DOC. NO. X07-HHD-CV-18-6090558-S	:	SUPERIOR COURT
WILLIAM PAETZOLD	:	COMPLEX LITIGATION
	:	J.D. OF HARTFORD
V.	:	
METROPOLITAN DISTRICT COMMISSION	:	OCTOBER 2, 2018

Memorandum of Decision Granting Motion to Strike in Part

1. The implied contract claim survives.

The Metropolitan District Commission says it can't be sued for overcharging its water customers. It says it can't be sued for refunds because the legislature has given it the same status as a municipality. And while the MDC recognizes that even municipalities can be sued for breaching their contracts, it claims to have no contracts with its water customers. Instead, the MDC claims it has a statutory right to payment, not a contractual right that would make it vulnerable to lawsuits for refunds like this one.

But the MDC is wrong. Its reliance on General Statutes § 7-239 (b) is misplaced. This statute is not the origin of the MDC's right to get paid for the water it provides. Instead, it is a mechanism to enforce that right, granting the MDC a lien

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against the premises served. At best, it assumes the existence of a right to be paid, but says nothing that would establish that right such as: "the owner of any premises accepting water must pay any charges established pursuant to this section." Instead, it merely describes the imposition of the lien after proper demand for payment is made: "[i]f any rates . . . are not paid within thirty days . . .[t]he rates or charges . . .shall constitute a lien upon the premises served."

Still, the MDC insists that even if it is wrong about the statute, there can be no contract here. It claims its bylaws provide that it can *only* contract through its chief executive officer, his designees, or the MDC chairman. It notes that no plaintiff claims the MDC CEO or chairman signed a water service agreement with them. The MDC insists that without this it is protected by the doctrine announced in 1996 in *Fennell v. Hartford,* holding that a contract not executed in the manner set out in the applicable municipal law is no contract at all.[1]

But the trouble for the MDC is that it misreads its own laws, specifically its bylaws. The bylaws merely say its CEO "shall be authorized" to *sign* contracts, that the CEO may delegate this signing authority, and that the MDC chairman shall sign "authorized" agreements. But the bylaws say nothing committing the power to authorize contracts solely to the CEO or to anyone else. They also say nothing about

[1] 238 Conn. 809, 818–19.

prohibiting the existence of implied contracts between itself and its customers. If the bylaws did, they would contradict the MDC charter. It specifically authorizes the MDC to claim in court that it has "implied contracts . . .for money due for the use of the water."

And, contrary to what it's saying in this case, the MDC has certainly asserted in many other cases that it does have implied contracts with its water customers. The MDC regularly sues to collect water bills from its customers, routinely alleging that it has implied contracts with its water customers. That's how it has chosen to collect its bills. Indeed, the MDC could point to no example in which it has ever claimed that its collection right springs from the statutes and not from the law of contract. By contrast, plaintiff's counsel has supplied the court with several sample complaints and in every case the MDC has claimed it has an implied contract with its customers that the MDC provides water and the customer in exchange must pay the legally established rate for it. The MDC's own claims in other cases may not be binding on the court but they are mighty persuasive given that they mesh neatly with the MDC charter.

Those who sue municipal entities like the MDC for breach of contract must allege the contract was entered in the way authorized by the entity in law. The water customers suing here have done so. Therefore, their breach of contract claim won't be stricken under *Fennell.*

2. The unjust enrichment claim fails.

On the other hand, the water customers' alternative claim for unjust enrichment fails. *Fennell* says that the only way to contract with a municipality is the authorized way. The water customers' contract claim survives because it alleges a contract was made in the authorized way. And allowing that claim alone appears to be where *Fennell* says to stop.

Fennell warned that allowing claims arising outside the authorized ways "would only invite endless litigation over real or imagined claims of misinformation by disgruntled citizens . . . imposing an unpredictable drain on the public fisc."[2] In *Biello v. Watertown* in 2008, the Appellate Court said this same thinking was fatal to unjust enrichment claims.[3] The reasoning is fairly obvious. If *Fennell* didn't cover contract-like claims, the parties could simply change a few words here and there in complaints, and the courts would be inviting endless litigation over real or imagined unjust enrichments. The MDC is only exposed to implied contracts because its controlling law allows them. That law doesn't allow unjust enrichment claims.

Therefore, the court strikes the plaintiffs' unjust enrichment claim.

3. The covenant of good faith and fair dealing claim fails.

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[2] 238 Conn. at 816.

[3] 109 Conn. App. 572, 583 n.7, cert. denied, 289 Conn. 934.

