ELECTRONICALLY FILED
Sebastian County Circuit Court - Fort Smith District
Cindy Gilmer, Circuit Clerk
2022-Aug-03 11:03:51
66FCV-17-637
C12D01 : 9 Pages

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT
CIVIL DIVISION I

JENNIFER MERRIOTT, Individually and on behalf of those similarly situated **PLAINTIFF**

VS. **CASE NO. CV-2017-637**

CITY OF FORT SMITH, ARKANSAS **DEFENDANT**

OPINION AND ORDER

Plaintiff brings this class action on claims of Illegal Exaction and Unjust Enrichment based on Defendant's failure to notify residential sanitation customers that the recycling program maintained by Defendant suffered a disruption of approximately thirty (30) months during the period of October, 2014, to May, 2017. The class seeks damages in the form of restitution of the amount it believes to have been paid to support the non-existent program. Defendant ("the City") takes the position that its actions during the period were reasonable and rationale, and that no tax is implicated which would support the claims. The Court addresses each claim in turn below.

ILLEGAL EXACTION

An illegal exaction is any exaction that is either not authorized by law or is contrary to law. Two types of illegal-exaction cases can arise: public funds cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent;

and illegal-tax cases, where the plaintiff asserts that the tax itself is illegal. *Miles v. Craighead Cty.*, 2022 Ark. App. 105, 643 S.W.3d 44. The instant matter is clearly a "public funds" case. The City asserts there can be no claim for illegal exaction here because the subject revenues were not produced by a tax, but rather by a fee. Plaintiff counters that the levy may, and should be, denoted a tax.

For the proposition that the levy in question is, in fact, a tax, Plaintiff cites *Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), and *Barnhart v. City of Fayetteville*, 321 Ark. 197,900 S.W.2d 539 (1995). *Marion* and *Barnhart* each hold that a governmental levy of a fee, in order not to be denominated a tax by the courts, must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services.

There are, then, two parts to the determination of whether the levy should be considered a tax: (a) whether the fee was fair and reasonable, and (b) whether the fee bears a reasonable relationship to the benefits conferred on those receiving the services. The answer to the first question is yes. Evidence at trial demonstrated sanitation fees charged by the City are reasonable in light of charges in similar municipalities. That fact was confirmed by the testimony of the City's expert. The answer to the second question is not so clear cut. It seems to the Court that the answer to that query depends on how the words "benefits" and "services" are defined. Do they apply to refuse removal as a whole or do they apply to the removal of waste and the removal of recyclable materials as separate benefits and services?

The City contends the former – that one fee is paid for all sanitation services and therefore so long as containers are emptied and refuse of all types is removed from the curb then the public has received all the "benefits" they have the right to expect from the City's "service". The Court disagrees. The simplest explanation for why the public should care about recycling as a separate benefit and why they should expect the benefits obtained by

recycling is because the City cared about recycling and because the City knew it was an expected benefit.

The fact the City never abandoned their interest in a recycling program, notwithstanding two years of inaction during the period of disruption, demonstrates they recognized the value of the program. The fact that City officials took great pains to hide that recycling was essentially non-existent for thirty (30) months signals that the City knew recycling was a benefit citizens expected to be serviced by the City.

The City's position that waste removal and recycling are part and parcel of one service and one benefit is belied by multiple factors. First, to participate in the recycling program a citizen must accept a burden not present in the waste removal program. Time and effort are required for a person to separate their refuse. That sacrifice is not required but instead is undertaken with the belief that a benefit will be received. Plaintiff testified eloquently about the reasons she put so much effort into recycling as well as the fact that, had she known the program was not operating, she would have found an alternative means to recycle the material. In addition, separate equipment and different disposal methods are employed, each unique to the particular service.

At trial, the City placed much of its focus on the reasonableness and rationality of its actions during the disruption while relying heavily on the testimony of its expert, Michael Timpane. Mr. Timpane provided thoughtful analysis and compelling testimony about a number of issues, including the value of trust between a municipality and its citizens. Mr. Timpane, in justifying the City's secretive approach, opined that lack of trust by the citizenry in its government was not as damaging [to the recycling program] as the possibility of changing behaviors. Mr. Timpane went so far as to say that keeping the public in the dark about the disruption was reasonable regardless of the time frame. Frankly, that opinion left

the Court nonplussed. The lack of honesty by the City is at the very center of this case and must be acknowledged.

