

Mommie Dearest

The story of an ESA without an MOM

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Nobody enters this world or a contract without a mother - there can be no agreement without a Meeting of the Minds (MOM). Parties' differing perceptions does not a contract make. MOM happens at congruent perceptions. Without a MOM recovery of damages will be only enough to pay actual losses. *Bar J Sand & Gravel, Inc. v. Fisher Sand & Gravel, Co.*, 310 F.Supp.3d 1215 (U.S. Dist. Ct., New Mexico, 2018).

This story began when plaintiff/seller acquired an exclusive right to excavate, remove, and sell aggregate earth products, remove asphalt, and to process materials on certain land in New Mexico. Seller entered into an Exclusive Supply Agreement (ESA) with defendant/buyer. Per the ESA, seller agreed only to sell materials to buyer and buyer agreed to purchase at least 400,000 tons of material annually. The initial five-year term of the ESA could be renewed for subsequent five-year periods. Renewal required written notification from buyer to seller at least 120 days before expiration of the current five-year period.

In early 2012, buyer informed seller that it would not be able to purchase the annual minimum due to a downturn in the market. Buyer recalled seller's reply that the price could not be reduced, but to simply "do your best" to purchase the minimum amount. From this, buyer believed the seller had agreed to reduce the annual minimum amount. Seller would later not recall having said anything like this.

Buyer did not provide to the seller a timely written notification of exercising the option to renew the ESA. Nevertheless, buyer continued purchasing materials from seller for three more years without a renewed ESA. Although buyer paid the same unit prices as per the ESA, quantities purchased were well below the annual minimum. Seller issued annual invoices to the buyer seeking payment for the difference between the seller's actual purchases and the minimum quantities. Buyer questioned each invoice, but seller reassured buyer the invoices were issued mistakenly. Throughout those same three years without a renewed ESA, buyer and seller periodically discussed terms of what could have been a renewed ESA and memorialized their discussions in various correspondence. The parties were close to renewing the ESA when buyer transmitted a proposed written amendment to the seller. The seller never acknowledged receipt.

The Federal Court for the District of New Mexico applied the law of "option" contracts holding that because the buyer's written notification of renewal was untimely, the ESA had not been expressly renewed. Traditionally, at any point after an offer is made, it can be accepted at any time thereafter. Unless, however, the offer is revoked or the offer expires by a certain deadline. An "option" contract is a promise to keep an offer open (an irrevocable offer) until acceptance or expiration. Here, that expiration was if timely written notification of acceptance was not provided by the buyer. However, even if the written notification had been timely, it was simply a written expression of intent to renew and not an actual expression of renewal. (What is said and how it is said is as important as timely saying it.)

Seller successfully argued that it waived the timing requirement for the buyer to accept the option by written notification because the deadline to accept was only for the seller's benefit. (Only the party benefiting from a term can waive that same term.) The seller did not expressly waive the notification requirement, but seller impliedly waived the requirement through periodic, post-deadline negotiations of a potential new ESA.

Nevertheless, seller was unsuccessful in arguing that the parties' periodic negotiations over the three-year period somehow renewed the ESA. The seller and buyer never agreed, either formally or informally on any minimum quantities. Even the proposed written amendment prepared by the buyer equivocated on minimum quantities and related pricing. The parties never had a MOM. In the end, seller did receive payment for the quantities actually sold to buyer, but seller could not recover payment for any alleged minimum quantities not purchased since the ESA was not renewed.

