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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ATLAS TRUCKING, INC. et al., ,

Plaintiff and Appellant,

v.

CITY OF LOMPOC, ,

Defendant and Respondent.

2d Civil No. B256062
(Super. Ct. No. 1409018)
(Santa Barbara County)

Atlas Trucking, Inc. dba Atlas Recycling, a California corporation, appeals from a judgment on demurrer entered in favor of City of Lompoc (City) on its first amended complaint for breach of contract and breach of implied covenant of good faith and fair dealing. The trial court concluded that the action was barred by City's exercise of a 30-day notice to terminate the contract. We affirm.

Facts and Procedural History

On May 1, 2009, Atlas contracted with City to provide free metal recycling services at the city landfill. The 12-month contract was signed by City Purchasing & Materials Manager Ray Ambler on behalf of City. (Lompoc Municipal Code, § 3.36.020.) Paragraph 3 of the contract provided that the contract could be extended four years but was subject to City's right to terminate on 30 days written notice. Paragraph 5 provided for immediate termination if Atlas failed to perform in a

timely and professional manner. In February 2010, Atlas and Ambler signed a contract addendum "expanding" the services through April 30, 2014.

Effective July 1, 2010, City enacted a landfill fee to dump solid waste and recyclables. The fee rate schedule was \$5 a car load, \$8 a van or pickup load, \$10 for a one axle trailer, and \$15 for a combined pickup/one axle trailer load. Atlas did not have to pay a fee to remove recyclables but the public was charged a fee to dump recyclables at the landfill.

In February 2012, City invited bids (i.e., a request for proposal (RFP)) for landfill recycling services. Atlas complained that its contract had not yet expired but nonetheless submitted a bid proposal. City awarded the recycling contract to Bedford Enterprises and, on March 2, 2012, mailed Atlas a 30-day notice terminating the contract.

Atlas sued for contract damages and violation of the Unfair Business Practices Act. (Bus. & Prof. Code, § 17200.) The trial court sustained City's demurrer with leave to amend. On November 22, 2013, Atlas filed a first amended complaint (FAC) for breach of contract and breach of implied covenant for good faith and fair dealing. City demurred on the ground that it terminated the contract with the 30 day written notice. The trial court took judicial notice of the contract documents and sustained the demurrer without leave to amend.

Standard of Review

The order sustaining City's demurrer is reviewed de novo. (*Beets v. County of Los Angeles* (2011) 200 Cal.App.4th 916, 922.) " ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] . . . [W]hen a demurrer is sustained . . . without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The

burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

Judicial Notice of Contract Documents

Atlas claims that the court erred in taking judicial notice of the contract documents because it transformed the demurrer into a contested evidentiary hearing. (See e.g., *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605 [trial court, on demurrer, may not take judicial notice of discovery responses purporting to contradict allegations in the complaint].) We review for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264.) Allegations that are contrary to the law or to a judicially noticed fact are treated as a nullity on demurrer. (*Interinsurance Exchange v. Narula* (1995) 33 Cal.App.4th 1140, 1143; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) A trial court may consider hearsay evidence in determining whether a matter is worthy of judicial notice. (Evid. Code, § 454, subd. (a)(2); Jefferson's, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2014) § 49.3, p. 49-4.)

We reject the argument that the trial court abused its discretion in taking judicial notice of the RFP for contract bids, the 2009 contract, and the contract addendum, all of which were authenticated. (Exhibits 1-5.) Most of the documents are attached to the original complaint but omitted from the FAC. Atlas cannot play "hide the ball" on demurrer. "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts that are judicially noticed.' [Citation.]" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

Atlas takes issue with the court's judicial notice of City Resolution No. 5630(10) which established the landfill fee schedule. Judicial notice of the resolution, a legislative act, is proper. (Evid. Code, § 452, subd. (b); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7, fn. 2.) Exhibit 6 of the demurrer is the City Council agenda shows that Resolution No. 5630(1)) was adopted at a noticed, public hearing. It is the

proper subject of judicial notice. (*Trinity Park L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.) Nor did the court err in taking judicial notice of the city ordinance (Exhibit 8; Lompoc Municipal Code § 3.36.020) authorizing the City Purchasing Agent to contract for services costing less than \$125,000. (Evid. Code, § 452, subd. (b); *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 178, fn. 3.)

