

**BLOGS**

Duty of Good Faith and Fair Dealing

## Georgia Federal Court Denies Franchisor's Motion to Dismiss Good Faith and Fair Dealing Counterclaim

A federal court in Georgia refused to dismiss a franchisee's counterclaim alleging a breach of a franchise termination agreement between the parties. *JTH Tax LLC v. Robertson*, 2021 WL 5449215 (N.D. Ga. Nov. 22, 2021).

A federal court in Georgia refused to dismiss a franchisee's counterclaim alleging a breach of a franchise termination agreement between the parties. *JTH Tax LLC v. Robertson*, 2021 WL 5449215 (N.D. Ga. Nov. 22, 2021). JTH Tax, the franchisor of the Liberty Tax Services, entered into an agreement with Robertson to terminate the parties' franchise agreements and providing that certain debt Robertson owed to JTH Tax would be forgiven if JTH Tax achieved certain performance metrics while operating Robertson's former franchises. JTH Tax subsequently filed suit against Robertson for breach of the termination agreement and Robertson filed a counterclaim alleging that JTH Tax had breached the agreement by failing to effectively operate the franchises so as to fall short of the agreement's performance metrics. JTH Tax moved to dismiss the counterclaim arguing, in part, that it did not promise to operate the outlets in any particular manner, and therefore, did not breach the agreement.

Applying Virginia law pursuant to the termination agreement's choice of law provision, the court denied JTH Tax's motion. While it acknowledged that the termination agreement contained no express provisions regarding how JTH Tax must operate the former franchises, it held that the lack of such explicit contractual rights meant that the implied covenant of good faith and fair dealing may fill the void and that Robertson had adequately alleged that JTH Tax had failed to adequately operate the outlets by shortening the hours, failing to advertise, and failing to employ "wavers" in front of the franchises. Furthermore, the court refused to dismiss Robertson's claim based on JTH Tax's argument that Robertson had committed the first breach of the termination agreement, because the court was obligated to take Robertson's allegations as true and the issue of whether Robertson had breached the termination agreement had yet to be adjudicated. Finally, the court rejected JTH Tax's argument that, under Virginia law, the implied covenant of good faith and fair dealing did not apply where the parties had entered into an express written agreement.

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