Opinion issued August 4, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00042-CV

HARRIS COUNTY UTILITY DISTRICT NO. 16, Appellant

V.

HARRIS COUNTY MUNICIPAL DISTRICT NO. 36, Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2008-19422

MEMORANDUM OPINION

Appellant Harris County Utility District Number 16 appeals from a summary judgment granted in favor of appellee Harris County Municipal District Number 36. District 16 argues that we do not have jurisdiction to consider its

appeal because the trial court's judgment was not final. *See* TEX. CIV. PRAC. & REM. CODE ANN § 51.001 (West 2008). District 16 alternatively contends that, if the judgment is final, the trial court erred in granting summary judgment in favor of District 36 and in denying its request for declaratory relief.

We reverse the trial court's judgment as to District 16's claims for breach of contract and suit on a sworn account, and we vacate the trial court's judgment as to District 16's declaratory judgment claim and remand for further proceedings consistent with this opinion. The judgment of the trial court is otherwise affirmed.

Background

District 16 and District 36 are both conservation and reclamation districts created under article XVI, section 59 of the Constitution of the State of Texas for the purposes of conserving and developing natural resources within each district's boundaries. TEX. CONST. art. XVI, § 59. As part of its mandate, each district supplies and distributes potable water to customers within its boundaries.

The contract. In September 1983, District 16 and District 36 each signed a Temporary Water Supply and Emergency Interconnect Contract. The contract provides for the construction of an interconnection line between the districts, which allows delivery of emergency water services. "Emergency" is defined in the agreement as "a mechanical or electrical failure causing a loss of 50% or more of the productive capacity of a district's water system." During an emergency, the

district requiring water provides notice of the emergency to the operator for the supplying district, which then supplies water to district in need. The contract provides:

> During an emergency, the District whose water system has failed may unlock and open the valve [at the interconnection point] and [allow] water into its system and may be supplied water by the other District, but only after providing notice of the Emergency to the operator for the other District. The District experiencing the Emergency may continue to receive water during the continuation of the Emergency without further notice to or approval by the supplying District; provided, however, that neither District shall be obligated to supply water hereunder for longer than a Temporary Period [i.e., a period not to exceed 15 days, unless otherwise agreed in writing] and neither District shall be obligated to supply water hereunder in such amounts . . . as will substantially impair the supplying District's ability to provide water to customers within [its] boundaries.

Under article VI of the contract, all water flowing between the districts is to be metered at the interconnection point. The supplying district must read the meter and "bill the using District promptly upon termination of the Emergency or the Temporary Period, whichever is earlier." The price to be paid for water is determined "by applying the rate charged by the supplying District at the time of delivery for potable water services to its highest volume customers within the supplying District's boundaries." Article VI further provides that the district receiving emergency water service must then pay the supplying district within 30 days of receiving the bill. If the receiving district refuses or fails to pay within 60

days of receipt, the supplying district may refuse to supply additional water until payment is made in full.

Article XII of the contract includes general provisions. Section 7.03 specifies a procedure for how the districts approve actions taken pursuant to the contract. It provides that "approvals or consents shall be evidenced by resolutions adopted by the Boards of Directors of the Districts or by an appropriate certificate executed by persons, firm or entities authorized to . . . give approvals or consents [for the Districts] . . . ." It further states that whenever approval or consent is required under the contract, such approval or consent is effective "without regard to whether such approval or consent is given before or after the time required [by the contract]." Section 7.04 states that "[i]n the event that either District is required by any regulatory authority to pay any fee, service charge, penalty, or fine because of, or as a condition to, providing service to the other party pursuant to this Contract, said fee, service charge, penalty, or fine may be billed to the other party as an expense of providing water service . . . in addition to all amounts due [for payment of water services]."

The controversy. Following the completion of construction on the interconnection point, the districts provided emergency water services to each other for over 10 years. In November 1999, the districts extended the contract an

additional 20 years and amended it to allow for in-kind repayment. The "Payment in Kind" provision was added to article VI of the contract. It provides:

> Notwithstanding anything contained in [a]rticle VI to the contract, the Districts may mutually agree to make and accept repayment in kind for water supplied and received during an Emergency. If agreed by the District, the utility system operators for the Districts shall coordinate such repayment in kind.

The amendment to the contract was signed by the president of each district's board of directors on November 12, 1999. On or around the same day, the directors of each district approved the amendment.

The districts employed a joint operator, Severn Trent Environmental Services, Inc., which was responsible for monitoring water flow and accounting for water usage between the districts. After the amendment was adopted, the joint operator maintained a balance sheet reflecting the amount of water received by and supplied to each district. Each month, a Severn Trent engineer would report this information to the boards of directors of each district. From November 1999 until October 2006, neither district invoiced the other for water used during an emergency. Instead, the water was carried on account, and each district, after providing the proper notice, would take water from the other during an emergency. The difference in the number of gallons received by the districts was reported as a balance owed by the receiving district.

Between 1999 and October 2006, District 36 received significantly more water from District 16 than it supplied. After determining that its need for emergency water supply had diminished, District 16 invoiced District 36 in the amount of $192,954.23 in order to settle the account. District 36 refused to pay, and District 16 sued, alleging alternative causes of action for suit on a sworn account, breach of contract, and quantum meruit. District 16 also sought a declaratory judgment confirming its interpretation of the contract.

District 16 moved for summary judgment on all of its claims. With respect to its claims for suit on a sworn account and breach of contract, District 16 argued that it had conclusively established each element of those claims. Alternatively, it argued that it had established its right to recover the reasonable value of the water provided to District 36 in quantum meruit, and that it was entitled to summary judgment on liability. With respect to its declaratory-judgment claim, District 16 argued that if the trial court held that it must take repayment from District 36 in kind, it was entitled to a declaration that District 36 must pay regulatory or administrative fees associated with settling the account.

District 36 filed a response and a cross-motion for summary judgment, arguing that District 16 had failed to meet its summary-judgment burden and that it was entitled to summary judgment against District 16. Attached to these filings were various account records, minutes from the meetings of each district's board of

directors, affidavits, and deposition transcripts. District 36 argued that the evidence attached to its response raised questions of material fact as to each of District 16's claims. It further argued that the evidence attached to its traditional motion for summary judgment conclusively proved that the amended contract language required District 16 to accept in-kind repayment and that District 16 either had expressly agreed to accept repayment in kind or, through its course of conduct, had ratified repayments in kind. District 36 argued that District 16 was precluded from recovering damages in quantum meruit because an express agreement covered the subject matter of the lawsuit, and finally, District 36 argued that District 16 was not entitled to declaratory relief.

The trial court granted District 36's motion in its entirety and denied District 16's. District 16 appealed.

Analysis

I. Appellate jurisdiction

District 16 contends that the judgment is not final because it is incomplete, indefinite, and uncertain. District 36 counters that the judgment, which was granted in its favor, is final because it disposes of all claims and parties.

Except for "a few mostly statutory exceptions" which do not apply here, this court's jurisdiction is limited to appeals from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). We determine whether a decree is a

final, appealable judgment based on the language in the decree and the record of the case. *Id.* A judgment is final and appealable if it disposes of all parties and claims in the case. *Id.*

Both parties moved for summary judgment, and the trial court entered two orders—one denying District 16's motion for summary judgment in its entirety and one granting District 36's. The orders do not contain a Mother Hubbard clause, and neither order expressly dismisses all of District 16's claims. Nevertheless, a judgment is final if it is clear from the record that it disposes of all claims and all parties. *Id.* The record demonstrates that District 36 filed a traditional motion for summary judgment motion on all of District 16's claims. Its prayer for relief requested that the motion "be in all respects granted [and] that [District 16] have and recover nothing . . . ." The trial court granted the motion in its entirety, thereby granting the relief requested by District 36 and effectively entering a take-nothing judgment against District 16. *See id.* Because the language of the order and record in this case reflect the trial court's intent to dispose of all claims and parties in this case with finality, we hold that this court has jurisdiction to consider this appeal. District 16's first issue is overruled.

II. Summary judgment

We review a trial court's summary-judgment decision de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail, the

movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *see* TEX. R. CIV. P. 166a(c). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). In deciding whether there is a disputed issue of material fact precluding summary judgment, we take as true evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in its favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

When, as in this case, both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment proof presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Valence*, 164 S.W.3d at 661; *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). If the order granting summary judgment does not specify the grounds on which it was granted, the appealing

party must demonstrate on appeal that none of the proposed grounds is sufficient to support the judgment. *Rogers v. Ricane Enter., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989); *Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

A. Suit on a sworn account and breach of contract

A suit on a sworn account is "a procedural tool that limits the evidence necessary to establish a prima facie right to recover on certain types of accounts." *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *see* TEX. R. CIV. P. 185. To establish a claim under Rule 185 of the Rules of Civil Procedure, a plaintiff must allege that: it sold and performed services for the defendant; the claim is due; the charges were just and true; all lawful offsets, payments, and credits were applied; and the damages are liquidated. The plaintiff must also include in its petition a systematic record of the services provided, which shows with a reasonable degree of certainty the name, date, and charge for each item and provides details on how the total amount was determined. *Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958); *Hou–Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ).

To prevail on its breach of contract claim, District 16 must prove the essential elements of a breach of contract claim, which are: (1) the existence of a

valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of contract by the defendant; and (4) damages sustained as a result of the breach. *Williams*, 264 S.W.3d at 235–36 (citing *Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

The summary judgment entered by the trial court was proper as to District 16's suit on a sworn account and contract claim only if District 36 conclusively negated at least one essential element of each of District 16's causes of action or conclusively established each element of an affirmative defense. *Sci. Spectrum*, 941 S.W.2d at 911. In its summary-judgment motion, District 36 argued that the amended contract requires in-kind repayment; the districts expressly agreed to accept in-kind repayment; and in the absence of an express agreement, District 16 ratified repayment in kind through its course of conduct. District 36 also argued it was excused from its obligation to pay because District 16 had failed to perform and thus materially breached the contract.

1. Whether the contract required in-kind repayment. In its motion for summary judgment, District 36 argued that the amended contract only allows for in-kind repayment. We construe this argument as an assertion by District 36 that it did not breach the contract by refusing to pay in cash. District 16 argued in its response that the amended contract does not require in-kind repayment but rather, establishes alternative methods of payment, i.e., the supplying district may elect to

bill and receive monetary repayment or the districts may mutually agree to make and accept repayment in kind for water supplied and received during an emergency. On appeal District 16 contends that the trial court erred in granting summary judgment on this ground because "the language of the contract does not require in kind repayment."

Article VI, sections 6.03 and 6.04 of the contract provide that upon the termination of an emergency or the temporary period, the supplying district "shall bill the using District promptly" for water taken during the emergency. The 1999 amendment, which added section 6.05 to article VI, provides that "[n]otwithstanding anything contained in [sections 6.01 to 6.04] to the contrary, the Districts may mutually agree to make and accept repayment in kind for water supplied and received during an Emergency. If agreed by the District, the utility system operators for the Districts shall coordinate such repayment in kind."

In determining the meaning of a particular provision in a written contract, courts must examine and consider the entire writing. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). District 36's interpretation is contrary to the plain language of the amended contract. *See Valence*, 164 S.W.3d at 662 ("Contract terms are given their plain, ordinary, and generally accepted meanings . . . ."). Section 6.05 was added to the existing payment terms in the original contract, and states that the districts "may" mutually agree to make and accept repayment in

kind. There is no language indicating that in-kind repayment is the exclusive method of payment or that the districts must accept repayment in kind, absent a mutual agreement between them. Therefore, the contract does not require in-kind repayment, to the exclusion of cash payment, and we cannot affirm summary judgment on this ground.

2. Whether District 16 expressly agreed to accept in-kind repayment or, by its course of conduct, waived the express agreement requirement. District 36 argues that District 16 either expressly agreed to accept in-kind repayment or ratified in-kind repayment through its course of conduct. District 16 contends that District 36 failed to proffer conclusive evidence of an agreement to accept in-kind repayment, and it argues that its course of conduct is irrelevant and that District 36's evidence of ratification is immaterial and insufficient. If, as District 36 argues, District 16 agreed to accept in-kind repayment, then District 36 did not breach the contract and summary judgment was proper. *See Sci. Spectrum*, 941 S.W.2d at 911. If, however, District 16 raised a question of material fact as to the existence of an agreement to accept in-kind repayment, then the trial court's summary judgment cannot be sustained on this ground. *See Provident Life*, 128 S.W.3d at 216.

A party seeking to enforce a contract bears the burden of proving that all conditions precedent have been satisfied. *Mensa-Wilmont v. Smith Int'l, Inc.*, 312

S.W.3d 771, 781 (Tex. App.—Houston [1st Dist.] 2009, no pet.). When a party's obligation under the contract is conditioned upon the happening of a future event, the condition must be performed or fulfilled exactly as set forth in the contract before the promise can be enforced. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992); *Beard Family P'ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839, 844 (Tex. App.—Austin 2003, no pet.). Courts may excuse compliance with a condition precedent if requiring its performance will cause extreme forfeiture or penalty and if its existence or occurrence is not an essential part of the parties' bargained-for exchange. *See Lesikar Const. Co. v. Acoustex, Inc.*, 509 S.W.2d 877, 881 (Tex. App.—Fort Worth 1974, writ ref. n.r.e.).

The failure of a condition precedent may also be waived by the failure to insist on performance. *Ames v. Great S. Bank*, 672 S.W.2d 447, 449 (Tex. 1984); *Farmer v. Holley*, 237 S.W.3d 758, 760 (Tex. App.—Waco 2007, pet. denied). Waiver is an affirmative defense and is defined as the intentional relinquishment of a known right or intentional conduct inconsistent with claiming it. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987); *Straus v. Kirby Court Corp.*, 909 S.W.2d 105, 108 (Tex. App.—Houston [14th Dist.] 1995, writ denied). To prove waiver, a party must show that the other party to the contract had knowledge of the right and remained silent or inactive for an unreasonable period of time. *See Tenneco, Inc. v. Enter. Prod. Co.*, 925 S.W.2d

640, 643 (Tex. 1996). Waiver may also be satisfied by showing intentional conduct inconsistent with the claim of right. *Sun Exploration*, 728 S.W.2d at 37. Waiver is ordinarily a fact question. *Tenneco*, 925 S.W.2d at 643. Because waiver is largely a matter of intent, it will not be implied absent a clear intent expressed in words, acts, or conduct. *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996).

Under the terms of the original contract, the districts exchanged emergency water services for cash. The amended contract provides that the districts may mutually agree to make and accept repayment in kind, and if agreed by the districts, the utility system operator for each district is empowered to coordinate in-kind repayment. Section 7.03 requires each district to demonstrate its approval or consent through a board resolution. It states:

> Whenever [the contract] requires or permits any approval or consent to be . . . given by either District . . . [s]uch approvals or consents shall be evidenced by resolutions adopted by the Boards of Directors of the Districts or by an appropriate certificate executed by persons, firms or entities authorized to determine and give approvals or consents on behalf of the Districts pursuant to resolutions adopted by their respective Boards of Directors.

Accordingly, the in-kind repayment provision conditions the supplying district's obligation to accept in-kind repayment on the mutual agreement of the districts; such agreement must be evidenced by a resolution of each district's board of directors.

District 36 argues that the summary-judgment evidence shows that the districts' respective boards approved repayment in kind or, alternatively, that District 16's course of conduct is conclusive evidence of its agreement to accept in-kind repayment. In support of its summary-judgment motion, District 36 attached numerous exhibits, including minutes from the regular meeting of the boards of directors for each district and transcripts of the deposition testimony of District 36's board president and District 16's board secretary. District 36 also relied upon minutes from the September 13, 2002 meeting of District 16's Board of Directors. At that meeting, a member of the board requested that its operator prepare a water usage schedule that calculated the amount of water sold by District 16 to District 36. Another member then recommended that District 16 carry water "on account" until it required emergency water supply from District 36. "The Board concurred with such recommendation and directed [the operator] not to take water from [District 36] unless and until the District experience[d] an emergency requiring such water." District 36 also pointed to minutes from a meeting of its board of directors in which its operator reported that both districts had approved and executed the amendment to the contract and that the Districts would "utilize water on an in-kind basis."

District 36 further argues that District 16's course of conduct between 1999 and 2006 demonstrates that it "ratified the repayment in kind agreement." It notes

that from November 2002 through August 2006, District 16's board of directors consistently carried water on account and approved board minutes, which included the water usage schedule. It argues that District 16's conduct was inconsistent with the intent to bill and collect monetary repayment and that District 16 ratified repayment in kind.

District 16 contends that there is a question of material fact as to whether it adopted a resolution to accept in-kind repayment. It argues that District 36 failed to proffer sufficient summary-judgment evidence to prove as a matter of law that District 16 agreed to accept in-kind repayment. In support of its argument, District 16 relies on the deposition testimony and sworn affidavit of its board secretary, who averred that "[n]o mutual agreement was made . . . that outstanding water . . . was to be repaid in kind." She also testified at her deposition that she did not believe District 16 intended to accept in-kind repayment after the amended contract was signed and that the board resolution to carry water on account was not a resolution to accept in kind repayment and did not satisfy the requirements of section 7.03. She testified that the amendment provided for an alternative method of repayment that had not been available under the original contract, but that District 16 never agreed to accept in-kind repayment because it never voted to that effect.

District 16 further contends that its course of conduct is irrelevant and that District 36's summary-judgment evidence does not conclusively establish ratification of an agreement to accept in-kind repayment. It argues that the alleged ratifying acts, such as approving board minutes, are immaterial because the board minutes do not reflect an agreement to accept in-kind repayment.

As discussed above, the amended contract provides that "the Districts may mutually agree to make and accept repayment in kind." Section 7.03 further states that whenever the approval or consent of the parties is required, "[s]uch approvals or consents shall be evidenced by resolutions adopted by the Boards of Directors of the Districts . . . ." The contract does not include or indicate what language is necessary to evidence a mutual agreement to accept in-kind repayment, nor does it indicate how the parties are to go about making a mutual agreement in writing. District 36 has proffered evidence that District 16 agreed to carry water on account, which tends to establish that District 16 agreed to accept in-kind repayment. However, this evidence is not conclusive, because District 36 has failed to demonstrate that a board resolution to carry water "on account" is equivalent to a mutual agreement "to make and accept in kind repayment" to the exclusion of ever seeking payment in cash. *See Sun Exploration*, 728 S.W.2d at 37. Moreover, deposition testimony and the affidavit from District 16's board secretary raise questions of material fact about the existence of a board resolution

to accept repayment in kind. District 36's argument that District 16's course of conduct "ratified" the agreement to accept payment in kind is also unavailing. Section 7.09 of the contract provides that:

> No waiver or waivers of any breach or default by either party hereto of any terms, covenant, condition, or liability . . . or of performance by the other party of any duty or obligation hereunder, shall be deemed a waiver thereof in the future, nor shall any such waiver or waivers be deemed or construed to be a waiver of subsequent breaches or defaults of any kind, character, or description, under any circumstances.

District 36's summary-judgment evidence does not conclusively establish the existence of an agreement to accept in-kind repayment. Likewise, District 36 does not conclusively establish that District 16 waived or ratified in-kind repayment through its course of conduct. Accordingly, summary judgment cannot be affirmed on the basis that District 16 either expressly or through its course of conduct agreed to accept in-kind repayment.

3. Whether District 36 is excused from making payment because District 16 failed to bill promptly. District 36 argues that if there was not an agreement by the districts to accept repayment in kind, it is excused from making payment because of District 16's failure to bill promptly within 15 days of the termination of an emergency. District 16 argues that it was not obligated to bill within 15 days and that the obligation to bill promptly is not material.

"It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004). However, when a breach is immaterial, the non-breaching party is not excused from future performance and may sue only for the damages caused by the breach. *See Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994). Whether a party's breach of contract is so material as to render the contract unenforceable is a question of fact to be determined by the trier of fact based on the evaluation of several factors, including the extent to which the non-breaching party will be deprived of the benefit that it could have reasonably anticipated from full performance. *See Hernandez*, 796 S.W.2d at 693 n.2; *Henry v. Masson*, 333 S.W.3d 825, 835 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

In this case, District 36 argues that District 16's failure to promptly bill was a material breach, which excused its performance, i.e., its obligation to pay for the water. District 36 contends that section 6.03 of the agreement requires the supplying district to send a bill to the receiving district "promptly following no more than 15 days after the supply of water." In response to District 36's argument, District 16 argues that section 6.03 actually requires the supplying district to bill the receiving district "upon termination of the Emergency or the

Temporary Period, whichever is earlier." While District 16 acknowledges that a "temporary period" may last no longer than 15 days under the contract, it contends that a supplying district does not have an obligation to send a bill within 15 days of supplying water. It also argues that time was not of the essence and that its failure to bill every time it supplied District 36 with water was reasonable given the type of agreement between the parties.

Ordinarily, the determination of whether there has been a material breach is a question for the jury. *See Hernandez*, 796 S.W.2d at 693. But when it is clear that the parties intended that time be of the essence, the failure to timely perform can be a material breach as a matter of law. *See Mustang Pipeline*, 134 S.W.3d at 196. Such an intention is not manifest from the language of this agreement. The contract only requires "prompt" billing, and District 36's summary-judgment motion did not argue that time was of the essence. Moreover, District 36 has not conclusively demonstrated that it was deprived of the benefit it reasonably expected under the agreement. *See Hernandez*, 796 S.W.2d at 693 n.2; *Herter v. Wolfe*, 961 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1995, writ denied). The record does not reflect that District 16 ever refused to supply District 36 with water during an emergency, and District 36 regularly received water usage reports, which stated the balance of water owed to District 16. District 36 has not established as a matter of law that District 16 failed to bill promptly, nor has it conclusively

proved that the failure to bill was a material breach. *See Hernandez*, 796 S.W.2d at 693 n.2. Accordingly, summary judgment cannot be affirmed on this ground.

4. Whether District 36 is excused from performance because of District 16's failure to meter water at the interconnection point. District 36 contends that District 16's failure to meter water at the interconnection point as required by section 6.01 of the contract was a separate material breach that excused its obligation to pay. District 16 argues that the districts had previously agreed upon the method to be utilized to meter water and that any breach on its part was immaterial.

As discussed above, whether a party's breach of contract is material is generally a question of fact to be determined by the trier of fact. *See id*. To support its position, District 36 attached the deposition of Joe Laughlin, the president of District 36's board of directors. Laughlin averred that from June 2001 to September 2006, water supplied under the contract had not been metered. In response, District 16 argued that the method of measuring water had been determined by the district's joint operator and that neither district had ever objected to the methods employed. To support its position, District 16 attached the contract, water usage records, and the affidavit of Juan Montano, an employee of Severn Trent. Article II of the contract provides that the metering equipment "shall be capable of adequately measuring the water to be supplied [and] shall be

subject to the approval of each of the Districts' engineers. . . ." District 16 argued that this alleged breach was not material because the district's joint operator had used the same method to measure the amount of water supplied to the receiving district for over twenty years. Monanto averred that water was measured by calculating the difference between the volume of water taken from the supplying district's metered pumps and the volume of metered water used for maintenance or supplied to customers. At minimum, the evidence proffered by District 16 is some evidence that any failure to properly meter water on its part was an immaterial breach. *See Hudson v. Wakefield*, 711 S.W.2d 628, 631 (Tex. 1986). Because the resolution of these issues involves questions of fact, we conclude that District 36 was not entitled to summary judgment on the ground that District 16 committed a material breach of the contract.

