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2011 IL. App. (3d) 110066-U

Order filed October 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CITY OF CUBA,	)	Appeal from the Circuit Court
an Illinois Municipal Corporation,	)	of the 9th Judicial Circuit
	)	Fulton County, Illinois,
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal No. 3-11-0066
	)	Circuit No. 06-MR-65
CITY OF CANTON,	)	
an Illinois Municipal Corporation, and	)	
WEE-MA-TUK WATER DISTRICT,	)	
an Illinois public water district,	)	The Honorable
	)	Edward R. Danner,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it determined that the contract at issue was a requirements contract, as the plain language of the contract indicated that it was a requirements contract, and a reading of the contract as a whole further supported this conclusion.

¶ 2 This appeal arises from the trial court's finding that the contract at issue was a requirements contract that mandated that the City of Cuba purchase all of its water from the City of Canton. We affirm.

¶ 3 FACTS

¶ 4 The following facts are taken from a stipulation of facts entered into by the parties. On December 7, 1982, the City of Cuba (Cuba) and the City of Canton (Canton) entered into a water purchase contract. This contract essentially provided that Cuba would purchase water from Canton for a period of 40 years from the date of the initial water delivery. Paragraph A.1 of this contract specifically stated:

> Seller Agrees: (Quality and Quantity) [t]o furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of Illinois and United States of America in such quantity as may be required by the Purchaser for use by consumers of Purchaser.

In paragraph C.4, this contract further provided that Canton and Cuba mutually agreed:

> Failure to Deliver [t]hat the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all reasonable dispatch. In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser's consumers shall be reduced or

> diminished in the same ratio or proportion as the supply to Seller's consumers is reduced or diminished.

The attorney representing Canton prepared this contact, and the parties were unaware who represented Cuba. No written documents exist that pertain to the execution of the 1982 contract. Also, neither municipality has meeting minutes that reflect any discussions about the terms of the contract, other than minutes from Cuba dated October 25, 1982. These minutes, however, have not been included in the record on appeal.

¶ 5 In 1997, the parties executed a similar water purchase contract at the request of the Wee-Ma-Tuk Water District. At that time, Wee-Ma-Tuk contracted to purchase water from Cuba. Wee-Ma-Tuk was borrowing funds from Rural Development, and Rural Development wanted Canton and Cuba to extend the duration of their 1982 contract so that Wee-Ma-Tuk had a guarantee of potable water for a minimum of 40 years. Thus, the parties changed the duration term of the 1982 contract from "40 years from the date of the initial water delivery" to "65 years from the date of the initial water delivery." Consequently, the 1997 water purchase contract was essentially identical to the 1982 contract, except for the changed duration term. The language of paragraphs A.1 and C.4 remained the same in both contracts.

¶ 6 The record on appeal contains a copy of the water purchase contract between Cuba and Wee-Ma-Tuk. This contract included a provision indicating that it was "understood that [Cuba] obtain[ed] water from the City of Canton. If the City of Canton fail[ed] to supply water to [Cuba], then [Cuba] shall be unable to supply water to [Wee-Ma-Tuk] and [Cuba] shall be relieved of its duties to [Wee-Ma-Tuk] under [their] Contract so long as the City of Canton fail[ed] to supply water to [Cuba]."

¶ 7 Neither Canton nor Cuba recalled any discussions pertaining to the interpretation of paragraph A.1 at the time the parties entered into the 1997 contract. Likewise, no written documents exist from this time regarding the interpretation of paragraph A.1.

¶ 8 The final relevant information from the statement of stipulated facts revealed that at the time the parties entered into the 1982 contract, Canton charged very low water rates. However, sometime after 2000, Canton undertook infrastructure improvements, resulting in higher water rates. Hence, Cuba's primary motivation underlying the instant cause of action was its belief that it could provide water to its citizens at a lower cost than was available from Canton.

¶ 9 On August 31, 2006, Cuba filed a complaint for declaratory judgment. In it, Cuba requested that the trial court determine if the water purchase contract required Cuba to purchase all of its water from Canton. Cuba acknowledged that Canton interpreted the contract in that manner; however, Cuba interpreted the contract to indicate that Cuba did not have to purchase all of its water from Canton. Cuba also explained that it sought to build a water treatment facility of its own, thus necessitating a determination by the trial court regarding the parties' rights and obligations under the contract. The trial court permitted Cuba to serve Wee-Ma-Tuk with their petition for declaratory judgment. An attorney subsequently entered his appearance on behalf of Wee-Ma-Tuk and stated that Wee-Ma-Tuk was not interested in becoming involved in the matter.

¶ 10 The trial court ordered the parties to submit briefs supporting their respective positions. In Canton's brief, it contended that the contract constituted a requirements contract. Canton specifically asserted that the language stating that Canton was to provide water to Cuba “in such quantity as may be required by Purchaser for use by consumers of Purchaser" (the contested

phrase) indicated that Cuba was obligated to purchase from Canton all of the water required for use by Cuba's citizens from Canton. Canton further contended that exclusivity and good faith were elements of a requirement contract; thus, Cuba could not reduce their requirements for water to zero by obtaining a cheaper source of water without acting in bad faith. Conversely, Cuba contended that the contract was a buyer's option contract. Cuba further asserted that the contract was not a requirements contract because there was no language in it to indicate that Cuba must purchase all, or even any, of its water from Canton, or that it had to purchase its water exclusively from Canton. Cuba also argued that since Canton drafted the contract, any ambiguity should be construed in Cuba's favor.

¶ 11 The court conducted a hearing on the matter, and concluded that the contract constituted a requirements contract. The court determined that Canton's sale of water to Cuba was the sale of a good, and not a service. Thus, the Uniform Commercial Code (UCC) applied. See 810 ILCS 5/2-101 *et seq*. (West 2006). The court further found that the term "required" as used in paragraph A.1 was ambiguous. The court found that relevant extrinsic evidence included that for approximately 15 years, all of the water used by Cuba came from Canton. The court also noted the provision in the contract between Cuba and Wee-Ma-Tuk stating that Cuba received its water from Canton, and that Cuba was relieved of its supply obligations to Wee-Ma-Tuk if Canton failed to supply Cuba with water.

¶ 12 Cuba appealed.

¶ 13 ANALYSIS

¶ 14 On appeal, Cuba contends that the trial court erred when it determined that paragraph A.1 rendered the instant contract a requirements contract. Cuba asserted that the word “may” in the

contested phrase indicated that its water purchase obligation from Canton was permissive. Cuba also argued that since the contract did not specifically state that it had to purchase all of its water from Canton, or that it had to purchase water exclusively from Canton, the contract constituted a buyer's option contract. Canton, on the other hand, argued that when construing the contested phrase as a whole, the plain language indicated that the parties intended to create a requirements contract. Thus, Cuba was obligated to purchase its water exclusively from Canton, and could not terminate or reduce this obligation in the absence of good faith.

¶ 15 In a dispute over the meaning of a contract, the primary rule of interpretation is to discern the parties' intent from the language of the contract. *Virginia Surety Co. v. Northern Ins. Co. of New York*, 224 Ill. 2d 550 (2007). When the language used in a contract is unambiguous, it should be given its plain and ordinary meaning. *Virginia Surety Co.*, 224 Ill. 2d 550.

¶ 16 "A requirements contract involves a promise to buy from another all of some commodity or service that the promisor *may thereafter need or require* in his business, usually for a designated period of time." (Emphasis added.) *Wald v. Chicago Shippers Ass'n*, 175 Ill. App. 3d 607, 618 (1988). The essential element of a requirements contract is the promise of the purchaser to buy exclusively from the seller either the buyer's requirements, or up to the amount specified in the contract. *Torres v. City of Chicago*, 261 Ill. App. 3d 499 (1994). Accordingly, a valid requirements contract exists when the contract obligates the buyer to buy: (1) goods; (2) exclusively from the seller; and (3) all of its requirements for goods of a particular kind from the seller. *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 186 F.3d 815 (7th Cir. 1999). It is not necessary, however, for a requirements contract to explicitly state that the purchaser will buy exclusively from the seller, because, in certain instances, the promise to buy exclusively from the

seller can be implied from the language of the contract. See *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145 (7th Cir. 1989).

¶ 17 In general, requirements contracts "provide that the products or services will be provided in an amount to equal all that the purchaser 'will need' or 'will require.'" *Wald*, 175 Ill. App. 3d at 618; see also *Illinois Commerce Comm'n v. Central Illinois Central Service Co.*, 25 Ill. App. 3d 79 (1975). Although a requirements contract does not specify a definite quantity term, the UCC, which Illinois has adopted, recognizes it as a valid contract because the quantity is "the actual good faith *** requirements of the particular party." 810 ILCS Ann. 5/2-306, Uniform Commercial Code Comment 2, at 205 (West 2006). Thus, section 2-306 of the UCC provides that "a [contract] term which measures the quantity by *** the requirements of the buyer means such actual *** requirements as may occur in good faith." Consequently, a purchaser "cannot arbitrarily declare his requirements to be zero" without acting in bad faith and in violation of an otherwise valid requirements contract. *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1341 (7th Cir. 1988).

