STATE OF MICHIGAN

COURT OF APPEALS

J. E. JOHNSON, INC. and JAMES E. JOHNSON, Plaintiffs/Counter Defendants-Appellees,	UNPUBLISHED August 28, 2014
v	No. 315225 Midland Circuit Court
STARNET WIRELESS, LLC, Defendant/Counter Plaintiff-Appellant, and JORDAN R. DICE and JULIE DICE, Defendants/Counter Plaintiffs.	LC No. 10-007083-CK

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals the trial court's holding that it breached an implied contract with plaintiffs and was required to pay plaintiff damages. For the reasons stated below, we reverse and remand for entry of an order of dismissal.

I. FACTS AND PROCEDURAL HISTORY

This case involves a contract dispute between two businesses. In September 2004, Jordan Dice, then 15 years old, founded defendant StarNet Wireless, LLC ("StarNet"), an internet and IT-services company. Dice met James Johnson, the owner of plaintiff J. E. Johnson, Inc ("J. E. Johnson") in November 2004, and Johnson agreed to hire StarNet to provide IT and internet services for his businesses, in exchange for office space at a building he owned. StarNet purported to memorialize this agreement in three undated documents in late 2004 and early 2005: a rental agreement, an LLC formation document, and a services contract. However, Johnson did not sign any of these documents, and they offer little clarity on the extent of the relationship

between the two companies.[1] The services contract specifies that the agreement "may be terminated at any time by either party" and that "email of termination to the other party" is an "acceptable way[] of notifying a termination of this agreement." None of the agreements mention utility costs at the office space rented by StarNet from J. E. Johnson.

Despite the lack of a formal documentary basis for their dealings, the business relationship between the two companies operated smoothly for three years. StarNet provided internet services (including website hosting and email services), DSL-line maintenance, and IT-support to J. E. Johnson, and StarNet billed J. E. Johnson for this work via monthly invoices. StarNet also occupied office space in a building owned by J. E. Johnson in Bay City.

The office rental, however, sparked a dispute between the parties in late 2008. For reasons not made clear by either party, J. E. Johnson began deducting the utility costs at the building StarNet rented from its monthly payments for StarNet's services.

This unhappy state of affairs persisted until May 11, 2009, when plaintiff's comptroller, Randy Stanford, sent an email to Dice to inform him that "as of this date . . . [J. E. Johnson, Inc.] will no longer require your services for IT." It appears—we use "appears" because, once again, both parties refuse to fully detail the factual background of this dispute—that StarNet interpreted this email quite literally, in that it merely terminated provision of IT services to J. E. Johnson, yet continued to provide website hosting and email services to the company. Neither party provides any indication of whether Dice responded to this communication. J. E. Johnson, however, was not aware of StarNet's continued service, and hired a new company, SPI Innovations, to provide internet and IT-services.[2]

From May 2009 to April 2010, StarNet continued to provide website hosting and email services to J. E. Johnson, and did not receive compensation. Breaking with past practice, StarNet failed to send monthly invoices for its work to J. E. Johnson—instead, the company received a

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[1] For an example of the sloppy draftsmanship that permeates every contract in this case, see the "Rent and Use Agreement," which relates to StarNet's use of office space at a building owned by J. E. Johnson. The contract makes no mention of: (1) utility costs; or (2) exactly what services StarNet was to provide J. E. Johnson. If StarNet's claims as to the gist of the relationship are accurate—i.e., StarNet provided internet and IT services to J. E. Johnson in exchange for office space—one would expect the lease agreement to mention explicit terms on the services StarNet would provide. Instead, the lease mentions StarNet's services only in passing: "J. E. Johnson will be renting building space to StarNet Wireless in return that [sic] J. E. Johnson will retain equity in StarNet Wireless which will be outlined in the StarNet Wireless Operating Agreement." The "StarNet Wireless Operating Agreement" does indeed grant J. E. Johnson a 5 percent ownership stake in StarNet—but, as mentioned, J. E. Johnson did not sign the agreement, and testified that he refused to do so because he did not want an ownership interest in StarNet.

