ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

RUSS SKALLERUP and BEAUFORD E. MYERS, Individually and o/b/o a class of similarly situated persons, and BURCHWOOD BAY SEWER IMPROVEMENT DISTRICT, and CARPENTER DAM – CATHERINE HEIGHTS SEWER IMPROVEMENT DISTRICT APPELLANTS	CA 07-1022 May 7, 2008 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CV-2004-1156-I]
V. CITY OF HOT SPRINGS, ARKANSAS, and HONORABLE MIKE BUSH, Mayor of Hot Springs, Arkansas, in his official capacity APPELLEES	HONORABLE JOHN HOMER WRIGHT, CIRCUIT JUDGE REVERSED AND REMANDED

Appellants brought this class-action suit challenging disparate sewer rates imposed by the City of Hot Springs, specifically contesting the higher rates charged to residents outside the city limits than those who reside within the city. The circuit court granted summary judgment to the City. On appeal, appellants contend summary judgment should not have been granted because: (1) the City breached its contracts with the districts and their customers; (2) the City should be estopped from charging appellants higher rates; (3) the circuit court erred in refusing to hold that the issues determined in this action were res judicata; (4) the City's imposition of a higher debt-service charge on customers outside the city limits was unreasonable and, therefore, invalid. We hold that the evidentiary items

presented by the parties left a material fact unanswered, and accordingly, we reverse and remand.

In the late 1960s and early 1970s, the City was forced to construct a regional comprehensive sewer collection and treatment system for the City and its area of reasonably-anticipated growth due to serious pollution problems with Lake Hamilton. State and federal agencies imposed a building ban precluding any new construction in and around Hot Springs until these problems had been addressed, which had a disastrous effect on Garland County's economy. Several improvement districts were formed inside and outside the City in response to this problem, and federal funds were released for the construction of a comprehensive sewer project to serve the area within the city limits and a large part of the five-mile planning area outside the city limits. The sewer improvements within the districts were substantially financed by the landowners/members. Appellants Burchwood Bay and Carpenter Dam were among these districts.

In 1980, the City and the districts entered into written agreements providing that the districts would dedicate their sewer improvements, once completed, to the regional sewer system, which promised to charge "all customer users within the district at the same rate established by ordinance as other customer users of the system." Burchwood's improvements were formally dedicated to the City in 1997 through an agreement and assignment, which conveyed the sewer improvements in exchange for the City's agreement to provide services within the district "in accordance with the City's policy, unless the same shall conflict with … any existing contracts of the district." Carpenter Dam entered into similar agreements

when it dedicated its improvements to the City.

Until June 21, 2004, the City charged its users the same rates whether they were inside or outside the city limits; however, on that date, the City enacted Ordinance No. 5274, which imposed a rate schedule that was significantly higher for the customers outside the city limits than it was for those inside the city limits. This ordinance also imposed a higher debt-service charge for residents outside the city limits.

On November 8, 2004, appellants filed this action challenging the ordinance. In their complaint, appellants alleged that the City breached its contractual obligations to the districts and their members when it enacted the ordinance; that the City should be estopped from enacting the ordinance because the districts and their members had relied on the City's promises to charge the districts' members the same rate as other users; that the City's decision to disparately increase the debt-service charge violated appellants' rights of due process and equal protection under the Arkansas Constitution; that the debt-service charge was actually an improperly-levied tax; and that the disparate rates were unreasonable. Appellants asked for a declaratory judgment and temporary and permanent injunctive relief. On September 2, 2005, a class was certified of all persons who had paid wastewater bills for services outside the city limits since the ordinance's effective date.

After the lawsuit was filed, appellants learned of a prior dispute between some of the districts and the City, which was settled by a consent decree in the Garland County Chancery Court in 1994. In that case, a city ordinance that allowed the City to impose additional burdens on customers outside the city limits for connection to the sewer system

was invalidated. Specifically, the court found that: (1) the property owners and former district members were third-party beneficiaries of the contracts between the districts and the City; (2) the districts were formed and taxes were paid by the district members in reasonable reliance on the City's promises and past practices of allowing connection to the city water and sewer system with no other prerequisites required, and the City was now estopped from requiring property owners to either annex to the City or promise to do so in the future in order to obtain city water and sewer service; (3) the resolution requiring annexation to the City violated an agreement between the City and the United States Environmental Protection Agency, which stated that the sewer system would be a regional one, that the City would accept connections and provide service to property outside the city limits, and no mention was made of any preconditions to providing that service.

