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SANDRA L. SKINNER, Clerk
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

Missouri Court of Appeals
Southern District
Division Two

STATE OF MISSOURI ex rel.)
JEREMIAH W. (JAY) NIXON,)
and MISSOURI DEPARTMENT)
OF NATURAL RESOURCES,)

Plaintiff-Appellant,)

vs.)

No. SD29002

CROSS COUNTRY TRAIL)
RIDES, L.L.C.,)

Defendant-Respondent.)

APPEAL FROM THE CIRCUIT COURT OF SHANNON COUNTY

Honorable David P. Evans, Circuit Judge

Before Burrell, P.J., Rahmeyer, J., and Lynch, C.J.

MEMORANDUM

THIS MEMORANDUM DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Plaintiff, Missouri Department of Natural Resources ("DNR"), appeals the grant of summary judgment in favor of Defendant-Respondent, Cross Country Trail Rides,

L.L.C. ("CCTR"). DNR argues that the trial court erred in sustaining CCTR's motion for summary judgment for three reasons: (1) because the settlement agreement between the two parties constitutes a valid and enforceable contract, in particular paragraph five; (2) because the trial court's construction of the settlement agreement at the very least involves genuine issues of material fact, making summary judgment inappropriate; and (3) because DNR presented a legitimate claim for relief and CCTR did not present the argument ultimately relied upon by the trial court. We affirm.

Factual and Procedural Background

CCTR is a commercial establishment in Shannon County, Missouri, offering horseback riding, stabling, boarding, camping facilities, and entertainment. CCTR is located near the city of Eminence, and its property runs adjacent to the Jack's Fork River, which is part of the waters of the State of Missouri. A consequence of operating such a business is the need to periodically dispose of horse manure. CCTR did so by removing the manure from covered stalls and piling it in open, unprotected areas where it was eventually made available for removal by individuals for their own personal use.

Manure that is exposed to rainwater is considered improperly contained, and on October 11 and 12, 2001, DNR staff members observed CCTR's manure piles being exposed to the elements. Before this observation, DNR had taken test samples of water from an area of Jack's Fork River downstream from CCTR's property, and tested them for fecal coliform bacteria, on the following occasions and with the following results: August 13, 1999 (220 col/100ml); August 4, 2000 (232 col/100ml); August 10, 2000 (210 col/100ml); August 11, 2000 (571 col/100ml); October 4, 2000 (1,492 col/100ml); and July 5, 2001 (640 col/100ml). Levels of fecal coliform bacteria in streams exceeding 200

col/100ml are considered toxic. 10 C.S.R. 20-7.031(4)(C). Duplicate water samples were taken from an area of the river upstream from CCTR's property on each of the above dates except for August 13, 1999, and none of those resulting levels were in violation of state Water Quality Standards.

On January 25, 2002, DNR issued an Abatement Order to CCTR. The order stated that horse manure stored on CCTR's property was improperly exposed to rainwater, and therefore was a potential contributing source of fecal coliform bacteria in the Jack's Fork River.¹ In support of this assertion, the order listed the toxic fecal coliform bacteria levels found during DNR's testing of the area downstream from CCTR, as well as DNR's own observations that CCTR kept its horse manure in uncovered piles. The order stated that such storage was in violation of sections 644.051.1(1) and 644.076.1,² which prohibit anyone from "caus[ing] pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state." Section 644.051.1(1).

CCTR appealed the Abatement Order the following month before it became enforceable. DNR and CCTR thereafter entered into a Settlement Agreement in which neither party admitted the validity of any of DNR's claims or CCTR's defenses. Pursuant to the Settlement Agreement, CCTR voluntarily dismissed its appeal, and DNR voluntarily withdrew the Abatement Order.

¹ According to the Abatement Order, "[d]omestic wastewater needs for [CCTR] are managed through the use of holding tanks and wastewater pump trucks. Wastewater is pumped from the holding tanks as needed and transported to the City of Eminence Municipal Wastewater Treatment Facility for treatment."