[2] An SPI Innovations employee testified at trial that he knew, as of May 2009, that StarNet was still providing website hosting and email services to J. E. Johnson, but that he did not inform anyone at J. E. Johnson of this continued service.

packet of backdated invoices on October 19, 2009, which it did not pay. Though StarNet claimed that it sent a notice of final collection on the services in late January 2010, Stanford testified that neither he nor any employee of J. E. Johnson ever received the notice.

On February 4, 2010, Johnson's attorney sent a letter to Dice to inform him that Johnson planned to terminate StarNet's occupancy at the Bay City property, and stated that StarNet had a week to vacate the premises. StarNet actually vacated the property on March 28, 2010, and does not reference this series of events in its appellate brief.

On April 12, 2010, StarNet discontinued provision of website hosting and email services to J. E. Johnson. This action caused J. E. Johnson's website and email services to fail for a limited period of time. SPI Innovations was able to restore the relevant services soon after the outage, however. Around this time, J. E. Johnson received a new set of backdated invoices from StarNet.

J. E. Johnson sued StarNet on September 21, 2010 in the Midland Circuit Court, and alleged, among other things, that StarNet breached the service contract when it terminated internet services to J. E. Johnson on April 12, 2010, which supposedly caused J. E. Johnson to lose almost $500,000 in potential business. StarNet responded with its own set of claims, and argued that J. E. Johnson: (1) failed to pay for services rendered from May 2009 to April 2010; (2) wrongly ascribed utility costs on Bay City office space to StarNet; and (3) wrongfully evicted StarNet from the office space.

The Midland Circuit Court conducted a bench trial. In a well-written and thorough opinion, the trial court held that: (1) there was an implied contract between StarNet and J. E. Johnson for website hosting and email services; and (2) Johnson had suffered damages from the outage. It awarded J. E. Johnson $6,779.00 in damages, and rejected its claim for almost $500,000 in potential business losses.

On appeal, StarNet argues that the trial court erred when it found that: (1) StarNet breached a contract implied in fact; and (2) J. E. Johnson had suffered damages because of the service outage. Specifically, it says it provided notice of termination in the form of invoices, which were unpaid, and asserts J. E. Johnson failed to provide proof that it actually incurred damages because of the website hosting and email services outage.

II. STANDARD OF REVIEW

We review a trial court's factual findings following a bench trial for clear error. *Ladd v Motor City Plastics Co*, 303 Mich App 83, 92; 842 NW2d 388 (2013). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). On review, we consider the trial court's findings of fact with deference "because it is in a better position to examine the facts,"[3] which includes the

[3] *Chelsea Investment Group*, 288 Mich App at 251.

"ability to judge the credibility of the witnesses who appeared before it," *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). Conclusions of law are reviewed de novo. *Ladd*, 303 Mich App at 92.

III. ANALYSIS

"A contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re Pierson's Estate*, 282 Mich 411, 415; 276 NW 498 (1937).[4] Like all contracts, "[a]n implied contract must also satisfy the elements of mutual assent and consideration." *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Whether there was mutual assent to a contract "is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006). "Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003).

Here, StarNet convincingly argues that the trial court erred when it found the existence of an implied contract. As the trial court correctly observed, J. E. Johnson was unaware that StarNet continued to provide website hosting and email services after the May 2009 termination message—which indicates that the company's officers sought full termination (and thought they had fully terminated) their agreement for these services with StarNet. Accordingly, there could not have been an implied contract between the two parties, which requires "mutual assent and consideration"—not one-sided service provision to a party that is unaware that is receiving service. *Mallory v Detroit*, 181 Mich App 121, 127. Because no contract, implied or otherwise, existed, J. E. Johnson is not entitled to any damages from StarNet.

Reversed and remanded for entry of an order of dismissal. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

[4] See also *Miller v Stevens*, 224 Mich 626, 632; 195 NW 481 (1923).