

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

WASTE CONNECTIONS OF NEBRASKA, INC., a Delaware corporation, d/b/a J & J SANITATION, INC.,

Plaintiff,

vs.

GREAT PLAINS RECYCLING, INC., a Nebraska corporation, and THE CITY OF O'NEILL, NEBRASKA, a city of the second class of the State of Nebraska,

Defendants.

Case No. CI00-86

INTERLOCUTORY ORDER ON MOTIONS FOR SUMMARY JUDGMENT

DATE OF HEARING: October 15, 2001.

DATE OF RENDITION: January 13, 2002.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff: Stephen D. Mossman.

For defendants:

GPR: No appearance.

City: James D. Gotschall.

SUBJECT OF ORDER: (1) defendant City's motion for summary judgment (filed 9/28/01); and, (2) plaintiff's motion for summary judgment (filed 10/3/01).

PROCEEDINGS: See journal entry rendered on or about October 15, 2001.

FINDINGS: The court finds and concludes that:

1. To the extent that either motion is granted by this order, the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. The motion of defendant City of O'Neill, Nebraska, (City or defendant City) should be granted to the extent that any determinations set forth below are favorable to the defendant City or adverse to the plaintiff, and should be otherwise overruled and denied.

4. The plaintiff's motion should be granted to the extent that any determinations set forth below are favorable to plaintiff or adverse to the defendant City, and should be otherwise overruled and denied.

5. Because viewed in the light most favorable to the plaintiff, an issue of fact exists as to whether the "Agreement for Garbage Hauling and Disposal" was originally entered into by J & J Sanitation, Inc., a Nebraska corporation (Exhibit 7), or by a partnership or sole proprietorship, the court cannot determine as a matter of law whether an assignment occurred from any such partnership or proprietorship to J & J Sanitation, Inc.

6. The court has provided a longer period of time between the rendition of this order and the final pretrial conference scheduled below than would ordinarily be allowed in order that all negotiations and discussions regarding settlement of the remaining issues may be exhausted prior to the pretrial conference. The court recognizes that such negotiations and discussions involving a municipal corporation would require more time than a nongovernmental party. Consequently, the parties and counsel are admonished to pursue such matters diligently and promptly.

7. This order is interlocutory in character and remains subject to modification by the court without further notice or hearing at any time prior to entry of final judgment.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant City's motion is granted to the extent that any determinations set forth below are favorable to the defendant City or adverse to the plaintiff, and is otherwise overruled and denied.

2. The plaintiff's motion is granted to the extent that any determinations set forth below are favorable to plaintiff or adverse to the defendant City, and is otherwise overruled and denied.

3. Upon application of the standard set forth in paragraph 1 of the findings, the court determines as a matter of law that:

a. The defendant Great Plains Recycling, Inc. (GPR) acted beyond the scope and course of its agency (created by Exhibit 2, the “Operating Agreement”) in purporting to establish rates and charges for the City’s Recycling Center.

b. Any action of GPR taken in the “Solid Waste Delivery Agreement” (Exhibit 3) purporting to establish a “tipping fee” constitutes an attempt to establish rates and charges for the Recycling Center, which are outside of the authority of GRP as agent for the City.

c. Any purported rates and charges determined in the “Solid Waste Delivery Agreement” may not be enforced against the defendant City.

d. The purchase by Waste Connections, Inc. of the shares of stock of J & J Sanitation, Inc. does not constitute an assignment of the “Agreement for Garbage Hauling and Disposal” (Exhibit 4).

e. The mere fact that the “Agreement for Garbage Hauling and Disposal” (Exhibit 4) calls for the performance of a labor or service is not sufficient to render it nonassignable. From the entire contract it appears that personality is not an essential consideration and that only the certain object or result is contracted for and not the personal labor or services of the promisor. This contract falls within the exception to the rule declaring personal services contracts not assignable, and thus falls within the general rule permitting assignment of executory contracts. The original contracting party, J & J Sanitation (whoever or whatever that turns out to have been), remains bound by such party’s obligations under the contract and would be liable for a default by any assignee.

f. The “Operating Agreement” (Exhibit 2) and the “Agreement for Garbage Hauling and Disposal” (Exhibit 4) constitute exercises of the City’s powers and authority under the Integrated Solid Waste Management Act. NEB. REV. STAT. § 13-2001 *et seq.* (Reissue 1997).

g. Actions taken by the City under the authority of the Integrated Solid Waste Management Act constitute proprietary functions of the City. NEB. REV. STAT. § 18-2803(5) (Reissue 1997).

h. The provisions of the “Operating Agreement” (Exhibit 2) and the “Agreement for Garbage Hauling and Disposal” (Exhibit 4), to the extent otherwise valid and enforceable, are binding for a term of years beyond the term or terms of the city council or councils that authorized execution of such agreements.

i. The plaintiff’s failure to pay the rates and charges for the O’Neill Recycling Center established by the City from time to time constituted a breach of paragraph 13 of the “Agreement for Garbage Hauling and Disposal” (Exhibit 4). The City cured such default of the plaintiff as to the amounts accruing on or before December 31, 2000, by setting off against such amounts the monies which would otherwise have been owed by the City to the plaintiff under the “Agreement for Garbage Hauling and Disposal.”

j. The answer and counterclaim of the City filed on June 19, 2000, with this court constituted notice of default to the plaintiff and provided the plaintiff the opportunity to cure in compliance with paragraph 14 of the “Agreement for Garbage Hauling and Disposal.”

k. The plaintiff’s failure to collect and haul grass clippings and yard waste constitutes a material breach of the fourth sentence (“HAULER will provide garbage service”) of paragraph 3 of the “Agreement for Garbage Hauling and Disposal,” because “garbage” is specifically defined by the second sentence of paragraph 1 of such agreement to include such materials, unless there is any legal excuse of such breach. The court does not reach any issues regarding legal excuse of such breach.

4. The determinations of the court regarding the inability of the plaintiff to enforce the “tipping fees” established in the “Solid Waste Delivery Agreement” as against the City apply only as between those two parties to this action. The court makes no determinations regarding the right of the plaintiff, if any, to enforce the provisions of that agreement against GPR.

5. The matter is scheduled for **final pretrial conference on Monday, March 25, 2002, at 1:40 p.m.**, or as soon thereafter as possible, in the District Judge’s chambers of the Holt County Courthouse, O’Neill, Nebraska. All other provisions of the previous progression orders not inconsistent with this order remain effective and shall govern the pretrial conference.

6. This order is interlocutory in character and remains subject to modification by the court without further notice or hearing at any time prior to entry of final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **January 13, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Interlocutory Order on Motions for Summary Judgment" entered**
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge