

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

REPUBLIC WASTE SERVICES OF
TEXAS, LTD.,
Plaintiff,

v.

TEXAS DISPOSAL SYSTEMS, INC.
Defendant.

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Cause No. 6:14-CV-00067-C

**BRIEF IN SUPPORT OF
DEFENDANT TEXAS DISPOSAL SYSTEMS, INC.’S
RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant Texas Disposal Systems, Inc. (“Texas Disposal”) and files this Brief in Support of its Response in Opposition to the Motion for Summary Judgment of Plaintiff Republic Waste Services of Texas, Ltd. (“Republic”) (Doc. 11) and brief in support (Doc. 12).

SUMMARY

The Court should not even reach Republic’s summary judgment motion, because this case should be dismissed pursuant to Texas Disposal’s Motion to Dismiss (Doc. 8). The contractual provision Republic seeks to enforce is void as contrary to Texas public policy as expressed in Tex. Health & Safety Code § 364.034(h). That legal issue has been fully briefed on the Motion to Dismiss, and is before the Court for decision.

If the Court does not dismiss the case, Republic’s summary judgment motion must be denied. The contractual provision Republic seeks to enforce is invalid under Texas law, and thus cannot be the basis for a tortious interference claim.

Even if the contract were valid, Republic has failed to allege that Texas Disposal has interfered with Republic’s contract with the City of San Angelo in a manner that would state a

claim for tortious interference with an existing contract. The crux of Republic's claim is alleged interference with its prospective contracts with San Angelo residents that actually have contracts with Texas Disposal.

Further, Republic's lawsuit is an effort to enforce a municipal ordinance, by a private party, through civil litigation. Republic does not have the authority to exercise a municipality's police power in such a manner.

Republic's motion also is premature; Texas Disposal has not even filed its answer yet, and thus has not been given an opportunity to plead the clearly applicable affirmative defense of justification.

ARGUMENT AND AUTHORITIES

I. The Provision of the Contract Between Republic and the City of San Angelo Purporting to Grant Exclusive Rights to Collect Construction Waste is Invalid Under Texas Law, and Cannot Be the Basis for a Tortious Interference Claim.

As Texas Disposal demonstrated in its Motion to Dismiss (Doc. 8) and its Reply in support of that motion (Doc. 14), Texas law grants municipalities the authority to enter into exclusive waste collection contracts, but excepts contracts for the collection of temporary construction waste from that grant of authority. Tex. Health & Safety Code § 364.034(h). Texas Disposal incorporates herein, by reference, the arguments and authorities on this legal issue from its Motion to Dismiss and Reply, as if set forth fully herein.

Under Texas law, a party has no cause of action for tortious interference with contract if the contractual provision sought to be enforced is actually unenforceable because it violates the state's public policy, as expressed in its constitution, statutes, or judicial decisions. *Washington Square Financial, LLC v. RSL Funding, LLC*, 418 S.W.3d 761, 770-71 (Tex. App. – Houston [14th Dist.] 2013, pet. denied). *See also Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 635 (Tex. 1997) (holding that public policy as expressed in a statute precluded a tortious-

interference claim based on an unenforceable contract); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 664 (Tex. 1990) (holding that a contractual provision that violated Texas' public policy could not form the basis for a tortious interference claim).

This dispositive legal issue should result in the grant of Texas Disposal's motion to dismiss, such that this Court need not reach Republic's summary judgment motion at all. Should the Court consider the summary judgment motion, that motion should be denied on Republic's declaratory judgment claim, which seeks a declaration that the contractual provision regarding construction waste is valid, because the provision is in fact invalid under Texas law. Republic's motion for summary judgment on its tortious interference claim should be denied because, as a matter of law, a party has no cause of action for tortious interference with a contractual provision that is invalid as contrary to public policy.

II. Republic Has Failed to Prove that Texas Disposal Has Interfered with Republic's Contract with the City of San Angelo.

Republic asserts a cause of action against Texas Disposal for tortious interference with an existing contract: the contract between Republic and the City of San Angelo, which purportedly gives Republic the exclusive right to collect construction waste within the City. Republic MSJ Appx. (Doc 13) at App 2-70 (see especially App 6, which purports to make the contract exclusive and grant Republic the exclusive right to collect temporary construction waste); Republic Complaint (Doc. 1) at 7 ¶ 7.2 (alleging that Republic and the City have entered into an exclusive contract that includes "the collection, hauling and disposal of construction and demolition waste generated within the City"); *id.* at 7 ¶ 7.6 (alleging that Texas Disposal has interfered "with Republic's contractual rights").

