BEFORE THE NEW MEXICO COURT OF APPEALS

THE ELDORADO AREA WATER AND SANITATION DISTRICT, a governmental Subdivision of the State of New Mexico

Plaintiff/Appellee,

No. 34524
Santa Fe County
No. D-101-CV-2012-01329

v.

THE JOSEPH AND ALMA MILLER REVOCABLE TRUST

and

JOSEPH F. MILLER, Trustee,

Defendant(s)/Appellant.

APPELLANT'S REPLY BRIEF

Honorable Sarah Singleton, District Judge

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POINT I

MILLER IS ENTITLED TO THE 4.8 ACRE FEET WATER RIGHTS CREDIT

The District contends that Miller did not set out all of relevant facts relating to the District's unilateral decision to waive all water rights associated with Well No. 11 a/k/a RG-18523. In response, the essential facts have been set out. Despite the obligations of the District set out in the Development Agreement with Miller, the District unilaterally negotiated with the State Engineer to dispose of any Well 11 rights. More than five years it informed Miller of the District's actions. Under the Development Agreement (District's Ex. 1) Miller had the right to notice "in writing" (*Id.* 1-V(A) and (F)) if there were a claimed breach. No written notice of breach was ever provided to Miller about Well 11 problems. (TR. I-94, 95). The District had no right to decide that the Well 11 water rights were of no value, negotiate them away and charge Miller $125,000.00. Without written notice and an opportunity to cure, the District alone must suffer the consequences of its actions. See, *Yu v. Paperchase Partnership*, 1992-NMSC-064, 114 N.M. 635, 845 P.2d 158 (notice and opportunity to cure required even with an assignee of the contracting party); *Public Service Co. of New Mexico v. Diamond D Construction Co., Inc.*, 2001-NMCA-082, 131 N.M. 100, 33 P.3d 651 ("best efforts" to resolve dispute prevents unilateral termination); *State ex rel. Concrete Sales & Equipment Rental Co., Inc. v. Kent Nowlin Construction, Inc.*, 1987-NMSC-114, 106 N.M. 539, 746

P.2d 645 (UCC obligation of notice and opportunity to cure enforced); *Harger v. Structural Services Inc.,* 1995-NMSC-018, 121 N.M. 657, 916 P.2d 1324 (notice and opportunity to cure recognized).

The only alleged oral notice was vague. Mr. Cooper stated at TR.I- 94 that he did not remember "specifically telling" [Mr. Miller], but he thought he had told Miller that "this was going on", and subsequently at TR.I-95 Mr. Cooper mentioned that "there weren't any water rights there." Significantly, however, no finding of fact was submitted by the District to the effect that Miller ever had any effective notice. (District's proposed Finding of Fact No.'s 90-106 at R-853-855). Nor was any such finding made by the Court. (R-899-900). In any event the notice was to be in writing.

Further, under the Development Agreement the parties were to "defend the validity, enforceability and effectiveness of this Agreement". *Id.* ¶ 1-V(E). That did not happen. (TR. I-67-8). See, *Public Service Co. of New Mexico v. Diamond D Construction Co., supra* ("best efforts" a requirement prior to any termination)

Paragraph IV(F) of the Development Agreement included an obligation of "good faith" and to perform with "due diligence" and without "evading or seeking to evade the spirit and purpose of this Agreement". All of this was violated.

The District does not deny Miller's contentions. Instead, it takes the "no harm, no foul" approach saying that these water rights were worthless. That,

however, was not a decision for the District. Instead it needed to defend those water rights t and provide Miller with detailed written notice of any purported breach.

NO HARM, NO FOUL

There was a foul and there was harm. The 1972 stipulated judgment (Miller's Ex. AA-1) required that these wells described in the judgment were to be placed into beneficial use within a reasonable time. Once that occurred, then the water rights were to be measured by the wells *"capacity"* as that existed on December 31, 1970. (*Id.*) The District expounds on the nature of inchoate water rights. While this is interesting, it does not apply to this case or to these wells which are defined by the terms of the stipulated judgment. Well 11 had been put to beneficial use and its capacity as of December 31, 1970, could have been established from current testing and historical data.

Also, Miller had years of experience with Well 11 and in uncontested testimony confirmed that it was a highly productive well (TR. III-92), was refurbished by the District's predecessor, Eldorado Utilities, was connected to its and the District's system. (TR. II-198-201). Miller, who later owned the well, put it to use by furnishing water to his residence and using it for livestock and watering grasses. (TR. III 69-71).

Miller's Ex. AA-5 is a letter from the State Engineer twenty-five years after the 1972 decree. Instead of declaring that these water rights were non-existent, the State Engineer declared that the "... 1972 judgment limits the capacity for each well as of December 31, 1970. The declarations provide that the amount of water for each of these wells (referring to RG-18523) is 4.8 afa". There is no suggestion that Well 11 had not been put to beneficial use or the failure to have it metered somehow jeopardized the water rights.

The District's Ex. 36, also authored some twenty-five years after the 1972 decree. Provides: "Also it is the State Engineer's opinion that the Stipulation and Judgment dated December 29, 1972, were negotiated in good faith, and the final decisions were based on existing declarations at the time. To change the declaration in our opinion is a violation of the Stipulation and Judgment."

Finally, Miller's Exhibit L, a District/Miller agreement dated August 25, 2006, recites that Well 11 was as of that date connected to the District's system and being put to beneficial use.

Many strong points could have been made to save these water rights. None were.

METERING

It is contended that because the 1972 judgment (Miller's Ex. AA-1, P. 3) requires the owners to "install upon each such well a totalizing meter to measure

the amount of water diverted thereby," since Well 18523 was not metered, all water rights were lost. The judgment does not so state. Also, the lack of a meter certainly did not affect the conclusion of the State Engineer's Office in 1997 when he showed full respect for the declared 4.8 acre feet of water rights attributable to this well. Finally, since Well 11 was part of the District's system as of 2006, it should be the last to complain about lack of metering.

THE QUITCLAIM DEED

The District claims that since Miller did not present a warranty deed transferring the water rights, this was a breach of the agreement. The District claims that Miller drafted the quitclaim deed. The District, however, does not know who drafted the deed. (TR. I-65, 85). Nevertheless, the District received the deed with full opportunity to inspect it. Finally, the quitclaim deed, while so entitled, actually contains warranty language within the body of the deed. (Miller's Ex. AA-7-A).

In any event none of this matters. Whatever the nature of the deed it transferred these rights to water to the District. The District in turn, simply disposed of them. If the District thought this was a breach, then it needed to provide appropriate notice.

RESCISSION

The District claims its actions did not result in a partial rescission of the Development Agreement. It is difficult to understand the argument. The District accepted a transfer of these water rights from Miller and took them to the negotiations with the State Engineer for their permanent destruction. Five years later, it announced that Miller's water rights were worthless and had been destroyed. The District then ratified the contract by not providing any restitution. Instead of returning the water rights to Miller so he could defend them, the District destroyed them. Such an approach has been rejected by *Branch v. Chamisa Development, Corp. Ltd.,* 2009-NMCA-131, ¶ 24, 147 N.M. 397, 223 P. 3d 942. Miller's water rights credits remain intact.

ESTOPPEL AND LACHES

The District Court found that the element of reliance required to establish estoppel and laches was lacking. (See, Court's Findings 106, 107 at R-901). In response, the Development Agreement relating to the credit for the water rights was signed in October of 2008. (District's Ex. 1). Miller then kept attempting to complete his development of Spirit Wind West. See, District's Ex. 4, August 2010 Amendment to Development Agreement, District's Ex. 14 and the "will serve" letter commitment for Spirit Wind West, December 30, 2011. See also Miller's Ex. AA-14, April 9, 2013, approval on Spirit Wind West Subdivision for Phase I,

reflecting five years of development activities on Spirit Wind West. Reliance cannot be denied.

FAILURE TO RAISE ISSUES

The District contends that the issue of the destruction of the Well 11 water rights in the State Engineer proceedings was not pled or raised below. The District is simply incorrect.

The pre-trial order reflects that one of Miller's claims is that he should receive credit for the 4.8 acre feet of water rights. (See, R-705-706). Further, at the time the pre-trial order was being entered, the District was amending its complaint to add the issue of Miller's forfeiture of these water rights. See, Pre-Trial Order at R-706) which specifically does not incorporate these amended pleadings that were taking place. Miller's counterclaim again specifically identifies his claim for 4.8 acre feet of water rights credits. (R-634)

Further, this issue was specifically litigated without objection. (See, TR. I-80-100). This issue was fully raised by Miller in his proposed Findings (R-873-880). Further, the District submitted a proposed Finding that it did not "interfere" with the Office of the State Engineers determination. (District's proposed Finding 9 at R-854). This in turn was adopted by the District Court at Finding No. 96 at R-899).

