

2009, nearly all the properties had been lost to foreclosure or bankruptcy.[12] O'Donnell's and HAT's holdings were reduced to—at the most—45 units, a third of which were at the Property.[13]

HAT regularly fell behind on the payments due on the First Note.[14] It failed to pay utility bills for the Property, resulting in shutdown notices and sewer liens.[15] The City issued code violations.[16] To keep the business afloat, HAT transferred tenants' security deposits to its operating bank account.[17]

HAT also failed to maintain the Property despite the requirement of paragraph 13 of the Contract that it do so.[18] HAT could not pay for roof repairs, so Greenleaf loaned it the funds.[19] When a burst pipe flooded one building in 2014, Greenleaf loaned HAT the funds not only for those repairs, but also for a needed renovation of the whole building, including new kitchens and bathrooms, because HAT, again, did not have any money.[20] After fire damaged another building on the Property, HAT once more needed Greenleaf to clean up the mess.[21]

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[12] A. 44 n.6; Trial Tr. vol. 1, 177:10-178:20 (Apr. 8, 2024) & vol. 2, 44:11-14 (Apr. 9. 2024).
[13] Trial Tr. vol. 1, 178:14-20 (Apr. 8, 2024) & vol. 2, 44:11-14 (Apr. 9. 2024).
[14] *See, e.g.,* A. 26, 31, & 37.
[15] *Id*. 33 & 34-35; Exhs. 31 & 86; Trial Tr. vol. 4, 48: 19-49:2 (Apr. 11, 2024) & vol. 1, 187:23-195:10 & 201:16-25 (Apr. 8, 2024).
[16] Exhs. 83-85.
[17] Exh. 137 (11/7/14 O'Donnell Depo.) 133:9-15.
[18] A. 26, 33, 50, & 125.
[19] *Id*. 33 & 166-68; Exh. 12.
[20] A. 35, 50, & 235-51; Exh. 139 (Bichrest Depo.) at 12:8-15, 13:14-15:15; Trial Tr. vol. 1, 105:8-15 (Apr. 8, 2024).
[21] A. 36 & 263.

Despite its travails, HAT was able to retain possession of the Property only due to the goodwill of Richard Harris, Greenleaf's managing member. As the trial court found, Harris "regularly forgave H.A.T.'s late payments on its mortgage as long as they were eventually paid" and loaned O'Donnell a lot of money.[22] Harris was a self-made man who had been given help along the way in his early years, and he always tried to pay that forward.[23] His generosity extended beyond family to tenants, employees, and others to whom he offered payment plans and personal loans.[24] This included O'Donnell, who Harris liked, mentored, and supported.[25] As Harris's daughter testified, "He always tried to give people a chance."[26] Richard Harris gave HAT every chance to succeed, but HAT repeatedly failed to uphold its end of the bargain.

C. Greenleaf terminated the Contract because of HAT's payment defaults.

Greenleaf terminated the Contract and took back possession of the Property in August of 2016 when HAT fell behind yet again on its payments due under the First Note.[27] It is undisputed—and admitted by HAT in its amended complaint—that HAT was three months behind in its payments when the termination was

[22] *Id*. 31.
[23] *Id*. 28 & 29; Trial Tr. vol. 3, 139:4-13 (Apr. 10, 2024).
[24] *Id.*
[25] A. 28.
[26] Trial Tr. vol. 3, 139:12-13 (Apr. 10, 2024).
[27] A. 43-44, 50, & 171-72.

recorded in the Registry of Deeds.[28] The three payment defaults were each a material breach of the Contract and each justified termination.[29] The Contract provided that upon termination, "all of [HAT's] interest in the Property shall be terminated, without reimbursement or credit for any amounts previously paid under the Promissory Note or this Contract except as otherwise provided . . . ."[30] The termination ended HAT's right to possess the Property and voided the First Note.[31]

Yet Greenleaf was still willing to entertain HAT's attempts to coordinate a sale of the Property that would pay the debt to Greenleaf and let HAT keep eight years' worth of equity.[32] But after several attempts, HAT was unable to arrange a sale.[33] O'Donnell acknowledged that Greenleaf gave HAT opportunities to sell the Property and that he does not blame Greenleaf for potential sales falling through.[34]

After it terminated the Contract and reclaimed possession of the Property, Greenleaf discovered the extent of HAT's mismanagement.[35] Tenants were living in intolerable conditions.[36] One tenant's kitchen was destroyed by fire, but the family was still living there, despite the existence of at least one vacant unit in the

