NO. COA09-1369

NORTH CAROLINA COURT OF APPEALS

Filed: 1 February 2011

SOUTHEAST BRUNSWICK
SANITARY DISTRICT,
Plaintiff,

v. Brunswick County
No. 08 CVS 3266

CITY OF SOUTHPORT,
Defendant.

Appeal by plaintiff from order entered 22 July 2009 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 14 April 2010.

Andresen & Arronte, PLLC, by Mark E. Carlson, for plaintiff-appellant.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for defendant-appellee.

GEER, Judge.

Plaintiff Southeast Brunswick Sanitary District ("the District") appeals from an order granting summary judgment to defendant City of Southport ("the City"). The District contends on appeal that genuine issues of material fact exist with respect to its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of quasi-contract. Our review of the record reveals, however, that the uncontroverted evidence establishes that the District's own anticipatory breach of

the parties' agreement excused the City from its obligations under the agreement. Consequently, no material issue exists as to whether the City breached the parties' contract. With respect to the implied covenant of good faith and fair dealing, the District has not demonstrated that the City acted in bad faith with respect to any obligations arising under the contract. Finally, the District's quasi-contract claim is barred by the existence of an express contract governing the same subject matter. We, therefore, affirm the trial court's summary judgment order.

Facts

Beginning in at least 1996 and continuing up until 2004, the District and the City entered into a series of agreements pursuant to which the District furnished wastewater treatment services to the City. On 8 October 2004, the District and the City entered into a contract ("the Contract") providing for a three-phase project that, when fully completed, would enable the District to meet all of the City's wastewater treatment needs — projected in the Contract to be up to 951,000 gallons per day ("gpd"). The Contract superseded all prior agreements and anticipated that upon completion of the three phases, the City's present and future projected wastewater needs would be fully satisfied.

The Contract set out specific sewer usage and impact fees that the City would be required to pay the District. In addition, the Contract provided that so long as the District "is capable of providing to [the City] its sewerage treatment needs, [the City] shall not acquire or produce sewer treatment capacity from any

source other than the [District] without the express written consent of the [District] . . . ." The Contract could "be terminated, modified or amended only with the written consent of the parties . . . ."

The Contract specified that the parties would retain the engineering firm of W.K. Dickson & Co. ("WKD") to perform engineering studies and cost estimates relating to modifications of the wastewater collection system, expansion of the wastewater facilities, and adequate disposal of the effluent resulting from expansion. Further, both parties agreed to a March 2003 preliminary design report prepared by WKD ("the 2003 Report") "as the basis for each parties [sic] cost estimate, construction and scheduling of the services in order to accomplish the services contemplated herein." The 2003 Report was incorporated into the Contract by reference.

Beginning in 2006, even before phase one was completed,[1] the parties entered into negotiations and discussions related to the District's desire to expand its treatment capacity to 1.5 million gpd and to amend other terms of the Contract. Neither party disputes that they both engaged in regular communications concerning possible changes to a number of provisions in the Contract. The parties' discussions covered several topics, including the District's desire to increase and otherwise modify the fees the City would be required to pay the District for its

[1]Phase one of the Contract was completed in September 2006. After its completion, temporary service interruptions occurred in December 2006 and August 2007.

treatment of the City's wastewater, as well as the possibility of merging phases two and three of the project into one phase. The parties also met with WKD on multiple occasions to discuss proposals.

On or about 17 November 2006, the District circulated its first proposed mark-up of the Contract to the City with suggested changes for the City's review. On 26 March 2007, the City informed the District that the City's manager and utilities director were meeting to discuss the proposed amendments to the Contract. In May 2007, WKD prepared another preliminary engineering report ("the 2007 Report") modifying the three-phase project by combining the second and third phases into a single phase and updating cost projections.

On 21 May 2007, the City sent the District a memorandum outlining the City's position with respect to the proposed amendments. The City stated: "Under our present agreement, the City is obligated to purchase allocation in the [District] plant by the gallon, and pay for actual treatment by the gallon as well. We believe this philosophy should be the basis of any revised agreement dealing with disposal." The following day, the District responded by e-mail that "[s]ince each of us are [sic] currently seeking funding and grant assistance we both need to agree on the future course of action quickly."

On 4 June 2007, the District sent the City a letter with "two options for the City to consider." The first option was to keep the existing Contract, but to revise one sewer rate. The second

option was to revise the Contract to reflect increased treatment at the District's plant, add a third sewer rate, and purchase spray from the City. The District stated that the "new sewer fees are reflective of the City's portion of the expansion costs of the treatment plant, calculated over forty (40) years and include a credit for impact fees collected." In its response to the proposal, the City emphasized its belief that the Contract was "valid and binding, particularly with regard to the fees and rates previously negotiated in good faith." It also noted ongoing concerns with the District's inability to adequately handle the City's phase one wastewater treatment needs under the Contract. The City, however, suggested counterproposals for the District's consideration.

On 7 November 2007, the District submitted to the City another proposed amendment to the Contract. The City rejected this proposal by letter dated 16 November 2007. The City explained that since it had been notified that it could reduce its per gallon residential reservation requirement, it was confident that the amount agreed upon in the Contract (951,000 gpd) was more than adequate for the City "now and into the distant future"; thus it saw no need for continued discussion "related to possible revision" to the Contract.

On 17 December 2007, the District sent the City an e-mail addressing the status of the parties' discussions concerning the Contract. The e-mail indicated that recent events had caused the District's board to re-evaluate the Contract. It further stated:

"Without a new agreement we cannot proceed ahead with the current project and schedule. Our deadline is March 31, 2008." On 25 January 2008, the District sent another e-mail to the City setting out two options: Updating the Contract or terminating the Contract. The District stated that "[t]he date to make a decision, either together or unilaterally, is March 31, 2008."

On 19 March 2008, the District sent the City another letter, emphasizing the importance of the 31 March 2008 date and stating, "We will also need to amend [the Contract] to reflect today's environment. Since 2004, wastewater treatment costs and expansion costs have increased." Shortly afterwards, on 25 March 2008, the District sent another letter to the City offering proposed rate structures and revised terms to the Contract. The following month, however, the City began discussions with Brunswick County ("the County") to acquire wastewater treatment services from the County.

Although there was never any written amendment to the Contract, the District sent the City a letter on 3 June 2008 stating that the District was "ready and agreeable to continue the partnership with the City of Southport pursuant to the terms of the [Contract] dated October 08, 2004, as amended by the continuing engineer reports and the rate structure presented to the City" by the District's 25 March 2008 letter. Then, on 10 June 2008, the District sent the City another letter offering new proposed rates and revised terms from those previously proposed in the 25 March 2008 letter. The letter concluded by asserting: "All agreed that if the City does continue with the District, the 2004 agreement

will be modified to reflect the above rates and also other needed changes to the agreement."

By mid-2008, when the City and the District had not yet agreed to a new contract, the City entered into an agreement with the County to handle the City's present and future wastewater needs. In response, the District filed suit against the City, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and, alternatively, breach of quasi-contract. The District asserted that the City's "well-publicized negotiations with the County regarding plans to obtain wastewater treatment services from the County constitute clear and unequivocal intent to breach the [Contract] and any amendments thereto." The City filed an answer that included a counterclaim seeking a declaratory judgment that the Contract had terminated as a result of the District's actions, as well as counterclaims for breach of contract, attorneys' fees and costs, and the right to refund or reimbursement.

On 8 June 2009, the City filed a motion for partial summary judgment as to all of the District's claims. The trial court held a hearing on the City's motion on 29 June 2009. On 2 July 2009, the court entered an order granting the City's motion as to all of the District's claims. The District filed a motion to alter or amend the order, after which the trial court entered an amended order purporting to certify the decision for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure. The District appealed the amended order to this Court.

Interlocutory Appeal

Since the City's counterclaims remain pending, this appeal is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). An interlocutory order is immediately appealable under only two circumstances: (1) when the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure; and (2) if the order or judgment affects a substantial right of the appellant that would be lost in the absence of immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001).

The District first contends that the trial court's designation of the order as "a final judgment" and certification of the order "for immediate appeal" made the judgment immediately appealable under Rule 54(b). In order to fall within Rule 54(b), however, the trial court must have determined not only that the order is final as to one or more parties or claims, but must also have "determine[d] that there is 'no just reason for delay' and include[d] a statement to that effect in the judgment . . . ." *Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981) (quoting N.C.R. Civ. P. 54(b)).

When an order or judgment "does not state that the judge found no just cause for delay . . . , the order is not an immediately appealable 'final judgment' under Rule 54(b) . . . ." *Id.* at 266-67, 276 S.E.2d at 721-22. *See also Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) ("Because the trial court in the case *sub judice* made no certification as required by Rule 54(b) of the North Carolina Rules of Civil Procedure, the first avenue of appeal is closed to [appellant]."); *Hall v. Hall*, 28 N.C. App. 217, 218, 220 S.E.2d 158, 158 (1975) (dismissing appeal from interlocutory order because "judge did not find there is no just reason for delay"). Since the order in this case did not include a finding that there is "no just reason for delay," Rule 54(b) cannot provide a basis for appellate jurisdiction.

Therefore, in order for the District to immediately appeal the summary judgment order, the District must demonstrate that a substantial right will be adversely affected if this order is not reviewed before entry of final judgment on the remaining issues. *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253-54. The District argues that the dismissal of its claims affects a substantial right because there are factual issues common to the dismissed claims and the pending counterclaims.

In *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982), the Supreme Court recognized that, generally, the right to avoid two trials is not a substantial right, but the right to avoid two trials *on the same issues* may involve a substantial

right. "Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.* *See also J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 9, 362 S.E.2d 812, 817 (1987) (holding that summary judgment order as to plaintiff's claims, leaving defendant's counterclaims pending, affected substantial right because of "presence of identical factual issues in both proceedings" that could "produce inconsistent verdicts").

Here, the District's claims and the City's defenses and counterclaims hinge on the issue of which party breached the Contract. Were separate trials to take place as to the City's counterclaims and the District's claims, identical factual issues would be present, and the respective juries could render inconsistent verdicts based on their findings as to whether the District or the City breached the Contract. We, therefore, conclude that the summary judgment order in this case affects a substantial right, and the appeal is, therefore, properly before us. *See Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 38, 626 S.E.2d 315, 321 (concluding, where buyer's counterclaim asserted fraud, negligent misrepresentation, unfair and deceptive trade practices, and breach of contract claims against seller, that seller's claims and buyer's claims involved identical issues of fact, and if buyer's interlocutory appeal was not allowed, there

was possibility of inconsistent verdicts resulting from same factual issues), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006).

Denial of Motion for Continuance

Turning to the merits of the appeal, the District first contends that the trial court should have granted the District's motion to continue the summary judgment hearing. The trial court had entered a scheduling order setting a deadline for completion of discovery and mediation 30 days prior to the 30 November 2009 trial date. In early May 2009, after the exchange of written discovery and the taking of initial depositions, counsel for the District e-mailed counsel for the City, suggesting that it was "apparent that a great deal of further discovery is required."

The next month, on 18 June 2009, nine days after the City moved for summary judgment and noticed the hearing for 29 June 2009, the District served subpoenas duces tecum and notices of non-party depositions of two individuals with WKD. On 22 June 2009, the District filed a motion to continue the summary judgment hearing. On 2 July 2009, the court entered a written order denying the District's motion for a continuance.

Our Supreme Court has noted that "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). As a

general principle, a summary judgment motion should not be decided until the parties have had a reasonable opportunity to complete discovery necessary to any issues likely to be raised on summary judgment. *See Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) ("Thus, motions for summary judgment generally should not be decided until all parties are prepared to present their contentions on all the issues raised.").

Rule 56(f), however, specifically provides that, "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." The Court has repeatedly held that where a party moves for a continuance but fails to file an affidavit pursuant to Rule 56(f), the trial court does not abuse its discretion in denying the party's motion to continue. *See, e.g.*, *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 214, 580 S.E.2d 732, 736 (2003) ("A trial court does not abuse its discretion when it denies motions to continue a hearing on a motion for summary judgment if a party fails to file and give notice of a motion to continue and submit an affidavit pursuant to Rule 56(f)."), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 711, 433 S.E.2d 449, 459 (1993) (holding defendants failed to demonstrate abuse of discretion where, *inter alia*,

"defendants did not file any affidavits detailing the facts necessary to justify their request for a continuance as required by G.S. § 1A-1, Rule 56(f)"), *appeal dismissed and disc. review denied*, 335 N.C. 552, 441 S.E.2d 110 (1994).

Here, the record reveals that the District's motion to continue the hearing did not attach any Rule 56(f) affidavits explaining the reasons why further discovery was necessary in order to present facts "essential" to its summary judgment opposition. Moreover, we note that in its brief on appeal, the District does not even acknowledge the existence of Rule 56(f). The District asserts generally that depositions it could have taken from WKD affiliates were "likely to provide key testimony" and were "likely to yield substantial evidence material to the issues of contract formation, modification and breach," but the District still does not articulate why such testimony was necessary to the District's opposition. Because the District failed to attach any affidavits pursuant to Rule 56(f), we conclude that the trial court did not abuse its discretion in denying the District's motion for a continuance.

