IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GO SERVICES, LLC, *Plaintiff/Appellant*,

v.

CITY OF AVONDALE, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0482
FILED 12-12-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-051321
No. CV2014-051322
(Consolidated)
The Honorable Aimee L. Anderson, Judge

AFFIRMED

COUNSEL

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By Brian A. Hatch
Counsel for Plaintiff/Appellant

Gust Rosenfeld P.L.C., Phoenix
By Gary Verburg, Charles W. Wirken
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Chief Judge Samuel A. Thumma and Judge Peter B. Swann joined.

M c M U R D I E, Judge:

¶1 Appellant Go Services, LLC ("Go Services") challenges the superior court's ruling granting summary judgment to defendants City of Avondale and City of Tolleson, who asserted they terminated towing contracts with Go Services for convenience. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The City of Tolleson contracted with Go Services in March 2012 for towing services on a rotational basis with other towing service providers. The City of Avondale entered into a similar contract with Go Services in June 2012.

¶3 Thomas O'Brien, the sole owner of Go Services, was arrested on December 11, 2012, under a warrant stemming from a grand jury indictment on two felony counts. Both counts related to O'Brien's involvement with a prior towing business when he served as general manager. Tolleson and Avondale learned of the arrest via news reports in January 2013. The cities terminated their contracts with Go Services effective March 9, 2013 and February 1, 2013, respectively, based on the information contained in the news reports.

¶4 Go Services served timely notices of claim on both cities, then sued both for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief. The cases were consolidated and the cities moved for summary judgment following discovery. The cities contended they properly terminated the contracts under the following provision of their contracts with Go Services:

> For City's Convenience. This Agreement is for the convenience of the City and, as such, may be terminated without cause after receipt by Contractor of written notice by the City. Upon termination for convenience, Contractor shall

> be paid for the undisputed portion of its fees for City Tows as of the termination dates.

Go Services argued in opposition that the cities "abused their discretion in terminating the Contracts for convenience" by, among other things, not investigating the O'Brien indictment.

¶5 The trial court granted summary judgment for the cities, concluding no genuine issues of material fact remained as to "whether Defendants acted in bad faith in terminating the contract for convenience." The court also concluded there was "no evidence that the termination of the contract due to . . . O'Brien's criminal indictment was beyond the reasonable expectations of the parties." Go Services timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶6 We review *de novo* whether summary judgment is warranted. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010). Because the underlying facts in this case are largely undisputed, we must determine whether the trial court correctly applied the substantive law to those facts. *Mitchell v. Gamble*, 207 Ariz. 364, 368, ¶ 8 (App. 2004). We must reverse "if different inferences may be drawn from [the undisputed] facts." *Id.* (quoting *Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 508 (1990)).

¶7 The parties, in their briefs and at oral argument, discussed whether the appropriate standard of review when reviewing the government's decision to terminate a contract for convenience is an abuse of discretion or a special standard applied by federal law.[1] Arizona law has not expressly adopted the federal approach. *See generally Arizona's Towing*

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[1] Review of the government's decision to terminate a contract for convenience under federal law provides that, absent either bad faith or clear abuse of discretion by the federal government in electing to terminate a contract for convenience, that election is conclusive. *T & M Distrib., Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999). Additionally, federal law uses a presumption that the government acted in good faith that can only be overcome with "well-nigh irrefragable proof" that the government specifically intended to harm the contractor. *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) (quoting *Torncello v. United States*, 681 F.2d 756, 770 (Cl. Ct. 1982)).

Prof'ls, Inc. v. State, 196 Ariz. 73, 77, ¶ 23 (App. 1999) (the government's termination of a contract for convenience was improper because the government "did not act in good faith"). Arizona law does, however, recognizes a covenant of good faith and fair dealing implied in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (1986). This implied covenant "cannot directly contradict an express term." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 423, ¶ 14 (App. 2002).

