IN THE COURT OF APPEALS OF IOWA

No. 3-1010 / 13-0253
Filed January 23, 2014

SHELBY COUNTY COOKERS, L.L.C.,
Plaintiff-Appellee,

vs.

UTILITY CONSULTANTS INTERNATIONAL, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Shelby County, James M. Richardson, Judge.

Utility Consultants International appeals the district court's ruling on Shelby County Cookers's motion for summary judgment. **AFFIRMED.**

Brett Ryan of Watson & Ryan, P.L.C., Council Bluffs, for appellant.

James G. Powers and April N. Hook of McGrath, North, Mullin & Kratz, P.C. L.L.O., Omaha, Nebraska, for appellee.

Heard by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Utility Consultants International (UCI) appeals the district court's ruling on Shelby County Cookers's (SCC) motion for summary judgment. The district court held there was a contract between SCC and UCI, but that UCI was only entitled to a contingency fee based on its review of four utility bills completed during the pendency of the contract. The court further held, pending payment of any refund fee, UCI's breach-of-contract counterclaim was not ripe, and dismissed UCI's other two counterclaims. UCI argues the district court erred when it found UCI was only entitled to a contingency fee based on its review of four utility bills, because SCC repudiated the contract and thus prevented UCI from fully performing. UCI also argues the court erred when it held the breach-of-contract claim was not ripe and when it dismissed UCI's counterclaims. Because we conclude the district court correctly determined the scope of the contract was limited to the four bills UCI reviewed, UCI's breach-of-contract claim was not ripe, and UCI's counterclaims are without merit, we affirm.

I. Factual and Procedural Background

In July of 2011, UCI contacted SCC through an unsolicited phone call and informed SCC it was in the business of conducting reviews of utility billings for possible errors. UCI spoke with Troy Schaben, the plant controller for SCC. After the phone call, Schaben forwarded to UCI four utility bills for UCI to review. On August 9, 2011, UCI informed Schaben that, after reviewing the utility bills, SCC was likely entitled to a large refund, though the amount and type was not specified.

A contract was signed on the same day by Schaben on behalf of SCC. In its entirety, the contract stated:

> This agreement authorizes UTILITY CONSULTANTS INTERNATIONAL, INC. to pursue refunds and bill reductions, on your behalf, on your utility billings.
>
> If UTILITY CONSULTANTS INTERNATIONAL, INC. is successful in obtaining a refund(s) for your company(ies), your fee obligation is 50% of the refund(s). Payable only if and when a credit has been applied to your account or a check has been issued to you. The future cost reductions, as defined by when the utility adjusts your account(s) strictly accrue to you.
>
> If you accept our money saving proposal, please sign where indicated.

After the contract was signed, UCI informed SCC that it believed a large refund was possible due to the overpayment of sales tax. UCI requested more utility bills so it could conduct a further review. Schaben informed UCI that Brad Poppen, SCC's secretary/treasurer, would need to approve the release of any more bills due to the fact this was now a sales tax issue. On September 2, SCC requested that UCI provide information regarding the scope of services UCI intended to provide to SCC, or SCC would terminate the contract. UCI never furnished this information, nor agreed to enter into a contract with more specific terms. Consequently, SCC terminated its agreement by letter dated September 20, 2011, which stated:

> As has previously been indicated to you, Shelby County Cookers, LLC disputes it has a valid contract with Utility Consultants International, Inc. concerning the pursuit of refunds. You have previously forwarded to me what you contend is a contract and I have told you that the person signing it was not authorized to sign on behalf of the company, and in addition, it is not supported by consideration
>
> Regardless of these issues, you are hereby notified that to the extent that any such agreement is valid, it is hereby TERMINATED effective as of today's date.

Before the contract was entered into, UCI's review of the sales tax was never mentioned. During the hearing, David Dawson, the owner of UCI, admitted to the following:

> Q: Aren't you concerned that if you put sales tax out there on the website or you told a customer that it was a sales tax review, that they would go ahead and hire their own accountant to do it or they would do it themselves? . . .
>
> . . . A: No. Yes, I guess they could do it on their own if they wanted to.
>
> Q: My question is, is that why you keep it a secret from them? A: Primarily.
>
> . . . .
>
> Q: You go out and market yourself as a utility rate refund, but your primary source of revenue is sales tax refunds? A: Yes.
>
> Q: You never tell anyone that what you're really there to do is see if they've been charged a sales tax until after they sign the agreement? A: That's correct.

After its initial review of the four utility bills, UCI did not conduct any further work on behalf of SCC. SCC engaged its own accountant to pursue the sales tax refund, asserting it had no obligation to UCI to employ UCI to review more utility bills. UCI disputed SCC's stance that the parties did not enter into an enforceable contract. Consequently, SCC filed a petition for declaratory judgment on December 5, 2011.

On December 26, 2012, SCC moved for summary judgment. A hearing was held, and the district court issued a ruling on January 22, 2013 holding there was a contract, but that "the agreement is ambiguous in its scope and duration." The court found the contract, based upon the conduct of the parties, was limited to the timeframe between August 9, 2011 and September 20, 2011. Within that timeframe, UCI had only reviewed four utility bills, and so, pursuant to the contract, it was only entitled to fifty percent of the sales tax refund that may be

forthcoming from those four bills. The court further found that, because the refund had not yet been issued to SCC, UCI's damages claim based on SCC's alleged breach of contract was not yet ripe, and dismissed the remaining counterclaims. UCI appeals.[1]

II. Standard of Review

We review the district court's ruling on motions for summary judgment for correction of errors at law. *Cemen Tech, Inc. v*. *Three D Indus.*, 753 N.W.2d 1, 5 (Iowa 2008). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If the only issue presented is the legal consequences flowing from undisputed facts, summary judgment is appropriate. *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011).

III. UCI's Damages Claim for Breach of Contract

UCI argues the proper amount of damages is $127,193.66, that is, the amount it identified it would have received had SCC not repudiated the contract and prevented UCI's full performance. This characterization of damages ultimately disputes the district court's holding that a contract only existed from August 9 until September 20, 2011. UCI further claims that, because there is little variation between utility bills, SCC received the benefit of the bargain when UCI informed SCC that it was entitled to a refund of $225,000. Alternatively, it asserts that the amount of damages is a question of material fact precluding

[1] SCC does not cross appeal the district court's finding there was a contract between the parties or that UCI is entitled to fifty percent of any sales tax refund "when and if said refund is received" based on the four submitted bills. We are therefore bound by the district court's conclusion there was a contract, and must proceed on that basis.

summary judgment, and that the district court ruled on the issue without either party requesting such a ruling.

As an initial matter, we disagree with UCI's contention neither party requested the district court to rule on the issue of liability. To the contrary, SCC's initial petition for declaratory judgment requested the court to determine that SCC "is not liable" to UCI, and UCI's counterclaims of fraud and equitable estoppel argue SCC breached the contract, entitling UCI to damages. Moreover, the record does not support UCI's argument there is an issue of material fact with regard to damages. Consequently, within the context of the action, the district court's ruling regarding SCC's liability to UCI under the existing contract was proper.

With respect to UCI's claim the amount of damages was inaccurate, we agree with the district court the contract was limited to the time period between August 9 and September 20, 2011. When a contract for the performance of services contains no time limitation, the contract can be terminated by either party upon reasonable notice. *Hess v. Iowa Light, Heat & Power Co.*, 221 N.W. 194, 196–97 (Iowa 1928) ("[W]here no time limitation is inserted in a contract for the performance of services, or the furnishing of commodities, the contract is regarded as terminable by either party on reasonable notice.").

Here, the contract did not specify a timeframe in which the contract was to be performed. It merely stated UCI was authorized "to pursue refunds and bill reductions, on your behalf, on your utility billings." After requesting further elaboration regarding the terms of the contract, SCC gave reasonable notice to UCI that, if UCI did not furnish the requested information, SCC would terminate

the contract. SCC then clearly terminated the contract on September 20 by stating: "[Y]ou are hereby notified that to the extent that any such agreement is valid, it is hereby TERMINATED effective as of [September 20, 2011]." Despite UCI's characterization of this letter as a repudiation of the contract, it is clearly a proper termination under Iowa law. *See id*. at 197. Therefore, the district court correctly determined the contract duration was limited to the time in which it was entered—August 9, 2011—to the time it was terminated—September 20, 2011.

Without any specified timeframe within the contract, SCC turned over four billings for UCI to review. Under the terms of the contract, SCC was not obligated to turn over any more billings, either past or future. Consequently, the district court was correct when it found SCC's liability was limited to fifty percent of whatever refund is obtained from the four bills it reviewed. Therefore, we affirm the district court's finding that SCC's liability to UCI is limited to fifty percent of any refund pertaining to the four utility bills UCI reviewed under the contract.

IV. Ripeness

UCI further asserts that SCC repudiated the contract, entitling UCI to immediately sue for damages. Consequently, it claims the district court erred when it ruled that UCI's claim for damages against SCC was not ripe.