² All statutory references are to RSMo 2000, unless otherwise indicated.

The Settlement Agreement states that the general purpose of the agreement is to satisfy both parties' "desire to reduce the levels of manure³] which may enter the Jack's Fork River from [CCTR's] facility." The preamble mentions no other purpose of the Settlement Agreement, or any other type of waste being at issue. The Settlement Agreement contains four substantive paragraphs in which CCTR agrees to undertake certain responsibilities in order to come into compliance with Missouri law with regard to its horse manure storage and disposal. In paragraph one, CCTR agreed to require campers not keeping their horses in stalls to remove all manure and bedding from their campsites and transport it to a site designated by CCTR, where it would not come into contact with stormwater. CCTR further agreed to remove horse manure and bedding from the stalls within ten days of the end of each trail ride. Finally, paragraph one allows CCTR to continue to use its "high ground manure/compost area" until the Stormwater Improvement Plan outlined in paragraph three was completed, provided that CCTR removes the manure in a timely fashion, and makes its "best efforts" to prevent the manure from coming into contact with stormwater.

Paragraph two of the Settlement Agreement requires CCTR to retain a "qualified consultant" to provide it with advice and other services pertaining to water quality for a period of two years, beginning June 1, 2003. Paragraph two further designates a DNR contact with whom CCTR must work to resolve all issues arising pursuant to the implementation of the Stormwater Improvement Plan, as well as who would approve the consultant hired by CCTR.

³ According to MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, eleventh edition, manure is defined as: "material that fertilizes land; especially refuse of stables and barnyards consisting of livestock excreta with or without litter."

Paragraph three sets out, in detail, a Stormwater Improvement Plan and Schedule for its implementation. CCTR was given 120 days after it gained DNR's approval of its hired consultant to submit to DNR a Stormwater Improvement Plan describing CCTR's property. The agreement requires this plan to include "a map of the property, descriptions of buildings, topographic features of the property, descriptions of manure handling and storage practices, and proposed handling of stormwater that comes into contact with animal manure." Such a plan must be developed by a state-certified engineer. Within 270 days of DNR's approval of the proposed plan, CCTR must complete construction of all of the plan's components; CCTR agreed to complete such implementation by no later than April 15, 2004.

Paragraph four of the Settlement Agreement requires that DNR notify CCTR in writing of any failure to comply with any portion of the agreement, and gives CCTR thirty days "from the close of the ride season" to cure the default. Failure to do so requires CCTR to close its doors until the default is cured.

Finally, paragraph five pertains to "sewerage improvements." It states that:

[w]ithin sixty (60) days of the [DNR's] approval of the Stormwater Improvement Plan, [CCTR] shall meet with [DNR's] designated contact person and together they shall develop a reasonable schedule for the implementation of sewerage improvements for the direct treatment of human wastewater via a sanitary sewer system to the Eminence wastewater treatment plant.

CCTR completed the Stormwater Improvement Plan within the parameters of the Settlement Agreement and met with DNR to develop a sanitary sewer plan pursuant to paragraph five. It appears that no further contract was borne out of that meeting. CCTR also applied for and obtained a construction permit for sanitary sewer improvements, which was issued to the company on August 13, 2004. Shortly thereafter, the owner of

CCTR, James Smith, wrote a letter to DNR's Director of Enforcement, Kevin Mohammadi, updating him on the status of the ongoing projects. Smith stated that construction of manure bunkers would begin at the close of the 2004 riding season in November and that building both the manure storage and sanitary sewer improvements at the same time was not feasible. Smith indicated that he planned to complete the manure storage problems first and then begin work on the sewerage upgrade. He also informed Mohammadi that he had been issued a twelve-month construction permit but was unsure of his ability to complete the sanitary sewer project by its expiration. Specifically, Smith expressed concern that CCTR's location on the Jack's Fork River floodplain might delay construction, particularly during the winter months. Smith further explained that undertaking construction during the riding season--which runs from March to November--was not feasible, as there is generally not enough time between scheduled events to both clean up the property for the next event and complete construction. Finally, Smith stated his intention to request an extension of the permit should construction be delayed.

CCTR had not implemented any human wastewater sewerage improvements before the start of the 2006 riding season, and on May 25, 2006, DNR filed a Petition for Declaratory Judgment and Specific Performance. The petition claimed that CCTR "failed and refused to construct the sewerage improvements in accordance with the Schedule in breach of paragraph 5 of the agreement." DNR requested that CCTR "immediately apply for any necessary permits from [DNR] and implement the sewerage improvements for the direct treatment of human wastewater via a sanitary sewer system to the Eminence wastewater treatment plant within 90 days of obtaining any necessary permits from [DNR.]"

The following July, DNR filed a Motion for Summary Judgment, arguing that the Settlement Agreement was a valid and enforceable contract whose clear and unambiguous terms required CCTR to implement human wastewater sewerage improvements by August, 2005. DNR argued in the alternative that, even if the express terms of the Settlement Agreement are deemed ambiguous, CCTR's conduct following its execution of the Agreement "makes clear that the parties intended that CCTR would implement these improvements."

In its response and cross-motion for summary judgment, CCTR argued that, to the contrary, the clear and unambiguous terms of the Settlement Agreement, and particularly those in paragraph five, did not require CCTR to actually construct and implement any human wastewater sewerage improvements, but rather required the company to merely meet with a representative of DNR to discuss the possibility of such improvements. CCTR further argued that, even if the terms of the Settlement Agreement were deemed to be ambiguous, CCTR's conduct in subsequently obtaining a construction permit did nothing more than indicate its intention to explore potential improvements, not to actually implement them on any strict timeline. Finally, CCTR stated that it was never established that CCTR's current human wastewater sewerage system was in violation of any regulation. As such, CCTR had not breached the Settlement Agreement.

The trial court sustained CCTR's cross-motion for summary judgment on January 25, 2008. In its judgment, the trial court found that "the provision of Paragraph 5 to meet and 'develop a reasonable schedule for the implementation of sewerage improvements' is 'nothing more than an undertaking to enter into later negotiations and as such, does not constitute an enforceable contract.' Hoffman v. County Mercantile Bank, 666 S.W.2d

446, 451 (Mo.App. 1984)." Noting that "Plaintiff does not in its Petition claim that subsequent discussions between the parties culminated in any other binding and enforceable agreement," the trial court held that paragraph five was merely an agreement to agree, and thus unenforceable. This appeal followed.

Standard of Review

Whether summary judgment is appropriate is purely an issue of law, and we review a court's decision sustaining a motion for summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Jarrett v. Jones*, 258 S.W.3d 442, 444 (Mo. banc 2008); Rule 74.04.⁴ "A genuine issue [of material fact] exists where the record contains competent material that evidences two plausible, but contradictory, accounts of the essential facts. A genuine issue is a dispute that is real, not merely argumentative, imaginary, or frivolous." *Rustco Prods. Co. v. Food Corn, Inc.*, 925 S.W.2d 917, 922-23 (Mo.App. 1996). In reviewing a trial court's decision, we use the same criteria as those used by the court in initially sustaining the motion. *Id.* We review the record in the light most favorable to the non-moving party, and "[f]acts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT*, 854 S.W.2d at 376. Finally, we will affirm a grant of summary judgment if the judgment "is sustainable as a matter of law under any theory," not just that relied upon by the trial court. *Meyer v. Enoch*, 807 S.W.2d 156, 158 (Mo.App. 1991).

⁴ All references to Rules are to Missouri Court Rules (2000), unless otherwise indicated.

Discussion

Although DNR presents three points for our review, our disposition of the first point is dispositive and renders the remaining points moot.

In its first point, DNR contends that the Settlement Agreement is a valid and enforceable contract and that, in particular, paragraph five is sufficiently definite to permit specific performance in its breach of contract action. We disagree.

