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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001494-MR

ZEOCHEM, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CI-009483

SÜD-CHEMIE, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Zeochem, LLC, appeals from a summary judgment of the Jefferson Circuit Court awarding Süd-Chemie, Inc., ("SCI"), $1,705,531.00, plus post-judgment interest on a claim for breach of contract. Zeochem contends that the presence of issues of fact precluded summary judgment. After our review, we agree. Consequently, we reverse and remand for further proceedings.

The parties are both industrial companies. They had engaged in a joint venture. After separating, they continued a business relationship. The case arises from a contract dispute involving waterwaste services provided by SCI to Zeochem. Zeochem produces synthetic zeolites at its manufacturing plant in Louisville. Zeolites are "molecular sieves" or adsorbents[1] and catalyst supports that are manufactured for use in a variety of industrial and environmental applications. Zeochem's production processes create industrial wastewater.

Zeochem's plant is adjacent to SCI's laboratories and production and administrative facilities. SCI is a chemical and industrial minerals company that produces catalysts, adsorbents, and additives for various industrial and consumer markets. SCI's production processes also create industrial wastewater; it maintains a wastewater treatment plant for the benefit of its several business units. Prior to 2000, SCI was known as United Catalysts, Inc.

Until August 28, 1997, United Catalysts held a substantial partnership interest in Zeochem. The companies shared office space and personnel. As part of their partnership, United Catalysts also provided numerous plant services to Zeochem, including industrial wastewater treatment for pH adjustment and solids removal. United Catalysts allocated a portion of the operating costs associated with its wastewater treatment operations to Zeochem's discharge and billed Zeochem more or less regularly for its services. Zeochem shared in the costs of

[1] Adsorption: "The assimilation of gas, vapor, or dissolved matter by the surface of a solid." *The American Heritage Dictionary of the English Language*, Ninth Edition. New York: American Heritage Publishing Co., Inc., 1971.

the wastewater treatment plant's operation wages, maintenance wages, laboratory charges, sulfuric acid purchases, and utilities costs.

On August 28, 1997, United Catalysts (SCI) sold nearly all of its partnership interest in Zeochem to Zeowest A.G. of Uetikon, Switzerland. Pursuant to the parties' purchase agreement, United Catalysts (SCI) and Zeochem executed an ancillary document styled, "Plant Services Agreement" (PSA). In this agreement, Zeochem and United Catalysts agreed that United Catalysts would continue to provide certain plant services to Zeochem for a three-year period ending on August 28, 2000. United Catalysts agreed to provide Zeochem with wastewater treatment, steam, gas, electric, and telephone services. The parties agreed that within ninety (90) days before the end of the three-year period, they would meet to discuss whether it was in their mutual best interests to continue the relationship.

Individual fee schedules related to each service provided by United Catalysts to Zeochem were included in the Plant Services Agreement. Gas and electric service were to be billed to Zeochem "for usage at the same rate billed to [United Catalysts] by the utility provider." Zeochem specifically acknowledged that these rates were subject to adjustment by the utility provider of the various services provided by United Catalysts to Zeochem; the only service at issue in this lawsuit is the wastewater treatment service. With respect to wastewater treatment services, the parties agreed that for the first three months, United Catalysts would "continue to bill Zeochem in accordance with past practice." After the first three

months, "UCI will bill Zeochem at a new rate to be mutually agreed by [United Catalysts] and Zeochem on a reasonable basis within such three-month period."

The parties agreed that each of the fees would be billed by United Catalysts and paid by Zeochem as follows:

> At the end of each week, Zeochem will make an estimated payment to [United Catalysts], which payment shall be equal to one-fourth of the average monthly fee during the preceding calendar quarter. After the end of each calendar quarter, [United Catalysts] will deliver to Zeochem an invoice stating the fees for the full quarter based on actual usage of services during the quarter, less the amount of the estimated payments already made by Zeochem during the quarter. Zeochem and [United Catalysts] will balance the full quarter invoice within five days after receipt of the invoice.

United Catalysts acknowledged that the "costs and expenses that [United Catalysts] expects to incur in performing the Plant Services are fully compensated by the fees set forth on [the separate schedules] and are not separately reimbursable by Zeochem."

The record does not establish that the parties mutually and expressly agreed to a rate for billing wastewater treatment services within the three-month period following August 28, 1997. Similarly, the record does not establish that the parties met within ninety (90) days before the end of the three-year period to discuss whether it was in their mutual best interests to continue the relationship. The parties' written agreement expired pursuant to its terms on August 28, 2000. Nevertheless, the parties continued on without interruption precisely as before.