[28] *Id*. 87 (¶ 64(c)).
[29] *Id*. 43-44.
[30] *Id*. 129.
[31] *Id*. 138 & 155-56.
[32] *Id*. 174 (HAT to receive $450,000 from proposed sale); Trial Tr. vol. 2, 32:12-33:17 (Apr. 9, 2024).
[33] Trial Tr. vol. 2, 22:18-24 (Apr. 9, 2024) & vol. 4, 54:8-55:17 (Apr. 11, 2024).
[34] *Id.,* vol. 2, 30:17-32:6 & 33:18-34:11 (Apr. 9, 2024).
[35] A. 38-39.
[36] Trial Tr. vol. 3, 111:24-112:11 & 113:18-114:4 (Apr. 10, 2024); Exhs. 31 & 37.

building.[37] Utility companies were again threatening shutoffs for nonpayment.[38] The City of Portland had myriad complaints.[39] Greenleaf was forced to address and resolve the problems left in HAT's wake.[40] In addition to putting the buildings back into habitable condition, Greenleaf spent years—and $462,398.62—repairing the building that was damaged by fire when HAT managed the Property.[41]

Although the termination at the heart of this case was recorded in August 2016, HAT waited three and a half years—and until after Richard Harris's death—to bring this lawsuit.[42] Not once before filing its complaint did HAT dispute the termination.[43] In its amended complaint, HAT raised a litany of factual allegations as well as counts ranging from a statutory right of redemption to fraud to breach of contract.[44]

II. The Business Court entered judgment against HAT.

Following a bench trial, the Business Court (Duddy, J.), ruled against HAT on all claims, including Greenleaf's counterclaim. The court did not credit

[37] Trial Tr. vol. 3, 112:7-113:7 (Apr. 10, 2024). Greenleaf promptly moved the tenants into the vacant unit. *Id.*
[38] *Id*. vol. 3, 114:5-16 (Apr. 10, 2024); A. 215.
[39] A. 211-14; Trial Tr. vol. 4, 110:23-111:23 (Apr. 10, 2024).
[40] Exhs. 40, 43 & 44; Trial Tr. vol. 3, 24:13-25:4, 115:4-17 & 139:14-16 (Apr. 10, 2024).
[41] A. 263; Trial Tr. vol. 3, 118:21-119:4 & 142: 20-144:13 (Apr. 10, 2024).
[42] A. 6 & 27; Trial Tr. vol. 3, 108: 9-11 (Apr. 10, 2024) (Richard Harris died on April 12, 2019).
[43] A. 203-10; Exhs. 39-44; Trial Tr. vol. 3, 25:19-26:5 & 55:8-18 (Apr. 10, 2024).
[44] A. 72-89.

O'Donnell's version of the events, finding that "O'Donnell and HAT were the source of all their troubles—not Dick [Harris] and Greenleaf."[45]

Three of the Business Court's conclusions of law are relevant to the appeal. First, the trial court rejected HAT's contention that Greenleaf had breached the Contract, finding that Greenleaf was "never in default."[46] The court found that HAT, on the other hand, had breached the Contract by defaulting on the payments due under the First Note.[47] Second, the trial court held that HAT was not entitled to redeem the title to the Property under 14 M.R.S. § 6203-F because HAT waived any rights it may have had under the statute and because section 6203-F did not apply to the Contract.[48] Third, the court ruled that the Contract was not unconscionable in light of the substantial risks that Greenleaf assumed in the transaction.[49]

ARGUMENT

I. HAT did not pay the sums it owed under the First Note, thereby entitling Greenleaf to terminate the Contract.

A. HAT defaulted on its payment obligations.

The trial court properly found that when Greenleaf terminated the Contract, HAT had breached its contractual obligations by not paying amounts due on the

[45] *Id*. 47; *see also id.* at 44 n.6 ("the problems lay with O'Donnell, not with [Harris] or Greenleaf").
[46] *Id*. 47 & 50.
[47] *Id*. 50.
[48] *Id*. 39-40.
[49] *Id*. 45.

First Note.[50] HAT's burden on appeal is to demonstrate that this factual finding is clearly erroneous. This Court recently emphasized that a finding of fact is clearly erroneous only if:

> (1) no competent evidence supporting the finding exists in the record; (2) the fact-finder clearly misapprehended the meaning of the evidence; or (3) the force and effect of the evidence, taken as a whole, rationally persuades us to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.[51]

Although HAT contends on appeal that it was not in default, HAT fails to acknowledge that the clearly erroneous standard applies, or that this standard even exists. Even if HAT had argued that the default finding was clearly erroneous, any such argument would fail because HAT's amended complaint and the evidence fully support the trial court's finding that HAT defaulted.

