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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000789-MR

KENTUCKY NATURAL GAS CORPORATION APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CI-00162

CITY OF LEITCHFIELD, BY AND THROUGH
ITS UTILITY COMMISSION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Kentucky Natural Gas Corporation (KNG) has appealed from the Grayson Circuit Court's November 29, 2007, entry of judgment nullifying KNG's gas purchase agreement with the City of Leitchfield by and through its Utility Commission (City). For the following reasons, we affirm.

In February of 2000 KNG approached the City regarding its discovery of a new natural gas field named the "Leitchfield Northeast Field." The City had

previously purchased natural gas from a gas field located south of Leitchfield known as the "Shrewsbury Field" and expressed its concerns to KNG regarding the quality of that gas. KNG assured the City that the new field would be free of the problems experienced in the Shrewsbury Field. KNG wished to enter into a long-term, uninterruptible contract to enable it to justify the cost of developing the Leitchfield Northeast Field and to provide the City with a local, reliable source of natural gas at an attractive price.

On November 17, 2000, following several months of extensive negotiations, the City as buyer and KNG as seller entered into a written Gas Purchase Agreement. The contract gave KNG a period of twelve months in which to construct its gas production, gathering and delivery facilities and begin delivering gas to the City at a minimum level of 60 thousand cubic feet (Mcf) per month, with certain specific requirements as to the quality of the gas delivered, and set the price City was to pay for the gas it received. Failure by KNG to complete construction in the allotted time frame was to render the entire agreement null, void and of no effect. In addition, during the twenty-year term of the contract, KNG's failure to deliver the minimum quantity of gas for reasons other than *force majeure* was considered a default under the express terms of the contract and such default entitled the City to cancel the agreement without notice to KNG. The City was required to purchase the total amount of deliverable gas KNG produced, up to eighty percent of the City's natural gas supply requirements. A miscellaneous provision of the agreement stated:

> This Agreement shall only apply to gas delivered to Buyer from the gas field known as the "Leitchfield Northeast Field," such field being located to the north and east of Leitchfield, and Buyer shall be expressly permitted, at its option, to purchase gas from certain properties from which Buyer has previously purchased gas from in the "Shrewsbury Field," such field being located south of the City of Leitchfield.

The agreement contained numerous other terms and conditions which are not germane to this appeal.

On November 15, 2001, two days before the expiration of the twelve-month construction period set forth in the contract, Randy Manek, the president of KNG, appeared before the City at its regular meeting. Manek requested permission to tie into the City's gas main in the Shrewsbury Field and provide gas from KNG's wells in that field. Manek informed the City that KNG could not supply gas from the Leitchfield Northeast Field and would be unable to do so before the expiration of the contract. Manek believed that supplying gas from the Shrewsbury Field would save the contract.

After some discussion, the City voted to extend the contract for sixty days to allow KNG to complete its construction in the Leitchfield Northeast Field and begin delivering gas under the remaining terms of the contract. The City further voted to purchase gas from the Shrewsbury Field if it met the quality requirements set in the contract, but only after the Leitchfield Northeast Field was connected and producing gas supplies. Manek went on the record to disagree with the City's interpretation of the contract, saying he believed the contract covered

gas production from any of KNG's wells in Grayson County, wherever located, and did not solely apply to the Leitchfield Northeast Field.

On January 17, 2002, Manek informed the City that KNG's equipment was in place and ready to begin gas delivery from the Leitchfield Northeast Field. The City completed its inspection of KNG's equipment and ordered a tie-in to the City's distribution system. The connection was completed on February 1, 2002, and KNG began delivering gas from the Leitchfield Northeast Field on February 7, 2002. On February 13, 2002, the City installed a tap and began accepting gas deliveries from the Shrewsbury Field.

On February 22, 2002, the City detected a gas leak on the outlet side of KNG's valve in the Leitchfield Northeast Field. The City closed the valve and informed KNG of the problem. KNG inspected the valve but took no corrective action. The valve was not reopened and gas deliveries from the Leitchfield Northeast Field ceased. KNG delivered a total of 16.29 Mcf of gas before the wells were shut in. KNG informed the City that sufficient amounts of gas were being delivered from the Shrewsbury Field to satisfy the minimum delivery amount set forth in the contract and it was, thus, not concerned about meeting that requirement from the Leitchfield Northeast Field.

