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DISTRICT II

November 19, 2014

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

2014AP876 Country Estates Sanitary District No. 1 v. Town Sanitary District #2 of the Town of Lyons (L.C. # 2013CV447)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Country Estates Sanitary District No. 1 ("CESD") appeals from a circuit court judgment dismissing on summary judgment its complaint against Town Sanitary District #2 of the Town of Lyons ("Lyons"). Based on 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.

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

This case arises out of a dispute between two sanitary districts that have a longstanding contractual relationship. Lyons has been collecting and treating CESD's wastewater since 1987. In 2008, after nearly nine years of negotiations, the parties entered into a new contract that is the subject of this appeal.

Under the terms of the 2008 contract, CESD agreed to control and otherwise limit the amount of hydrogen sulfide in its wastewater to 0.2 ppm ("parts per million). CESD further agreed to a stipulated damages clause that would apply if it breached the limit and failed to correct it. That clause allows Lyons to collect damages in the amount of $500 or $1000 for each day the breach persists, depending on how many times CESD has already breached the limit during that year.

In the fall of 2012, CESD sought permission from Lyons to increase the hydrogen sulfide limit. The parties discussed the issue informally and eventually proceeded to mediation. Through the discussion and mediation, Lyons offered to raise the limit to either 0.9 ppm or 1.0 ppm. However, CESD turned down that offer.

In April 2013, CESD filed this action seeking to void either the hydrogen sulfide limit or the stipulated damages clause. The parties subsequently filed competing motions for summary judgment. Following a hearing on the matter, the circuit court granted Lyons' motion and issued an order dismissing the CESD's complaint. This appeal follows.

We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Estate of Sheppard ex rel. McMorrow v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.***; WIS. STAT. § 802.08(2).

On appeal, CESD contends that the circuit court erred in granting Lyons' motion for summary judgment. It argues that the stipulated damages clause amounts to an impermissible penalty clause.[2] It also accuses of Lyons of violating the implied covenant of good faith and fair dealing by not renegotiating the hydrogen sulfide limit to a more substantial level. We disagree on both counts.

With respect to CESD's first argument, "[a] stipulated damages clause will be enforced if it is reasonable under the totality of the circumstances." ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶30, 266 Wis. 2d 124, 667 N.W.2d 751 (citation omitted). As the party seeking to avoid the application of the contract, CESD bears the burden of persuading this court that the stipulated damages clause is unreasonable. ***Id.***, ¶31. We conclude that CESD has not met its burden.

As noted, the 2008 contract containing the stipulated damages clause was the product of nearly nine years of negotiations. During that time period, both parties were represented by counsel. Reviewing the record, it is evident that the parties intended the clause to protect Lyons from undeterminable future damages caused by hydrogen sulfide, which is a recognized pollutant with undesired effects.[3] It is also evident that CESD can control the amount of hydrogen sulfide in its wastewater by pre-treating it with Bioxide, thereby avoiding the clause

[2] A penalty clause is a type of stipulated damages clause that a court holds to be unreasonable and unenforceable. ***Equity Enters., Inc. v. Milosch***, 2001 WI App 186, ¶18, 247 Wis. 2d 172, 633 N.W.2d 662.

[3] According to Lyons, hydrogen sulfide affects the microbiology of its treatment plant and can diminish its ability to effectively treat wastewater. Furthermore, hydrogen sulfide is a precursor to sulfuric acid, which can severely deteriorate concrete and metal. Finally, hydrogen sulfide poses a danger to the health and welfare of its treatment system personnel and the public.

altogether. Under these circumstances, we are satisfied that the stipulated damages clause is reasonable and enforceable.

With respect to CESD's second argument, we are not persuaded that Lyons violated the implied covenant of good faith and fair dealing by not renegotiating the hydrogen sulfide limit to a more substantial level. Under the express terms of the 2008 contract, Lyons has the right to refuse to increase the limit even when CESD is adamant that an increase is necessary. Given this right, we fail to see how a breach of the covenant occurred. *See* ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988) (where a contracting party complains of acts of the other party which are specifically authorized in their contract, we do not see how there can be a breach of the covenant of good faith and fair dealing).

In the end, we are satisfied that Lyons was entitled to judgment as a matter of law. Accordingly, we affirm.[4]

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[4] To the extent we have not addressed an argument raised by CESD on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").