

**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

**JUDGMENT**

**DATE OF TRIAL:** May 7, 2001.  
**DATE OF RENDITION:** July 28, 2002.  
**DATE OF ENTRY:** See court clerk's file-stamp date per § 25-1301(3).

**APPEARANCES:**  
For plaintiff: Stephen D. Mossman and April Cover with Ron Richards, corporate officer.  
For defendants:  
GPR: No appearance.  
City: James D. Gotschall and Boyd W. Strobe with Kevin E. Seger, municipal corporate officer.

**SUBJECT OF JUDGMENT:** Trial on the merits to the court without a jury.

**PROCEEDINGS:** See journal entry rendered on or about May 9, 2002.

**FINDINGS:** The court finds and concludes that:

1. Although comprising one of two named defendants, Great Plains Recycling, Inc. (GPR) remained a defendant only because the court's relief could affect GPR's rights, liabilities, or interests. GPR thereafter occupied the litigation sideline. The plaintiff and the defendant City of O'Neill, Nebraska, actively litigated their respective claims. For

convenience, references to “the defendant” mean the defendant City of O’Neill. The court will specifically refer to GPR where necessary.

2. The litigated issues revolve around three written documents: (a) the “Agreement for Garbage Hauling and Disposal” (Exhibit 4); (b) the “Solid Waste Delivery Agreement” (Exhibit 3); and, (c) the “Operating Agreement” (Exhibit 2). For convenience, the court refers to them as AGH&D, SWDA, and OA, respectively.

3. The court previously granted partial summary judgment by interlocutory order. Except to the extent modified by this order, the court adheres to the determinations in the prior summary judgment order and includes such relief in this final judgment.

4. Both counsel for plaintiff and counsel for defendant acknowledged at trial that paragraph 3.k. of the interlocutory partial summary judgment order is now moot. Because of this admission the final judgment denies relief on that issue.

5. The declarations in paragraphs 1.a. through 1.c. of the Judgment section below adversely determine the plaintiff’s first cause of action of the second amended petition, and favorably partially determine the first clause of defendant’s counterclaim’s prayer for relief seeking a “finding that the [defendant] is not bound to the terms of the [SWDA] . . . .” Except to the extent of the specific declarations, the evidence fails to show an existing, ripe controversy regarding rights and responsibilities under the SWDA.

6. The general rule states that demand for contract performance is not necessary unless required by its terms or by its peculiar nature. *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980). However, the AGH&D expressly required such demand and mandated that it be accomplished “by giving sixty (60) days written notice to cure to [plaintiff] . . . .” Exhibit 4, ¶ 14. It then dictated that “if such listed violation or default is not cured by the end of such sixty (60) days, this contract shall terminate and be at an end.” *Id.*

7. In this court’s interlocutory summary judgment order, this court stated, in paragraph 3.j., that “[t]he answer and counterclaim of the [defendant] 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 [AGH&D].” This court now concludes that the interlocutory ruling misstated the appropriate relief and should be modified in this final judgment.

8. While the June 19, 2000, answer and counterclaim (Exhibit 47) made known the defendant’s contention that the failure to pay tipping fees constituted a violation, the answer and counterclaim did not constitute an effective or meaningful notice to cure. Paragraph 18 asserts that the “breach of contract . . . relieves [the defendant] from further performance . . . .” Exhibit 47, ¶ 18 (counterclaim). Paragraph 20 states that defendant “intends to terminate all said contracts, immediately[.]” *Id.* at ¶ 20 (counterclaim). These statements fail to acknowledge any right to cure and, indeed, directly contradict the right’s existence. The opportunity to cure contemplated by paragraph 14 of the AGH&D constitutes an equally important contract term as any other agreement provision.

9. Paragraph 19 of the June 19, 2000, answer and counterclaim alleges that demand “has been made” for “the balance due” on tipping fees. *Id.* at ¶ 19 (counterclaim). While regular monthly billings for the tipping fees were sent to plaintiff, no specific demand for “the balance due” was sent until after this court’s interlocutory order. That separate demand was satisfied within 60 days of the date of giving of such notice. Paragraph 19 did *not* allege that the answer and counterclaim itself constituted notice of default and the opportunity to cure in compliance with paragraph 14 of the agreement. The allegation that demand “has been made” does not constitute the notice contemplated by paragraph 14 of the agreement. The June 19, 2000, answer and counterclaim language fails to satisfy the AGH&D paragraph 14 requirement of “written notice to cure.”

10. The attempt to characterize the answer and counterclaim (Exhibit 52) filed September 24, 2001, as such notice fails for the same reasons.

11. The plaintiff’s second cause of action for declaratory relief seeks a declaration that the AGH&D is not a contract-at-will and is in place for a term continuing through April 1, 2007, and damages for defendant’s failure to pay the paragraph four fees

for December, 2000, and subsequent months. Because the court has determined that the defendant failed to give effective notice to cure the plaintiff's failure to pay tipping fees violation and the court rejects the defendant's other claims to terminate the contract, the plaintiff is entitled to declaratory relief of the continuing existence of the AGH&D containing a stated term of existence. Of course, this court cannot declare that the contract will continue through April 1, 2007, because the court cannot anticipate and the parties cannot litigate in advance regarding future events.

12. Because the plaintiff's claim that it owed tipping fees of only \$36 per ton has been rejected, the defendant's setoff was proper. The plaintiff is not entitled to any monetary relief on its second cause of action.

13. The plaintiff's third cause of action asserts that the defendant's conduct of a competing "roll-off" business violates the exclusive right granted by the AGH&D. Paragraph one states:

1. Scope and Description of Right. HAULERS have the exclusive right during the term of this Agreement to collect and haul for hire over the streets and alleys of the MUNICIPALITY, all garbage collected from public and private customers located within the corporate limits of the MUNICIPALITY. "Garbage" as used herein, shall be interpreted to mean and include all waste, animal and vegetable matter, rubbish, trash, debris, tin cans, aluminum, paper, and other waste materials generally, including articles ordinarily and customarily hauled away and dumped. *See attached Exhibit B.*

Exhibit 4, ¶ 1 (emphasis supplied).

14. The attached Exhibit B describes "[g]arbage [s]ervice [f]or [i]n[-]town residential, commercial[,] and farm & ranch customers" and specifically describes a variety of types of waste that will or will not be accepted by the plaintiff. *Id.* Of course, where a contract expressly incorporates an attached document, the words of that attached document will be considered in the same manner as if expressly stated at the point of incorporation.

15. Incorporation of Exhibit B in paragraph one introduces an ambiguity. The definition of "garbage" can be given two reasonable, conflicting interpretations. On one hand, the agreement may be viewed giving literal effect to the broad definition of "garbage."

On the other hand, the incorporated descriptions can be read to limit the definition of “garbage” contemplated by the parties. The recitals refer to a “trash removal service” or “trash disposal service,” and contemplate that the plaintiff “will be the only trash disposal service operating within” the defendant. Exhibit 4. Because of the ambiguity, the court may consider parol evidence to construe the contract.

16. The court agrees with plaintiff that the court must interpret the meaning of the AGH&D and that the definitions of the Integrated Solid Waste Management Regulations (Exhibit 49) provide little assistance in that process.

17. The evidence shows that the agreement was prepared by the plaintiff’s assignor and must be construed against the plaintiff. The plaintiff’s interpretation would render Exhibit B meaningless and partly absurd. If possible the court must give effect to all of the words of the contract. The contract cannot be interpreted to confer the exclusive right to haul items that the plaintiff refuses to haul. The literal, blanket interpretation necessarily fails.

18. Because of the ambiguity discussed above and the evidence demonstrating the separate nature of a “roll-off” business from the regular garbage-removal business, the court construes the AGH&D to apply to the plaintiff’s regular garbage-removal business and not to the competing “roll-off” businesses conducted by the plaintiff and the defendant. Accordingly, the plaintiff’s third cause of action for breach of the exclusive-right clause and resulting damages fails.

19. The plaintiff also failed to sustain its burden of proof on the elements of causation and damages on that third cause of action. The court rejects the plaintiff’s assumption that defendant’s roll-off receipts would have necessarily gone to the plaintiff in the absence of the defendant’s competing operation. The court finds it more likely than not that a substantial portion of those loads would have been hauled by the customers directly. Because it is not possible to separate and determine the portion that would have gone to the plaintiff, the proof of damages is too speculative and remote.

20. Neither party completely prevailed or completely failed on its petition or counterclaim. Each party should be required to pay its own taxable costs.

**JUDGMENT:** IT IS THEREFORE ADJUDGED that:

1. The following determinations made by interlocutory summary judgment, as modified below, are adopted as final declarations 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 the OA (Exhibit 2), in purporting to establish rates and charges for the defendant City's Recycling Center.

b. Any action of GPR taken in the SWDA (Exhibit 3) purporting to establish or modify the "tipping fee" constituted an attempt to establish rates and charges for the Recycling Center, which was outside of the authority of GRP as agent for the defendant.

c. Any purported rates and charges determined in the SWDA may not be enforced against the defendant City. The court makes no determination whether the plaintiff may enforce such provisions against GPR.

d. The purchase by the plaintiff of the shares of stock of J & J Sanitation, Inc. does not constitute an assignment of the AGH&D (Exhibit 4).

e. The fact that the AGH&D calls for the performance of a labor or service is not sufficient to render it nonassignable. From the entire contract, the court determines 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 that personal services contracts may not be assigned, and thus falls within the general rule permitting assignment of executory contracts.

f. The OA and the AGH&D constitute exercises of the defendant's power and authority under the Integrated Solid Waste Management Act. NEB. REV. STAT. § 13-2001 *et seq.* (Reissue 1997).

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

h. The provisions of the OA and the AGH&D, 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.

2. Upon the evidence at trial and partially relying upon the determinations of the interlocutory summary judgment, the court declares:

a. The plaintiff's failure to pay the rates and charges for the O'Neill Recycling Center established by the defendant from time to time (the "tipping fees") constituted a violation of paragraph 13 of the AGH&D. The City recovered the entire amount of unpaid tipping fees as to the amounts accruing on or before February 28, 2002, by setting off against such amounts the monies which would otherwise have been owed by the defendant to the plaintiff under the AGH&D and by payments made by the plaintiff.

b. The defendant's answer and counterclaim (Exhibit 47) filed on June 19, 2000, stated allegations of violation but failed to give "written notice to cure" to the plaintiff as required by paragraph 14 of the AGH&D.

c. The defendant's answer and counterclaim (Exhibit 52) filed on September 24, 2001, stated allegations of violation but failed to give "written notice to cure" to the plaintiff as required by paragraph 14 of the AGH&D.

d. The defendant's prior statements through counsel to the effect that the AGH&D is now a contract-at-will and may be canceled by the defendant at any time are declared to be contrary to law and void. As of the date of trial, the AGH&D remains effective for a stated term.

3. Except to the extent of the determinations in paragraphs 1.a. through 1.c., inclusive, above, the plaintiff's first cause of action for declaratory relief and the defendant's counterclaim for declaratory relief "finding that the [defendant] is not bound to

the terms of the Solid Waste Delivery Agreement . . .” are dismissed with prejudice. The defendant’s counterclaim for such declaratory relief is granted to the extent of the declarations in said paragraphs 1.a. through 1.c., inclusive.

4. The plaintiff’s second cause of action for declaratory relief is granted to the extent of the declarations stated in paragraphs 1.d. through 1.h., inclusive, above and in paragraphs 2a. through 2.d., inclusive, above. The plaintiff’s second cause of action is otherwise dismissed with prejudice.

5. The plaintiff’s third cause of action is dismissed with prejudice.

6. The claims in the defendant’s counterclaim that the defendant “may terminate the [AGH&D] prior to April 1, 2007 as contrary to the governmental function and police powers of the [defendant]” are dismissed with prejudice.

7. The claims in the defendant’s counterclaim that the defendant “may terminate the [AGH&D] prior to April 1, 2007 . . . due to the breach of contract by [plaintiff or plaintiff’s assignor]” for “[f]ailing to act in good faith,” “[a]ttempting to sublet or contract without the consent of the [defendant],” and “[f]ailing to pay the [defendant’s] tipping fees” are dismissed with prejudice.

8. The claim in the defendant’s counterclaim that the defendant “may terminate the [AGH&D] prior to April 1, 2007 . . . due to the breach of contract by [plaintiff or plaintiff’s assignor]” for “[f]ailing to pick up yard waste” is dismissed as moot.

9. All claims of all parties not expressly determined above are dismissed with prejudice. All requests for attorneys’ fees, express or implied, are denied. Each party shall bear such party’s own costs. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **July 28, 2002**;  
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

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 "Judgment" entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

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**William B. Cassel**  
District Judge

Mailed to: