2019 IL App (3d) 180358-U

Order filed March 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

COLONA MOBILE HOME PARK, LLC,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellant,	)	Henry County, Illinois,
	)	
v.	)	Appeal No. 3-18-0358
	)	Circuit No. 17-CH-110
	)	
VILLAGE OF COLONA,	)	Honorable
	)	Jeffrey W. O'Connor,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant had authority to enter into the parties' Agreement under section 11-124-1 of the Municipal Code. 65 ILCS 5/11-124-1 (West 2016).

¶ 2 Plaintiff, Colona Mobile Home Park, LLC, appeals the granting of the motion to dismiss filed by defendant, Village of Colona, arguing the Agreement between the parties fell within section 11-124-1 of the Illinois Municipal Code (Code) (65 ILCS 5/11-124-1 (West 2016)) and was not *ultra vires*. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In 2005, the parties entered into an "Agreement" which stated that "issues have arisen between the parties regarding the ownership[,] condition, repair and maintenance of water meters and water meter pits within the [Willowhaven Mobile Home Park]. *** Whereas, without resolving the issue of ownership, the parties wish to settle the remaining issues on the manner set forth in the agreement." The Agreement provided that plaintiff would pay to replace the meters and defendant would install the meters. Defendant was responsible for maintaining, repairing, and replacing the meters after installation and would operate and maintain the sewer lift station. Plaintiff was responsible for all maintenance, repairs, and plumbing in the pits and water lines and for changes and improvements to the pit areas. Defendant would provide water to the individual tenants and send individual water bills to the tenants. Plaintiff was responsible for repairing any water main leak and paying for the lost water. The Agreement further stated,

> "The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties, their heirs, executors[,] administrators, assigns and successors in interest. Further, this Agreement shall be recorded and shall run with the land. The parties consider this Agreement to be an Agreement to provide a water supply which may by statute continue for forty (40) years (65 ILCS 5/11-124 *et seq.*). The parties hereby agree that this Agreement shall be in full force and effect for a period of forty (40) years, unless terminated or modified by the parties mutually prior to the end of such period. However, [defendant] shall continue to supply water to [plaintiff] after the passage of the forty (40) year period of this Agreement without interruption in the same manner as water is supplied to other citizens of [Colona.]"

"[A]s part of the [defendant's] consideration under [the] Agreement," they agreed to dismiss the small claim complaint of *City of Colona v. Michael Conley*, with prejudice. The mayor executed the Agreement and the city clerk attested his signature.

¶ 5 In December 2017, 12 years after the Agreement, defendant sent a letter to plaintiff stating that effective the last week of December 2017, they would no longer be sending individual bills to the tenants, but would instead be sending one bill to the owner of the mobile home park for all of the tenants. Plaintiff filed a petition for injunction, seeking a temporary restraining order or a preliminary injunction to prevent defendant from changing the billing practices based on the Agreement. After a hearing, the court granted a preliminary injunction.

¶ 6 Defendant then filed a section 2-619 motion to dismiss the petition arguing that the Agreement was *ultra vires* and void or, alternatively, that plaintiff was in material breach of the Agreement such that defendant could rescind the Agreement. Defendant argued that the Code only allowed municipalities to enter into contracts of one year unless expressly allowed by statute. Defendant contended that while the Agreement stated that it was an agreement to provide a water supply under section 11-124-1 of the Code (65 ILCS 5/11-124-1 *et seq.* (West 2016)), that provision only applied where the municipality is receiving the water supply, not providing it. Therefore, defendant argued that it was inapplicable to the Agreement. The Agreement contained provisions that would amount to future costs to defendant, therefore, defendant contended that the Agreement was *ultra vires* and void.

¶ 7 A hearing was held on the motion to dismiss. The parties briefly addressed both of the defendant's arguments, but primarily relied on their written briefs. The court filed a written order granting the motion to dismiss, finding the Agreement was *ultra vires*.

¶ 8 II. ANALYSIS

¶ 9 On appeal, plaintiff contends that the circuit court erred in finding that the Agreement was *ultra vires* because the Agreement fell within section 11-124-1 of the Code. We ~~find that~~ need not determine whether the Agreement fell within section 11-124-1 of the Code because we find that defendant impliedly ratified the Agreement and, therefore, it is not *ultra vires*.