HAT did not pay the sums due in June, July, and August of 2016 on the First Note. These three payment defaults are conclusively established by HAT's factual assertion in its amended complaint that "[a]t the time of the seizure, Plaintiff had not remitted monthly payments <u>due</u> in June, July, and August, 2016."[52] This

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[50] *Id*. 43-44.
[51] *General Holdings, Inc. v. Eight Penn Partners, L.P.*, 2025 ME 20, ¶ 15, 331 A.2d 445 (*quoting Carter v. Voncannon,* 2024 ME 65, ¶ 20, 327 A.3d 9).
[52] A. 87 (¶ 64(c)) (emphasis added).

statement is a judicial admission of HAT's payment defaults under the Contract, and therefore it is binding on HAT under Maine law.[53]

HAT's judicial admission by itself establishes the payment default, but the evidence also corroborates this finding. O'Donnell acknowledged in an email to HAT's attorney in late July of 2016 that HAT was two months behind in its payments.[54] (The August 1st payment was not due until four days after the email.) Six months later, he conceded in another email that HAT deposited only five monthly payments in Greenleaf's bank account in 2016.[55]

On appeal, HAT ignores its judicial admission and the undisputed evidence of its defaults. Instead, HAT devotes ten pages of its brief to a rambling recital of extraneous "facts" unsupported by record citations while at the same time failing to articulate in a coherent fashion why it believes that it was not in default. As best as Greenleaf can discern, HAT makes two arguments. First, that it was not in default because it had a right under the Contract to set off, against its payment obligations on the First Note, insurance proceeds that Greenleaf received after it paid to repair water damage at the Property. Second, that HAT could also set off lost rent

[53] *See R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*, 2007 ME 138, ¶ 25, 931 A.2d 1081 ("party is bound by an assertion of fact in a responsive pleading"); *Bahre v. Liberty Group, Inc.*, 2000 ME 75, ¶ 15, 750 A.2d 558 ("assertion of fact in a pleading is a judicial admission by which [the party] is normally bound throughout the course of the proceeding") (internal quotation marks omitted).
[54] A. 261.
[55] *Id*. 272.

insurance proceeds that were not—but in HAT's view should have been—paid by the insurer. Neither of these theories holds water.

B. HAT was not entitled to a credit on the First Note for insurance proceeds received by Greenleaf.

HAT theorizes that it was not in arrears before the termination because Greenleaf did not transfer to HAT an insurance payment for extensive damage caused by a burst pipe. This theory appears to be predicated upon the following rationale: (1) paragraph 11 of the Contract assigns all insurance proceeds to HAT; (2) Greenleaf failed to hand over to HAT almost $81,000 in insurance proceeds; (3) paragraph 17 of the Contract allows HAT to set these proceeds off against amounts it owed under the First Note; and (4) the amounts subject to setoff exceeded the payments due on the First Note in the summer of 2016, and therefore HAT was not in default.

HAT's theory flies in the face of its judicial admission in the amended complaint that the unpaid 2016 installment payments were "due." HAT also disregards paragraph 13 of the Contract, which required HAT to maintain the property in "as good order and repair as … on the date of th[e] Contract."[56] HAT failed to do so after the burst pipe because it was unable to finance damage repairs. Greenleaf stepped into the breech, hiring contractors, overseeing the repairs, and

[56] *Id.* 125; *see* Trial Tr. vol. 1, 205:12-15 (Apr. 8, 2024).

paying the substantial construction costs with its own funds even though it was under no contractual duty to maintain the buildings.[57]

HAT argues that it was entitled to the insurance reimbursement even though Greenleaf bankrolled the extensive out-of-pocket repair costs after HAT breached its contractual duty to repair. As the trial court found, this would result in "an unjust windfall" for HAT.[58] It is also contrary to what the parties agreed after the burst pipe. O'Donnell testified that HAT did not have the resources to repair the water damage and agreed to Greenleaf's generous offer to advance the repair costs.[59] He also conceded at trial that Greenleaf was entitled to the insurance proceeds because it paid for the repairs.[60] As the trial court held, this means that HAT waived any claim it may otherwise have had to the insurance payment.[61]

HAT cannot shirk its repair obligations, disregard its agreement with Greenleaf after the burst pipe on how to handle the repairs and insurance, stand by silently during construction, and now claim entitlement to insurance payments that only partially reimbursed Greenleaf for its expenditures on HAT's behalf.[62] Maine law requires that contracts be "construed in accordance with the intention of the

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[57] A. 35, 50, & 235-51.
[58] *Id*. 50.
[59] Trial Tr. vol. 1, 204:25-205:6 (Apr. 8, 2024).
[60] A. 50; Trial Tr. vol. 1, 204:25-205:11 & 222:4-13 (Apr. 8, 2024).
[61] A. 50.
[62] *Id*. 235.