On September 8, 2006, appellants moved for partial summary judgment on their requests for declaratory and injunctive relief. In their accompanying brief, appellants argued that the ordinance should be declared invalid on the basis of estoppel; that the City had breached its contracts with the districts and their customer users; that the customer users of the districts were third-party beneficiaries of the City's contracts with the districts; and that the ordinance was unconstitutional.

In response, the City argued that the agreements between the City and the improvement districts had expired when the districts were dissolved; that there was no order or agreement in effect prohibiting the City from establishing different rates for customers inside and outside the City and, therefore, no justifiable reliance; and that Ark. Code Ann.

§§ 14-234-110 and 14-234-111 (Repl. 1998) permitted the imposition of different rates. In reply, appellants argued that the dissolution of the districts did not end the City's contractual obligations to users in the districts. Relying on the 1994 consent decree, appellants argued that the City was actually in contempt of court in enacting the latest ordinance.

In its supplemental response brief, the City contended that the original contract between the City and Burchwood Bay was not the final contract between those parties, noting that they executed a new contract on April 21, 1982, which stated:

> Sewer Rates. The City covenants and agrees to maintain rates for the services of the System, including increases from time to time as necessary to always provide net revenues of the System sufficient to pay as due all requirements of Sewer Bonds, Contractual Payments, and all other obligations payable from revenues of the System, and to make adequate provision for the depreciation of the System.

The City also stated that, just before its dissolution on June 2, 1997, Burchwood entered into another contract with the City, which stated:

> In consideration of said Agreement by said DISTRICT, the CITY agrees to operate and maintain the constructed system … and to collect user charges, levy industrial cost recovery charges, to operate and maintain the collection systems and the pump stations, and other project appurtenances and equipment, and further, to enforce the sewer use ordinance developed by the CITY as more particularly set out in the United States Environmental Protection Agency grant program.

The City also stated that the Carpenter Dam-Catherine Heights District had entered into similar agreements on July 12, 1983, and July 30, 1996.

The City contended that the later agreements did not require the City to treat all users the same and that, by entering into the 1982, 1983, 1996, and 1997 contracts, the parties had modified their original contracts that did require all users to be treated the same. The City

distinguished this case from the situation presented in the previous lawsuit by noting that (1) when the 1993 lawsuit was filed and settled, the improvement districts had not yet been dissolved, and (2) the 1993 action did not involve sewer rates or user charges. The City asserted that the 1994 consent order simply established that connection to the City's sewer service could not be withheld from the plaintiffs.

On November 3, 2006, the City moved for summary judgment for the same reasons that it had argued in response to appellants' motion for partial summary judgment.

On December 8, 2006, the circuit court issued an order denying appellants' motion for partial summary judgment, stating:

> 1. The current contracts entered into between the various improvement districts and the City of Hot Springs do not provide for equal rates between the district users and in-city users.
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> 2. The pleadings and exhibits presented do not establish the elements of estoppel.
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> 3. Garland County Chancery Court Case No. 93-1639, styled as Burchwood Bay-Highway 7 South Sewer Improvement District No. 20, et al vs Ellis, et al, filed in 1993, does not address the issue presented by this case, and the Consent Order entered therein does not control this case.
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> 4. From the foregoing, the Court finds no basis to grant the Plaintiffs' Motion for Partial Summary Judgment on Counts VI and VII, and therefore the same is denied.

On June 13, 2007, the circuit court granted summary judgment to the City. Appellants requested findings of fact and conclusions of law on June 15, 2007, and moved for reconsideration on June 18, 2007. On July 11, 2007, appellants filed their notice of appeal from the grant of summary judgment to the City. The circuit court later entered the

following findings of fact and conclusions of law: (1) there is no contractual obligation requiring the City to charge the members of the districts the same rates as other users; (2) promissory estoppel can be a basis for relief only when there is no contract, and in this case, the parties entered into contracts; (3) no citation of authority was submitted that would support the contention that the members of the districts were denied due process and equal protection; (4) the method of setting the rates complies with the contracts existing between the City and the members of the districts, as well as the relevant case law; (5) the ordinance is constitutional and consistent with relevant statutory authority and case law; (6) [appellants] are not entitled to any injunctive relief.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Pakay v. Davis*, 367 Ark. 421, 241 S.W.3d 257 (2006). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id*. On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id*. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. *Wagner v. General Motors Corp.*, 370 Ark. 268, ___ S.W.3d ___ (2007). Summary judgment is not proper where the evidence, although in no

material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Technology Partners, Inc. v. Regions Bank*, 97 Ark. App. 229, 245 S.W.3d 687 (2006).

