

2-20-18
Judge Carl III
Bus. Court
L. Dawkins
S. Morgan

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

**Riley Natural Gas Company,
Plaintiff,**

vs.

**Northstar Energy Corporation,
Defendant.**

**Civil Action No. 15-C-405
Presiding Judge: Clawges
Resolution Judge: Carl**

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court pursuant to Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Summary Judgment. The Court has heard argument from both parties and finds the issue ripe for adjudication.

This case focuses on a contract between the parties to facilitate the purchase and sale of Northstar Energy Corporation's ("Northstar") natural gas by Riley Natural Gas Company ("RNG" or "Riley"). Riley's Amended Complaint seeks declaratory and monetary relief from Northstar, alleging that Northstar breached the agreement and seeks monies owed for firm transportation capacity on Dominion Transmission Inc.'s Appalachia Gateway Project Facilities.

¹ The Agreement between the parties, and the Term Sheets which were incorporated therein, set forth charges which were imposed for transportation for gas delivered into the DTI pipeline system. Riley asserts that Northstar is responsible and liable to reimburse Riley for all charges, including transportation charges such as the DTI Gateway Charges, upstream or downstream of these delivery points. Riley contends that a reading of the entire contract makes clear that the

¹ According to the Complaint, RNG has a precedent agreement with DTI on behalf of Northstar to financially support DTI's incurrence of construction costs to construct the additional firm pipeline transportation capacity. In exchange, DTI commits to reserve firm capacity in the pipeline ready at all times for the shipper to call upon to use when needed. Plaintiffs assert that Northstar agreed to reimburse RNG for the DTI Gateway Charges RNG would pay to DTI for the firm transportation capacity for 10 years, as memorialized in the 8-1-08 agreement.

“Delivery Point” is into the DTI Appalachia Facilities at DTI’s Oakford Interconnection with Texas Eastern Transmission, LP.

Moreover, the Amended Complaint asserts, Northstar is responsible and liable to Riley, and agreed to reimburse Riley, for DTI Gateway Charges irrespective of whether Northstar actually tenders natural gas to Riley. Plaintiff claims that Northstar has breached this contract by refusing to reimburse Riley for DTI Gateway Charges.

In its counterclaim, Northstar seeks excuse from performance by reason of Riley’s default, an account for excessive fees, damages for Riley’s failure to market and sell produced gas in a commercially reasonable manner, and a determination of the Agreement’s termination.

Northstar counters that the point of sale and Delivery Point from Northstar to Riley was and is Meter #215530.² Accordingly, Northstar asserts, the Delivery Point is not into the newly constructed DTI Facility, but instead into the old Dominion Transmission Pipeline, TL-263, at the same meter. Therefore, Northstar contends, under paragraph 2(a) of the agreement, Riley is responsible for all charges downstream of said Delivery Point, including the Gateway Fee that Northstar chose to pay under the Deferred Option, referenced above. “Since September, 2012, RNG has been wrongfully imposing upon and collecting from the proceeds of gas sold by Northstar to RNG Dominion Transmission’s Appalachian Gateway Fees...”³

Defendant Northstar also complains that Riley should have sold Northstar’s gas to other markets when DTI changed BTU requirements, but instead Northstar was required to expend funds to have its gas “stripped” prior to the sale of the gas.⁴ In November 2015, Northstar gave

² Meter known as the Northstar Energy Corporation Carbon Fuel interconnection into Dominion Transmission Pipeline, TL-263, in Kanawha County, sometimes designated as being located in Cheylan.

³ Amended Answer and Counterclaim

⁴ Count II of the Amended Answer and Counterclaim

notice to Riley and DTI that it was shutting down operations because it could no longer meet DTI's demands.

The Contract, dated August 1, 2008, but executed on August 25, 2008, consists of "the Agreement" and incorporated Term Sheet, Additional Terms For Any Delivery Point(s) Into DTI's Appalachia Gateway Project Facilities, and amended Term Sheet dated August 8, 2012.

Plaintiff's Motion for Summary Judgment

Plaintiff, Riley Natural Gas Company, asserts that from the Agreement's commencement, the Delivery Point has always been through Dominion Transmission, Inc's ("DTI") Appalachian Gateway Facilities at DTI's Oakford Interconnection with Texas Eastern Transmission, LP. The Motion asserts that the clear language of the Contract, as well as the parties' course of dealing, demonstrates that the Plaintiff is entitled to summary judgment as a matter of law. In the event the Court finds the Contract ambiguous, Plaintiff offers extrinsic evidence to show that the parties always intended the Delivery Point to be the Oakford Interconnection with Texas Eastern Transmission.

Plaintiff offers pre-contractual documents that were allegedly sent to the Defendant, Northstar Energy Corporation ("Northstar"), during the time leading up to the contract. Riley offers an April 2008 letter to Northstar and other producers to assess interest, which apparently noted the "FT service Delivery Point as the Oakford Interconnection..." Riley also asserts that it supplied potential producers a memorandum the same day which stated the "primary delivery point [will be] an interconnection with Texas Eastern at Oakford..." Plaintiff asserts that Northstar first demonstrated its agreement with this plan and delivery point on April 24, 2008, when it submitted a non-binding request form. Then in July 2008, Riley sent Dominion's slides from a July 2, 2008 meeting that allegedly showed a map of TL-263 terminating at the Texas

Eastern Delivery Point at Oakford. Furthermore, Plaintiff cites a Precedent Agreement between RNG and DTI, which defines the “Primary Point(s) of Delivery” and “Primary Point(s) of Receipt” for the DTI Gateway Project

Plaintiff’s Motion for Summary Judgment also asserts that Northstar is not entitled to seek termination of the Agreement until the expiration of the Primary Term in September 2022.

Plaintiff cites paragraph 3 of the Agreement.

The Primary Term of this Agreement shall be as set forth in the Term Sheet, and shall thereafter continue in effect from month to month unless terminated by either party by written notice to the other party at least thirty (30) calendar days prior to the expiration of the Primary Term or any extension thereof or as otherwise set forth in this Agreement.

The plain reading of this excerpt shows procedure for automatic extension, but does not seem to limit termination. Further, paragraph 3 of the agreement continues with procedures and opportunities for cancelation when the Purchaser uses its option to *revise* the price.

The parties recognize that sale and deliveries of Seller's Gas hereunder will be dependent on volumes accepted by various buyers that purchase Gas from Purchaser during any particular month. Accordingly, it is agreed that Purchaser shall have the right to determine in its sole discretion at various times during this Agreement that a price revision is necessary for the sale of such Gas to remain competitive in the market. If Purchaser shall so determine, Purchaser shall promptly provide Seller telephonic notice of the revised Price which Purchaser believes is required to meet the existing market condition and Purchaser shall provide written notice to Seller no later than five (5) calendar days after such telephonic notice. **Not later than five (5) calendar days after Seller's receipt of Purchaser's written notice, Seller shall notify Purchaser in writing that Seller accepts Purchaser's revised Price or Seller requests that this Agreement be terminated and if so requested, such termination shall be effective on the last day of the third calendar month following the month that Purchaser received Seller's written notice;** provided, however, the revised Price shall be applicable to all deliveries made to the Delivery Point(s) after the date of Seller's

notice of its request to terminate until its effective date of termination and in the event Purchaser further revises such Price prior to such effective date of termination, the parties shall utilize the procedures as set forth in this Paragraph for any such further Price revisions.

However, the last sentence of this Term paragraph does mention a limitation on termination: " Notwithstanding anything to the contrary, in the event that Seller fails to provide to Purchaser timely written notice of either Seller's acceptance of such revised Price or Seller's request to terminate, Seller shall be deemed to have accepted such revised Price and Seller shall not be able to request this Agreement be terminated." Here, Northstar responds that it appropriately terminated the contract following its receipt of the December 1, 2015 term sheet. However, this Court cannot determine whether this term sheet or some other correspondence triggered a purchaser's price revision. Defendant's response last attaches a term sheet from September 28, 2012.

Accordingly, the Court holds this issue in abeyance until further conclusions of law can be appropriately made.