parties, which is to be ascertained from an examination of the whole instrument."[63] As this Court has emphasized: "All parts and clauses must be considered together so that it may be seen if and how one clause is explained, modified, limited or controlled by the others."[64] Here, the parties intended that the assignment of insurance proceeds in paragraph 11 of the Contract be conditioned on HAT honoring its contractual repair obligations. Otherwise, the repair clause is meaningless if there is a casualty. HAT cannot selectively enforce one provision of the Contract while breaching its obligations under another term upon which the first provision is contingent. As the trial court held, HAT is not entitled to insurance proceeds when it fails to foot the bill for those repairs, in breach of paragraph 13.[65] HAT's argument runs counter to not only the parties' intent, as evidenced by the Contract as a whole, but also the parties' agreement after the burst pipe as to who would pay for the repairs and be entitled to the insurance proceeds.

HAT also misconstrues the Contract's setoff provision. Paragraph 17 provides that if Greenleaf defaults and "Purchaser is in good standing under this Contract, the Purchaser may deduct all loss it incurs due to the default . . . from amounts due hereunder to Seller and may set off such loss against amounts due

[63] *Am. Protection Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989.
[64] *Id.*
[65] A. 50.

under the Promissory Note."[66] HAT cannot rely on this provision to avoid the consequences of its payment defaults for three reasons.

First, paragraph 17 is triggered only if HAT is in good standing. The trial court found that when the Contract was terminated, HAT was not in compliance with numerous provisions of the Contract, including its payment obligations, duty to repair the Property, and failure to pay heating bills (thereby causing the burst pipe, as the trial court found), among other lapses.[67] The court stressed that HAT's lack of good standing eliminates any setoff right it may have had.[68]

Second, the Contract only permits HAT to set off losses it incurs stemming from a default by Greenleaf. The trial court found that Greenleaf was "never in default,"[69] and HAT does not contend that this factual finding is clearly erroneous. Besides, HAT did not incur any out-of-pocket losses related to an alleged Greenleaf default: Greenleaf paid for the repairs, and the contractors did good work, did not cause delays, and worked as fast as they could.[70] When Greenleaf terminated the Contract, HAT had no eligible losses to set off.

Third, HAT never invoked a right to set off the insurance proceeds. Paragraph 17 stipulates that HAT "may deduct all loss" due to a default by

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[66] *Id*. 131.
[67] *Id*. 43 & 50.
[68] *Id*. 50.
[69] *Id*.
[70] Trial Tr. vol. 1, 205:16-206:9 (Apr. 8, 2024).

Greenleaf as a setoff.[71] This means that HAT must actually and overtly exercise its setoff option; paragraph 17 does not operate automatically. HAT never attempted to set off any sums before the termination or, indeed, at any time before the trial nearly eight years later. It cannot feign ignorance of the facts as an excuse for not doing so. HAT knew well in advance of the termination that Greenleaf had received insurance payments that exceeded the installment payments due in the summer of 2016.[72] The trial court correctly rejected HAT's untimely, after-the-fact attempt to invoke paragraph 17's setoff provision to excuse its payment defaults.

C. HAT was not entitled to credit on the First Note for lost rent insurance proceeds never paid by the insurer.

HAT's other attempt to circumvent the trial court's default finding is confined to a single sentence containing no record or case law citations: "the failure to involve HAT in the insurance dealings on at least an informational basis constitutes a further, unliquidated liability, it being established that HAT never received any credit for lost rent from two casualties despite being the benefitted party of a 'confidential relationship.'"[73] This cryptic statement does not explain who failed to involve HAT in "insurance dealings" on "an informational basis" or

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[71] A. 131.

[72] *See id*. 195-97 (Greenleaf attorney's May 19, 2016 letter and enclosed account reconciliation refer to $71,999.58 insurance payment); *id*. 178 & Trial Tr. vol. 1, 213:1-9 (Apr. 8, 2024) (Greenleaf informed O'Donnell two years before termination that the insurance company was honoring its obligations.); A. 198 (Greenleaf's attorney informed HAT's attorney almost two months before the termination that Greenleaf had received $85,000 in insurance proceeds).

[73] HAT Brief at 27.

the significance of this alleged failure, nor does it spell out why HAT was entitled to a credit or how much that credit should be. HAT also neglects to inform this Court that the insurer never paid benefits to anyone under the lost rent coverage.

If HAT seeks to blame Greenleaf for the lack of lost rent insurance payments, it furnishes no justification or record support for doing so in its one-sentence argument. Any attempt to somehow blame Greenleaf is contradicted by the fact that only HAT had a lost rent insurance claim: HAT had exclusive possession of the Property and its tenants occupied the apartment units. HAT also ignores the fact that it actively pursued its lost rent claim and repeatedly interacted with the adjuster.[74] Despite hearing nothing from the insurer for an extended period of time, HAT made no effort to follow up or to file a lawsuit against the insurer.[75] There is no excuse for HAT's failure to do so, especially since it was represented by its current counsel on the lost rent claim and kept him in the loop on everything.[76] Greenleaf is not responsible for either HAT's puzzling lack of diligence in pursuing its lost rent claim or for any oversights by the insurer. HAT has no one to blame but itself for not recovering lost rent. And, as noted above, it had no right in any event to set off unpaid lost rent insurance against the installment payments it owed to Greenleaf under the First Note.

[74] Exhs. 50, 51, & 60-63; Trial Tr. vol. 1, 207:1-208:4 (Apr. 8, 2024) and vol. 4, 35:14-36:6 & 37:4-38:2 & 39:20-40:10 (Apr. 11, 2024).
[75] Trial Tr. vol. 1, 220:4-25 (Apr. 8, 2024).
[76] *Id*. vol. 1, 182:21-183:9 & 220:22-25 (Apr. 8, 2024).

D. Waiver and equitable estoppel are alternative grounds for affirming the trial court's decision that HAT was in default of its payment obligations.

As this Court has observed, it can affirm a judgment on grounds different from those relied on by the trial court.[77] Here, waiver and equitable estoppel furnish alternative grounds that justify affirming the holding that HAT had defaulted when Greenleaf terminated the Contract.

1. Waiver

HAT waived any right it may have had to challenge the default and subsequent termination. Waiver is the voluntary and knowing relinquishment or abandonment of a legal right.[78] This Court has emphasized that waiver "may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon."[79]

HAT's conduct demonstrates an intent not to contest the payment defaults or Greenleaf's exercise of its right to terminate. Upon learning of the termination, O'Donnell immediately called HAT's attorney.[80] Over the next three months, Attorney Cloutier, on behalf of HAT, communicated frequently with Greenleaf's

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[77] *See, e.g., McDonald v. City of Portland*, 2020 ME 119, ¶ 22, 239 A.3d 662 (affirming on alternative basis); *Sears, Roebuck & Co. v. State Tax Assessor*, 2012 ME 110, ¶ 13, 52 A.3d 941 (same).
[78] *See, e.g., Dep't of Human Servs. v. Bell,* 1998 ME 123, ¶ 6, 711 A.2d 1292.
[79] *Id.*
[80] A. 201-02; Trial Tr. vol. 2, 26:5-8 (Apr. 9, 2024).

attorneys about potential sales of the Property.[81] But in these emails and telephone conversations, he never once challenged—or even reserved the right to challenge—HAT's default or the termination.[82] Instead, the focus of these communications was to try to extricate his client from its failed investment by convincing Greenleaf to voluntarily agree to a third-party sale of the Property.[83] This conduct is incompatible with HAT's current position—first raised nearly eight years after the termination—and evidences an intention by HAT to relinquish any right it may have had to claim that it was not in default. [84] Greenleaf was entitled under these circumstances to infer that HAT's conduct manifested its relinquishment or abandonment of any right to challenge the defaults and the termination.

2. Equitable Estoppel

Equitable estoppel also provides an alternative basis for affirming the trial court. Equitable estoppel "precludes a party from asserting rights which might perhaps have otherwise existed, against another person who has in good faith relied upon [the party's] conduct, and has been led thereby to change his position for the

[81] A. 203-14 & 216; Exhs. 39-44; Trial Tr. vol. 2, 30:22-31:7 (Apr. 9, 2024).
[82] A. 203-14 & 216; Exhs. 39-44; Trial Tr. vol. 3, 25:19-26:5 & 55:8-18 (Apr. 10, 2024).
[83] *Id.*
[84] *Manella v. Brown Co.*, 537 F. Supp. 1226, 1228 (D. Mass. 1982) (applying Maine law) (Waiver "may be shown by words or acts and may arise from inferences from all the attendant acts as well as from express manifestations of purpose.") (quotation marks omitted)).

worse, and who on his part acquires some corresponding right."[85] This doctrine is premised on a misrepresentation that can occur through misleading statements, conduct, or silence, or a combination of these factors.[86]

The undisputed evidence showed that HAT misrepresented its intentions regarding the validity of the termination. After Greenleaf's attorney notified HAT's attorney of the recording of the termination, neither O'Donnell nor Attorney Cloutier disputed the payment defaults or the termination.[87] HAT had a duty to speak if it disagreed with the legality of Greenleaf's actions. HAT not only failed to do so, but it also acquiesced in the termination. HAT's communications to Greenleaf after the termination focused only on HAT's efforts to sell the Property, requests that Greenleaf agree to a sale arranged by HAT, and the mechanics of a sale, including how much HAT owed Greenleaf and how the proceeds would be split.[88] Equitable estoppel does not require an explicit statement that a party will, or will not, take certain actions.[89] HAT's silence when it had a duty to speak, the many years that passed before it questioned the validity of the termination, its acquiescence in the termination and Greenleaf re-taking possession, and its post-

[85] *Dep't of Health & Human Servs. v. Pelletier*, 2009 ME 11, ¶ 15, 964 A.2d 630 (internal quotation marks omitted).
[86] *Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 2019 ME 175, ¶ 16, 222 A.2d 613.
[87] A. 201-14 & 216; Exhs. 39-44; Trial Tr. vol. 3, 25:23-26:5 & 55:8-18 (Apr. 10, 2024).
[88] A. 203-14 & 216; Exhs. 39-44; Trial Tr. vol. 3, 25:16-22 (Apr. 10, 2024).
[89] *Fortney & Weygandt, Inc.,* 2019 ME 175, ¶ 22, 222 A.2d 613.

termination communications devoted solely to arranging an agreed-upon sale of the Property, all demonstrate that equitable estoppel applies here.

Greenleaf relied on HAT's misleading communications, conduct, and silence to change its position. This change would be to Greenleaf's great detriment if HAT's belated challenge to termination is permitted. Greenleaf took possession of the Property on the reasonable assumption that HAT was in default and the Contract properly terminated. Greenleaf has now managed the Property as its own for almost a decade, paying maintenance, repair, and utility costs, real estate taxes, and all other expenses.[90] When Greenleaf took back the Property after termination, it was in disrepair and the City of Portland was threatening to shut down the buildings.[91] Greenleaf immediately began working with the City, tenants, and utility companies to restore the Property to good working order.[92]

Greenleaf also shouldered the hardships and costs of restoring to habitable condition the fire-damaged three-unit building that HAT failed to repair in violation of its contractual obligations.[93] These hardships included extensive dealings with the City of Portland on code issues (and the ensuing lengthy delays and greatly increased expenses), hiring and overseeing contractors, and a $350,000

[90] Trial Tr. vol. 2, 101:5-102:8 & 108:10-109:8 (Apr. 9, 2024).
[91] A. 206-216; Exhs. 40, 44, 73, 83, & 84; Trial Tr. vol. 3, 110:13-114:16 (Apr. 10, 2024).
[92] Trial Tr. vol. 2, 100:18-102:8 (Apr. 9, 2024) & vol. 3, 140:2-16 (Apr. 10, 2024); Exh. 73 (email from Peggy Harris detailing actions to work with City and repair 52 Greenleaf Street).
[93] A. 263 (list of Greenleaf expenses to repair 52 Greenleaf Street); Trial Tr. vol. 3, 142:20-144:13 (Apr. 10, 2024).

construction loan to pay for the substantial code-related and repair costs not covered by insurance.[94] During the four years of reconstruction, this building generated no rental income for Greenleaf.[95] Meanwhile, HAT stood by and silently watched Greenleaf incur these costs and delayed filing suit for three and a half years, until after Richard Harris died. When it finally commenced this litigation, HAT admitted three payment defaults in its pleadings.[96] Greenleaf made extensive and detrimental changes in its position in reliance on HAT's silence and acquiescence to the termination of the Contract. Estoppel prevents HAT from taking advantage of its misleading actions by challenging the validity of its default and the termination of the Contract long after the fact.

II. Greenleaf did not need to provide notice of default and an opportunity to cure before terminating the Contract.

A. HAT waived any statutory right it may otherwise have had to notice and cure.

HAT contends that even if it failed to honor its payment obligations, Maine law required Greenleaf to provide notice of the payment defaults and an opportunity to cure before terminating the Contract. HAT refers to the "requirements" of "33 M.R.S. § 6304-F,"[97] but there is no such statute. HAT

[94] A. 263; Exhs. 81 & 82 (construction loan and advances for 52 Greenleaf Street fire repairs); Trial Tr. vol. 3, 142:20-144:13 (Apr. 10, 2024). The insurance policy limited coverage for code issues. Exh. 57 (Cross 247).
[95] Trial Tr. vol. 3, 139:16-21 & 142:16-19 (Apr. 10, 2024).
[96] A. 87 (¶ 64(c)).
[97] HAT Brief at 28.

apparently intended to cite 14 M.R.S § 6203-F. In paragraph 14(e) of the Contract, HAT unambiguously waived rights it may otherwise have had under section 6203-F.[98] The trial court held that this contractual waiver barred HAT from raising claims under the statute.[99]

