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DISTRICT II

December 11, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP740

Condon Oil Company v. Harjeet S. Walia (L.C. #2012CV27)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Kuldip, Inc., appeals from a circuit court judgment granting summary judgment in favor of Condon Oil Company. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment of the circuit court. In addition, we grant Condon's motion to find this appeal frivolous and remand to the circuit court to assess attorney fees and costs against Kuldip.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

In 2002, Condon entered into a fuel supply agreement with Kuldip for a period of ten years. Pursuant to the agreement, Condon agreed to sell fuel and related products to Kuldip who would, in turn, resell them at its gas station under the Citgo brand name. The agreement provided an allowance to Kuldip for each gallon of fuel that it purchased from Condon. It also required Kuldip to repay some or all of the allowance if it debranded or stopped buying fuel for any reason prior to the date set forth in the agreement.

In January 2012, Condon commenced this action, alleging breach of contract and unjust enrichment because Kuldip had debranded its gas station prior to the termination of the agreement. Requests for admissions were served upon Kuldip, and it failed to answer them.

Condon subsequently moved for summary judgment. At the hearing on the motion, Kuldip raised the frustration of purpose doctrine² to justify its refusal to repay any portion of the allowance. It also moved the circuit court for leave to amend its answer so that it could include the doctrine as a defense. Ultimately, the circuit court granted Condon's motion and entered summary judgment in its favor. It did not specifically rule on Kuldip's motion for leave to amend. This appeal follows.

On appeal, Kuldip contends that the circuit court erred in granting Condon's motion for summary judgment in light of the frustration of purpose doctrine. We review a grant of summary judgment using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when

² Under the frustration of purpose doctrine, when there is nothing that an obligor can do to fulfill his or her contractual duties, the obligee's duty to compensate is excused. *In re Estate of Sheppard*, 2010 WI App 105, ¶14, 328 Wis. 2d 533, 789 N.W.2d 616.

there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

Here, we are satisfied that the circuit court properly granted Condon's motion for summary judgment. As noted, requests for admissions were served upon Kuldip and it failed to answer them. Thus, regardless of Kuldip's belated attempt to raise the frustration of purpose doctrine at the summary judgment hearing, it had already admitted to liability to Condon's claims for breach of contract and unjust enrichment. *See* WIS. STAT. § 804.11(1)(b); *see also Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 625, 334 N.W.2d 230 (1983) ("a party's failure to respond to a request for admission is construed as a conclusive admission against such party"). Those admissions were dispositive of the entire case.³

As a final matter, Condon argues that this appeal is frivolous. We agree. Upon careful review, we are convinced that Kuldip knew or should have known that the entire appeal was without any reasonable basis in law and could not be supported by a good faith argument for extension, modification, or reversal of existing law. *See* WIS. STAT. § 809.25(3). We therefore grant Condon's motion and remand to the circuit court to assess attorney fees and costs against Kuldip.

Upon the foregoing reasons,

³ Kuldip also contends that the circuit court erroneously exercised its discretion by failing to explicitly rule on Kuldip's motion for leave to amend its answer so that it could include the frustration of purpose doctrine as a defense. Again, because Kuldip failed to answer Condon's requests for admissions, it had already admitted to liability to Condon's claims for breach of contract and unjust enrichment and the motion for leave to amend was essentially moot. If Kuldip wished to contest its liability to Condon via the frustration of purpose doctrine, it needed to do so in a response to the requests for admissions.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21 and remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals