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Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000368-MR

XCELL ENERGY & COAL COMPANY, LLC — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CI-03681

EMERALD INTERNATIONAL CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Xcell Energy & Coal Company, LLC appeals from a summary judgment granted in favor of Emerald International Corporation by the Kenton Circuit Court in an action for breach of contract. The trial court concluded that the parties' contract plainly provided for its cancellation, that there were no genuine issues of material fact to be resolved, and that Emerald International was entitled to judgment as a matter of law. After our review, we conclude that summary judgment was properly granted. Therefore, we affirm.

From a limited record, we have derived the following facts. Xcell is a Delaware Limited Liability Company headquartered in Scarsdale, New York, and is authorized to do business in Kentucky. It operates several coal mines and sells coal to its customers. Emerald is an Ohio corporation headquartered in Florence, Kentucky. Emerald blends, brokers, and exports coal purchased from coal mines in the United States.

From late 2007 through 2008, Emerald and its customer, Glencore, Ltd., entered into a series of contracts that provided for the cumulative sale of more than 2 million metric tons of coal. In order to fulfill Glencore's 2009 coal delivery requirements, Emerald needed to obtain approximately 1.5 million metric tons of coal.

On August 11, 2008, Emerald and Xcell entered into a written contract whereby Emerald agreed to purchase and Xcell agreed to sell approximately 181,437 metric tons of coal to be delivered by barge down the Big Sandy River from January 2009 through December 2009. Emerald sought to fulfill part of its obligation to Glencore by acquiring some of the necessary coal from Xcell. After the agreement was executed, Xcell purchased coal from a third-party producer to make sure that it had access to enough coal to fulfill its commitment to Emerald.

The parties' agreement was subject to numerous written terms and conditions. One clause of the agreement provided as follows:

> **Customer Nonperformance.** SELLER acknowledges that BUYER acts only as a dealer with respect to the Products. If BUYER'S customer rejects, refuses, or is unable to accept delivery of the Products for any reason,

> BUYER may suspend or cancel further delivery under this agreement and return delivered Products to SELLER for a refund.

On November 17, 2008, Glencore provided Emerald with notice that it was rejecting, refusing, or was unable to accept delivery of the coal that Emerald had agreed to purchase from Xcell. On December 15, 2008, Emerald provided written notice to Xcell of its intention to cancel delivery of the coal under the "Customer Nonperformance" clause of the parties' agreement.

On December 4, 2009, Xcell filed this action in Kenton Circuit Court against Emerald alleging breach of contract. Xcell sought to recover an amount representing the difference between the agreed contract price for the sale of coal and the market value of coal of a similar quality for delivery at the same time and place.

On December 28, 2009, Emerald filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. Emerald contended that Xcell could not state a cause of action for breach of contract because Emerald had not deviated from the mutually agreed-upon terms and condition of the parties' agreement. Emerald argued that Xcell had expressly accepted the risk that Emerald might cancel delivery under the terms of the agreement if one of Emerald's customers rejected, refused, or was unable to accept delivery of the coal for any reason. Emerald contended that Xcell could not set forth any breach of the parties' agreement since Emerald's cancellation had been made precisely in harmony with the express terms of the written agreement.

In response, Xcell contended that its "short and plain statement of the claim" was sufficient to state a cause of action. It noted that Emerald's recitation of the "facts" surrounding Emerald's decision to cancel delivery of the coal was not supported by the record and could not be taken into account in determining whether Xcell would be entitled to relief under any state of facts which could be proven at trial. Xcell asserted that it "believe[d] that there are facts to be developed in discovery which will support its claim for recovery against [Emerald], and [Xcell] should not be foreclosed from conducting that discovery." Plaintiff's Response to Motion to Dismiss at 4. Xcell asked the trial court to deny the motion to dismiss.

On January 29, 2010, Emerald filed a reply memorandum to which it attached the affidavit of its president, Jack Wells. In his affidavit, Wells indicated that the purpose of the agreement with Xcell was to fulfill Emerald's obligation to supply coal to its customer, Glencore. Wells confirmed that Glencore had provided Emerald with notice in November 2008 that it was rejecting, refusing, or was unable to accept delivery of the coal that Emerald had agreed to buy from Xcell. He also confirmed that Emerald had provided a timely, written cancellation of the intended coal delivery to Xcell in December 2008. Wells indicated that the cancellation had been made pursuant to the express terms and conditions of the agreement between Emerald and Xcell. Emerald argued that no genuine issues of material fact existed and that it was entitled to judgment as a matter of law. It asked the court to grant its motion for summary judgment.

Xcell filed a written reply and attached the affidavit of Gregg Steinhauser, Xcell's managing member. Xcell maintained that multiple, disputed issues of fact precluded the entry of summary judgment. It argued that the parties' agreement never identified Glencore as Emerald's customer or as the ultimate purchaser of the coal that Emerald agreed to buy and that there was no indication that Glencore had a right (under its agreement with Emerald) to refuse to accept delivery of that coal. Xcell contended as follows:

> While [Emerald] contends that Glencore refused to accept the coal [Emerald] was buying from Xcell, [Emerald] has not provided the Court or Xcell, with a copy of Glencore's written rejection in order to substantiate its allegation.

Plaintiff's Reply to Defendant's Reply Memorandum in Support of Motion to Dismiss at 3.

Moreover, Steinhauser indicated in his affidavit that the market price of domestic coal had fallen after the agreement with Emerald had been executed. "Xcell has reason to believe that [Emerald's] cancellation of the [agreement] was not tied to any particular customer, but rather related to a drop in the market price of coal after [the agreement] was executed." *Id.* Xcell argued that summary judgment could not be granted because of the existence of questions of fact concerning Glencore's alleged right as a customer to invalidate Emerald's contract with Xcell. Finally, Xcell pointed out that "[n]o discovery requests have been propounded, no documents have been produced, no testimony has been taken."

Id. It contended that Emerald's motion for summary judgment was wholly premature at this juncture.

The trial court concluded from the pleadings and affidavits that no genuine issue as to any material fact existed and that Xcell could not show that Emerald had breached the terms of the contract. Thus, it granted Emerald's motion for summary judgment on February 10, 2010. This appeal followed.

On appeal, Xcell contends that the trial court erred by granting summary judgment before it had been given a sufficient opportunity to conduct discovery related to the transaction underlying the parties' agreement – particularly the reason or reasons behind Emerald's purported cancellation. In the alternative, Xcell argues that the trial court erred by granting summary judgment since a genuine issue of fact exists as to whether **any** customer specifically rejected, refused, or was unable to accept delivery of the coal that Emerald had arranged to purchase.

The standard for reviewing the decision of a trial court to grant summary judgment is well established. We must determine whether the trial court correctly concluded that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rule(s) of Civil Procedure (CR) 56.03. In *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky.App.2001), we observed as follows:

> The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least

> some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."

(citations omitted).

Xcell argues that the trial court erred by granting the motion for summary judgment before Xcell "had been given any opportunity to conduct discovery in this case. . . ." Appellant's brief at 4. However, we have found nothing in the record to support this allegation. Kentucky courts recognize a difference between having an opportunity to conduct discovery and simply failing to conduct it. *See Suter v. Mazyck*, 226 S.W.3d 837 (Ky.App.2007). According to Xcell, its cause of action accrued when Emerald gave written notice cancelling delivery of the coal. Nearly a year later, it filed its breach of contract action. Another two months elapsed before the trial court finally dismissed the action. At no point did Xcell attempt to undertake any discovery.

Xcell had months to prepare for the civil action before its complaint was filed. Written interrogatories, requests for production of documents, and requests for admission may all be served upon a party along with the summons. CR 33.01, CR 34.02, CR 36.01. During the two months between the filing of its complaint and the entry of summary judgment, Xcell had sufficient time and opportunity to serve written interrogatories, requests for production of documents, requests for admission, and even to notice depositions if it believed these were necessary. Despite the straightforward nature of this breach of contract action and the limited

duration of the parties' relationship, no discovery whatsoever was undertaken by Xcell.

While conceding that it *could have* taken written discovery, Xcell contends that Emerald likely would have ignored any discovery requests once the motion to dismiss had been filed. This contention is speculative and inappropriate and constitutes more of an excuse than a justification for inaction. Our civil rules provide for the timely and orderly exchange of information. Our trial courts are empowered to remedy discovery violations. There was no impediment to Xcell's ability to collect the information that it now argues was critical to the outcome of the litigation.

Xcell was afforded a sufficient opportunity to engage a wide range of discovery tools and to challenge directly Emerald's assertion that it had cancelled delivery of the coal pursuant to the "Customer Nonperformance" clause of the parties' agreement. Xcell was aware that this was the single provision that Emerald had relied upon to cancel the contract for nearly a year before the litigation commenced. Since the company had an adequate opportunity to discover the relevant facts surrounding the matter, the trial court did not err by granting the motion for summary judgment on this basis.

In the alternative, Xcell argues that the trial court erred by concluding that no genuine issues of material fact existed to preclude its decision that Emerald was entitled to judgment as a matter of law. We disagree.

Depending on the nature of the litigation, entry of summary judgment may be justified even where little or no discovery has been undertaken. In this case, the relatively simple facts and circumstances surrounding the allegation of breach of contract had been sufficiently developed by the time that the trial court considered Emerald's motion for summary judgment. It was undisputed that Emerald's customer rejected, refused, or was unable to accept delivery of the coal that Xcell was to deliver. Under the plain terms of the contract, this conduct clearly constitutes "customer nonperformance." Emerald properly exercised its express right under the agreement to cancel the contract with Xcell under the circumstances. Consequently, Xcell cannot show a breach of the parties' agreement.

We conclude that the trial court did not err by granting the motion for summary judgment. Xcell was afforded an adequate opportunity to conduct discovery; the material facts remained undisputed; and Emerald was entitled to judgment as a matter of law.

Therefore, we affirm the judgment of the Kenton Circuit Court.

CLAYTON, JUDGE, CONCURS.

WINE, JUDGE, DISSENTS BY SEPARATE OPINION.

WINE, JUDGE, DISSENTING. Respectfully, I dissent. The majority notes that nearly one year passed between the time Emerald breached the written contract and the XCell filed its lawsuit. The suit was timely filed, and there is no evidence that

XCell did not attempt to informally resolve the matter. Further, there is no statutory requirement or civil rule under which an aggrieved party can demand production of documents prior to the filing of a complaint in a breach of contract action.

Additionally, it is not unreasonable for a party to delay filing motions for discovery pending resolution of a pending CR 12.02 motion to dismiss or a motion for summary judgment pursuant to CR 56.01. It is common practice for trial courts to stay discovery until it rules on a motion to dismiss or for summary judgment. *Burton v. Helmers*, 2009 WL 4021148 (Ky. App.). XCell should not have speculated that Emerald would ignore requests for discovery; however, a delay of two months in propounding discovery requests is not unreasonable and certainly does not mandate the extreme measure of granting summary judgment.

> A summary judgment is a final order and should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). It is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence. *Pendleton Bros. Vending, Inc. v. Com. Finance & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)).

Suter v. Mazyck, 226 S.W.3d 837, 841 (Ky. App. 2007).

Wherefore, I would vacate the summary judgment and remand this matter to the trial court to allow the parties to conduct customary discovery.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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