In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00098-CV

CIRRUS WIND I, LLC, APPELLANT

V.

STEPHENS RANCH WIND ENERGY, LLC AND STEPHENS RANCH WIND ENERGY II, LLC, APPELLEES

On Appeal from the 106th District Court
Lynn County, Texas
Trial Court No. 15-12-07252, Honorable Carter T. Schildknecht, Presiding

April 7, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

We have been asked to construe multiple agreements created by the parties to determine who pays what to the local school district. The parties involved are Cirrus Wind I, LLC, (Cirrus), Stephens Ranch Wind Energy, LLC (Stephens I) and Stephens Ranch Wind Energy II, LLC (Stephens II). Apparently, the payment was due the O'Donnell Independent School District (OISD), and Cirrus, Stephens I and Stephens II could not agree on the proportionate share each was to pay. The means of determining that appeared in their contracts, though. But, Cirrus seemed to interpret the clause one

way while Stephens I and II and the OISD read it differently. So, Cirrus turned to the trial court for help by filing a petition for declaratory relief. The two Stephens entities joined issue and everyone moved for summary judgment. The trial court granted that of Stephens I and II, in part. The motion of Cirrus was denied. The latter appealed. We are asked to review the accuracy of the trial court's summary judgment. Upon doing so, we reverse.

Background

In November of 2011, the OISD and Wind-Tex Energy-Stephens, LLC (Wind-Tex) entered into an agreement involving a wind farm project in Lynn County, Texas. The agreement was entitled "Limitation on Appraised Value of Property for School District Maintenance and Operation Taxes" (the Limitation Agreement) and was created pursuant to the Texas Economic Development Act.[1] An amended limitation agreement (Amended Agreement) was later executed by the two entities in October 2012. No one denies that the Amended Agreement remains enforceable.

On December 8, 2011, Wind-Tex assigned its rights to a portion of the wind farm project to Cirrus. The remainder of its rights was assigned to Stephens I on October 16, 2012. Thereafter, Stephens I assigned a portion of its rights to Stephens II in October of 2014. Eventually, Cirrus and the two Stephens entities executed an agreement for "Allocation of Payments and Responsibilities." Through it, they apportioned the "responsibility for certain payments under Articles III and IV of the Limitation Agreement." And, the apportionment was based for the most part on the "nameplate

[1] Among other things, the Texas Economic Development Act, located at § 313.001 *et seq* of the Texas Tax Code, authorized school districts to provide tax relief for certain corporations and limited liability companies that make large investments which create jobs. *See* TEX. TAX CODE ANN. § 313.025 (West 2015).

capacity" or mega-wattage produced by each entity. The payment contemplated included that now at issue, which was due for the 2015-16 school year. It totaled $1,417,806.

As of January 2015, only Cirrus and Stephens I were producing mega-wattage, with the former generating more than the latter. Production from Stephens II began in May of 2015, and it apparently generated more mega-wattage than both Cirrus and Stephens I combined.

When the body tasked with the duty to calculate the apportionment (Moak Casey & Associates) did so, it assigned approximately $1,086,000 to Cirrus, $317,000 to Stephens I, and $14,000 to Stephens II. These calculations were disclosed to the parties on September 28, 2015, but readjusted about a month later, allegedly at the instigation of Cirrus.

As a result of the readjustment, Moak Casey informed the parties that Cirrus was obligated to pay about $355,900 while Stephens I and Stephens II were to pay about $104,000 and $957,700, respectively. This led both of the Stephens entities to appeal the determination per the terms of their contracts. They believed that next to nothing should be assigned to Stephens II since it produced no mega-wattage on January 1, 2015. So too did they assert that the data to be used in making the calculations had to reflect mega-wattage or nameplate capacity as it existed on January 1, 2015.

Stephens I and II derived the January 1st date from their belief that 1) the payments were based on the taxable value of the "applicant's" property, 2) taxable property was appraised at its market value as of January 1 of each year per § 23.01(a) of the Texas Tax Code, and 3) it would be inconsistent to use any date other than

January 1 as the date for determining total nameplate capacity. "Special Counsel" for the OISD apparently agreed with the interpretation proffered by the Stephens entities. Furthermore, his (and therefore the OISD's) agreement was encapsulated in a letter sent to Moak Casey prior to disposing of the Stephens entities' appeal.

Needless to say, Moak Casey readjusted its adjusted figures and informed the parties of the new decision in writing on December 20, 2015. The writing revealed that Cirrus was to pay $1,096,957, while Stephens I owed $320,849. Moak Casey assigned nothing to Stephens II.

