

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000794-MR

STELLUTI KERR, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE IRV MAZE, JUDGE  
ACTION NO. 07-CI-005921

BASTIAN MATERIAL HANDLING, LLC

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Stelluti Kerr, LLC (“SK”) appeals from Amended Findings of Fact, Conclusions of Law and Judgment of the Jefferson Circuit Court in its action seeking damages from Bastian Material Handling, LLC (“BMH”) for breach of contract and breach of the covenants of good faith and fair dealing. SK argues that the circuit court improperly concluded that BMH was obligated to pay a 15%

commission to SK only for a single project with third party buyer Continental Mills and not on all sales to Continental Mills in perpetuity. SK maintains that the circuit court erred in ruling that the contract at issue was terminable, that BMH terminated the contract within a reasonable time and that the court erred in finding that BMH did not breach its covenants of good faith and fair dealing. SK also contends that the court misconstrued the scope of the agreement, improperly considered the unilateral course of performance of BMH, and erred in ruling that SK was not entitled to recover attorney fees. We find no error, and accordingly affirm the Judgment on appeal.

SK is a Texas limited liability company owned by Anthony Stelluti and Pamela Stelluti, who are husband and wife. It provides packing machinery and services to its customers, including the design of conveyor systems to transport materials through a manufacturing facility and onto a palletizing system. BMH sells packaging material handling systems to its customers, and sells equipment such as robotics, conveyors and palletizing systems. Hytrol is a brand of conveyor equipment that BMH sells. Continental Mills manufactures food products and one of its facilities is located in Hopkinsville, Kentucky.

In January of 2001, SK made a written proposal to Continental Mills concerning a robotic palletizing system. Continental Mills, through its agent Scott Seebold, stated that it intended to buy any equipment directly from the vendor. Continental Mills then identified Hytrol as its preferred palletizing equipment manufacturer.

Thereafter, SK, by and through Anthony Stelluti, contacted BMH inquiring if BMH would provide Hytrol equipment and services to SK's customers. The following month, Anthony Stelluti telephoned BMH sales representative Dave Knight to determine if BMH would be interested in working with SK on a robotic palletizing project for an unidentified customer. As part of the project, Mr. Stelluti sought an original equipment manufacturer ("OEM") discount of 15% for the conveyor equipment. According to the record, this could benefit SK by allowing it to purchase Hytrol equipment from BMH at a 15% discount and then sell the equipment to Continental Mills at full price, or BMH could sell the equipment directly to Continental Mills and give SK a 15% commission. Hytrol would not sell the equipment directly to SK because SK was not a qualified Hytrol distributor.

SK sent a letter to BMH with an enclosed agreement asking BMH to "sign and return the partnership agreement as soon as possible so that we can send you the required technical data to work on this project." Knight received the letter and gave it to BMH regional manager Mitch Smith, who telephoned Stelluti. Knight would later state that he contacted Stelluti to request that additional language be included in the agreement reflecting that the agreement was for a single project. The agreement was then amended by Stelluti to state that, "BMH agrees to pay Stelluti Kerr a commission of 15% of total project equipment sold including all repeat orders."

Stelluti also added language which stated, “BMH agrees to pay commissions on parts and services sold to the customer after completion of project. The commissions on these will be reduced and negotiated at later date.” Based on the fact that he had only discussed a single project with Stelluti, and because he still did not know the identity of the customer, Smith believed the addition of this language to mean that BMH agreed to pay commissions to SK on parts and services sold to the unknown customer that were related to the robotic palletizing project.

Upon receipt of the amended agreement, Smith handwrote the word “project” into the agreement between the words “repeat” and “order” so that it read, “BMH agrees to pay Stelluti Kerr a commission of 15% of total project equipment sold including all repeat *project* orders.” This language was incorporated into the final agreement.

Thereafter, SK went on to perform work on the palletizing project with Continental Mills. Jon Tilmon, a BMH senior sales representative, prepared BMH’s budget proposal for the conveyor system. From his conversations with Smith, Tilmon understood that BMH would pay a 15% finder’s fee rather than commission to SK for providing BMH with the project. By February, 2002, the conveyor system portion of the project was complete and BMH had invoiced Continental Mills for \$374,215.00 for BMH’s work on the project. Pursuant to the Letter Agreement entered into between BMH and SK, BMH paid \$56,132.25 (or 15%) for the project.