This issue was certainly raised before the District Court and preserved for appeal. See, *Alcantar v. Sanchez,* 2011-NMCA-073, ¶ 59, 150 N.M. 146, 257 P.3d 966 and *Chapel v. Nevitt,* 2009-NMCA-017, 145 N.M. 674, 203 P.3d, 889.

Further, the District misapprehends the burden of proof. Miller asserted in his counterclaim an entitlement to 4.8 acre feet of water rights credits. The District denied this and attempted to justify the reason that Miller was not so entitled. The burden of proof was on the District, not Miller, to prove that the rights set forth in the Development Agreement and their transfer were not effective. The District's contention is that it threw away these rights in State Engineer proceedings. Miller's response is that the District had no right to do so. See, *Camino Real Mobile Home Park Partnership v. Wolfe,* 1995-NMSC-013, ¶ 18, 119 N.M. 436, 891 P.2d 1190. "The burden of proof is on the party relying upon a breach of warranty to show the warranty, the breach thereof, and that his loss resulted from the breach of such warranty." See, also *Newcum v. Lawson,* 1984-NMCA-057, 101 N.M. 448, 684 P.2d 534. (Burden of proof rests with the person at trying to prove the existence of the fact).

EASEMENT DELAY DAMAGES

The District again claims that all relevant facts were not referenced in the Brief in Chief relating to this issue. Indeed, the relevant facts were recited by Miller. Those were the several orders entered by the District Court which defined

the rights and obligations of the parties. Miller's actions were scrutinized by the Court pursuant to the District's motions for preliminary injunction and to hold Miller in contempt, and Miller was exonerated. Given Miller's exoneration, there was no basis for assessing damages.

The District contends that the District wanted an easement for electric lines and Miller was not prepare to give the easement. However, Miller has the right to refuse to grant easements. The District has the right of condemnation which, as addressed in the Brief in Chief, would likely have been short, simple and relatively inexpensive process.

1. On December 31, 2011, Miller and the District entered into an agreement (Miller's Ex. V) granting the electric easement and requiring the District to release its "will serve" letters. The agreement contemplated that the easement would be on the east side of a proposed Colinas Drive, but this proved to be difficult because of a water line easement and subdivision lots on this same side.

2. After December 31, 2011, the District could not locate its own water lines so that an electric easement could be identified. Attempts were made to locate an easement, but apparently these were rejected by PNM because of possible conflicts with the water lines.

3. On May 15, 2012, the District, still unable to locate water lines, filed a motion for preliminary injunction requesting the Court to affirmatively require

Miller to adjust the location of the easement, although it was not explained how this would be done. (R-60, ¶ 39-41). As pointed out by Miller (R-92-93), the District admitted it had not yet located its water lines, demanded a 20 foot wide easement, when the agreement called for a 10 foot wide easement, and hired an unsupervised backhoe operator to haphazardly dig holes on Miller property looking for water lines.

4. On May 30, 2012, the Court ordered that the District find its water lines and use technology to do so, not backhoes. If the current iteration of the easement plat was rejected by PNM, then the District could prepare a plat which showed the location of the water lines. The 10 foot wide easement was to be *adjacent* to the road. As of this date Miller had done nothing wrong. Water lines needed to be located first and were not. (R-127-128).

5. July 26, 2014, the District filed a motion for order to show cause. (R-130). Finally, the District claimed that it located its own water lines using "sound-based non-invasive technology" (R-133 ¶ 9), something it could have done six months before. The District then attached a copy of a proposed easement survey and demanded that Miller sign it or be held in contempt. (*Id.*) (R-133, ¶ 9-13) Miller's response objected to the location of the proposed easement and to the fact that PNM "standard grant of easement" was far more expansive than any easement Miller agreed to grant. (R-142-145).

6. In Miller's response, Miller attached an email dated July 18, 2012, to the District's attorney suggesting an option to simply move the electric line easement to the other side of the road. (R-160). Also, the draft survey which the District was trying to force Miller to sign was in violation of the Court Order because it was in several locations not adjacent to the road and was pushing further east into Miller's subdivision. (R-162).

7. On August 13, 2012, the District filed its reply (R-173) but waited until September 11, 2012, to file a notice of completion of briefing. (R-179).