Termination of Contract Without Cause

The FAC alleges that Ambler's March 2, 2012 letter to Atlas terminated the contract but "[t]here was no city council approval for such termination. No good faith explanation was given to Atlas for such sudden termination after the City had just expanded its contract with Atlas to 2014." Paragraph 3 of the contract provides that the contract can be terminated on 30 days written notice. "In our view, a contract which provides that it may be terminated on specified notice cannot reasonably be interpreted to require good cause . . . [S]uch a contract allows termination with or without good cause." (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1369; see e.g., *Bernard v. State Farm Mutual Automobile Ins. Co.* (2007) 158 Cal.App.4th 304, 311 [insurance agent whose contract was terminable at any time could not maintain cause of action for breach of covenant of good faith based on allegations of misrepresentation by supervisors].)

Atlas argues that City represented that the contract would only be terminated for cause. The contract has an integration clause and provides that amendments or modifications of the contract must be in writing and signed by the parties. No facts are alleged there was side agreement to terminate the contract only for cause. "A public entity cannot be held liable on an implied-in-law or quasi-contract theory. [Citations.]" (*Pasadena Live L.L.C. v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.)

Atlas further argues that the contract required the City Council to approve the termination notice. The contract and contract addendum, as signed by City Purchasing & Materials Manager Ray Ambler, did not require City Council

approval to terminate the contract. A city ordinance vested Ambler with the authority to enter into service contracts not costing more than \$125,000. (Lompoc Municipal Code, § 3.36.020.) Ambler had ostensible authority to enter into and terminate a contract in which City paid nothing for Atlas' services. (Civ. Code, § 2330; 3 Witkin, Summary of Cal. Law, (10th ed. 2005) Agency & Employment, § 130, p. 175.) Atlas cannot use an implied covenant of good faith and fair dealing to transform a terminable at will contract into a terminable-only for cause contract. (See e.g., *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 698, fn. 381 ; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277.)

Landfill Fees

The FAC alleges that City's imposition of landfill fees breached the contract because the public was unwilling to pay a fee to dump recyclables, thus causing Atlas to make less money. The contract is what it is. City did not barter away its right to impose landfill fees or guarantee that a certain quantity of recyclables would be available to Atlas. The 2009 bid request (RFP), which was the genesis for the contract, anticipated that the amount of recyclable metal could decrease over time and provided that Atlas could not claim forfeiture of contract by reason of changes in work by City.

Even if the landfill fee reduced the volume of metal available for recycling, there was no breach of contract. Rate setting is a legislative act. A municipality may not contract away its governmental power to impose landfill disposal fees. (See e.g., *Totten v. Board of Supervisors of County of Ventura* (2006) 139 Cal.App.4th 826, 838-839 [county may not delegate government functions affecting its financial affairs].) Any contract that does is void. (*County Mobile Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 736.) The implied covenant of good faith and fair dealing may not be used to create obligations that violate public policy or the contract terms. (*Pasadena Live L.L.C. v. City of Pasadena, supra*, 114 Cal.App.4th at p. 1094.)

Bid Request for Metal Recycling Services

Atlas alleges that City breached the contract by soliciting bids for recycling services before the contract expired. If City had the authority to terminate the contract without cause, it had the power to solicit new bids before the contract expired. "The greater contains the less." (Civ. Code, § 3536.) Atlas cites no provision in the contract that limits how and when City can solicit bids for recycling services.

Denial of Existence of Contract

Atlas claims that City denied the existence of the contract but that is not actionable in contract or tort. (*Freeman & Mills v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 87-88.) Atlas further asserts that City breached an implied covenant of good faith during contract formation. It is a specious argument. "There is no obligation to deal fairly or in good faith absent an existing contract. [Citations.]" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.) Atlas is suing for expectancy damages but the implied covenant provides no basis for recovery. (See *Foley v. Interactive Data Corp*, *supra*, 47 Cal.3d at p. 683; [breach of implied covenant is limited to traditional contractual remedies]; *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1272.)

Implied Covenant of Good Faith

Finally, Atlas asserts that every contract has an implied covenant of good faith and fair dealing by which a party to the contract may not do anything that would deprive the other party of the benefits of the contract. (See *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.) An implied covenant may not be used to create obligations not contemplated in the contract. (*Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1389.) There is nothing in the contract that limits City's authority to impose landfill fees or terminate Atlas' contract on 30 days written notice. "[B]ecause the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no agreement to terminate only for cause, the implied covenant standing alone cannot be read to impose such a duty. [Citation.] [Citation.]" (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 350.)

Conclusion

Atlas' remaining arguments have been considered and merit no further discussion. Atlas makes no showing that the trial court erred in sustaining the demurrer or that the complaint can be amended to cure the pleading defects. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

The judgment (dismissal order) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

Daniel A. Martorella, for Appellant.

June S. Ailin, Aleshire & Wynder, for Respondent.