

Coniber v Center Point Transfer Sta., Inc.

2015 NY Slip Op 30401(U)

March 23, 2015

Supreme Court, Wyoming County

Docket Number: 41453

Judge: Michael M. Mohun

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

**JEFF CONIBER, DOING BUSINESS AS
JEFF CONIBER TRUCKING,**

Plaintiff,

-vs-

DECISION

Index No. 41453

**CENTER POINT TRANSFER STATION, INC.,
MATTHEW W. LOUGHRY AND KENNETH
LOUGHRY,**

Defendants.

The Court conducted a non-jury trial in the above-captioned matter on October 27, 29 and 30; November 3, 5, 6, 17; and December 1, 2014.

Upon the evidence presented at the trial and upon all the proceedings previously had herein, after considered the Plaintiff's Proposed Findings of Fact/Conclusions of Law submitted by Steven E. Feder, Esq., attorney for the plaintiff, dated January 15, 2015 , and the Defendants' Request for Findings of Fact, submitted by E. Robert Fussell, Esq., attorney for the defendants, dated January 16, 2015, the Court renders the following Decision in compliance with §4213 of the Civil Practice Law and Rules.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiff owns and operates a trucking business. He seeks in this law suit to recover from the defendants monies owed him under

a Waste Hauling Agreement dated October 19, 2007.

2. Defendants Kenneth and Matthew Loughry, father and son, are the sole owners and officers of the defendant, Center Point Transfer Station Inc. [hereinafter, "CP"]. CP was the operating company for the Loughry's solid waste transfer station located at 119 River Road, Scottsville, New York. During the period relevant to the law suit, CP had no employees.

3. Matthew and Kenneth Loughry also own and operate LT Disposal, Inc. [hereinafter, "LT"], through which they run a garbage collection and hauling business. The Loughrys had been in the garbage collection and hauling business for some years before incorporating CP and opening the transfer station. Neither of them had any prior experience running a transfer station. To the extent needed, the Loughrys used employees of LT to operate the transfer station. It appears that CP periodically would reimburse LT for wage costs.

4. The complaint states five (5) causes of action. During the trial, the plaintiff withdrew, with no opposition from the defendants, the second and fifth causes of action. The three (3) remaining causes of action allege breach of the October 19, 2007, Agreement seeking damages, including late fees and lost profits.

5. At the trial, the plaintiff called to the stand Peggy Coniber, wife of plaintiff; Edward Fosdick, expert witness; and plaintiff Jeff Coniber.

The defendants called to the stand Steven Beardsley, Official of the Bank of Castile; Raymond Duerr, Director of Landfill Sales, Casella Corp.; Brian Lanpher, truck driver; Michael Wolf, truck driver; Kenneth Loughry, defendant; Mark Cole, owner of M & T Trucking; Christopher Maggoli, former employee of defendant CP; Sean Buchwald, truck driver; Matthew Loughry, defendant; and Connie Loughry, Kenneth Loughry's wife and Matthew Loughry's mother.

6. The October 19, 2007, Waste Hauling Agreement was signed by the plaintiff and both Matthew and Kenneth Loughry. The signature line reserved for Matthew Loughry to sign a second time as "President" of CP was left blank.

7. The first paragraph of the Waste Hauling Agreement identifies the parties to the contract in the following manner. After the names of all three defendants are given, they are designated, collectively, as the "Supplier." The plaintiff is the designated the "Hauler."

8. The testimony indicated that the Waste Hauling Agreement was drafted by an attorney hired by the plaintiff. Clause #1 of the agreement states that when the "Supplier's" transfer station begins operation, Hauler will haul deposited garbage to landfills in Angelica, New York, and Canandaigua, New York. Clause #2 provides that Hauler will be compensated for the tonnage hauled, and it promises Hauler a minimum of

100 tons per day. Thirty days advance notice must be given to Hauler "[i]f Supplier needs more than 450 tons per day hauled." Clause #3 makes Hauler responsible to "supply all rolling stock necessary to fulfill this agreement." Clause #4 sets the initial hauling rates at "\$11.00 per ton for waste hauled to Canandaigua and \$14.65 per ton for waste hauled to Angelica." Clause #4 also establishes a "fuel surcharge" to be added to the rates, and it provides that the rates "shall be adjusted upward on each one year anniversary from the effective date of this contract at a rate of \$.33 per ton."

9. Clause #5 states that the effective date of the agreement shall be "the date the Supplier's Transfer Station is complete and ready for operation," and it provides that the contract between the parties "shall continue for a five (5) year period and may be extended thereafter by mutual agreement of the parties." Clause #6 requires that "Hauler shall be paid in full on the next Tuesday following each week of the contract." A five percent penalty is to be added to any payments more than 3 days late, and "unpaid accounts shall accrue simple interest at the rate of 2% per month or fraction thereof."