On April 3, 2002, the City sent a letter to KNG indicating its belief that the contract was null and void because of KNG's failure to deliver the minimum quantity of gas specified from the Leitchfield Northeast Field. The City further indicated its unwillingness to enter into a long-term contract for the

purchase of "Shrewsbury gas." It stated that if KNG could demonstrate the ability to generate gas of sufficient quality and quantity from the Leitchfield Northeast Field, the City would be willing to renegotiate a long-term purchase agreement for such gas. A subsequent meeting between the parties failed to reach a compromise or new agreement.

The City filed the instant declaratory judgment action on May 30, 2002, seeking a determination of whether the gas purchase agreement was null and void based on KNG's default. KNG counterclaimed and affirmatively pled that the agreement had been modified on November 15, 2001, to extend the delivery date for sixty days and to provide for the purchase of gas from the Shrewsbury Field. It also contended the City's refusal to accept delivery of gas from the Shrewsbury Field constituted a default under the terms of the modified contract. The City filed a response, specifically denying that the agreement had been modified to include Shrewsbury gas. Following a substantial discovery period, both parties filed motions for summary judgment accompanied by extensive memoranda setting forth their respective positions.

A lengthy hearing was held on April 16, 2007, following which the trial court granted summary judgment in favor of the City and dismissed KNG's counterclaim. In its order, the trial court found the terms of the contract contained no ambiguity and specifically required KNG to produce 60 Mcf of gas from the Leitchfield Northeast Field within twelve months from its execution and that KNG had failed to satisfy this requirement. It stated the City had unilaterally extended

the production date by sixty days, but that the contract had not otherwise been modified. Specifically, the court noted a clear disagreement between the parties as to the necessity of producing from the Leitchfield Northeast Field first and whether the contract applied to the Shrewsbury Field. Because such disagreements were present, the trial court concluded there could be no mutually agreed upon modification of the contract as KNG urged. The trial court found that since the proposed modification was not in writing, the statute of frauds[1] precluded a finding that the contract had been amended. It further found that KNG's attempt to substitute production from the Shrewsbury Field did not provide consideration for the alleged modification. Thus, it held KNG's default under the delivery terms of the contract rendered the entire agreement null and void and dismissed KNG's counterclaim. This appeal followed.

KNG presents three arguments on appeal in seeking reversal of the trial court's judgment. First, KNG contends the trial court erred in concluding a finding of modification was precluded by the statute of frauds, since the City waived consideration of the affirmative defense and the written minutes of the City's meetings satisfied the requirement that the proposed amendment be in writing. Second, KNG contends summary judgment was improper since an issue of fact existed as to whether it was precluded from delivering the required amounts

[1] The rule commonly known as the statute of frauds is codified in Kentucky Revised Statutes (KRS) 371.010(7), which requires agreements that are not to be performed within one year to "be in writing and signed by the party to be charged therewith, or by his authorized agent." Absent such a writing, the alleged agreement is unenforceable.

of gas under the contract by operation of *force majeure* or whether the City interfered with the delivery by shutting the valve. Finally, KNG argues the trial court erred in concluding the amendment was unsupported by consideration. Based on these three contentions, KNG urges reversal of the trial court's entry of summary judgment. Discerning no error, we refuse to do so.

The standard of review governing appeals from the grant of summary judgment is well settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. In *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated, "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Appellate courts are not required to defer to the trial court when factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor [citation omitted]." *Steelvest,* 807 S.W.2d at 480. However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. *See also* Philipps, *Kentucky Practice,* CR 56.03, p. 418 (6th ed. 2005).

KNG first contends the trial court erred in concluding the statute of frauds precluded a finding of modification of the contract. It further alleges the City waived consideration of the affirmative defense over the five-year course of litigation and the written minutes of the City's meetings satisfied the requirement that the proposed amendment be in writing. We disagree.

KNG conceded before the trial court that the original contract was properly executed and valid. It went on to argue that the contract was modified to allow it to substitute production from the Shrewsbury Field wells for the production required by the contract from the Leitchfield Northeast Field. The trial court, citing *Dalton v. Mullins*, 293 S.W.2d 470 (1956), found the burden of proof to be on KNG to prove the contract had been modified. It went on to conclude the oral modification relied upon by KNG did not satisfy the requirements of KRS 371.010(7). Citing *Cox v. Venters*, 887 S.W.2d 563 (Ky. App. 1994), the trial

court stated that where a contract is required by the statute of frauds to be in writing, any subsequent agreement to change the terms of that agreement must also be in writing.

After carefully examining the transcripts of the City's meetings and the correspondence between the parties, the trial court correctly found that no meeting of the minds occurred regarding the alleged modification, the City continued in its position that the contract required the production requirements be satisfied solely from the Leitchfield Northeast Field, and no writing to the contrary existed. Thus, the trial court held KNG had failed to meet its burden of proof and the statute of frauds precluded a finding that the contract had been modified by the alleged oral agreement. We agree with the trial court's analysis that no meeting of the minds occurred and thus, no modification of the contract could exist. Because no modification occurred, we need not determine whether the statute of frauds is applicable.

There is no dispute the original contract was properly executed. It specifically requires KNG to produce 60 Mcf of gas, meeting certain quality requirements from the Leitchfield Northeast Field. The express terms of the contract state the agreement applied *only* to the Leitchfield Northeast Field. Our review of the record leads us to agree with the trial court's conclusion that there was no concurrence between the parties allowing KNG to substitute production from the Shrewsbury Field to satisfy the delivery requirements. Contrary to KNG's assertions, the minutes of the various meetings do not provide evidence

that such a modification occurred. KNG's tortured interpretation of the meeting transcripts and minutes runs afoul of common sense and logic.

It is abundantly clear that the City and KNG had disparate views on the production requirements. There is no question that KNG never produced the quantities of natural gas called for under the contract from the Leitchfield Northeast Field, nor does KNG allege it was capable of doing so. As the trial court correctly found, the contract was specifically limited by its terms to production from the Leitchfield Northeast Field, and no persuasive evidence of modification exists. We conclude there was no meeting of the minds on the issue, and that absence is fatal to KNG's assertion that the contract was amended.

"*General Steel Corporation* [*v. Collins*, 196 S.W.3d 18 (Ky. App. 2006),] states a fundamental tenet of contract law; i.e., that the parties must enter into a meeting of the minds in order to form an enforceable contract." *Olshan Foundation Repair and Waterproofing v. Otto*, 276 S.W.3d 827, 831 (Ky. App. 2009). There being no mutual assent, there could be no modification of the contract, as the trial court correctly found. We believe the trial court's determination that the statute of frauds precluded a finding of modification—although likely a correct holding—constituted surplusage and thus, we need not render an opinion as to the correctness of that decision since our holding on this issue renders that argument moot. For the same reason, we also need not consider KNG's argument that the City waived consideration of the affirmative defense under the statute of frauds.

Second, KNG contends issues of fact existed as to whether it was precluded from delivering the required amounts of gas under the contract by operation of *force majeure* or because the City interfered with the delivery by shutting the valve. KNG thus argues that the trial court's entry of summary judgment was improper. Again, we disagree.

As stated previously, there is no dispute that KNG failed to deliver the required amounts from the Leitchfield Northeast Field. KNG contends the conditions giving rise to this failure were caused solely by the City's closure of the delivery valve it had determined was leaking. It further alleges the City refused to allow KNG to return the Leitchfield Northeast Field to production. Based on these assertions, KNG contends a genuine issue of fact existed concerning whether the *force majeure* clause of the contract prohibited the City from declaring the contract to be null and void.

Black's Law Dictionary 645 (6th ed. 1990), defines "*force majeure*" as:

> In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event that a part of the contract cannot be performed due to **causes which are outside the control of the parties and could not be avoided by exercise of due care**. An oil and gas lease clause that provides that the lessee will not be held to have breached the lease terms while the lessee is prevented by *force majeure* (literally, "superior force") from performing. Typically, such clauses specifically indicate problems beyond the

> reasonable control of the lessee that will excuse performance. *See also* Act of God; Vis major.

(Emphasis added).

The parties expanded this general definition in the *force majeure* provision contained in the contract which reads, in pertinent part, as follows.

> 8.1 In the event either party hereto being rendered unable, wholly or in part, by *Force majeure* to carry out its obligations under this Agreement, other than to make payments due hereunder, then on such party's giving notice and full particulars of such *Force majeure* in writing to the other party as soon as possible after the occurrence of the cause relied on, the obligations of the party giving such notice, so far as they are affected by such *Force majeure*, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.
>
> 8.2 The term "*Force majeure*" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightening, earthquakes, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accidents to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells or sources of supply of gas, **and other causes, whether the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome** . . . .

(Emphasis added).

KNG had the legal duty to produce a minimum of 60 Mcf of gas per month from the Leitchfield Northeast Field unless there was a valid *force majeure* which suspended this obligation and excused KNG's nonperformance. By

contract, such *force majeure* had to be reasonably beyond KNG's control and had to be of such a nature that KNG was unable to prevent or overcome the same. KNG was also obligated to remedy the situation, if possible, in a reasonable time.

The record reveals KNG was notified immediately that the City had closed in the wells upon discovery of a leak on the outlet side of one of KNG's valves. KNG agreed with the City that the valve should be closed for public safety reasons. KNG inspected the well at issue to determine the cause and source of the leak, but repairs were never undertaken. Without explanation of its position or citation to evidence of record, KNG asserts the City prohibited it from repairing the leaking valve and returning the field to production. It contends the City's actions constituted a *force majeure* under the contract, thereby suspending KNG's obligations under the contract until such time as the City removed the impediments to restoring the wells to production. We find no support for KNG's contentions in the record before us.

Before the trial court, KNG conceded that the contract allowed the City to cancel the contract without notice upon its failure to deliver 60 Mcf of gas per month. However, it contended it was, in fact, delivering over 100 Mcf per day; thus, the City was required to give KNG notice in writing of its allegation of default and allow KNG thirty days in which to cure the default. It reiterates this argument on appeal. We believe this contention is without merit since the production and delivery amounts relied upon by KNG are from wells located in the Shrewsbury Field and, as we have previously held, the contract provisions applied

solely to the Leitchfield Northeast Field. Although in its brief before this Court, KNG attempts to use a mathematical formula to show it was complying with the contract terms prior to discovery of the leak; before the trial court, it conceded it could not ever meet the production requirements set forth in the contract solely from the Leitchfield Northeast Field. KNG admitted it did not seek to make the necessary repairs to the leaking valve—estimated to have required approximately thirty minutes of labor—because it unilaterally believed the deliveries from the Shrewsbury Field were sufficient to "save the contract." Based on these facts, we are unable to conclude that a genuine issue could exist as to whether the conditions of *force majeure* were met. KNG was aware of the alleged problem with the valve, had the ability to repair the issue, and failed to do so. The failure to use due diligence to effectuate the necessary repairs to the faulty valve is fatal to a finding that KNG's default resulted from *force majeure* under the express terms of the agreement.

We are further unpersuaded by KNG's contention that the City failed to provide written notice of the deficiency in delivery amount and allow it thirty days to cure the problem. The agreement plainly provides that KNG's failure to deliver the required quantity of gas from the Leitchfield Northeast Field constituted a default entitling the City to immediately—and without further notice—cancel the entire agreement. The City availed itself of that provision, and KNG cannot be heard to complain. Interestingly, the agreement required KNG to give written notice to the City if it was relying on the *force majeure* clause to suspend its

obligations. It did not do so. Thus, KNG would appear to be seeking enforcement of the contractual notice requirements against the City while simultaneously attempting to avoid enforcement against itself. Such inconsistent and contradictory arguments cannot be sanctioned by this Court, for "[w]hen all is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Ins. Comm'n,* 450 S.W.2d 235, 236–37 (Ky. 1970).

Finally, KNG argues the trial court erred in concluding the amendment was unsupported by consideration. It contends the continuation of production and delivery of gas from the Shrewsbury Field provided the necessary consideration to support modification. However, as we have previously concluded that no modification was possible in the absence of a meeting of the minds, this issue is rendered moot and requires no further discussion.

We have not discerned the existence of any genuine issues of material fact so as to preclude the entry of summary judgment. The trial court did not err. Thus, the judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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