¶ 10 "The defense of *ultra vires* is looked upon by many courts with disfavor, and in recent cases especially the rule has been frequently announced that the plea of *ultra vires* should not be allowed to prevail *** when it will not advance justice, but, on the contrary, will accomplish a legal wrong." *Royal Drug Co., Inc. v. Levin*, 273 Ill. App. 231, 234 (1934). In *People ex rel. Stead v. Spring Lake Drainage & Levee District*, 253 Ill. 479, 500-01 (1912), the supreme court said,

> "Contracts entered into by a municipality which are prohibited by express provision of the law, or which under no circumstances could be legally entered into, are uniformly held to be *ultra vires* and void, and cannot be rendered valid, as against the municipality, by receipt of the consideration or other matter of estoppel, and cannot be rendered valid and binding by any act of the municipality ratifying the same. 1 Dillon on Mun. Corp. (5th Ed.) § 323.
>
> There is another class of municipal contracts which are usually classed as *ultra vires* which are only so in a limited or secondary sense. There are contracts which are within the general powers of the corporation but which are void because the power was irregularly exercised, or where some portion of an entire contract exceeds the corporate powers but other portions of the contract are within the corporate powers. This class of municipal contracts is well illustrated by the case of *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415.

In that case the city of East St. Louis contracted for the lighting of its streets with the gas company, at a fixed price per light, for the term of 30 years. A suit was brought by the gas company to recover the monthly installments that were past due under the contract. The city defended on the ground that the contract was *ultra vires* and that no suit could be maintained thereon. This court held that the lighting of the streets was a purpose clearly within the corporate powers of the city; that the contract had no element of illegality in it; that it was only illegal in respect to the term of its duration; that, the corporation having received the benefits under a contract which was merely *ultra vires*, it was bound to pay for the benefits received; and that the rule applicable to municipal corporations in this regard was the same as in the case of a private corporation. Many cases are to be found applying this rule, and the principle is now firmly established that the doctrine of *ultra vires* is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honestly and fair dealing.

Contracts made by a municipality which are merely *ultra vires* in a modified or secondary sense may be ratified, and any defect in the manner of exercising the power thereby cured, and the municipality may likewise estop itself by acts in pais from setting up the defense of *ultra vires*. 2 Dillon on Mun. Corp. (5th Ed. § 797)."

Stated another way, contracts which are within the general powers of the municipality, but which are *ultra vires* because the power has been irregularly exercised, and contracts in which some portion exceeds, but other portions are within, the powers of the municipality are merely *ultra vires* in a limited sense and may be ratified by the municipality. *Id.* Ratification of such a contract by a municipality may be implied from acquiescence (*City of Chicago v. Norton Milling Co.*, 196 Ill. 580 (1902)) or by its acceptance and retention of benefits from the contract (*Athanas v. City of Lake Forest*, 276 Ill. App. 3d 48, 57 (1995)).

¶ 11 We find that this case falls under the second class of municipal contracts discussed in *Stead* and exemplified by the *East St. Louis* case. The parties do not dispute that supplying water falls under the corporate powers of the municipality. The only potentially illegal portion of the Agreement was the 40-year duration. See 65 ILCS 5/8-1-7 (West 2016). Moreover, the portion of the Agreement that plaintiff seeks to enforce, individualized bills for the mobile home residents, is definitely in the powers of the municipality. Even if defendant did not have authority to enter into the Agreement for a term of 40 years, defendant, through its actions, impliedly ratified the Agreement. For a period of 12 years, defendant acquiesced to the Agreement. See *Athanas*, 276 Ill. App. 3d at 57 ("Ratification may *** be inferred from surrounding circumstances, including long-term acquiescence, after notice, in the benefits of an unauthorized transaction."). Defendant also received benefits under the Agreement. Moreover, enforcement of the doctrine of *ultra vires* would give defendant an unconscionable advantage over plaintiff. We note that our holding does not prevent defendant from dissolving the Agreement, for example by a finding that plaintiff breached the Agreement; we only hold that defendant may not do so by way of the doctrine of *ultra vires* as, by its conduct, it has ratified the Agreement.

¶ 12 Though the circuit court found the Agreement *ultra vires* and void, it did not rule on the other allegation in the motion to dismiss, *i.e.*, that plaintiff breached the Agreement. Since the parties had briefed the issue and argued it at the hearing on the motion to dismiss, the circuit court may hold a new hearing, or simply review the parties' written arguments and its own notes and enter a judgment.

¶ 13 III. CONCLUSION

¶ 14 The judgment of the circuit court of Henry County is reversed and remanded with directions.

¶ 15 Reversed and remanded with directions.