¶ 18 A term or provision in a contract is ambiguous when it is reasonably and fairly susceptible to more than one interpretation or construction. *Brooklyn Bagel Boys v. Earthgrain Refrigerated Dough Prods.*, 212 F.3d 373 (7th Cir. 2000). In such an instance, a court may employ the aid of extrinsic evidence to determine the actual intent of the parties. *In re Modern Dairy, Inc.*, 171 F.3d 1106 (7th Cir. 1999). A contract is not necessarily ambiguous, however, merely because the parties to it disagree about the meaning of a term or phrase. *Brooklyn Bagel Boys*, 212 F.3d 373.

¶ 19 In contrast to a requirements contract, a buyer's option contract is an agreement by a seller to sell a product to the purchaser at a specified price, within a specified period of time, but does not mandate that the purchaser must buy all of his needs for a particular product exclusively from the seller. See *Brooklyn Bagel Boys*, 212 F.3d at 378. Courts have found contracts of this sort in instances where the contract language had indicated that the seller was "to process and package the ordered quantity of [goods]" (*Brooklyn Bagel Boys*, 212 F.3d 373), or to provide the good in such a quantity as "to be ordered" (*In re Modern Dairy, Inc*., 171 F.3d at 1108).

¶ 20 An appellate court reviews the trial court's interpretation of a contract *de novo*. *Gallagher v. Lenart*, 226 Ill 2d. 208 (2007). We may affirm the determination of the trial court on any basis apparent in the record. *Lewis v. Chica Trucking, Inc*., 409 Ill. App. 3d 240 (2011).

¶ 21 We conclude that the contract at issue is a requirements contract, and two reasons underlie our conclusion. First, the plain language of the contested phrase in the contract is not ambiguous, and it mirrors classic language indicating the parties' intent to enter into a requirements contract. Second, another provision of the contract itself supports this conclusion, as it states that the contract concerns the "quantities of water required by Purchaser." This provision further indicates that the parties intended for Canton to be Cuba’s sole provider of water because the parties agreed to bear any water shortage proportionately.

¶ 22 First, looking to the terms of the contract itself, we do not believe that the phrase that Canton agreed to provide water to Cuba "in such quantity as may be required by the Purchaser for use by consumers of Purchaser" is ambiguous. This language mirrors the definition of a requirements contract as stated by another district of the Illinois appellate court; *i.e*., a contract that contains "a promise to buy from another all of some commodity or service that the promisor

may thereafter need or require in his business." (Emphasis added). *Wald*, 175 Ill. App. 3d at 618. Also, a plain reading of the contested phrase indicates that Canton would provide all of the water that the citizens of Cuba would need for their use. This language evinces the intent of the parties for Canton to provide water in such an amount as the purchaser "'will need.'" See *Wald*, 175 Ill. App. 3d at 618. Thus, we disagree with the contention of Cuba that the word "may" renders Cuba's obligations under this contract as permissive. Rather, we believe that the term "may" merely indicates that Canton will supply water in any such a quantity as is needed for use by consumers of the petitioner.

¶ 23 Second, when considering the contract as a whole, it supports the conclusion that it is a requirements contract. Specifically, paragraph C.4 of the contract states that Canton must supply Cuba with "quantities of water required by the Purchaser." We believe this simple language shows the parties' intent to enter into a requirements contract, as we cannot think of a clearer manner in which to evince this intent than stating Canton's obligation was to "provide quantities of water required by [Cuba]."

¶ 24 Paragraph C.4 also provides that if Canton encountered an extended period of diminished water supply, the water delivered to the citizens of Cuba would be diminished in the same proportion as the water delivered to the citizens of Canton. We believe that this paragraph indicates that the parties intended for Canton to be Cuba's exclusive supplier of all of the water its citizens required, or needed. Had the parties intended to enter into a buyer's option contract, or had they contemplated that Cuba would obtain water from other sources notwithstanding the contract with Canton, the parties would have indicated that in such an instance of decreased water supply, Cuba would have to turn to its alternate suppliers. It is illogical to think that the

parties contemplated entering into a buyer's option contract, but required the citizens of Canton to endure a water service disruption when Cuba had the option of obtaining water from other sources. Therefore, by virtue of the fact that the parties agreed to bear any diminution in supply proportionately, they contemplated that Canton would be the exclusive supplier of all of the water needed by the citizens of Cuba. This conclusion buttresses the finding that the water contract between Canton and Cuba is a requirements contract.

¶ 25 CONCLUSION

¶ 26 Based on the foregoing, the judgment of the circuit court of Fulton County is affirmed.

¶ 27 Affirmed.