Summary Judgment

The District next argues that the trial court erred in granting the City's motion for summary judgment because issues of fact exist. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a

judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.* Rule 56(e) provides that the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." This Court reviews de novo a trial court's decision to grant summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

A. Breach of Contract Claim

In arguing that a genuine issue of material fact exists with respect to whether the City breached the Contract, the District points out that the City entered into a contract with the County for sewage treatment services in violation of the Contract provision limiting the City's right and ability to obtain wastewater treatment services from any entity other than the District. The City, however, contends that prior to its negotiations with the County, the District repudiated the Contract, thus excusing the City from its obligations under the Contract.

"The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the

contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party." *Dixon v. Kinser*, 54 N.C. App. 94, 101, 282 S.E.2d 529, 534 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E.2d 805 (1982). Our Supreme Court has observed, however, that when "a seller refuses to perform his contract at the agreed price and demands a higher price," the buyer may be deemed to have waived the breach if it goes ahead and pays the higher price unless the buyer shows that it paid the higher price under economic duress. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 664-65, 194 S.E.2d 521, 535 (1973).

Here, Louis Roberti, the District's chairman, sent the City an e-mail on 17 December 2007 stating:

> Recent events have caused changes and they have necessitated the Board to re-evaluate a number of items in the current Agreement.
>
> . . . I will explain each item that needs to be changed, why the change, and a new format to the current agreement.
>
> The District anticipates spending almost $15M to expand its facilities to accommodate our needs and the needs of Southport. *Without a new agreement we cannot proceed ahead with the current project and schedule. Our deadline is March 31, 2008.*

(Emphasis added.) On 25 January 2008, Roberti again e-mailed the City, stating: "Our options, on one hand, is [sic] to update the October 8, 2004 agreement based upon today's environment or, the other extreme, to terminate the agreement." Then, on 19 March 2008, Roberti sent a letter stating:

> We need to come to closure, by March 31, 2008, on your commitment to the District to continue its treatment of Southport's wastewater and the required plant expansion. . . .
>
> March 31, 2008 is a critical date since the engineers will be submitting, April 1, 2008, Environmental Assessments (EA) and Preliminary Engineering Reports (PER) to the USDA in support of funding requests to them for the City and the District. They will not allow us to go ahead without both of our commitment to our agreement.
>
> We will also need to amend the agreement to reflect today's environment. Since 2004, wastewater treatment costs and expansion costs have increased.

The District thus repeatedly told the City that the City would have to agree to amend the Contract to provide more favorable terms to the District, or the District would terminate the Contract. While Roberti, in his deposition, characterized these communications as "a threat to be quite honest," he claimed that the District would not have unilaterally terminated the Contract: "Would we have unilaterally, you know, no, of course not. We wouldn't have done that." It is, however, the District's actual representation to the City and not the District's secret motivation or intention that mattered with respect to anticipatory breach of contract. *See Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510-11, 358 S.E.2d 566, 569 (1987) ("In order to constitute a repudiation, a party's statement must be sufficiently positive to be reasonably interpreted that a party will not or cannot substantially perform. . . . *[I]f a party to the contract states* that he cannot perform except on some condition which goes outside the terms of his contract then the statement

will constitute a repudiation." (emphasis added) (internal quotation marks omitted)); *Dixon*, 54 N.C. App. at 101, 282 S.E.2d at 534 ("*[W]hen a party to a contract gives notice* that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party." (emphasis added)).

Since the undisputed evidence establishes that the District notified the City that it would not perform the Contract unless the City agreed to amend the terms of the Contract, the District repudiated the Contract, and the City was no longer obligated to perform under the Contract. The District argues, however, that a genuine issue of material fact existed as to whether the Contract was amended.

The District contends that WKD's 2007 Report superseded the 2003 Report (which was incorporated by reference in the Contract) and that the 2007 Report was thus incorporated in and effectively modified the terms of the Contract. N.C. Gen. Stat. § 160A-16 (2009), however, specifically requires that "[a]ll contracts made by or on behalf of a city shall be in writing." While the District argues that "it is possible that a modification of the 2003 Report could effect a modification of the underlying 2004 Contract, so long as any such modification was in writing as required by N.C. Gen. Stat. § 160A-16," the District does not point to any evidence that the City agreed in writing that the 2007 Report would modify the terms of the Contract. The District cites no authority to

support its theory that N.C. Gen. Stat. § 160A-16's writing requirement does not require that the City's agreement be in writing, but rather can be met by a writing prepared by a third party and not adopted in writing by the City. We, therefore, reject the District's suggestion that WKD's preparation of the 2007 Report effected a modification of the Contract. *See Concrete Machinery Co. v. City of Hickory*, 134 N.C. App. 91, 95, 517 S.E.2d 155, 158 (1999) (holding that even if private corporation orally consented to modify easement given to city to construct and maintain sewer, oral agreement to relocate easement was not enforceable, since, *inter alia*, all contracts made by city had to be in writing).