The record before us indicates that from January 1998 until mid-2003, United Catalysts (known after 2000 as SCI) prepared a detailed invoice for Zeochem that allocated a portion of the wastewater treatment plant's costs to Zeochem. Because the invoice accounted for Zeochem's *actual usage* of services during the quarter, the parties referred to this invoice as a "true up." United Catalysts/SCI submitted the "true up" invoice to Zeochem on a regular basis for the most part. The parties agree that Zeochem routinely paid $20,000.00 per month as its estimated fee pursuant (more or less) to the express terms of the Plant Services Agreement and that it paid the "true-up" invoices (when they came) on a timely basis.

Before November 30, 2006, SCI's "true up" invoice tracked the parties' total **actual** water consumption and allocated to Zeochem its portion as a ratio of the total. The invoice also included detailed results of the wastewater plant's sludge chemical analysis. Based on the analysis results, United Catalysts derived a solids allocation factor that attributed a portion of the chemicals to Zeochem. A portion of the wastewater plant's utilities costs (designated at $60,000.00 annually) was also allocated to Zeochem in the "true up." To arrive at the utilities cost allocation factor, United Catalysts consistently averaged Zeochem's water usage ratio and the solids allocation factor. The proportion of services attributed to Zeochem relevant to the utilities costs ranged from $5,102 in first-quarter of 1998 to $13,922 for the second and third quarters. The overall true-up charges ranged from $110,823.00 in 1998 to $9,962.00 in 2002.

Over the course of several years, each company experienced management and personnel changes, and the wastewater treatment services agreement generally slipped from view. As a result, SCI admits that it failed to submit to Zeochem its detailed "true up" invoice for calendar years 2004, 2005, and 2006. Nevertheless, Zeochem continued to remit a monthly estimated fee of $20,000.00. (Eventually, it established a reserve account for the anticipated "true-up" charges.) SCI continued to accept Zeochem's regular estimated fee payment without reservation, comment, or protest. While Zeochem claims that it repeatedly asked for the "true up" invoices -- to no avail, SCI disputes the assertion.

On November 30, 2006, a new controller, Susan Drake, assumed responsibility for the "true up" invoices at SCI. SCI notified Zeochem by e-mail that it owed an additional $653,322.00 for 2004 through the second-quarter of 2006. This figure was significantly higher than the highest amount ever paid by Zeochem for a corresponding period. Several weeks later, SCI amended its computation of the true-up charges to $1,364,343.00. Before filing its complaint, SCI again revised Zeochem's true-up wastewater treatment charge. In the end, SCI claimed that Zeochem owed more than $1,705,500.00.

When questioned about the charges, Drake explained that she had not been involved in any of the wastewater treatment services accounting before this time and that she did not know why a "true up" invoice had not been provided to Zeochem since 2003. She explained that she did not examine "true up" invoices from previous years before making her computations because she "wasn't worried

about the past practice." Drake Deposition at 39. She could not explain why Zeochem had historically been billed for a portion of a flat $60,000.00 annual utilities cost rather than a portion of the annual utilities cost that she figured at more than $500,000.00 per year. She did not know whether the parties had mutually agreed to a new rate for the wastewater treatment services.

Nevertheless, Drake included in her computations of Zeochem's share of the utilities cost a portion of sewage charges that SCI had incurred for its wastewater treatment plant. Sewage charges **had never before** been included in Zeochem's share of costs. Drake also allocated a portion of SCI's labor costs and other categories of expenses to Zeochem that **had never before** been included in Zeochem's share of costs. Zeochem was dissatisfied with SCI's tardy invoices and what it asserted were substantial new charges. It did not remit the sums demanded.

On September 27, 2007, SCI filed an action for breach of contract action in the Jefferson Circuit Court. Acknowledging that the parties' written contract had expired by its terms, SCI alleged that the companies had continued to operate as before pursuant to a contract implied in fact. SCI also asserted an alternative claim of unjust enrichment.

Zeochem answered the complaint and agreed that the parties were bound by a contract implied in fact following the expiration of their express agreement. However, Zeochem vehemently denied that it had been unjustly enriched.

On October 22, 2008, SCI filed a motion for summary judgment on its claim of unjust enrichment. SCI contended that its "true up" charges were fair and reasonable and that it would be unjust to allow Zeochem to retain the benefit of its wastewater treatment services without adequate compensation. SCI claimed that it was entitled to judgment as a matter of law.

In its response, Zeochem contended that SCI had breached the terms of the parties' contract implied in fact by its unilateral departure from the parties' past course of dealing and historical fee calculations. Zeochem explained that SCI's breach was illustrated and compounded by its routine acceptance of Zeochem's estimated fee payment and its unreasonable delay in providing the "true up" invoices. Zeochem claimed that principles of equitable estoppel and the doctrine of laches barred SCI's recovery of the massive "true up" increases that it claimed for the years 2003 through 2006.

On December 16, 2008, the Jefferson Circuit Court granted summary judgment in favor of SCI. The trial court concluded that SCI was entitled to recover the sums that it sought under a *quantum meruit* theory and that equitable estoppel and the doctrine of laches were inapplicable. The trial court denied Zeochem's motion to vacate. This appeal followed.