On January 3, 2004, Tilmon sent to Stelluti an e-mail entitled “Happy New Year,” wherein Tilmon advised Stelluti that SK was entitled to a commission for a “Case Line B project” at Continental Mills. Stelluti was unaware that SK was owed any such commissions. What followed was a series of communications between BMH and SK, with each entity requesting from the other various invoices and accounting documents. Sometime near the end of January, 2004, Stelluti became aware of BMH’s position that SK was entitled to commissions derived directly from the initial project, but was not entitled to commissions on all subsequent projects between BMH and Continental Mills. Stelluti later learned that BMH was doing work for Continental Mills other than on the original project and the related Case Line B project.

Around February 4, 2004, Stelluti and Smith talked on the telephone for nearly an hour discussing their differing interpretations of the Letter Agreement. Stelluti believed that SK was entitled to a 15% commission on all sales made by BMH or work performed by BMH for Continental Mills, whereas BMH believed that it only owed commissions for the original project or work directly related to the original project. It was during this phone call that the parties became aware of their irreconcilable different interpretations.

On April 27, 2004, BMH tendered to SK what it characterized as the final commission check, and stated that SK’s acceptance of the check constituted a closure and final termination of their business relationship. Stelluti, believing SK’s entitlement to ongoing commissions, did not cash the check. The relationship

continued to deteriorate, resulting in SK filing a lawsuit against BMH in Texas. That action eventually was dismissed by the Texas Court of Appeals for lack of personal jurisdiction.

Thereafter, SK filed the instant action in Jefferson Circuit Court alleging breach of contract and breach of the covenants of good faith and fair dealing. At issue was whether SK was entitled to ongoing commissions for all sales by BMH to Continental Mills, or whether the Letter Agreement provided that BMH owed to SK commissions only for the original project and related projects. The parties filed cross motions for summary judgment on the contract issues. The court ruled that BMH was obligated to pay commissions as set forth in the Letter Agreement (also referred to in the record as the Agreement Letter), reserving for later adjudication the scope of that agreement.

The circuit court later concluded that BMH's obligation to pay commissions related only to the initial project and not to all subsequent projects in perpetuity. In so doing, it stated,

Examining the four corners of the Letter Agreement itself, the Court concludes that certain ambiguities exist regarding the compensation Stelluti Kerr should receive from sales BMH makes to Continental Mills. Taken alone and isolation from the other language in the Letter Agreement, one can understand how Stelluti Kerr would argue that it is entitled to receive a 15% commission on all sales BMH makes to Continental Mills, in perpetuity. Indeed, paragraph 3 reads: "BMH agrees to pay commissions on parts and services sold to the customer after completion of project. The commissions on these will be reduced and negotiated at later date."

However, paragraph 3 cannot be read in isolation - the entire Letter Agreement must be read as a whole. (Citation omitted). The word “project” is mentioned eight times in the Letter Agreement. Paragraph 2 mentions the word “project” twice and provides that “BMH agrees to pay Stelluti Kerr a commission of 15% of total project equipment sold including all repeat project [handwritten] orders.” Read together, one can reasonably conclude that paragraph 3’s reference to commissions is merely an expansion of paragraph 2, requiring BMH to pay Stelluti Kerr a commission of 15% on all “repeat project [handwritten] orders.” Moreover, at the time the Letter Agreement was executed, the term “project” was not defined, as Stelluti Kerr had yet to disclose details regarding the project or the unknown customer. While the Letter Agreement considered as a whole is ambiguous and does not provide sufficient information to discern the parties’ intent, the circumstances surrounding the Letter Agreement and the parties’ conduct sheds [sic] light on this issue.”

The circuit court then found that in light of the all of the facts surrounding the parties’ negotiations and performance of the Letter Agreement, and considering that Kentucky’s case law provides that agreements in perpetuity are not favored and that ambiguities should be construed against the drafter - in this case SK - the Letter Agreement provided that BMH pay SK commissions on all sales to Continental Mills related to the original project. The facts relied on to reach this conclusion included the limited nature of SK’s involvement with Continental Mills after the design phase was completed, and BMH’s internal documentation throughout wherein it characterized the obligation as a “finder’s fee.”