However, the crux of Republic's complaint is not that Texas Disposal has caused a breach of the contract between Republic and the City, or even that Texas Disposal's conduct has

made Republic's performance of that contract more difficult. Rather, Republic complains that Texas Disposal has entered into contracts with San Angelo residents for the hauling of construction waste – and Republic has not shown that it has existing contracts with those residents. Indeed, Republic's complaint is that *Texas Disposal* has entered into contracts with those residents, instead of Republic. Republic's Complaint alleges that these residents are "customers of Republic," Republic Complaint (Doc. 1) at 6 ¶ 5.2.5, but has failed to produce any contracts between it and these residents for the hauling of construction waste (because the residents have contracted with Texas Disposal, not Republic).

An essential element of tortious interference is "a willful and intentional act of interference with the contract." *Prudential Ins. Co. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). A plaintiff can establish interference by showing that the defendant induced a third party to breach its contract with the plaintiff. *John Paul Mitchell Systems v. Randalls Food Markets, Inc.*, 17 S.W.3d 721, 731 (Tex. App. – Austin 2000, pet. denied). Here, Republic does not contend that Texas Disposal has caused the City of San Angelo to breach its contract with Republic.

A plaintiff also can establish the essential element of interference by proving that the defendant's actions made a contract between a plaintiff and a third party "more burdensome or difficult" for the plaintiff to perform, even if there was no induced breach. *AKB Hendrick, LP v. Musgrave Enterprises, Inc.*, 380 S.W.3d 221, 236 (Tex. App. – Dallas 2012, no pet.). Careful examination of Republic's allegations reveals that Republic is not actually contending that Texas Disposal made it more difficult for Republic to perform its contract with the City of San Angelo. Rather, Republic is complaining that Texas Disposal has entered into contracts with San Angelo

residents that Republic contends it has the exclusive right to contract with – even though Republic has not shown it actually has contracts with these residents.

Republic's actual claim is that Texas Disposal interfered with Republic's alleged *prospective* contracts with the San Angelo residents (who have contracts with Texas Disposal, not Republic). Republic has failed to prove, or even adequately allege, that Texas Disposal has tortiously interfered with the existing contract between Republic and the City, and Republic has not alleged a cause of action for tortious interference with prospective contract (a different tort with different elements). Republic's summary judgment motion on its tortious interference claim should be denied.

III. Republic's Summary Judgment Motion is Premature; Texas Disposal Has Not Had an Opportunity to Plead and Prove Justification, or Any Other Affirmative Defense.

Republic seeks summary judgment before Texas Disposal has even filed an answer. (As provided by Fed. R. Civ. P. 12(a)(4)(A), because Texas Disposal filed a motion to dismiss under Rule 12(b)(6), it is not required to file an answer unless the Court denies the motion, in which case it has until 14 days after receiving notice of the denial to file its answer.) Thus, Texas Disposal has not had an opportunity to assert any substantive affirmative defenses. If the motion to dismiss is denied, Texas Disposal may assert various affirmative defenses to Republic's tortious interference claim, including the defense of justification.

A party is not liable for tortious interference if it proves that its alleged interference was justified. *Prudential Ins. Co.*, 29 S.W.3d at 80. Justification can be shown through demonstrating that the alleged interference was an exercise of the defendant's own legal rights, or was the exercise of "a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." *Id.* As set forth herein, Texas Disposal had a legal right to enter into contracts with San Angelo residents for collection of construction waste, because

Texas law does not allow municipalities to adopt exclusive agreements for such collection. But even if the Court holds that Texas Disposal's interpretation of Texas law is incorrect, Texas Disposal still is not liable for tortious interference if it can prove that it, in good faith, was exercising a colorable though mistaken legal right. Justification can be determined as a matter of law, if a court determines that the alleged interference was an exercise of the defendant's own legal rights; or good faith can be a fact issue, even if the defendant was mistaken about its legal rights. *Id.* Thus, it is not necessary for Texas Disposal to prove this affirmative defense as a matter of law to avoid summary judgment.

Should this Court not dismiss the case, Republic's motion for summary judgment should be denied, to allow Texas Disposal to plead and prove justification and any other applicable affirmative defense.

IV. Republic Does Not Have Authority to Enforce a Municipal Ordinance Through a Civil Tort Lawsuit.

Republic's allegations against Texas Disposal do not actually amount to a complaint of interference with the contract between Republic and the City of San Angelo, as described above. Texas Disposal's construction waste customers in San Angelo are not in contractual privity with Republic, and the contract between Republic and the City does not and cannot impose any duties or obligations on Texas Disposal or its customers.

Rather, Republic here is attempting to enforce an ordinance of the City of San Angelo authorizing the City to enter into an exclusive waste contract, and requiring that citizens contract only with the exclusive provider (Republic). That ordinance is specifically cited in the contract between Republic and the City as the authorizing mechanism for the contract. Republic MSJ Appx. (Doc 13) at App 2-3 ¶ C (citing and discussing San Angelo Code of Ordinances, Article 11.400, by which the "City is authorized to enter into a special exclusive contract with an

established garbage collection company for the collection of garbage and trash”). Only a City ordinance – not a contract to which residents are not parties – could mandate that City residents must use Republic for the collection of construction waste.

Republic’s actual argument, then, is that Texas Disposal and its San Angelo customers have violated a San Angelo City ordinance by entering into construction waste collection contracts. The contract between the City and Republic purports to delegate to Republic the authority to “enforc[e] the exclusivity of this Special Contract,” and that authority purports to extend to “any actions to enforce the San Angelo Code of Ordinances.” *Id.* at App 6 ¶ 6.B. Consistent with the terms of the contract, Republic is attempting to enforce the City ordinance by filing a civil action in this Court.

A municipality’s authority to enforce its ordinances is one of its police powers. *State v. Portillo*, 314 S.W.3d 210 (Tex. App. – El Paso 2010, no pet.) (holding that a city could adopt and enforce a bicycle helmet ordinance under its police powers). The authority of a city to enforce its police powers cannot be delegated to private entities. *See, e.g., Kousal v. Texas Power & Light Co.*, 142 Tex. 451, 179 S.W.2d 283, 285 (1944).

Functions such as the exercise of the police power by which [a city] promotes or protects the general welfare, comfort and convenience of the people ... are governmental functions over which the governing body must retain exclusive control. These cannot be delegated nor bartered away and any effort to do so or any contract which has the effect of passing them to others ... is unconstitutional and void.

City of Crosbyton v. Texas–New Mexico Utilities Co., 157 S.W.2d 418, 420 (Tex .Civ. App. – Amarillo 1941, writ ref’d w.o.m.). The current Code of Ordinances for the City of San Angelo requires “all residential and commercial customers to subscribe to a commercial garbage collection service” (§ 11.04.002(a)), authorizes the City to enter into exclusive contracts for the collection of waste (§ 11.04.003(d)), and allows for penalties for the violation of the ordinances

regulating waste collection (§ 11.04.007). These ordinances – *not* the contract between the City and Republic – are the only authority for imposing a duty on City residents to enter into contracts for construction waste collection with Republic. Republic’s lawsuit attempts to impose civil tort liability on Texas Disposal for entering into contracts with City residents. This amounts to an effort by Republic to enforce the City’s ordinances, via the delegation of enforcement authority in the contract between the City and Republic. But such delegation of the City’s police powers is improper. The City itself may attempt to invoke its enforcement authority for violation of these ordinances; Republic may not. Republic’s summary judgment motion must be denied.

CONCLUSION AND PRAYER

Wherefore, premises considered, Defendant Texas Disposal Systems, Inc. prays that this Court deny the Motion for Summary Judgment of Plaintiff Republic Waste Services of Texas, Ltd.; tax all costs against Republic; and further grant to Texas Disposal all other relief to which it may show itself justly entitled.

Respectfully submitted,

/s/ James A. Hemphill

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CERTIFICATE OF SERVICE

I hereby certify that this document was served on counsel of record for Plaintiff via CM/ECF, with courtesy copies transmitted via email, on this 2nd day of January, 2015, as follows:

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