COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2165 **Cir. Ct. No. 2015CV499**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LAKE ALTOONA REHABILITATION AND PROTECTION DISTRICT,

PLAINTIFF-APPELLANT,

V.

ARVID JERECZEK AND STEPHEN J. HILGER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Reversed and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Lake Altoona Rehabilitation and Protection District (the Lake District) appeals a judgment dismissing its breach of contract claim against Arvid Jereczek and Stephen Hilger (collectively, Jereczek). The Lake District argues the circuit court erred by determining: (1) Jereczek's failure to give written notice of termination of the contract was the relevant breach, rather than Jereczek's failure to make payments according to the terms of the contract, and this breach was not actionable; and (2) the Lake District's claim was barred by the frustration of purpose doctrine. We agree, and remand for the circuit court to enter judgment in favor of the Lake District for damages due under the contract.

BACKGROUND

¶2 In November 2010, the Lake District began selling to Jereczek sand dredged from Lake Altoona. Jereczek resold the sand as "frac sand," which is high-purity quartz sand used in hydraulic fracturing (known as "fracking") to extract oil and natural gas. *See* ***O'Connor v. Buffalo Cty. Bd. of Adjust.***, 2014 WI App 60, ¶2 n.1, 354 Wis. 2d 231, 847 N.W.2d 881. On June 16, 2011, Jereczek and the Lake District entered into a written agreement giving Jereczek the exclusive right to buy sand from the Lake District for five years, with the option to renew for two additional five-year periods. The price of the sand was set at $1.50 per ton. Jereczek was required to buy at least 2000 tons of sand per month, except for months in which road bans were imposed.[1] The contract further provided that Jereczek "shall have the right to terminate this Agreement upon thirty (30) days written notice to [the Lake District] in the event that, in [Jereczek]'s sole and absolute opinion, the sand ... cannot be used as frac sand." As to the sand's

[1] There is no dispute on appeal related to months in which road bans were imposed.

suitability for use as frac sand, the contract provided: "[The Lake District] makes no warranty of the sand for any purpose. [Jereczek] buys sand 'as is'."

¶3 After June 2012, Jereczek stopped hauling sand from the Lake District because he could no longer sell it for use as frac sand. Nonetheless, Jereczek did not give the Lake District written notice that he was terminating the contract until October 18, 2013. In April 2014, the Lake District demanded payment from Jereczek for the minimum monthly haul amounts through March 2014, asserting that the contract remained in force during that time. After Jereczek refused to pay, the Lake District initiated this action to collect the amount due under the contract from July 2012 to November 17, 2013 (i.e., thirty days after the written notice),[2] together with interest as required under the terms of the contract.

¶4 The Lake District's claim was tried to the circuit court. The court found that the contract was terminated as of November 17, 2013, and concluded Jereczek breached the contract by failing to give written notice of his desire to terminate the contract. Nonetheless, the court further concluded that the Lake District's claim for recovery of the unpaid monthly minimum amounts failed as a matter of law because Jereczek's failure to give written notice of termination was not material and, therefore, that breach was not actionable. Further, the court determined that the doctrine of frustration of purpose applied, also precluding the Lake District from recovering damages. The Lake District now appeals.

[2] Neither party disputes that an email from Jereczek to the Lake District dated October 18, 2013, constitutes written notice of termination and that the contract was terminated effective November 17, 2013.

DISCUSSION

¶5 The issue regarding the nature of Jereczek's breach requires us to interpret the parties' contract. When the facts are undisputed, as they are here, the existence and interpretation of a contract are questions of law that we review de novo. *See* ***Gustafson v. Physicians Ins. Co.***, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). "The primary goal in contract interpretation is to give effect to the parties' intentions." ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. A court may not rewrite a clear and unambiguous contract to relieve a party from disadvantageous terms to which that party agreed. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 31, 577 N.W.2d 32 (Ct. App. 1998).