HAT contends on appeal that statutory rights relating to residential real estate cannot be waived prior to a default.[100] HAT cites no authority for this proposition and offers scant explanation for why this should be so. And as will be explained in more detail below, HAT agreed to purchase commercial real estate, not a residence, and therefore it never had rights enjoyed only by residential property owners. Moreover, under Maine law, a party may waive a statutory right by agreement if the waiver is "explicitly stated" and "clear and unmistakable."[101] The contractual waiver here—in bold type and all capitals—unambiguously waives the precise statutory section that HAT now attempts to invoke.[102] Notably, HAT had legal counsel when O'Donnell signed the Contract on its behalf.[103] HAT cannot now claim that it should have received notice to cure when it explicitly

[98] A. 129.
[99] *Id*. 39-40.
[100] HAT Brief at 28.
[101] *Estate of Barrows*, 2008 ME 62, ¶ 6, 945 A.2d 1217; s*ee Robinson v. Chase*, 98 A.483, 484 (Me. 1916).
[102] A. 129.
[103] *Id*. 28; Trial Tr. vol. 1, 68:16-19 & 168:22-15 (Apr. 8, 2024).

waived section 6203-F. The trial court properly held that HAT, a business entity represented by counsel, should be held to the waiver to which it freely agreed.

B. 14 M.R.S. § 6203-F does not apply to the Contract because HAT is not a purchaser of residential real estate or in possession of residential real estate.

Even if it is assumed for purposes of argument that HAT did not waive section 6203-F, HAT would not be entitled to relief. This statute addresses foreclosure procedures for certain types of bonds-for-deed. Subsection (2) requires notice of right to cure, but "only [for] contracts for the sale of residential real estate . . . when the purchaser is in possession of the subject real estate. All other transactions are governed by the terms of the contract and applicable law."[104]

The trial court held that the Contract controlled "because as to H.A.T., [it] was not a contract for residential real estate, and H.A.T. was not a purchaser in possession of residential real estate."[105] HAT appears to be arguing that the statute protects purchasers of any real estate in which people live, regardless of whether it is a single-family home or an apartment building purchased as a commercial real

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[104] 14 M.R.S. § 6203-F(2)(b). HAT also asserted below that § 6203-F granted it the right to redeem the title to the Property. The trial court found that HAT waived any such right in paragraph 14(e) of the Contract. A. 39-40. The court also held that a right of redemption did not exist because the Contract was not for the sale of residential real estate and HAT was not a purchaser in possession of residential real estate, as required by section 6203-F. *Id*. 40; *see generally Thurston v. Galvin*, 2014 ME 76, ¶ 15, 94 A.3d 16 (because a bond-for-deed purchaser's "sole rights are possessory rights, those are the only rights affected by the section 6203-F foreclosure process"). On appeal, HAT does not challenge either of these holdings rejecting its title redemption claim.

[105] A. 40.

estate investment by a business enterprise. This argument ignores both the plain language and intent of the statute.

The Property—15 apartment units in three buildings—was an investment for HAT, not a residence. The First Note confirms this: "[t]he undersigned [(HAT)] warrants that the loan evidenced by this Note has been obtained only for business purposes, and not for personal, family or household purposes."[106] The fact that HAT bought a commercial property that happened to contain residential rental units instead of, for example, office, retail, or warehouse space, does not trigger section 6203-F(2)'s notice requirement for residential property. For HAT, the purchase was indisputably commercial, rather than residential, in character. Because the statutory notice provision applies only to installment sale contracts for residential property, Greenleaf was not required to provide notice to cure.[107] Under section 6203-F(2)(b), this transaction is governed by the terms of the Contract, not the statute.

HAT also cannot demonstrate that it is a "purchaser in possession of residential real estate."[108] HAT is a limited liability company, and as such, it does

[106] *Id*. 138.
[107] HAT offered no evidence that it *could* have cured, in any event, or that it could have made the balloon payment due on January 1, 2018. *See* A. 137.
[108] 14 M.R.S. § 6203-F(2)(b).

not—and cannot—have a residence.[109] The residential nature of the individual apartment units here is not relevant to HAT's relationship to the Property for the purposes of section 6203-F(2). The tenants lived in their individual residential units; HAT, on the other hand, possessed commercial real estate that it operated as a business for its economic benefit.[110] None of the 15 apartments were occupied by HAT, or even any of its members.[111]

HAT also cites "subsection 6203-P" to support its claim that it enjoyed a right to notice and an opportunity to cure.[112] This subsection does not exist.