Additionally, the court stated that,

It was in this June 25 draft of the Letter Agreement that the controversial paragraph 3 first appeared

providing that “BMH agrees to pay commissions on parts and services sold to the customer after completion of the project.” The problem with accepting as true Mr. Stelluti’s interpretation of paragraph 3 (that BMH is to pay commissions indefinitely), is that it requires one to also find that BMH was obligating itself to pay commissions to Stelluti Kerr on future projects that did not yet exist. The negotiations favor finding that the Letter Agreement only require [sic] BMH to pay commissions to Stelluti Kerr for sales related to the original or originating project.

The court went on to find in favor of BMH on SK’s claim of violation of the covenant of good faith and fair dealing. It also ruled that under Kentucky law, the contract at issue was terminable by either party, and that it was terminated by BMH during the parties’ February 4, 2004 telephone conversation. The court awarded to SK a yet unpaid commission of \$16,583.88 plus pre-judgment interest, and imposed the “American Rule” on attorney fees with each party being responsible for its own fees. This appeal followed.

SK first argues that the circuit court erred in ruling that the Letter Agreement was a “contract in perpetuity” and was thus terminable by BMH after a reasonable time. SK maintains that a contract will not be construed to confer a right in perpetuity unless unequivocal language compels such a construction, and that the agreement at issue does not confer perpetual rights but terminates when BMH ceases selling equipment, parts and services to Continental Mills. As such, SK contends that the Letter Agreement was not terminable by BMH, and that the court erred in failing to so find.



Kentucky law does not favor contracts running in perpetuity. *Brownsboro Road Restaurant, Inc. v. Jerrico, Inc.*, 674 S.W.2d 40 (Ky. App. 1984). However, if a contract covers no definite period, it may be terminated by either party at will. *Id.* In the matter at bar, the circuit court determined both SK's interpretation and BMH's interpretation of the contract must result in a finding that the contract has no fixed termination date and is therefore terminable at will. Under SK's interpretation of the contract, BMH is required to pay commissions for as long as BMH continues to provide sales, parts and services to Continental Mills.

Conversely, the court found that if BMH's interpretation prevailed, there is also no fixed termination date and commissions are owed to SK as long as sales, parts and services are rendered to Continental Mills under the original project. Thus, the court found that under either interpretation, the contract was of perpetual duration and was therefore terminable at will. The court went on to find that the facts and the law supported BMH's interpretation; therefore, BMH was entitled to end its relationship with SK after the original project had run its course. The court determined that the Letter Agreement was terminated on February 4, 2004, during the parties' telephone call. The record and the law support this conclusion, and we find no error.

In a related argument, SK contends that even if the Letter Agreement is found to be a contract in perpetuity, it is only terminable after a reasonable period of time. In support of this contention, it directs our attention to *Electric and Water Plant Bd. of the City of Frankfort, Kentucky v. South Central Bell Telephone Co.*,

805 S.W.2d 141, 143 (Ky. App. 1990). SK argues that BMH's termination did not occur after a reasonable period of time pursuant to *Electric and Water Plant*, and that the court erred in failing to so find.

The trial court's rulings are presumed to be correct, and the burden of demonstrating error rests with the party claiming error. *City of Jackson v. Terry*, 302 Ky. 132, 194 S.W.2d 77 (Ky. 1946). SK contends that the circuit court erred herein by failing to demonstrate that BMH's termination occurred after a reasonable period of time. The burden on appeal, however, rests with SK to show that the termination did not occur after a reasonable period of time. *Id.* SK has not demonstrated that the original project did not end within a reasonable period of time prior to BMH's termination and we find no basis for concluding that the court erred on this issue.