8. On November 28, 2012, the District Court entered an Order and did *not* require Miller to sign the District's proposed easement. (R-189). Instead, the parties were ordered to negotiate an easement location. Again Miller did nothing wrong. This period of delay was caused by the District insisting on something it was not entitled to.

9. Days later, the parties agreed on a new location for the easement, which was now to be on the other side (west) of Colinas Drive). (R-192 and 209).

10. On December 11, 2012, the District Court entered an order acknowledging the agreement of the parties and acknowledging their "diligent" efforts. (R-218-219).

Each one of these delays were the result of either the District's incompetence or recalcitrance. Without locating the water lines, the electric

easement could not be located. Once the water lines were located, the electric easement could not be located on the east side of Colinas Drive without violating the Court's Order. Nothing Miller did delayed locating the easement. On January 2, 2012, the District could have ordered up the non-invasive technology which located its water lines. Thereafter it was clear that the electric easement needed to be placed on the other side of the road. Miller's actions or lack thereof were not a proximate cause of any delays.

THE DISTRICT FAILED TO PROVIDE "WILL SERVE" LETTERS

The District complains that Miller did not fully present all testimony relating to the issue of the failure of the District to provide an adequate "will serve" letter. In response, Miller presented the testimony of the District and its representatives relating to their efforts, or lack thereof, to ensure that adequate "will serve" letters were available for delivery to the County. These testimony references were unequivocal and direct and are party admissions. Testimony about contacts with the State Engineer or with the county hydrologist without any details or specifics does not and cannot affect the unambiguous and direct admissions of these parties. "We concluded that '[s]uch' post-hoc efforts to nullify unambiguous admissions under oath will not create a factual dispute sufficient to evade summary judgment." *Woody Investment, LLC v. Sovereign Eagle, LLC, et al.,* 2015-NMCA-111, ¶ 31, 362, P.3d 116,126. The District clearly admits, and indeed it cannot deny, that it

had a duty to "work with the appropriate governmental entity to ensure its 'will serve' letters are in force and effect ..." (Millers Ex. P. §IV). This obligation is admitted by the District's representatives in testimony. (TR. I-34-35; TR. I-40; TR. I-52). In February 2010, Mr. Jenkins, the District President, wrote Santa Fe County on February 8, 2010, addressing the problems with the "will serve" letter and announced in his final sentence: "Upon review of the water requirements of this application, the District's 'will serve' letter remains valid", essentially refusing to compromise in the slightest. (Miller Ex. AA-19). In response to Miller's inquiry about the "will serve" letter issues, Jenkins' only response was "give me some details". (TR. I-141). Mr. Chakroff, the District Manager, followed suit and stated "... we had given them all of the information they needed ... and they had the will-serve letter that stated that." (TR. I-190). Finally, it was Miller with the assistance of the Court of Appeals mediator who brokered a "will serve" letter form that the District agreed to sign. (TR. I-134, 136). The new form was simply a minor tweak of the District's 2008 form of letter. (TR. I-127; Miller's Ex. G(2)). The District's position is that it exerted diligent efforts to resolve the "will serve" letter problem. However, the undisputed facts are that it had an affirmative obligation to work through these issues with the County but took a "take it or leave it" approach, with the result being a three year long problem whose cure was only some minor language tweaks.

It is also uncontroverted that the District could have signed and delivered this new letter in September of 2011. However, it held off delivering any letters to Miller until Miller provided an easement to the District for the electric lines. (TR. I-151, 2) and Miller's Ex. V, P. 2 ¶2). Given the easy solution to the "will serve" letter problem, no reasonable fact finder could conclude that the District fulfilled its obligation to work with authorities to ensure the validity and effectiveness of its "will serve" letters. See, *Paez v. Burlington Northern Santa Fe Railway, et al,* 2015-NMCA-112, ¶ 26, 363 P.3d 116 where photographic proof of a line of sight was conclusive despite the filing of affidavits complaining about obstructing vegetation in a summary judgment proceeding, the court noting that a "'judge can enter judgment as a matter of law only if the judge concludes that no reasonable jury could decide the ... legal cause question except one way'".

THE DISTRICT'S OBLIGATION TO PROVIDE WATER TO MILLER'S RESIDENCE

The District claims that because it disabled itself from being able to continue water service to Miller's house, it does not have to "continue" water service to Miller's house as required by its agreement with Miller. Instead, the District argues, any obligation to continue with water service was conditioned upon Miller paying thousands of dollars in new infrastructure costs. The District completely ignores the agreement that it signed. The agreement between Miller and the District (Miller's Ex. L) provides that, "The District shall *continue* to provide

water ... to Miller's house." The word continue means to "maintain without interruption a condition, course, or action." *Merriam-Webster's Learner's Dictionary*. Another definition is "to keep happening or to keep doing something without stopping." *Cambridge Academic Content Dictionary.*

Accordingly, to continue providing service means that the District continues to provide service. It does not mean that the District stops providing service and requires Miller to build new infrastructure. That is found nowhere in the parties' agreement.

The District complains that Miller's house was previously serviced by Well 11 and that the District disabled itself by transferring the Well 11 rights to Miller. That is not Miller's problem. Miller's Exhibit L in Paragraphs 1 and 2 provides that the rights to Well 11 are to be transferred to Miller and Well 11 is to be disconnected from the District's system. Later in that same Agreement at Paragraph 7, the District agrees to continue water service to Miller's house. It made this commitment knowing that a few paragraphs back it gave up any rights to Well 11. The District had the obligation to continue service to Miller's home.

The District relies on Paragraph 7 of the agreement to the effect that the continued service would be "in accordance with the District's usual policies and procedures..." The District interprets this language as allowing it to stop service to the Miller house unless Miller builds substantial infrastructure for the District. This

interpretation is fanciful. The District is first obligated to continue water service to the Miller home. This obligation is without condition. Naturally, this continued water service is subject to policies and procedures relating to water usage and water rates just has it has always been. There is nothing in the agreement to suggest that the continuation of service that Miller bargained for was conditioned upon his spending thousands of dollars on new infrastructure. If that were the case, the District needed add this condition to the agreement, assuming Miller's consent.

FAILURE TO MITIGATE

The District claims that there was no evidence as to the cost of filing a condemnation complaint against a single defendant, depositing several thousand dollars with the court clerk and obtaining an immediate order of entry. In response, the Court can take judicial notice that filing a simple complaint and a few other pleadings should not take thousands of dollars.

The District claims that it was essentially intimidated by Miller's threat of a counterclaim relating to the District's failure to issue "will serve" letters and therefore did not file a condemnation action. This argument rings hollow, as this threat did not stop the District from spending tens of thousands of dollars allegedly to run a generator and then suing Miller to recover the costs. Either action would have brought the counterclaim. One then returns to the beginning. The District

could have spent a few thousand dollars to obtain its easement rather than throwing money away to run a generator.

MILLER'S PROVEN DAMAGES

The District contends that its three year delay in refusing to assure that its "will serve" letters were effective was not a proximate cause of damages. Instead, it was because Miller did not develop an affordable housing agreement until 2012 that caused the delay. (Answer Brief, P. 42). The District also suggests that there is no causation because Miller did not receive final plat approval until 2013. (*Id.*).

The District ignores the testimony of its own witness, Penny Ellis-Green, that without a "will serve" letter an application is put on hold and cannot move forward. There could be no affordable housing agreement or county approvals until the "will serve" letters were delivered. (TR. II-28) Further, the District ignores the uncontradicted testimony of Miller that once the "will serve" letters were issued, he was then able to work out an Affordable Housing Agreement. Until the "will serve" letters everything was on hold. (TR.II-201-211; Tr.III-51-2, 94-5)

As set forth in Miller's Brief in Chief, he presended considerable evidence relating to damages which the Court cannot simply disregard in its entirety. Generally, unimpeached testimony and "undisputed evidence cannot be arbitrarily rejected". *Reed v. State ex. rel. Ortiz,* 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86.

PUNITIVE DAMAGES

The District contends that Miller caused the difficulty in establishing the electric easement and was deserving of an assessment of punitive damages. As explained in the section on Miller not being responsible for delay damages, Miller did everything required by the Court's orders and at each turn was exonerated. Not only should no damages have been awarded, certainly punitive damages should not have been.

CONCLUSION

The judgment of the District Court should be reversed and the matter remanded for further proceedings relating to Miller's counterclaims.

STATEMENT OF COMPLIANCE

We are used Times New Roman and this brief contains 4,073 words, 350 lines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 13th day of June, 2016, a true copy of the foregoing was mailed First Class mail, postage pre-paid to:

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