C. 33 M.R.S. § 482(L) does not grant HAT a right to notice and cure.

HAT further relies on 33 M.R.S. § 482(L), which mandates that land installment contracts include a "statement of the rights of the buyer established by Title 14, section 6111 to cure a default by the buyer."[113] In the Contract, HAT explicitly waived rights under section 482,[114] thereby eliminating a potential remedy under that section. Also, section 6111's right-to-cure provision applies

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[109] *See, e.g., Windham Land Trust v. Jeffords*, 2009 ME 29, ¶¶ 27-28, 967 A.2d 690 ("residential" refers to "the act or fact of dwelling in a place for some time" and "regularly living at that locale"); 38 M.R.S. § 11 ("'Municipal resident' means any person who occupies a dwelling within the municipality. . . ."); 22 M.R.S. § 4307(2)(A) ("'[R]esident' means a person who is physically present . . . with the intention of remaining . . . to maintain or establish a home . . . ."); 21-A M.R.S. § 112(1) ("The residence of a person is that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return.").

[110] A. 28; Trial Tr. vol. 1, 169:4-13 (Apr. 8, 2024).

[111] *Id*.

[112] HAT Brief at 29.

[113] 33 M.R.S. § 482(L).

[114] A. 129.

only "when the mortgagor is occupying all or a portion of the property as the mortgagor's primary residence and the mortgage secures a loan for personal, family or household use."[115] This provision has no bearing on a commercial real estate investment by a business entity such as HAT. Because the right-to-cure provision in section 6111(1) is inapplicable, the Contract did not need to include a statement of that provision.

D. Procedural due process has no bearing on Greenleaf's enforcement of the terms of the Contract.

HAT asserts that procedural due process requires that it receive "notice and an opportunity to be heard when substantial rights are affected."[116] But the three cases cited by HAT address due process requirements in a proceeding, not in the terms of a contract.[117] There is no constitutional requirement that a party to a contract provide notice and an opportunity to be heard before exercising contractual rights. Greenleaf merely availed itself of its right to terminate because of HAT's payment defaults. Procedural due process has no relevance here.

III. The Contract is not unconscionable.

HAT's final attempt to evade the consequences of its failure to pay the sums owed to Greenleaf posits that the default and termination provisions of the

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[115] 14 M.R.S. § 6111(1).
[116] HAT Brief at 30.
[117] *See Hamill v. Bay Bridge Assocs.*, 1998 ME 181, ¶ 5, 714 A.2d 829; *Senty v. Bd. of Osteopathic Examination & Registration*, 594 A.2d 1068, 1072 (Me 1991); *Michaud v. Mut. Fire, Marine & Inland Ins. Co.*, 505 A.2d 786, 789-90 (Me. 1986).

Contract are substantively unconscionable because they did not give HAT an opportunity to cure.[118] Substantive unconscionability examines whether an agreement's terms are so unfair as to shock the conscience.[119] "[I]f upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonably and oppressive, courts of equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering unless upon very strong circumstances."[120] A party "seeking to invalidate a contract on the ground of unconscionability bears the burden of demonstrating that the contract in question is unconscionable."[121]

HAT cites no evidence even approaching the requisite level of unfairness or oppression. This was a commercial transaction between two business entities represented by attorneys. As the trial court found, the bond-for-deed was a high-risk transaction for Greenleaf because HAT paid only three percent of the $1,000,000 purchase price at the closing, with Greenleaf seller-financing the remainder.[122] The court stressed that the default and termination provisions were

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[118] HAT Brief at 32-33. HAT argued below that these provisions were also procedurally unconscionable. The trial court rejected this argument, and HAT does not challenge this rejection on appeal.
[119] *Blanchard v. Blanchard,* 2016 ME 140, ¶ 19, 148 A.3d 277 (quotation marks omitted).
[120] *Bordetsky v. Charron*, No. BCD-RE-10-8, 2011 Me. Bus. & Consumer LEXIS 35, at *10 (Aug. 17, 2011).
[121] *E,H. Ashley & Co. v. Wells Fargo Alarm Services,* 907 F.2d 1274, 1278 (1st Cir. 1990); *see Blanchard*, 2016 ME 140, ¶ 18, 148 A.3d 277.
[122] A.45-46.

justified "in light of the substantial business risks involved in the transaction."[123] There simply is nothing about the terms of the Contract that shock the conscience.

Greenleaf also notes that HAT's unconscionability claim in Count IX of its amended complaint is improperly pled as an independent cause of action.[124] Such a claim can only be raised as a defense.

Conclusion

For the reasons stated above, Greenleaf requests that this Court affirm the judgment entered by the Business Court.

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[123] *Id*. 45.

[124] *See, e.g., Bordetsky,* No. BCD-RE-10-8, 2011 Me. Bus. & Consumer LEXIS 35, at *9 n.8 (noting that counterclaimant had improperly made a claim for unconscionability, but "this claim is in fact a defense").