A case is ripe for adjudication when it presents an actual, present controversy, rather than a claim that is merely hypothetical or speculative. *State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010). The purpose of the ripeness doctrine is:

> [T]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from

> judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Id. If a claim is not ripe, the court is without jurisdiction to hear the claim, and it must be dismissed. *Iowa Coal Mining Co. v. Monroe Cnty*., 555 N.W.2d 418, 432 (Iowa 1996).

As stated above, the contract was limited to the timeframe between August 9 and September 20, 2011, during which UCI reviewed four utility bills. Under this contract, payment to UCI is not due until either a refund is applied to SCC's account or SCC receives a check for the refund from these four bills. There is no evidence that either of these two conditions precedent has occurred, and thus there is no evidence SCC has breached, or is even intending to breach, the contract that the district court decided existed. Therefore, there is no justiciable controversy over which a court may adjudicate the rights of the parties, and the district court was correct in determining the issue of SCC's breach of contract was not yet ripe.

V. UCI's Counterclaims

UCI's final argument asserts the district court erred in dismissing its counterclaims of equitable estoppel and fraud. UCI again asserts SCC accepted the benefit of the bargain then intentionally breached the contract, giving rise to UCI's counterclaims of equitable estoppel and fraud.

To prove equitable estoppel, UCI must show:

> (1) the opposing party misrepresented or concealed material facts, (2) the party relying on estoppel lacked knowledge of the true facts, (3) the party misrepresenting or concealing the true facts intended the deceived party to act on those representations, and

> (4) detrimental reliance by the party to whom the representations were made.

Rubes v. Mega Life & Health Ins. Co., 642 N.W.2d 263, 271 (Iowa 2002). To succeed on a claim of fraud, the plaintiff must prove by clear and convincing evidence: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. *B & B Asphalt Co. v. T.S. McShane Co*., 242 N.W.2d 279, 284 (Iowa 1976).

UCI has not shown any facts upon which it could prove either counterclaim. SCC's actions of signing UCI's form contract then lawful termination of said contract do not amount to intentional acts meant to mislead UCI into detrimentally relying on SCC's position. Therefore, UCI has not met its burden showing there is an issue of material fact regarding its counterclaims, and we affirm the district court's dismissal of UCI's counterclaims of fraud and equitable estoppel.

Having considered all claims presented by UCI, we affirm the district court's ruling on SCC's motion for summary judgment.

Costs of this appeal assessed to UCI.

AFFIRMED.

Mullins, J., concurs; McDonald, J., dissents.

McDONALD, J. (dissenting)

I respectfully dissent. When the record is viewed in the light most favorable to UCI, there is a genuine issue of material fact that precludes the entry of summary judgment. Specifically, there is a disputed issue of material fact as to whether UCI performed or substantially performed prior to SCC providing notice of its intent to terminate the contract and, consequently, whether SCC's notice of termination was a repudiation of duties already owed or a termination of the parties' contract without further obligation.

"Substantial performance is that which, despite deviations from the contract requirements, provides the important and essential benefits of the contract to the promisee." *SDG Macerich Props., L.P. v. Stanek, Inc.*, 648 N.W.2d 581, 586 (Iowa 2002). "The doctrine is intended to protect the right of compensation of those who have performed in all material and substantive particulars . . . ." *Id.* Although we typically use the term "substantial performance" in construction cases, the doctrine is not necessarily limited to that subject matter. *See Flynn Builders, L.C. v. Lande*, 814 N.W.2d 542, 546 (Iowa 2012) ("In the area of contracts, substantial performance is performance without a material breach, and a material breach results in performance that is not substantial." (quotation marks and alteration omitted)).

I begin my analysis with the language of the contract. UCI promised to "pursue refunds and bill reductions" on SCC's "utility billings." In exchange, SCC agreed to pay "50% of the refund(s)." SCC provided exemplar utility billings to UCI so that UCI could pursue refunds and bill reductions. After reviewing the exemplar billings, UCI was able to determine that SCC was entitled to refunds for

overpaid sales tax and was able to reduce its sales tax going forward. SCC's duty to pay UCI for its services arose once UCI performed or substantially performed. When the record is viewed in the light most favorable to UCI, the finder of fact could find that UCI's provision of sales tax information provided the "essential benefit" of the contract and thus constituted substantial performance. This would be a reasonable finding given that the provision of the information resulted in SCC obtaining more than a quarter-million dollar sales tax refund plus substantial sales tax savings going forward. The finder of fact could also find UCI's provision of sales tax information was not the "essential benefit" of the contract and the "essential benefit" was actually conducting a sales tax audit and completing the necessary applications to obtain sales tax refunds and future sales tax reductions. In either case, this is a question of fact. S*ee* 17B C.J.S. *Contracts* § 1035, at 482 (2011) ("Whether there has been substantial performance of a contract is ordinarily a question of fact . . . ."); Richard A. Lord, *Williston on Contracts* § 44:54, at 226 (4th ed. 2004) ("There is no ready formula for determining what amounts to substantial performance in any particular case. Precise boundaries cannot be drawn, since the question turns on the facts of each case.").

The question of substantial performance is material because it determines whether UCI is entitled to contract damages. If UCI performed or substantially performed, then SCC's purported termination constitutes a repudiation of its performance as a matter of law, and UCI is entitled to payment of the contract price. *See Farrington v. Freeman*, 99 N.W.2d 388, 391 (Iowa 1959) (holding that a party who proved substantial performance is entitled to contract damages);

Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 406 (Iowa Ct. App. 1994); *see also Pavone v. Kirke*, 807 N.W.2d 828, 834 (Iowa 2011) (holding a "termination letter constituted a total repudiation" of the parties' agreement); *In re Pickel*, 493 B.R. 258, 268-70 (Bankr. D. N. M. 2013) (holding that purported termination of contract was actually repudiation of duties owed under contract and "[t]he remedy for anticipatory breach, as repudiation is also known, is the right of the non-breaching party to immediately seek damages for a total breach of the contract"); *Digital Ally, Inc. v. Z3 Tech., LLC*, 864 F. Supp. 2d 1050, 1079 (D. Kan. 2012) (holding that a party's letter terminating a contract was repudiation the of contract). If UCI failed to perform or substantially perform prior to termination, then SCC has no duty to pay UCI anything, including payment for the refunds related to the four exemplar billings UCI reviewed. *See Flynn Builders*, 814 N.W.2d at 547 (holding a contractor was not entitled to payment where the contractor failed to prove substantial performance); *Littell v. Webster Cnty.*, 131 N.W. 691, 700 (Iowa 1911) (holding that a party was not entitled to compensation where it failed to prove substantial performance). It is not material whether SCC erroneously concluded that it had a right to terminate the contract at the time it did so. The Restatement of Contracts provides that "[g]enerally, a party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty." Restatement (Second) of Contracts § 250, cmt. d, at 274–75 (1981). "Iowa law is consistent with section 250 of the Restatement." *Pavone*, 807 N.W.2d at 833.

There is no Iowa case directly on point, but analogous cases involving commission disputes and contingency fee agreements provide support. For

example, under the efficient procuring cause doctrine, a broker is entitled to a commission under some circumstances even if the sale at issue occurs after the termination of the brokerage agreement. *See Bus. Consulting Servs., Inc. v. Wicks*, 703 N.W.2d 427, 429 (Iowa 2005). Under the facts and circumstances of brokerage agreements, the efficient procuring cause doctrine is another way of asking whether the broker substantially performed prior to termination of the contract such that the broker is entitled to payment. This question is one for the finder of fact. *See Vint v. Ashland*, 139 N.W.2d 457, 461 (Iowa 1966) (observing that a broker's entitlement to commission was a question for the factfinder).

In *Harold Wright Co., Inc. v. E.I. Dupont De Nemours & Co., Inc.*, 49 F.3d 308, 309 (7th Cir. 1995), a manufacturing representative sued DuPont for commissions owed. Under the parties' agreement, Wright marketed DuPont's products and received commission based on the invoice price of the products actually ordered. *Harold Wright*, 49 F.3d at 308-09. Wright completed its marketing work to a major purchaser, but the purchaser was not going to place the orders until the following year, as was its practice. *Id.* at 309. DuPont terminated Wright before the purchaser actually ordered the product the following year. *Id.* Judge Posner concluded that summary judgment was inappropriate:

> This is one of those cases where, try as we will, we can neither figure out the meaning of the contract from its language and the uncontested background facts nor invoke a default rule to resolve the controversy. The controversy thus cannot be resolved without resort to extrinsic evidence. Maybe there is a custom in the fishing-products trade that would allow Wright to claim commissions on orders that it can show grew out of its marketing efforts. Maybe the negotiating history of the contract between Wright and Du Pont can illuminate the parties' intentions with respect to orders shipped after the end of the contract. These are areas for further exploration in the district court. Summary judgment was premature.

Id. at 310.

The most analogous cases, however, involve attorney contingency fee agreements. While an attorney is entitled to receive the entirety of a contractually agreed upon contingency fee if the attorney was discharged after substantially performing, whether the attorney "substantially performed" is a question for the finder of fact. *See Taylor v. Shigaki*, 930 P.2d 340, 343 (Wash. Ct. App. 1997) ("The determination of substantial performance is a question of fact . . . ."). As another court explained:

> If the attorney fully performs his agreement until discharged without cause, the measure of his damages should be the compensation named in the contract. The client, in such case, breaks his contract and at least makes it difficult, and in some cases practically impossible, for an attorney to show the amount of his injury under the rule of quantum meruit. If the client prevents the performance which entitled the attorney to specific recompense, it would seem that such amount and interest from the time it became due may be recovered in an action which sets forth such state of facts . . . . [T]he measure of damages for such breach of contract is the full contract price, especially when the attorney's work is substantially done, unless some other sum has been agreed upon.

Martin v. Buckman, 883 P.2d 185, 194 (Okla. Civ. App. 1994) (alteration in original) (citation and internal quotation marks omitted).

The majority implicitly rejects the application of the substantial performance doctrine on the ground that SCC had no duty to pay UCI for its services at the time SCC purported to terminate the contract. The majority appears to reach this conclusion by construing the payment clause in the contract as a condition precedent to SCC's duty to pay. As an initial matter, this does not jibe with the conclusion that UCI is entitled to payment for the refunds paid on the four exemplar billings because SCC had not received any refund for

those billings prior to termination of the contract. More important, however, while I agree that substantial performance will not excuse the non-occurrence of a condition precedent, *see SDG Macerich Props*., 648 N.W.2d at 586, I disagree that the payment clause should be construed as a condition precedent to SCC's obligation to pay. Instead, I would hold the payment clause is merely a measurement of when payment is required on performance already owed.

Construing the payment clause as a measurement of when payment is due rather than a condition precedent to performance is the preferred construction because it avoids forfeiture. As a general rule, contracts should be construed to avoid forfeiture. *See Lane v. Crescent Beach Lodge & Resort, Inc.*, 199 N.W.2d 78, 81 (Iowa 1972) ("Forfeitures are not favored in law, and courts will construe contracts as to avoid them . . ."). Consider the following illustration: UCI reviewed all of SCC's utility billings and determined SCC was entitled to sales tax refunds; UCI performed any and all necessary auditing; UCI completed all applications necessary to obtain the refunds and submitted the application to the appropriate authorities; and SCC terminated the contract after the applications were submitted but prior to the condition precedent of the refunds actually being received by SCC. Would we state under these facts and circumstances that UCI is not entitled to compensation as a matter of law? Construing the payment clause as a condition precedent requires that result. Our canons of construction have long provided that we should avoid the harsh result of forfeiture where we can do so without doing violence to the language of the contract. *See Davis & Co. v. Cobban*, 39 Iowa 392, 392 (1874) (construing a clause requiring road to be completed by date certain to not be a condition

precedent to payment on the grounds that the construction "is more equitable than the other, which would operate as a kind of forfeiture"). The language of this contract permits the more equitable construction. Other courts have reached the same conclusion under similar circumstances. *See* 2 E. Allan Farsworth, *Farnsworth on Contracts* § 8.4, at 435-42(2004) (summarizing cases and concluding that contract provisions relating to the time for payment are generally construed as measurements of time and not conditions precedent to performance so as to avoid contract forfeiture).

The facts and circumstances set forth in the above illustration are not the facts and circumstances of this case; however, the facts and circumstances of this case lie somewhere along the continuum between no performance and perfect performance. Where on the continuum, as Justice Cardozo once eloquently stated, is for the finder of fact: "Where the line is to be drawn between the important and the trivial cannot be settled by a formula . . . . The question is one of degree, to be answered, if there is doubt, by the triers of the facts . . . ." *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

Finally, I address the district court's conclusion that UCI's contract claims related to sales tax refunds not yet credited or received are not ripe for resolution. "A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008). The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (abrogated on other grounds by *Califano v.*

Sanders, 430 U.S. 99, 105 (1977)). Under my construction of the contract, UCI and SCC have an actual dispute regarding UCI's right to payment under the terms of the parties' contract. Even if the district court and the majority are correct, however, that the payment clause is a condition precedent to SCC's performance, then it simply means that UCI's claims fail as a matter of law, not that the claims are not ripe for adjudication. The fact that the refunds have not been credited or received goes to the relief to be provided and not the justiciability of UCI's claims. *See Team Two, Inc., v. City of Des Moines*, No. 12-1565, 2013 WL 1749909, at *9 (Iowa Ct. App. Apr. 24, 2013) (stating that specific performance is available to ensure that a party continues to make payments as money is collected in the future). UCI's claims are real and capable of judicial resolution.

For the foregoing reasons, I respectfully dissent. I would reverse the judgment of the district court and remand this matter for further proceedings.