SK's third argument is that the circuit court erred in concluding that BMH did not breach its covenants of good faith and fair dealing. It notes that all contracts contain an implied covenant of good faith and fair dealing under which all parties had a duty to carry out the letter and spirit of the agreement, and it argues that the court found below that BMH knowingly failed to provide SK with accounting documentation to which SK was entitled in order for it to know what it was owed under the agreement. Because of this finding, SK maintains that the court erred in then ruling that BMH did not violate the implied covenant of good faith and fair dealing. SK also argues that BMH violated this covenant when it

tendered to SK a letter and check in the amount of \$3,079.64 which by BMH's admission was less than what it owed to SK.

SK correctly asserts that the circuit court rendered a finding that BMH did not provide SK with all of the accounting documentation that it sought. However, the court opined that BMH's action in this regard was not nefarious, but was based on BMH's reasonable belief that it owed commissions arising only from the original project and not for all subsequent unrelated sales to Continental Mills. "Within every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out." *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005), citing *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154, 156 (Ky. 1991). "An implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights." *Hardwoods* at 11. The circuit court determined that the Letter Agreement required BMH to pay commissions to SK arising only from the original project; therefore, it found that BMH's failure or refusal to provide accounting documentation unrelated to the original project did not breach its covenant of good faith and fair dealing. Additionally, BMH acknowledged throughout that it owed to SK additional commissions arising from the original project, and we cannot conclude that its tender of the \$3,079.64 check to SK constituted a breach of its covenant. We find no error on this issue.

SK goes on to argue that the circuit court erred in resolving ambiguities about the word “project” in favor of BMH, and improperly considered the unilateral course of performance of BMH in construing the contract. SK characterizes as erroneous the circuit court’s determination that the Letter Agreement was ambiguous, arguing that the contract’s terms are definite, certain and subject to but one reasonable interpretation. It contends that even if the term “project” is ambiguous, the ambiguity must be resolved in favor of SK and against BMH resulting in a determination that BMH owes commissions to SK for all future sales to Continental Mills even if unrelated to the original project.

In ruling on this issue and as noted above, the circuit court found an ambiguity in the agreement’s reference to the “project” in paragraphs 2 and 3. In its view, on one hand the agreement appeared to grant SK commissions for all future sales by BMH to Continental Mills irrespective of their relation to the original project. On the other hand, the agreement also appears to evince the parties’ intent that commissions were owed only as they were derived from the original project. The court opined that paragraph 3 cannot be read in isolation, but rather the Letter Agreement must be read as a whole. Paragraph 2 sets out the word “project” twice and states that “BMH agrees to pay Stelluti Kerr a commission of 15% of total project equipment sold including all repeat project [handwritten] orders.” The court determined that read together, paragraph 3’s reference to commissions is merely an expansion of paragraph 2, requiring BMH to pay SK a commission of 15% on all repeat project orders. Additionally, the

court recognized that at the time the Letter Agreement was executed, the term “project” was not defined and SK had yet to disclose the unknown customer or the details of the project.

The circuit court first looked to the four corners of the contract, and upon finding an ambiguity, looked outside the contract to discern the parties’ intentions. It did so in conformity with *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440 (Ky. 2005), which allows the court to look outside the contract to resolve ambiguity. In so doing, the circuit court recognized that from the outset, BMH regarded the commissions as a “finder’s fee,” and that SK’s interpretation would bind BMH to a fixed commission on all future projects irrespective of type and duration, and irrespective of SK’s involvement. We have no basis for concluding that the circuit court erred in finding ambiguity nor in resolving the ambiguity in favor of BMH.

Lastly, SK argues that the circuit court erred in failing to enter an award of attorney fees. Citing *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754 (Ky. App. 1984), SK acknowledges that such fees are not ordinarily allowable as costs or damages and that “a trial court always had discretion to award attorneys fees depending on the particular circumstances of each case.” It contends that BMH acted in bad faith and with flagrant dishonesty in its knowing concealment and falsification of business records, and in so doing breached its duty of good faith and fair dealing thus justifying an award of attorneys fees. We find no error on this issue as the circuit court properly found no violation of the covenant of

good faith and fair dealing. We cannot conclude that the court abused its discretion in failing to award attorneys fees.

For the foregoing reasons, we affirm the Amended Findings of Fact, Conclusions of Law and Judgment of the Jefferson Circuit Court.

ALL CONCUR.

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