10. Clause #7 makes the agreement binding "upon the parties, their heirs, successors and assigns." Clause #8 directs that the agreement shall be governed by the laws of New York. Clause #8 also states that

disputes arising out of the agreement are to be resolved by binding arbitration. (The Court notes that the plaintiff waived arbitration by bringing this claim, and the defendants chose not to move pursuant to CPLR §7503[a] to compel arbitration.) Finally, clause #9 permits Hauler to assign his interest in the contract to an LLC "so long as he retains the controlling interest in such Limited Liability Company or Corporation."

11. The transfer station began operating on November 15, 2007. The plaintiff provided hauling to CP from that date onward until May 4, 2009, at which point a heated confrontation occurred at the transfer station between the plaintiff and Kenneth Loughry. The plaintiff claims that Kenneth Loughry unilaterally terminated the contract on May 4, 2009, by angrily ordering him to remove himself and his equipment from the transfer station property. Kenneth Loughry described the conversation slightly differently in his testimony. He indicated that when the plaintiff, shouting, demanded to know whether he, Kenneth Loughry, wanted the plaintiff and his equipment off the property, he, Loughry, calmly answered him in the affirmative.

12. While the plaintiff hauled for CP, he was paid by CP in accordance with the provisions of clause #4 of the Waste Hauling Agreement – including the fuel surcharge and the scheduled upward adjustments in the basic rates.

13. Although it appears to be undisputed that the Waste Hauling Agreement accurately reflected the terms of the understanding that existed between the Plaintiff and CP with regard to compensation, the defendants nonetheless contend that the Waste Hauling Agreement was a sham which the parties never intended to be a binding contract. In support of this contention, Kenneth Loughry testified that when the plaintiff presented him with the proposed agreement on October 19, 2007, he immediately informed the plaintiff that he would not agree "to bind CP for 5 years." He also testified that he told the plaintiff that he did not wish to agree to the payment schedule, the late payment penalty or the interest charge on unpaid balances.

14. The Court finds it significant, however, that Kenneth and Matthew Loughry chose to sign the agreement without crossing out these offending clauses to which, they now claim, they never agreed. Asked to explain why he would sign a purported agreement even though, according to him, no actual agreement had been reached, Kenneth Loughry offered only that he did so after the plaintiff told him, "I won't hold you to it."

15. The evidence established that Kenneth and Matthew Loughry are experienced businessmen. Notably, Kenneth has held positions as a senior executive in several banks, in addition to running his own businesses. The Court finds it not credible that these experienced

businessmen would sign a document purporting to be a waste hauling agreement with the plaintiff – a document which includes fairly elaborate terms giving the appearance of having been the product of negotiations between the parties – unless they intended that the document should, in fact, be a binding contract. Furthermore, the defendants have advanced no credible reason why they would have signed the Waste Hauling Agreement – in the absence of an intention to be bound by it.

16. Certainly, no experienced businessman would sign a complete written agreement with a 5-year term involving a great deal of money merely because the other party orally promised him that “I won’t hold you to it.” Nor is it credible that the Loughrys – in the absence of an intention to actually be bound by the Waste Hauling Agreement – would sign it simply because the plaintiff, as they claim, had been very insistent that they do so in order that he have documentation to support a bank loan. In this regard, the Court found it highly significant that Kenneth Loughry, on cross-examination, declined to say that the agreement was signed so as to deceive the plaintiff’s bank regarding the nature of the plaintiff’s business relationship with CP. Either the Waste Hauling agreement was a sham, as the defendants claim, in which case it follows that the bank would be deceived by relying on it, or it was not sham.

17. From the evidence, the Court concludes that the Waste

Hauling Agreement is what it purports to be: a binding agreement between the parties who signed it. The defendants have failed to show that it was intended to be fraudulent or illusory.

18. In addition, contrary to the arguments of defense counsel, the fact that the corporate defendant, CP, was to operate the transfer station, rather than by the Loughrys in their personal capacities, did not preclude Kenneth and Matthew Loughry, the controlling officers of CP, from binding themselves personally by signing the contract. Similarly, the Court rejects defense counsel's argument that the contract must be found to be void as impossible with respect to the Loughrys, personally. The Court is not persuaded by defense counsel's argument that since all garbage deposited at the transfer station would actually belong to the operating company, CP, the Loughrys, personally, could not possibly "supply" the plaintiff with any waste. The contract obviously contemplates that the Loughrys will "supply" waste to the plaintiff through CP, the corporation that they control.

19. The Court also rejects defense counsel's contention that the contract was void as illegal because no operating permit had been issued at the time it was signed. The required permit was issued before the transfer station opened. The fact that the permit went to CP, not to the Loughrys personally, also did not render the contract void with respect to the Loughrys. As noted above, the Loughrys owned and controlled CP. Nothing

prevented them from operating a transfer station through their corporate alter-ego, CP, using the operating permit issued to CP.