The MDC also rightly moves to strike the water customers' claim for violation of the covenant of good faith and fair dealing. In 2013, the Supreme Court decided *Capstone Building Corp. v. American Motorists Ins. Co.*[4] It emphasized that the covenant of good faith and fair dealing is a contract-based claim that forbids a party to "do anything that will injure the right of the other to receive the benefits of the agreement . . . . ."[5] The court said the doctrine is aimed at cases where the "*terms and purpose of the contract* are agreed . . . and that what is in dispute is a party's *discretionary application or interpretation of a contract term.*"[6]

To withstand a motion to strike, Practice Book § 10–1 says that pleadings must contain a "plain and concise statement of the material facts." Here, the complaint doesn't allege what discretion the MDC allegedly exercised to impose the charges the water customers want refunded. Without alleging what discretion the MDC was exercising, the complaint fails to allege a pivotal fact that would allow the claim to stand on its own instead of needlessly duplicating the breach of contract claim.

Therefore, the court strikes the claim for breach of the covenant of good faith and fair dealing.

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[4] 308 Conn. 760.
[5] *Id.* at 795.
[6] *Id.*

4. The implied contract claim is not untimely on its face.

The MDC says the plaintiffs sued too late. What's left of the case is a contract claim. The plaintiffs say it is governed by the ordinary contract statute of limitations, General Statutes § 52-576, which provides that the limitation period to bring a claim for the breach of an implied contract is six years. The MDC says that any contract here would be subject to the three year statute of limitations that applies to executory contracts under General Statutes § 52-581.

The ordinary contract limitations period applies here. At issue is the offer of water at what this court held in another case was an illegally inflated price and the water customers' unnecessary payment for it. With respect to the allegations in the complaint there is nothing more that the parties were expected to do. The MDC offered the water at a certain price it no longer charges and the plaintiffs paid that price when they shouldn't have had to. That much was all decided in the previous case. This means we aren't waiting for anyone to do anything else about carrying out the bargain at issue—and that bargain is over and done with.

So what's left to execute that we could call executory? As the Appellate Court confirmed in 2018 in *Nassra v. Nassra*, "[a] contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully

performed its contractual obligations."[7] Here, the plaintiffs allege they paid the amount they were required—and then some. So, at least one party performed. And to the extent the MDC provided water it performed too. At issue now is having been found to have overcharged must the MDC make good the difference.

The parties may have had an ongoing relationship beyond the deliveries in dispute here that they rely on for saying the contract is executory. But as the Appellate Court held in 2006 in *Vanliner Ins. Co. v. Fay*, that is not dispositive where the relationship could be terminated at any time.[8] What matters here is that the transactions at issue in this case were completed when water was delivered and payment made.

Accordingly, the water customers' claims will not be stricken as untimely on their face.

5. The complaint reveals no absence of necessary parties.

The complaint does not reveal the absence of any necessary parties. The MDC says the member towns and the customers residing in member towns should all be joined because they will bear the expense of any judgment in favor of the water customers in this case against the MDC. As the Supreme Court held in *Biro v. Hill* in

[7] 180 Conn. App. 421, 435-36.
[8] 98 Conn. App. 125, 144.

1990: "[A] party is necessary if its presence is absolutely required in order to assure a fair and equitable trial." [9]

A fair trial in this case doesn't "absolutely require" the MDC member towns and customers to be parties to the case. The MDC represents their interests. Joining them is no more necessary than joining the shareholders and customers of every corporation that finds itself in a lawsuit.

The court will not strike the complaint because it fails to name necessary parties.

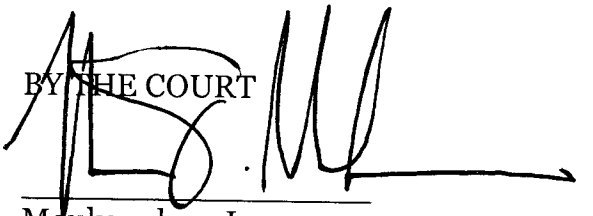
6. Conclusion: immunity doesn't mean impunity.

Municipal entities enjoy protections. But they shouldn't assume without clear authority that they are free from the common sense consequences of overcharging customers who buy goods and services from them.

The court allows the water customers' claims for breach of an implied contract to stand. But because municipalities do enjoy special protections it strikes the unjust enrichment claim. And because the customers' complaint lacks a claim that the MDC abused some contractual discretion, it also strikes the claim for breach of the covenant of good faith and fair dealing.

[9] 214 Conn. 1, 6.

BY THE COURT



Moukawsher, J.