"Deceive" is defined as "to cause to accept as true or valid what is false or invalid". *Merriam-Webster.com.* 2022. https://www.merriam-webster.com (29 June 2022). Make no mistake – this case arose because officials of the City deceived the citizens whose interests they are charged to serve. The evidence and testimony produced at trial clearly demonstrated the deception was conducted purposely over a period of approximately two and a half years and would have continued even longer were it not for the intervention of the media. The deception was both covert and overt.

The covert aspect of the City's efforts is evidenced by the conscious decision to keep the truth out of public view. Numerous outlets were available for the City to communicate with sanitation customers, including media, City and Sanitation Department Facebook pages, bills, and text messages. None were utilized by the City to provide notice of the disruption. Other evidence in the case demonstrates those omissions were intentional. In an email dated May 1, 2017, from the City Administrator, Carl Geffken, to a member of the City's Board of Directors after the media had revealed the service disruption, it is stated "We did not notify the residents of the change in recycling since we were working on a solution to the problem." In truth, even the City's Board of Directors had been kept in the dark and uniformed of the disruption prior to the media report, despite their duty, according to the City's website, to "set the policies by which the City operates."

Even after the media had made the disruption public and the Board of Directors made aware, the City still attempted to mask the issue. On May 12, 2017, Mr. Geffken sent an email to the Board attaching a spreadsheet detailing the amount of recycling since October, 2014. That email contained an admonition stating, "do not share this e-mail or spreadsheet

with anyone." Other exhibits evidencing communication between and among City officials indicate a knowledge the public had not been informed.

Evidence demonstrating the City's overt efforts to deceive its citizens was also clearly on display at trial. The named plaintiff testified, and city employees confirmed, that both a recycling truck and a side loader visited the same houses on the same day, with the recycling trucks, bearing messaging about their purpose, picking up recycling containers and the side loaders picking up other waste. This left Ms. Merriott (and certainly others) with the impression recycling was continuing unabated. In addition, City workers utilized stickers placed on recycling containers reprimanding residents who placed regular trash in those receptacles as if the program were still in full effect. In fact, the City continued the use of the stickers even after the media had reported the disruption.

Citizens should be able to trust the officials overseeing their business to be honest and transparent. Surely, the damage caused by a breach of trust must carry more weight than the perceived effectiveness of a single program. In a business, personal, or family relationship no one would expect a person to tolerate being deceived in such a manner for such a duration. Why then should citizens be expected to accept such disrespect in their relationship with their municipal government? The City directs a multitude of programs, not just recycling, and interacts with its citizens hundreds of times a day in myriad ways. If trust is broken in one area, how can it exist at all? The Court cannot find that the City acted reasonably or rationally in deceiving the public for two and a half years, especially given the fact that during the bulk of that period the City was doing nothing to address the issue.

In the Court's view, the speculative impact on the recycling program pales in comparison to the value of a positive relationship between the City and its people. From the evidence at trial, it is evident a significant portion of the populace was outraged by the City's actions. It seems to the Court that if the City had cultivated a spirit of trust, rather than

deceit, the people would have been willing to adjust and resume the program when it began anew. Even if it had not, a relationship of trust would carry enormous value beyond a single program.

In its trial brief the City dismissed "Plaintiff's hurt feelings" and "the sensibilities of the Court" and mocked "the Plaintiff cries of 'they didn't tell us' and 'they misled us'." It is disconcerting to see the City dismiss the consequences of its actions on its citizens so cavalierly. It is perhaps what is most concerning about this entire matter because it leads to a concern that the City genuinely believes it has the right to deceive the public when it suits its purposes. A lack of recognition or remorse leads to fears that such behavior may be repeated in the future.

Throughout the course of this lawsuit the City relied on its "discretion" to determine the rates for sanitation services. To be sure, such discretion does indeed exist. In the Court's view, however, that discretion does not extend such as to automatically justify the same fee for one service rather than two nor does it cover the City when crucial facts are hidden from the public. Simply put, discretion does not authorize collecting a fee for a service not delivered while simultaneously actively misleading its customers. Discretion may not be abused.

The City further justified its actions at trial on the basis it was always the intention to restart a recycling program once a vendor was engaged and that to notify the public would have caused the citizenry to get out of the habit of recycling and limit participation when the program resumed. Multiple witnesses, including the current City Administrator and the City's expert witness, defended the action to keep the disruption secret, as being "reasonable" and/or "rational". Such a characterization might be more palatable if the disruption had been shorter or even if the City genuinely had been working diligently to find a vendor during the period of disruption.

The evidence at trial demonstrated the efforts to restart the program were severely lacking during much of the subject period. Notwithstanding Mr. Geffken's May 1, 2017, representation that "we were working on a solution", no procurement attempts appear to have been undertaken between late 2014 and late 2016, when Mr. Geffken learned of the disruption. To his credit, Mr. Geffken jumpstarted efforts to procure a vendor once he was made aware of the situation. However, prior to that time the City's efforts could be charitably described as very limited. Even Mr. Geffken recognized that in his email of May 23, 2017, to Board member Tracy Pennartz, in which he described the City's recycling efforts as "a failed program that was not watched or maintained since October 2014."

On the claim of illegal exaction, the Court finds for Plaintiff and the class.

UNJUST ENRICHMENT

To prevail on a claim of unjust enrichment Plaintiff must prove the following four elements:

> First, that Plaintiff provided money to the City, who received the benefit of such money;
>
> Second, that the circumstances were such that Plaintiff reasonably expected to receive the value of such money from the City;
>
> Third, that the City was aware that Plaintiff was providing such money with the expectation of receiving services and accepted the money; and
>
> Fourth, the reasonable value of such money received by the City.

Again, Defendant relies on its discretion and the reasonableness of its actions in defending against this claim. There is no need to repeat the discussion of those defenses in this section. The City also takes the apparent position that because a single fee is collected for both waste and recycling removal then no value can be placed on the loss of recycling. That simply is not the case. Certainly, a portion of the sanitation fee is used to pay for the cost of recycling, when operational. The fact the City does not divide it does not mean it is

not divisible. Indeed, Plaintiff's expert, Mr. Leroy Duell did just that, as did Mr. Timpane using Mr. Duell's figures.

In fact, the City's expert complimented Mr. Duell for following good auditing principles and stated he tried to follow the same methods used by Mr. Duell. Mr. Timpane also testified the method used by Mr. Duell to calculate the cost of the recycling program was reasonable.

As to the required elements to establish a claim for unjust enrichment, the Court finds the class paid money expecting, in part, to receive recycling services. Further, the City accepted that money knowing the expectations of those paying the money and that the reasonable value of the expected services has been established.

On the claim of unjust enrichment, the Court finds for Plaintiff and the class.

DAMAGES

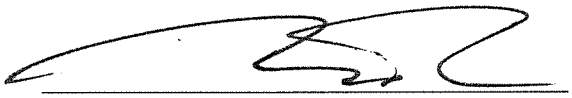
Plaintiff seeks only a portion of the recycling costs for the period of disruption. Mr. Duell calculated those damages as follows:

Rear Loader Capital Cost	$27,040.19
Rear Loader Operating Cost	$128,286.45
Labor Cost	$646,846.56
Container Cost	$85,219.02
Total	$887,392.22

During cross-examination, Mr. Duell conceded the capital cost and the container costs either would have been spent regardless of the state of the recycling program (capital cost) or was spent before the subject period (container cost). Therefore, those amounts are not recoverable and must be deducted from the claim, leaving a total of $775,133.01. Further, Mr. Duell attributed only 96.12% of the total costs as damages, representing the estimated percentage of recycling material sent to the landfill. Applying that method to the figure above, damages are calculated to be $745,057.85.

Plaintiff and the class are hereby awarded judgment in the amount of $745,057.85.

IT IS SO ORDERED this 3rd day of August, 2022.



STEPHEN TABOR
CIRCUIT JUDGE - DIVISION I