Defendant's Motion for Summary Judgment

The issues in Defendant's motion are nearly identical to Plaintiff's. The Defendant's motion for summary judgment mirrors the counter-arguments made to the Plaintiff's Motion. Defendant asserts that there are no material facts in dispute and Northstar is entitled to recover from Riley the amounts paid by it for transportation.

Defendant's motion states that Riley designated the Delivery Point in the term sheets, which determined whether or not the gas moved through the new Gateway facilities. Northstar admits that prior to the inception of services, Riley indicated that the Delivery Point would be into a Texas Eastern Pipeline or other points. However, each term sheet designated the meter

#215530 in Chelyan as the Delivery Point. Instead, the gas sold to Riley was not delivered into the newly-constructed DTI Appalachian Gateway Project Facilities and the transportation costs should have been the responsibility of Riley. Defendant argues this is a matter of law and appropriate grounds for summary judgment.

Defendant's Motion also asserts that Northstar properly terminated the contract under the Agreement.

Legal Standard

Summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. *San Francisco v. Wendy's Int'l Inc.*, 221 W.Va. 734, 750, 656 S.E.2d 485 (2007). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 9, *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.*

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial

or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60. Otherwise, the movant is entitled to summary judgment.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

W. Va. R. Civ. P. 56.

Analysis

First, it should be noted that this agreement provides for existing pipelines/facility delivery points, wherein Riley is responsible for downstream charges, i.e., transportations costs, etc, after the point of purchase. In other words, under (a), once Purchaser owns the gas, it is responsible for its maintenance. It is only when Gateway Project facilities are used that the possibility of Northstar paying for downstream charges arise.⁵ Both parties seem to agree that the case hinges on the point of delivery. Plaintiff argues that the Delivery Point is set by the Agreement and that under section (b), Riley is clearly responsible and liable to DTI for the DTI Gateway Charges on behalf of Northstar irrespective of whether Northstar tenders natural gas to Riley for purchase and sale.

Defendant argues that it was promised usage of the new DTI Gateway, but actually remained on the old pipeline and that Riley has wrongfully charged Northstar for Riley's own expenses. In other words, Defendant asserts the expenses at issue were not incurred on Northstar's behalf.

⁵ This anomaly was allegedly created to finance reservation of firm transportation space on a new pipeline.

Defendant argues that this meter runs directly into DTI's TL-263 pipeline and that the meter, gas tap, and pipeline upstream and downstream are the same ones that have been in place more than ten years prior to the DTI Appalachia Gateway Project, citing the applicable term sheets for the period before, during, and after construction showing that the Delivery Point(s) listing has remained the same. Northstar states that its production touches no other DTI pipe or facilities as it travels from the production wells to this Delivery Point.⁶ Furthermore, Defendant cites the deposition of Northstar's President, James Abcouwer, wherein Mr. Abcouwer asserts that, during the time at issue, Plaintiff never produced any documents or evidence of Riley reserving firm transportation capacity on The DTI Gateway for Northstar's gas.

Here, the contract taken as a whole, including the term sheets, as well as allegations of deviating course of performance, demonstrate ambiguity in the contract and its execution. Plaintiff offers evidence to clarify the application of the contract, but Defendant's argument and evidence meets the minimal burden of showing a genuine issue of material fact. Accordingly, this Court cannot grant either party summary judgment. Here, course of dealing and any other parol evidence intended to show what the parties meant at the time of the contract's execution must be weighed by a fact-finder, not the Court, and thus precludes summary judgment.

THEREFORE, the Court hereby DENIES both the Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Summary Judgment. The Court holds the issue of future damages and whether the contract could be terminated prior to September 2022 in ABEYANCE. The Court directs the Circuit Clerk to enter the foregoing and forward an attested copy to all counsel of record; the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401; and to Resolution

⁶ The pleadings and motions do not address downstream facilities.

Judge, the Honorable Charles Carl, III, Hampshire County Judicial Center, P.O. Box 856, 50
South High Street, Suite 6, Romney, WV 26757.

ENTER this 13th day of February, 2018.



RUSSELL M. CLAWGES JR., JUDGE
BUSINESS COURT DIVISION