ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION II

CA08-182

September 10, 2008

FULL COUNSEL CHRISTIAN FELLOWSHIP AND FULL COUNSEL MINISTRIES, INC.
APPELLANT

V.

THE HOLLOWAY FIRM, INC. CIVIL AND ENVIRONMENTAL DESIGN
APPELLEE

APPEAL FROM PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CV-2004-12720]

HON. CHRISTOPHER CHARLES PIAZZA, JUDGE

AFFIRMED

This is an appeal from an order granting summary judgment to the defendant-appellee in a suit alleging breach of contract and negligence in performance of a contract on the grounds that plaintiff-appellant failed to show a contractual relationship between the parties regarding the subject matter of the lawsuit. Appellant argues that the trial court erred in granting summary judgment because there were genuine issues of material fact concerning the existence and nature of the contractual relationship. We affirm.

Summary judgment is to be granted by the circuit court only when it is clear that there are no genuine issues of material fact to be litigated. *Clark v. Transcontinental Insurance Co.*, 359 Ark. 340, 197 S.W.3d 449 (2004). 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 fact. *Id.* On appellate review, we determine 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.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Appellant is a church corporation. Appellee is an engineering firm. Viewing the evidence in the light most favorable to appellant, the record shows that appellant hired appellee to obtain permits and draw up plans relating to construction of a church building. Appellant selected and hired a different firm, Mid-South Boring Co., to construct water lines, sewer lines, and storm drainage relocation on the project. By the express term of the contract between appellant and Mid-South, the latter was to "commence and complete" that work, and would "furnish all of the materials, supplies, tools, equipment, labor and other services necessary for the completion of the project." Appellee engineering firm is not mentioned in the construction contract. Nevertheless, when faulty sewer work by Mid-South resulted in damages to appellant's property, appellant brought this action against appellee engineering firm under the theory that there was an implied contract for appellee to supervise Mid-South, and that appellee breached the contract and was negligent by failing to do so.

Summary judgment was properly granted in this case. Not only does the construction contract impose no duty on appellee regarding construction or supervision, appellee's own proposal to appellant for engineering work, after outlining the engineering services it had been asked to provide, stated that:

> Our Company has the capability of providing construction layout and supervision of various parts of the work and would be very much interested in providing that service. The cost for that work could be done on a lump sum basis, a percentage of

> construction cost or on an hourly rate, in accordance with our standard hourly rate schedule.

Appellant adduced no evidence to show that it accepted this offer to provide construction supervision or that the terms of payment, left open in the offer, were agreed upon. Instead, appellant concedes that no express contract exists but argues that one should be implied in law based on letters written by appellee to Mid-South. This argument is without merit. An implied contract is based upon the prior relations and course-of-dealings of the parties. Appellee's letters to Mid-South are not evidence of supervision because they were written after the work was completed. As such, they could not be supervisory in nature but appear to have been intended to show that the fault resulting in the damage was in Mid-South's work rather than in appellee's engineering plans. Furthermore, there was an express contract between appellant and Mid-South that imposed upon Mid-South the duty to provide all materials, labor, and services necessary for completion of the project. Finally, and compellingly, although there is evidence that appellee offered to perform supervisory services for a price, there is neither allegation nor evidence that appellant accepted this offer. As a general rule, the law will not accommodate a party with an implied contract where there has been a specific one on the same subject matter. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998); *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994). In the absence of allegation and evidence that appellant accepted appellee's offer to provide supervisory services, there was no contract to do so, no breach of such contract, and no duty on the part of appellee in failing to supervise Mid-South. We hold that the trial court did not err in granting summary judgment.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.