¶6 The Lake District argues the circuit court erroneously concluded both that Jereczek's breach was his failure—due to mistake, inadvertence or neglect—to give written notice of termination of the contract, and that this breach was neither material nor actionable and, therefore, did not give rise to any damages. The circuit court dismissed the Lake District's complaint, concluding:

> although, technically, [Jereczek] breached the contract, if you will, by not giving written notice of their desire to terminate the contract, in this particular case, under these facts, the breach isn't material. And in order for there to be something actionable on a contract, there has to be a material breach.

Specifically as to materiality, the court found Jereczek's failure

> to give written notice didn't breach the essential—the essential objects of the contract. The essential objects of the contract were that [Jereczek was] going to unload this sand, take this sand, assuming they could make money. … And when the essential object of the contract wasn't being fulfilled, didn't exist, failing to give written notice wasn't a material breach.

¶7 The Lake District contends Jereczek materially breached the contract when he failed to make payments pursuant to its terms, causing the Lake District damages. We agree. Jereczek was not required to terminate the contract. Rather, the contract would continue for five years, with the option for renewal, unless and until Jereczek, at his sole discretion, decided to terminate the agreement because he determined the sand was not useable as frac sand. Because Jereczek was not required to terminate the agreement, the circuit court erred in concluding he breached the agreement by failing to provide notice of termination.

¶8 The contract did, however, require Jereczek to buy a monthly minimum quantity of sand at a particular price during the lifetime of the agreement, or until he terminated the agreement early by written notice. Therefore, under the contract's clear and unambiguous terms, Jereczek breached the contract by failing to purchase and pay for the minimum quantity of sand prior to the effective date of his notice of termination—that is, from July 2012 to November 17, 2013.

¶9 We reject Jereczek's contrary contention that his breach was not material, but merely technical. Jereczek seems to contend the contract was terminated when he hauled his last load of sand in June 2012, and the notice provision served no purpose once it was evident he was no longer hauling sand. Jereczek argues that because he deemed the sand worthless beginning in September 2012, the Lake District lost nothing—i.e., with or without Jereczek's written notice, the Lake District was not going to be able to sell the sand to anyone and for any amount.

¶10 Jereczek's continuing failure to purchase and pay for the minimum quantity of sand was a material breach, as it destroyed the essential object of the

agreement: Jereczek would obtain sand to sell as frac sand on an exclusive basis, while the Lake District would sell its sand to Jereczek at a specified price and in a minimum monthly quantity. The Lake District did nothing to interfere with the agreement. The notice provision served an obvious purpose in telling the parties the agreement was over, payments would cease, Jereczek would no longer have an exclusive right to purchase the sand, and the final amount due to the Lake District would be fixed. The fact that Jereczek failed for some reason to provide the notice required to terminate the agreement when he no longer considered the sand useable did not alleviate his responsibility to comply with the contractual terms. Jereczek provides no authority for the position that his apparent inability to sell the sand and make a profit excuses him from his responsibilities under the agreement, including providing written notice that he wished to terminate his exclusive rights to the sand.

¶11 We also conclude the circuit court erred in determining the Lake District had a duty to mitigate its losses. The Lake District had no ability to do so. Again, the agreement was exclusive to Jereczek's benefit, and Jereczek provided no notice that it was terminated or that the Lake District would not be paid.

¶12 The Lake District also argues that the circuit court erred by determining that the frustration of purpose doctrine applied so as to bar its claim. A party to a contract wishing to assert the defense of frustration of purpose must establish three things: (1) the parties' principal purpose in making the contract is frustrated; (2) it was frustrated without that party's fault; and (3) it was frustrated by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. ***Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N. W. Transp. Co.***, 82 Wis. 2d 514, 523-24, 263 N.W.2d 189 (1978). The circuit court here found that the parties' principal

purpose in making the contract was frustrated because the sand was not useable as frac sand and Jereczek could not make money by reselling it.

¶13 It is undisputed Jereczek has satisfied the first two elements of the frustration of purpose doctrine: due to no fault of either party, the sand turned out to be worthless because it could not be sold as frac sand due to its quality. However, the purpose of the contract was not frustrated because Jereczek has not satisfied the third element of the test. Jereczek's actual ability to resell the sand for fracking was not a basic assumption upon which the contract was made. Indeed, the contract explicitly anticipated that the sand might not be useable for that purpose, and allowed Jereczek to terminate the contract if, in his sole discretion, he determined this was the case. The contract specified that the Lake District "makes no warranty of the sand for any purpose" and Jereczek "buys sand 'as is.'" The contract unambiguously provided for the possibility that the sand could not be used as frac sand. Therefore, it cannot be said that resale of the sand as frac sand was a basic assumption of the contract. Accordingly, the frustration of purpose doctrine does not apply.

¶14 Having concluded that Jereczek breached the contract by failing to make the minimum monthly purchases, and having further concluded the frustration of purpose doctrine does not apply, we turn to the issue of damages. "[T]he elementary rule of contract damages is to restore a party to the position he [or she] would have been in but for the breach." ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis, S.C.***., 2005 WI App 217, ¶52, 287 Wis. 2d 560, 706 N.W.2d 667.

¶15 Jereczek concedes that "the only fair and reasonable conclusion" is that he promised to pay a minimum amount month-to-month unless and until, in

his "sole and absolute" discretion, he decided to terminate the sand mining venture. It is also undisputed that Jereczek failed to provide written notice of termination until October 18, 2013. Therefore, Jereczek had a continuing obligation to make the required monthly purchases until November 17, 2013. In order to restore the Lake District to the position it would have been in but for the breach, the Lake District is entitled to recover the unpaid monthly purchase amounts. *See* ***Wolnak***, 287 Wis. 2d 560, ¶52. If Jereczek had complied with his contractual obligation to purchase sand, he would have bought at least 2000 tons of sand each month from July 2012 to November 17, 2013, for a total price of at least $43,710.[3]

¶16 Given the issue of damages for Jereczek's breach of the contract, this court asked the parties to address whether WIS. STAT. ch. 402 (2015-16)[4]—which adopts the Uniform Commercial Code Article 2 on sales of goods—applies, and whether the unpaid monthly minimum purchase amounts are the correct measure of damages flowing from Jereczek's breach. Jereczek argues ch. 402 does not apply because he paid for "every ounce of sand" he took and he was "not obligated to take any aggregate minimum amount of sand over the life of the agreement." However, Jereczek was required to make minimum monthly purchases over the life of the agreement, or until he provided early termination notice, and he fails to explain the significance of an aggregate minimum obligation rather than a monthly minimum obligation. Furthermore, Jereczek does not

[3] The Lake District calculates this amount using the following figures: 2000 tons of sand per month at $1.50 per ton for 14.57 months. Jereczek does not dispute this calculation.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

dispute that the contract was for the sale of goods. We therefore conclude that the provisions of ch. 402 related to damages apply here.

¶17 WISCONSIN STAT. § 402.703 provides in relevant part:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery ... then with respect to any goods directly affected ... the aggrieved seller may:
>
> ...
>
> (5) Recover damages for nonacceptance (s. 402.708) or in a proper case the price (s. 402.709) ....

The contract here provided no warranty as to the suitability of the sand for any purpose, and Jereczek was required to purchase 2000 tons of sand per month, unless and until he elected, by written notice, to terminate the contract. Therefore, Jereczek had no right to reject the sand for any reason prior to written notice of termination.

¶18 The Lake District seeks to recover the price of the sand Jereczek was required to purchase between July 2012 and November 17, 2013. Under WIS. STAT. § 402.709, a seller may, when the buyer fails to pay the price due, recover the price of "goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing." WIS. STAT. § 402.709(1)(b). Here, though there is no evidence in the record of the Lake District attempting to sell the sand to a third party, it is undisputed that the sand could not be resold because it has no value. Moreover, Jereczek failed to assert a § 402.709 "reasonable effort" defense and thereby forfeited any argument that the Lake District failed to make reasonable efforts to sell the sand to a third party. In any event, the Lake District was prohibited from selling the sand to any other party, due to the contract's

exclusivity provision. We conclude that § 402.709(1)(b) provides the relevant measure of damages in this case.

¶19 We therefore reverse and remand for the circuit court to enter a judgment in favor of the Lake District in the amount of $43,710 and to calculate interest on the judgment amount according to the contract terms.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.