A settlement agreement is "a species of contract." *Vulgamott v. Perry*, 154 S.W.3d 382, 387 (Mo.App. 2004). In order to prevail on a breach of contract claim, "a plaintiff must allege and prove (1) mutual agreement between parties capable of contracting; (2) mutual obligations arising out of the agreement; (3) valid consideration; (4) part performance by one party; and (5) damages resulting from the breach of contract." *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co., Inc.*, 968 S.W.2d 727, 730 (Mo.App. 1998). Furthermore, a party is not guaranteed the remedy of specific performance; specific performance issues "as a matter of grace, the grant of relief resting in the sound discretion of the court." *Quality Wig Co., Inc. v. J.C. Nichols Co., Inc.*, 728 S.W.2d 611, 617 (Mo.App. 1987) (citing *Lancaster v. Simmons*, 621 S.W.2d 935, 942 (Mo.App. 1981)). Specific performance is an equitable remedy "available only where a valid contract is in existence between the parties based on a clear mutual understanding and in terms sufficiently definite and certain to enable the court to decree its performance." *Quality Wig*, 728 S.W.2d at 617 (citing *McKenna v. McKenna*, 607 S.W.2d 464, 467 (Mo.App. 1980)). The trial court cannot create a contract for the parties, "and if the agreement sought to be enforced is indefinite, specific performance may not be decreed." *Quality Wig*, 728 S.W.2d at 617 (citing *Gegg v. Kiefer*, 655

S.W.2d 834, 838 (Mo.App. 1983)). "There can be no contract so long as the essential terms thereof are reserved for the future determination of both parties." *Brown v. Childers*, 254 S.W.2d 275, 281 (Mo.App. 1953); see also *Gateway Exteriors v. Suntide Homes*, 882 S.W.2d 275, 279 (Mo.App. 1994).

In the instant case, paragraph five consists of the following:

5. SEWERAGE IMPROVEMENTS. Within sixty (60) days of the [DNR's] approval of the Stormwater Improvement Plan, Cross Country shall meet with the [DNR's] designated contact person and together they shall develop a reasonable schedule for the implementation of sewerage improvements for the direct treatment of human wastewater via a sanitary sewer system to the Eminence wastewater treatment plan.

There is no other mention of *human* wastewater treatment in the entirety of the Settlement Agreement, nor is there any reference to paragraph five or to "sewerage improvements" in general. Thus, we are confined to the provisions of paragraph five alone to determine if it contains sufficient specificity to give rise to a contract which may be enforced by specific performance.

To that end, paragraph five is devoid of *any* essential contractual terms; not even the intended parties are clear, as the Eminence wastewater treatment plant is mentioned as a necessary part of the ultimate "solution" to the alleged human wastewater disposal problem. Other than meeting within sixty days after the approval of the Stormwater Improvement Plan, this paragraph contains no specificity as to a time schedule for performance, the nature, type or extent of any improvements to be constructed, or the assignment of any implementation responsibility to any party.

Paragraph five contains merely an agreement between DNR and CCTR that representatives of the two parties would meet within sixty days of DNR's approval of the Stormwater Improvement Plan to agree at that time upon a separate and distinct

improvement plan dealing with CCTR's disposal of human waste. Moreover, neither party introduced a new contract or agreement arising out of the negotiations that took place pursuant to paragraph five, or even implied that a subsequent agreement existed. "An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto." *Jenks v. Jenks*, 385 S.W.2d 370, 376 (Mo.App. 1965) (quoting *Rosenfeld v. United States Trust Co.*, 290 Mass. 210, 195 N.E. 323, 122 A.L.R. 1210, 1216 (1935)). In the absence of a contract specifically assigning to CCTR an obligation to construct a specifically described human-wastewater sewerage system, it is impossible for this Court to construe exactly what DNR now claims it expected CCTR to undertake, and, likewise, to force CCTR to specifically comply with that expectation. Paragraph five is nothing more than an agreement to agree, which is unenforceable.

Decision

The judgment of the trial court is affirmed.