* * *

Because District 36 did not conclusively prove each element of an affirmative defense, and because it failed to disprove an element of each of District 16's claims for suit on a sworn account and breach of contract, we hold that the trial court erred in granting summary judgment with respect to those two claims. We sustain District 16's second and third issues on appeal.

B. Quantum meruit

We next consider whether the trial court properly granted summary judgment as to District 16's alternative cause of action for quantum meruit. In its fourth issue, District 16 argues that the trial court erred in dismissing its quantum meruit claim. District 36 contends that District 16 is precluded from recovering damages in quantum meruit because an express agreement covers the subject matter of the suit. District 36 also argues that "[a]s a municipal utility district, [it] has governmental immunity for all non-tort claims, except those specifically authorized under [sections 271.151 to 271.160 of the Local Government Code]." *See* TEX. LOCAL GOV'T CODE ANN §§ 271.151–.160 (West 2005 & Supp. 2010). District 16 argues that summary judgment was improper, despite the existence of an express contract, because it partially performed, and because District 36 waived its immunity.

Quantum meruit is an equitable and alternative theory of recovery intended to prevent unjust enrichment. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005). A cause of action for quantum meruit arises when a plaintiff establishes that it has provided a valuable service to the defendant, the defendant accepted the service, and the defendant had reasonable notice that the plaintiff expected to receive compensation. *See Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 49 (Tex. 2008). However,

while a party may seek alternative relief under contract and quasi-contract theories, it generally cannot recover under quantum meruit when there is a valid contract covering the services or materials furnished and no exception applies. *In re Kellogg Brown & Root*, 166 S.W.3d at 740. The Texas Supreme Court has recognized only three exceptions to the general rule that an express contract bars recovery under quantum meruit: (1) "when a plaintiff has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract"; (2) "when a plaintiff partially performs an express contract that is unilateral in nature"; and (3) in a construction contract, when a breaching plaintiff may recover the reasonable value of services less any damages suffered by the defendant if the defendant accepts and retains the benefits arising from the plaintiff's partial performance. *See Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988).

None of the exceptions is applicable here. First, District 16 has not been prevented from performing any of its obligations under the contract. Second, this is a bilateral contract, and third, it is not a construction contract. It is undisputed that District 16 supplied a valuable service to District 36, and the parties do not dispute the existence of an express contract covering the emergency water services. Therefore, recovery under a breach of contract claim is available, and recovery under quantum meruit is precluded.

Because we conclude that this theory of recovery was not available due to the existence of an express contract, we do not reach District 36's other arguments. We hold that the trial court properly granted summary judgment against District 16 on the grounds that it could not recover under a cause of action for quantum meruit. District 16's fourth issue is overruled.

C. Declaratory judgment

In its fifth issue, District 16 argues that the trial court erred in denying its summary-judgment request for declaratory relief. District 16 pleaded an alternative cause of action for declaratory judgment. It claimed that it was entitled to a declaration that the party making an in-kind repayment be "obligated to pay any regulatory or administrative fees, service charges, penalties, or fines associated with that repayment, including but not limited to the water importation or pumpage fees" if the trial court determined that it must accept in-kind repayment.

Resolution of the declaratory judgment claim depends on the trial court's resolution of District 16's breach of contract claim. We have already sustained District 16's second issue. Because we reverse and remand on that issue, the declaratory judgment issue is not ripe for resolution on appeal. However, the parties are free to litigate this matter upon remand. Accordingly, we vacate the trial court's judgment granting District 36's motion for summary judgment as to

District 16's claim for declaratory judgment. We also vacate the trial court's judgment denying District 16's as to its declaratory judgment claim.

Conclusion

We reverse the trial court's judgment as to District 16's claims for breach of contract and suit on a sworn account, and we vacate the trial court's judgment as to District 16's declaratory judgment claim and remand for further proceedings consistent with this opinion. The judgment of the trial court is otherwise affirmed.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.