Cirrus objected to the December 20th calculations and initiated suit against Stephens I and II for declaratory relief. As previously mentioned, both sides moved for summary judgment, which resulted in the trial court confirming the December 20th figures of Moak Casey. It declared not only that 77.37% of the payment was due from Cirrus while the remainder (22.63%) was the obligation of Stephens I but also that "nameplate capacity" was to "be determined as of January 1 of each year."

Issues and their Resolution

Cirrus questions the trial court's judgment by contending, in effect, that it inaccurately interpreted the contracts at issue. In its view, the trial court and Moak Casey did not heed contractual language requiring that the data used be the "best available current estimates," as "adjusted from time to time." The need to address this and other pending questions leads us to first reiterate various long-standing rules applicable to contract interpretation.

First, sophisticated parties have broad latitude in defining the terms of their business relationship. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 58 (Tex. 2008),

quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) (articulating the principle that Texas courts should uphold contracts negotiated at arm's length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel). And, Texas favors their freedom to contract. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc*., 389 S.W.3d 802, 811-12 (Tex. 2012). That freedom permits the parties to allocate risk among themselves as they see fit. *Id.* at 812. They do this by having the ability to select what terms and provisions to include in their agreements before executing them. *Cross Timbers Oil Co. v. Exxon Corp*., 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.). And, a court cannot rewrite the agreement or otherwise alter it simply because one party has found unbeneficial some of the words it included therein. *Devine v. Devine*, No. 07-15-00126-CV, 2016 Tex. App. LEXIS 2527, at *6 (Tex. App.—Amarillo Mar. 9, 2016, pet. denied) (mem. op.); *Cross Timbers Oil Co. v. Exxon Corp*., 22 S.W.3d at 26-27. Doing that would undermine the sanctity afforded the contract and the expectations of those who created and relied upon it. *Id.*

Next, when interpreting an instrument, effect is given to the parties' intent as expressed from the words in the document. *RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). Unless the agreement directs otherwise, those words must be afforded their plain, ordinary, and generally accepted meaning while reading them in context and in light of the rules of grammar and common sense. *Id.* And, we strive to give effect to all of the words and provisions and avoid rendering any meaningless. *Id.* This is why specified terms cannot be ignored. *FPL Energy, LLC v. TXU Portfolio Mgt. Co*., *L.P.*, 426 S.W.3d 59, 64 (Tex. 2014) (stating that "[w]e cannot interpret a contract

to ignore clearly defined terms"). Nor are we free to ignore the context within which words, sentences, and sections of the contract appear for that context helps explain what the parties intended. *See RSUI Indem. Co. v. Lynd Co.,* 466 S.W.3d at 118 (stating that no one phrase, sentence or section of an agreement may be isolated from its setting and considered apart from the other provisions).

Contention One—Is judicial review available?

The initial contention we address is one raised by Stephens I and II. It is the first because answering it in the affirmative would preclude us from considering Cirrus' complaints.

The two entities argue that Cirrus relinquished any right it had to have a court adjudicate the dispute between them. This is purportedly so because the parties agreed that someone questioning the calculations could appeal them to a third party and the third party would make "a final determination of the certification containing the calculations." In addition to being the first party to make the calculations in question, Moak Casey was also the third Party tasked with rendering that "final determination." And, because it is a "final determination," it was beyond review by the judiciary, says Stephens I and II. Yet, the trial court rejected the argument propounded by the two Stephens entities, and we conclude that it was correct in so doing.

That paragraph 3.4 of the Amended Agreement required "all calculations" to be "made annually by an independent Third Party ('the Third Party')" is clear. Appearing in paragraph 3.8 is a mechanism through which one could question the independent Third Party's calculations. It provided that those disagreeing with the certification could appeal "the findings, in writing, to the Third Party within thirty (30)

days of receipt of the certification." Within thirty days of receiving the appeal the Third Party "will issue, in writing, a final determination of the certification containing the calculations." If an entity such as Cirrus disagreed with those "final" calculations, then it "may appeal the final determination . . . to the District [*i.e.* OISD]" within thirty days.