Zeochem contends that the trial court erred as a matter of law by imposing **a contract implied in law** and by concluding that SCI was entitled to recover under the doctrine of unjust enrichment. Zeochem argues that the parties had expressly acknowledged to the court that they were bound by **a contract**

implied in fact. It believes that the court erred in essentially redrafting the parties' contract with terms more favorable to SCI than those provided by the parties' original express agreement and exemplified by their past course of dealing. Zeochem emphasizes that the parties had continued operating under the **same terms and conditions** for many years. It argues that when a contract expires by its terms, but the parties continue to perform as had been the practice under the contract, an implied contract governed by the same terms as the earlier written contract is presumed to exist. In the alternative, Zeochem contends that the trial court erred by concluding as a matter of law that SCI could defeat its affirmative defenses of laches and estoppel.

Summary judgment is a stringent standard. It serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule[s] of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*., *citing Paintsville Hosp. Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). Since summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Building Components. Inc.,* 833 S.W.2d 378 (Ky. 1992). Our review is *de novo.*

An express contract may be written, oral, or implied in fact as determined by the conduct of the parties. "A contract implied in fact is a true contract, shown by evidence of facts and circumstances from which a meeting of the minds concerning the mutual promises may be reasonably deduced." *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky.App. 1987) *citing Thompson v. Hunter's Ex'r*., 269 S.W.2d 266 (Ky. 1954). A contract implied in fact differs from a written or oral contract primarily in the mode of proof required; "and it is implied only in that it is to be inferred from the circumstances, the conduct, and the acts or relations of the parties" rather than from spoken or written words. *Victor's Executor v. Monson*, 283 S.W.2d 175, 176-77 (Ky.App. 1955). Thus, a court may conclude from the evidence that the parties entered into an agreement without direct proof of an express offer and a concrete acceptance. *Id.* If an ambiguity exists, the intention of the parties will be gathered from the terms of the agreement.

On the other hand, a contract implied in law is an obligation created by law *in the absence* of an agreement between the parties. *Quadrille Business*

Systems v. Kentucky Cattlemen's Association, 242 S.W.3d 359 (Ky.App. 2007). It is a legal fiction crafted by the court to allow recovery where the law of natural justice dictates that there ought to be recovery. *Perkins v. Daugherty*, 722 S.W.2d 907 (Ky.App. 1987). A contract implied in law allows for recovery under the theory of *quantum meruit* for the unjust enrichment of another. *Id.* The doctrine of unjust enrichment is said to have no application where there is an explicit contract that has been performed. *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161 (Ky.App. 1978).

In its complaint, SCI plainly alleged that it provided wastewater treatment services to Zeochem "in full accordance with the terms of the [parties'] Agreement." Complaint at 3. Similarly, it alleged **and admitted** that the companies' "course of dealing created a contract implied in fact." Complaint at 4, Answer at 4. We are not prepared to adopt as a matter of law Zeochem's position that a "presumption" arises from the parties' post-expiration conduct. However, we are persuaded that because the parties continued to perform under the same terms and conditions after the written agreement had expired, at least an "implication" may be said to have arisen from which the parties' intent to continue the contract might reasonably be inferred.

Our review of the entirety of the record indicates that the parties adhered to a consistent fee calculation for a period of years following expiration of their written agreement. Zeochem remitted a monthly estimate for the wastewater treatment services; SCI accepted the estimated payment without reservation or

protest. SCI delivered the "true up" invoices more or less regularly; those charges remained relatively stable. After SCI experienced some personnel changes, the historical fee calculation was modified substantially. At that point, the "true up" charges increased exponentially. On the other hand, there is also relevant evidence to show that: the parties inadvertently allowed the written contract to expire, were aware that a new agreement was necessary, and simply failed to negotiate a replacement.

It is also possible that an express contract as implied by the facts and circumstances actually governed the parties' conduct. SCI acknowledged a binding contract and the parties' continued course of performance under the same terms and conditions for several years following the expiration of their written contract. Thus, a fact-finder could be persuaded as to a variety or permutation of possibilities.

Zeochem may be able to produce at trial relevant evidence from which a meeting of the minds concerning mutual promises may be reasonably deduced. It may be able to show that the parties mutually agreed to continue to incorporate past practices with respect to the wastewater treatment services charges. Issues of fact indeed exist as to what kind of contract – if any – governed the conduct and performance of the parties following the expiration of the original three-year contract. Consequently, we are not persuaded that SCI is entitled to judgment as a matter of law on its equitable theory of recovery in *quantum meruit*.

Since we have concluded that genuine issues of material fact preclude the entry of summary judgment, we need not consider – and we specifically decline to address – Zeochem's alternative argument based on its affirmative defenses of laches and estoppel.

We vacate the order of the Jefferson Circuit granting summary judgment and remand for further proceedings.

ALL CONCUR.

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