20. With regard to the liability of the corporate defendant, CP, the Court finds that, despite the lack of a signature explicitly on behalf of CP on the Waste Hauling Agreement, CP made itself liable under the agreement by accepting the benefits of the agreement from November 15, 2007, until May 4, 2009. Given that Kenneth and Matthew Loughry, the owners and controlling officers of CP, both signed the contract, CP obviously must be said to have known of the agreement's existence from its inception. And the contract, of course, includes CP as a party. Despite this imputed knowledge on the part of the corporation, however, no action was taken by CP to repudiate or clarify this allegedly unauthorized agreement. On the contrary, from the opening of the transfer station until the final breach of the contract, CP paid the plaintiff in accordance with the hauling rate terms stated in the Waste Hauling Agreement. Under these circumstances, the Loughrys cannot now claim that the lack of an authorized signature relieves the corporation of liability. By accepting the benefits of the agreement for some 18 months, CP must be deemed to have ratified the contract with respect to itself.

21. Having found that the defendants were bound by the Waste Hauling Agreement, the Court further finds that the defendants breached the agreement when they unilaterally terminated their relationship with the

plaintiff on May 4, 2009.

22. From the evidence, the Court also finds that the defendants have not shown that the plaintiff was in breach of the agreement prior to the termination. It is true that the testimony showed that the defendants had become very dissatisfied with the plaintiff's performance prior to May 4, 2009, but it appears that the primary source of the Loughry's growing dissatisfaction with the plaintiff was not a breach of the contract by the plaintiff, but a circumstance which the contract did not contemplate at all.

23. According to the testimonies of Kenneth and Matthew Loughry, State regulations prohibited them from leaving garbage on the floor of the transfer station overnight. It is not clear whether the Loughrys were aware of the existence of this regulation when they signed the contract. It is clear, however, that the implications of the regulation were not considered by them when the contract was drafted.

24. To reach either of the landfills before closing time, a loaded truck had to leave the transfer station by 2:30 pm. Garbage deposited at the transfer station after that time could not be trucked to a landfill before the following day. Consequently, on days when large quantities of garbage arrived at the transfer station after 2:30 pm, the defendants, seeking to comply with the regulation, were faced with the problem of finding receptacles in which to store the garbage overnight off the floor.

25. It appears that the defendants considered it the plaintiff's obligation under the agreement to provide extra, empty trailers for the overnight storage of late arriving garbage. The Court's reading of the Waste Hauling Agreement finds no support for this claim. The contract requires only that the plaintiff shall "provide the necessary tractors and trailers to transfer waste products" to the specified landfills, and for this purpose he must "supply all rolling stock necessary . ." It does not contain any provision requiring that the plaintiff must "transfer" all garbage deposited at the transfer station to a landfill on the same day that it arrives. Nor does it say anything about the plaintiff being responsible for the storage of garbage which cannot immediately be taken to a landfill because the landfills are closed.

26. Having determined that the plaintiff has shown that the defendants are liable for the breach the contract, it remains to assess the plaintiff's damages. With respect to the plaintiff's claim for lost profits, contrary to the argument of defense counsel, the claim is not speculative. The Waste Hauling Agreement specifies the hauling rates which will prevail, and it specifies that the defendants are to provide the plaintiff with a minimum of 100 tons of garbage per day to haul. From these terms, coupled with the plaintiff's proof with respect to projected profits, the plaintiff's lost profits from the early termination of the contract can easily be

calculated. Also, the evidence did not establish a failure on the part of the plaintiff to mitigate damages.

27. The agreement left to the discretion of the defendants the choice of the destination for each load – whether it should go to the Canandaigua landfill or the Angelica landfill. The proof showed that the plaintiff's profit for any given load was less, however, if that load went to Canandaigua rather than Angelica. Thus, since the contract does not obligate the defendants to send any loads to Angelica, had the contract continued in effect after May 4, 2009, it must be assumed for the purpose of calculating lost profits that all future loads would have gone to Canandaigua. Using this assumption, along with the 100-ton minimum and the plaintiff's costs and rate of profit as shown by the proof, the Court has determined that the amount of the plaintiff's lost profits over the remainder to the 5-year term of the contract is \$755,125.58.

28. With respect to the plaintiff's claim for late payment penalties and interest under the Waste Hauling Agreement, the Court finds that the defendants are additionally indebted to the plaintiff in the amount of \$4,884.44.

NOW, THEREFORE, based upon the foregoing, and for the reasons set forth above, it is hereby

ORDERED that judgment be entered herein in plaintiff's favor

against the defendants jointly and severally in the amount of \$760,010.02,
plus the costs and disbursements of this action.

Dated: March 23, 2015
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court