We first address appellants' breach-of-contract argument. In its argument in support of summary judgment, appellee argued that the City's agreements in the original contracts were no longer enforceable because the districts later entered into agreements that formally assigned their sewer improvements to the City, and those later agreements did not include language requiring district users to be charged the same rate as city users. In effect, the City argued that the later agreements superseded, or modified, the earlier contract, and the trial court appears to have agreed with that argument. In its findings of fact and conclusions of law, the trial court found that contracts were entered into between the parties, but there was no contractual obligation requiring the City to charge the members of the districts the same rates as other users.

On appeal, appellants contend that finding was in error because the later agreements did not repudiate or modify the original agreement, and in fact, the later agreements expressly stated that the City would provide services within the district "in accordance with the CITY'S policy, unless the same shall conflict with … any existing contracts of the DISTRICT." In response, appellee contends that the later agreements were a modification, and further, that our supreme court found, in a similar situation, that a modification of the contract was not necessary for the City to increase rates in a disparate manner. In *Delony v. Rucker*, 227 Ark. 869, 302 S.W.2d 287 (1957), our supreme court addressed the issue of

whether the Little Rock municipal waterworks may charge its nonresident consumers higher rates than those paid by residents of the city. Contrary to the ruling of the trial court, the supreme court held that the challenged legislation was not void and that the City could charge disparate rates as long as they were reasonable. The supreme court also addressed an additional argument raised by a water improvement district, which asserted that the increased rate schedule impaired the obligation of a contract between it and the city. Our supreme court addressed this argument as follows:

> In 1925 the private company which then owned what is now the municipal waterworks system agreed to sell water to the residents of this district at the same rates that were then, or might later be, in effect within the city. The performance of this contract was assumed by the municipality when it purchased the system in 1936. It is now asserted by the district that the imposition of the higher nonresident rates constitutes an unconstitutional impairment of the obligation of its contract. To this contention there are two answers. First, an agreement fixing public utility rates to be charged in the future is subject to the sovereign's reserved power of rate regulation and must yield to the exercise of that power. *Camden v. Arkansas Light & Power Co.*, 145 Ark. 205, 224 S.W. 444; *North Little Rock Water Co. v. Water Works Comm. of City of Little Rock*, *supra*. Second, this particular contract contains no provision fixing the period of its duration; it is therefore terminable at the will of either party. *Fulghum v. Town of Selma*, 238 N.C. 100, 76 S.E.2d 368; *Childs v. City of Columbia, supra*.

227 Ark. at 874, 302 S.W.2d at 290.

Appellee asserts that the factual basis of *Delony* is analogous to the case at bar, the only difference being that the City and the districts have also modified their written contracts via the later Agreement and Assignment documents. First, we are not convinced that the fact situation in *Delony* is sufficiently analogous to the present facts to be controlling. In *Delony*, the city of Little Rock voluntarily undertook to provide services to consumers outside the municipal boundaries. In doing so, it bought the existing waterworks system from a private

company and assumed its contract with nonresidents. In the case at bar, the City was forced to construct a regional comprehensive sewer system. Improvement districts were formed inside and outside the City's boundaries, and these districts' landowners/members largely financed the sewer improvements, which they ultimately dedicated to the City. Thus, the cost of the system was funded by members of districts both within and without the city limits.

Second, we do not agree that it is clear, as a matter of law, that the later agreements between the City and the districts superseded or modified the earlier agreement, nor do we necessarily agree that the later agreements allowed disparate rates between city and non-city members of the same district, as opposed to disparate rates between districts only. Under general contract law, both parties must agree to a modification of a contract and to the terms of the modification. *Luningham v. Ark. Poultry Federation Ins. Trust*, 53 Ark. App. 280, 922 S.W.2d 1 (1996). In interpreting contracts, the fundamental inquiry centers on determining the intent of the parties at the time of the agreement. *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989). Whether the later contracts were a modification of the original agreement, or whether the later contracts' silence as to the clause in question constituted a waiver by the districts, are questions of fact that should have been tried. We therefore reverse and remand for further proceedings. Because we decide that summary judgment was inappropriate as to this issue, we decline to address appellants' other arguments.

Reversed and remanded.

HART and VAUGHT, JJ., agree.