In accordance with N.C. Gen. Stat. § 160A-16, we further reject the District's suggestion that "[t]he real question is whether the parties established sufficient mutual assent with respect to the modification of the 2004 Contract by virtue of the modification of the 2003 Report." Since the City did not agree in writing to increase the rates, the District was not entitled to demand any terms other than those provided for in the Contract.

The District's repeated threats — that if the City did not assent to a new agreement, then the District would terminate the Contract — amounted to an anticipatory breach of the Contract. The City was, therefore, excused from its obligations under the Contract, and there was no material issue whether the City breached the Contract by negotiating with the County. *See Phoenix Ltd. P'ship of Raleigh v. Simpson*, ___ N.C. App. ___, ___, 688 S.E.2d

717, 725 (2009) ("Because by their words and conduct, defendants indicated that they would no longer honor the contract, plaintiff was excused from its obligation to tender the purchase price and had an action for breach of contract."). *See also Millis*, 86 N.C. App. at 511, 358 S.E.2d at 569 (holding contractor's statement that "he was 'busted,' 'belly-up' and would be unable to complete the contract unless he received retainage" which he was not yet entitled to could have constituted repudiation, raising jury issue of anticipatory breach); *Dixon*, 54 N.C. App. at 103, 282 S.E.2d at 535 (holding any failure of second party to fully comply with terms and provisions of option contract was excused because of first party vendor's anticipatory breach when that party, through her attorney, said that she would not go through with agreement). The trial court, therefore, did not err in granting summary judgment to the City on the District's breach of contract claim.

B. Breach of Implied Covenant of Good Faith and Fair Dealing Claim

The District further contends that the trial court erred in granting summary judgment on its claim for breach of the implied covenant of good faith and fair dealing. "It is a basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement. Good faith and fair dealing are required of all parties to a contract; and each party to a contract has the duty to do everything that the contract presupposes that he will do to accomplish its purpose."

Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 40 N.C. App. 743, 746, 253 S.E.2d 625, 627-28 (1979) (internal quotation marks omitted).

At the outset, we note that the District's theory on appeal regarding how the City breached the implied covenant is not the same as the one alleged in the complaint. In the complaint, the District alleged that the City acted in bad faith when it sought to acquire services from the County in April 2008. On appeal, however, the District argues that the City failed to act in good faith when, as early as 2005, the City knowingly and intentionally failed to disclose to the District that the City was pursuing a reduction in its future treatment capacity needs while at the same time working with the District to pursue an even more aggressive expansion of the District's treatment plant than was originally contemplated.

In any event, there is no allegation that the City did anything in bad faith with respect to fulfilling its existing obligations "under the agreement." *Id.* The District's argument in its brief merely characterizes the City as having possibly negotiated in bad faith with the District regarding a new or amended agreement relating to higher rates and increased capacity. And, with respect to the allegations concerning the City's 2008 negotiations with the County, those negotiations could not have been a breach of any implied covenants, as they occurred after the District's anticipatory breach. We, therefore, hold that the trial court also properly granted summary judgment to the City on the

claim of breach of the implied covenant of good faith and fair dealing.

C. Breach of Quasi-Contract Claim

Finally, the District contends that the trial court erred in granting the City's motion for summary judgment on the District's claim for breach of quasi-contract. It is, however, "a well established principle that an express contract precludes an implied contract with reference to the same matter. . . . 'There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing[.]'" *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713-14, 124 S.E.2d 905, 908 (1962) (quoting 12 Am. Jur. *Contracts* § 7 (1938)). *See also Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) ("A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract.").

Here, there was an express agreement between the parties: the Contract. Consequently, there can be no implied contract with reference to the same matter — *i.e.*, the rates the District would charge the City for its wastewater treatment services. The trial

court, therefore, did not err in granting the City's motion for summary judgment on this claim.[2]

Affirmed.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).

[2]Because we reach this conclusion, we need not address the District's argument regarding whether the City had sovereign immunity.