Should one disagree with the District's calculations, then they were susceptible to review by our State's judiciary. The verity of this is illustrated by other provisions of the Amended Agreement. For instance, the entity could refuse to both abide by the District's decision and make the designated payment. That could be deemed a breach of contract under paragraph 7.6(c) (defining a material breach to include the situation where an "Applicant [such as Cirrus] fails to make any payment required under Articles III or IV of this Amended Agreement on or before its due date."). The failure to resolve that breach via the nonjudicial measures specified in the first subparagraph of paragraph 7.9 (which included mediation) then enabled either the OISD or the applicant to "seek a judicial declaration of their respective rights and duties" under the Amended Agreement. And, that meant a court could ultimately address and resolve a dispute regarding the accuracy of the Third Party's interpretation of the agreements and "final determination" based on the interpretation.

Reading each of the foregoing paragraphs together, as we must under *RSUI Indemnity*, we cannot but conclude that the parties to the Amended Agreement simply intended to establish an internal administrative means of resolving disputes involving calculations made under paragraph 3.4. That is, initial calculations would be made by the Third Party under 3.4. One questioning them then had the ability to have them recalculated by the same Third Party under 3.8. Once the Third Party completed his or

its recalculations, if any, then they could be reviewed by the OISD per 3.8 as well. Should 1) the OISD's decision be objectionable, 2) the party objecting refuse to abide by it, and 3) nonjudicial means to resolve the objection be unsuccessful, then either could seek judicial relief under 7.9. Given this scenario, a "final determination" by the Third Party was no different than a "final judgment" of a trial court. The issuance of a final judgment or a final determination simply meant that steps prerequisite to further review had been completed, and the parties could then proceed further. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating that an appellate court normally does not have jurisdiction over the dispute until the trial court has rendered a final judgment).

To read "final determination" in the manner proffered by the Stephens entities would be to ignore its context and rewrite the contract. The trial court correctly eschewed that invitation, as we do too.

Contention Two—Interpretation of a Formula

Next, we address the contention that the trial court misinterpreted the method for calculating the allocation of payments due the OISD under articles III and IV of the Amended Agreement. To reiterate, the trial court interpreted the contract as requiring "nameplate capacity" to "be determined as of January 1 of each year." Allegedly, this interpretation was not what the parties intended given other provisions of the Amended Agreement. We agree.

The manner of apportioning the payments in question can be found in a document entitled "Allocation of Payments and Responsibilities under the Amended

Agreement for Limitation on Appraised Value" (Allocation Agreement). It was executed by the OISD, Cirrus, and the two Stephens entities. It provided in paragraph 4 that:

> Each of [Cirrus, Stephens I and II] shall be responsible for its portion of the payments required under each of Articles III and IV of the Limitation Agreement with such portion for each such entity being the product of (i) the total payment required multiplied (ii) by a fraction in which the (a) numerator is the total nameplate capacity of all wind turbines placed in service for such entity and (b) denominator is the total nameplate capacity of all wind turbines placed in service for all such entities (such entity's fractional share being such entity's respective "Allocation Percentage'').

Via paragraph 16 of the same document, the parties also stated that the Allocation Agreement "expressly incorporates the Limitation Agreement [*i.e.* the Amended Agreement] and the Prior Assignments and notices related thereto and makes them part of this Agreement."

As previously mentioned, the requisite calculations were to be made by the Third Party according to paragraph 3.4 of the Amended Agreement. And a description of the data to be utilized by the Third Party in making the calculations appears in paragraph 3.5. There, the parties said:

> The calculations for payment under this Amended Agreement shall be initially based upon the valuations placed upon the Applicant's Qualified Investment and/or the Applicant's Qualified Property by the County Appraisal District in their annual certified tax rolls submitted to the District pursuant to Texas Tax Code § 26.01 on or about July 25 of each year of this Amended Agreement. Immediately upon receipt of the valuation information by the District, the District shall submit the valuation information to the Third Party selected under Section 3.4. The certified tax roll data shall form the basis of the calculation of any and all amounts due under this Amended Agreement. All other data utilized by the Third Party to make the calculations contemplated by this Amended Agreement shall be based upon the best available current estimates. The data utilized by the Third Party shall be adjusted from time to time by the Third Party to reflect actual amounts, subsequent adjustments by the County Appraisal District to the

> District's certified tax rolls or any other changes in student counts, tax collections, or other data.[2]

When those calculations were to be delivered then was established in paragraph 3.6. There, the parties said:

> [o]n or before November 1 of each year for which this Amended Agreement is effective, the Third Party appointed pursuant to Section 3.4 of this Amended Agreement shall forward to the Parties a certification containing the calculations required under Sections 3.2 and/or 3.3 and Article IV, and/or Section 5.1 of this Amended Agreement in sufficient detail to allow the Parties to understand the manner in which the calculations were made.

The plain wording of these provisions leads us to the following observations. First, the Third Party was to "initially base[]" his calculations on the valuations assigned by the County Appraisal District to the applicant's qualified investment or property. Second, the valuations were those included in the "annual certified tax rolls," which rolls were to be prepared, certified and submitted to the OISD no later than July 25th. Third, though the basis for the calculations were the valuations from the County Appraisal District, the Third Party could consider "other data." Fourth, the parties did not define the phrase "other data" but mandated that it had to "be based upon the best available current estimates." Fifth, the parties similarly mandated that the "data" used by the Third Party be "adjusted time to time . . . to reflect actual amounts," adjustments to the tax rolls, and "changes" not only to student count and tax collections but also "other data."

[2] Section 26.01(a) of the Texas Tax Code states: "By July 25, the chief appraiser shall prepare and certify to the assessor for each taxing unit participating in the district that part of the appraisal roll for the district that lists the property taxable by the unit. The part certified to the assessor is the appraisal roll for the unit. The chief appraiser shall consult with the assessor for each taxing unit and notify each unit in writing by April 1 of the form in which the roll will be provided to each unit." TEX. TAX CODE ANN. § 26.01(a) (West 2015).

Sixth, using both the word "data" without any modifier and the phrase "other data" in the last sentence of paragraph 3.5 indicates that "data" and "other data" did not refer to the same thing. *See RSUI Indem.*, 466 S.W.3d at 118 (stating that all words must be afforded meaning and that they should not be construed to make any word, passage or section meaningless). Rather, beginning the sentence with a broad reference to "data," then itemizing various types of information, and then concluding that litany of itemized information with "other data" indicates that the latter was intended to be a subset of the "data" alluded to at the onset of the sentence. In other words, the word "data" at the beginning of the sentence meant ***all*** the information the Third Party would use while "other data" meant whatever else the Third Party considered in addition to the certified tax rolls provided it by July 25th, "actual amounts" (whatever that is), "student count" and "tax collections."

More importantly, by stating not only that all the "data" used "shall be adjusted from time to time" but also that the "other data" had to "be based on the best available current estimates," the parties evinced an intent related to the timeliness of the information. The Third Party was not to rely on dated information if new information was available. Nor could it rely on information that had changed. Rather, the data it was to use had to be updated to the most current information available, and the calculations had to be based on it.

In short, we construe the Allocation Agreement and Amended Agreement as follows. The former provides the formula to be used by the Third Party when calculating allocations. In turn, the Amended Agreement informs the Third Party of the general and rather open-ended category of information to use in deriving the components of the

equations specified in paragraph 4 of the Allocation Agreement. And, while the information to be used starts with annual tax rolls from the County Appraisal District and may include other data, all of the data had to be updated to reflect current circumstances (when updated information is available). So, simply utilizing "nameplate capacity . . . determined as of January 1 of each year" does not reflect the intent of the parties as expressed in their written agreements. The calculations may begin with January 1st information but it must be rendered current as of the time the calculations were being made. Thus, changes in nameplate capacity may influence the ultimate calculation just as changes to student enrollment, tax collections and "other data," whatever that "other data" may be.

And as to Cirrus' insinuation at oral argument that the updating never ends and must include changed circumstances irrespective of when they occur, we say the following. The focus of paragraphs 3.4 and 3.5 lies on the calculation of the apportionment and when it is to be done. Again, the process starts when the Third Party receives the annual certified tax rolls of the County Appraisal District. When it ends can be found in paragraph 3.6 of the Amended Agreement. That provision alludes to a November 1st date, and states that "the Third Party appointed" to make the calculations "shall forward to the Parties a certification containing the calculations required" by that date.

So we construe the Amended Agreement as establishing a proverbial window of opportunity. It opens on the date the Third Party receives the annual certified tax rolls (which may be before July 25th) and closes when the Third Party sends its calculations

to the “Parties.” Only changes in (or more current) information available to the Third Party during that window of time need be considered in the calculations.

Having construed the contract as we did, we conclude that the trial court erred in rendering the final summary judgment it did. We reverse that judgment and remand the cause for further proceedings. Unlike the trial court, though, we do not render judgment dictating the percentage allocation payable by Cirrus and the two Stephens entities. This is so because of all the changing data that may have arisen and now be susceptible to consideration by the Third Party per our opinion, which data may include but not be limited to changes in mega-wattage production or nameplate.

Brian Quinn
Chief Justice