¶8 We need not decide whether to squarely adopt the federal approach on the facts of this case. Under generally applicable Arizona law, Go Services failed to show that the cities' actions breached the express terms of the contracts or the implied covenant.

I. The Cities Did Not Breach the Contracts or the Implied Covenant.

¶9 Go Services contends the cities abused their discretion by terminating the contracts for convenience based on O'Brien's indictment, citing *Gulf Group Enterprises Co. W.L.L. v. United States*, 114 Fed. Cl. 258, 362, 409 (2013). There, the government terminated a contract citing several justifications, including alleged security concerns. *Id.* at 362. The court found termination was improper in part because the "alleged security incident had not been verified as a security threat" as of the date of termination and rejected the government's other justifications as neither reasonable nor consistent with its obligation to operate in good faith. *Id.* at 362, 409.

¶10 Go Services contends the cities acted similarly by relying on "over-hyped news reports . . . based on over-hyped charges" without investigating the facts behind the O'Brien indictment. But Go Services did not dispute the cities' evidence that news reports of the indictment concerned them because the charges related to O'Brien's previous towing business. Go Services also presented no evidence to show the cities' reliance on these news reports constituted an abuse of discretion or was not in good faith. *See, e.g.*, *Rawlings*, 151 Ariz. at 153 ("The essence of th[e] duty [of good faith] is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship."); *see also Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 111, ¶ 23 (App. 2007) ("Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but [includes]: evasion of the spirit of the bargain, . . . willful rendering of imperfect performance, . . . and interference with or failure to cooperate in the other party's performance.") (quoting Restatement (Second) of Contracts § 205(d) (1981)). Go Services also offered

no evidence to support its contention that the cities should have independently investigated the charges against O'Brien before terminating the contracts for convenience.

¶11 Go Services also relies on *Arizona's Towing Professionals*. There, we determined the Department of Public Safety did not act in good faith by cancelling a contract for convenience because, by doing so, the Department mooted the contractor's appeal of its earlier decision to cancel the contract for other reasons. 196 Ariz. at 77, ¶ 23. There is no evidence in this case to suggest the cities either breached or tried to terminate the Go Services contracts for any reason other than O'Brien's arrest, and there is no evidence that the cities breached the contracts before the terminations. *See id.* at 78, ¶ 24 ("If DPS could avoid liability simply by canceling 'for convenience' those contracts which it has already breached, it could breach any contract with impunity and escape its obligations without reason.").[2] For these reasons, on this record, the trial court did not err by concluding the cities did not act in bad faith or abuse their discretion in terminating the Go Services contracts for convenience.[3]

II. The Cities May Recover Reasonable Attorney's Fees and Costs Incurred on Appeal.

¶12 The cities request their attorney's fees and costs incurred in this appeal pursuant to section 13.12 of the contracts:

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[2] Go Services also relies on *Brown v. City of Phoenix*, 77 Ariz. 368 (1954). *Brown* involved a mandamus action brought by an unsuccessful bidder in a procurement proceeding turning on the discretion afforded the city council, under a city charter, to "reject any and all bids." 77 Ariz. at 370-71. Go Services has not shown how the *Brown* analysis, in that distinguishable context, would apply here.

[3] Go Services also contends the trial court erred by not ruling on the cities' separate motion for partial summary judgment regarding unexercised options under the contracts. Our review of the record indicates the court denied the motion. In any event, our decision affirming summary judgment on Go Services' claims renders it moot. *See, e.g.*, *Arpaio v. Maricopa County Bd. of Supervisors*, 225 Ariz. 358, 361, ¶ 7 (App. 2010) ("A case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties.") (quoting *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127, ¶ 5 (App. 1998)).

> In the event either party brings any action for any relief, declaratory or otherwise, arising out of this Agreement or on account of any breach or default hereof, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees and reasonable costs and expenses . . . .

The cities are the successful parties in this appeal. We will award them reasonable attorney's fees and costs contingent upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶13 We affirm the judgment.

AMY M. WOOD • Clerk of the Court
FILED: AA