IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

RENTCLIFTON.COM., INC.,	:	APPEAL NO. C-170634 TRIAL NO. A-1702974
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
RUMPKE WASTE, INC.,	:	
and	:	
RUMPKE OF OHIO, INC.,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant RENTCLIFTON.COM, Inc., (hereinafter "appellant") entered into a contract with defendants-appellees Rumple Waste, Inc., and Rumpke of Ohio, Inc., (hereinafter collectively "Rumpke") for solid waste removal. The contract contained a number of provisions that allowed Rumpke to adjust the monthly amount it charged based on certain factors. At the top of the page, the contract contained a provision that "[a]ll services are subject to fuel surcharges (see www.rumpke.com for additional information)[.]" The Terms and Conditions of the contract also contained a paragraph further detailing the possible charges:

> 4. RATE ADJUSTMENTS: Rumpke may adjust the rates hereunder to reflect and pass through to the Customer any new or additional generation or disposal fees, taxes, and/or surcharges levied on Rumpke by federal, state, or local government [entities]. Rumpke reserves the right to adjust rates charged hereunder to reflect changes in CPI, processing, fuel, or increased transportation. Rumpke may increase rates for reasons other than set forth above with the consent

> of the Customer, which may be evidenced verbally, in writing, or by the actions and practices of the parties.

Appellant filed an amended complaint in which it alleged that Rumpke had breached the contract. Appellant alleged that the "fuel surcharge" violated the clear terms of the form contract in that it was not charged to reflect changes in Rumpke's "actual" fuel costs. The amended complaint alleged that "[b]y charging Plaintiff and each putative member a fuel surcharge that does not adjust to reflect changes in the fuel costs it incurs, Rumpke has breached the written contracts at issue and failed to fulfill its obligations." The amended complaint also sought certification from the trial court to allow the matter to proceed as a class action, with a class membership of all Rumple customers who had paid the fuel surcharge under the same "form" contract.

Rumpke filed an answer to appellant's amended complaint. In its answer, Rumpke admitted

> that it charges commercial customers such as Plaintiff for fuel-related expenses through a fuel surcharge that is connected to actual fuel costs, updates monthly, and itemized on each invoice. Answering further, Rumpke states that the "fuel surcharge table" and explanatory statements to "its customers" that are referenced and purportedly quoted in paragraph 23 of the Amended Complaint are publically available on the Rumpke website at https://www.rumpke.com/pay-your-bill/fuel-surcharge, true and accurate copies of which are attached as Exhibit 2 (the "Fuel Surcharge Customer Information").

Rumpke attached several documents to its answer that detailed how the fuel surcharge was calculated for a period of several years.

The trial court granted Rumpke's motion for a judgment on the pleadings. In granting the motion, the trial court focused a majority of its analysis on the issue of

the voluntary-payment doctrine, finding that appellant had agreed to the manner of calculating the fuel surcharge by making monthly payments based on those calculations. But the court also stated that

> [t]he other arguments set forth by the defendants are adopted as well. The plaintiff has failed, in this breach of contract case, to set forth specifically the portion of the contract that it contends has been breached. Alleging some sort of misdeed regarding the fuel surcharges is fine but that must be tied to specific language in the contract which is alleged to have been violated. This has not been done in the original Complaint nor the Amended Complaint.

In three assignments of error, appellant argues that the trial court improperly granted judgment on the pleadings. It first argues that the trial court improperly granted the motion on the basis of the failure to set forth specifically the portion of the contract that it contended had been breached. The second assignment of error alleges that fraud or mistake of fact rendered the payments involuntary for purposes of the voluntary-payment doctrine. Finally, appellant argues that the application of the voluntary-payment doctrine requires factual determinations, making a judgment on the pleadings pursuant to Civ.R. 12(C) inappropriate. In this case, the resolution of the first assignment of error is dispositive.

Granting a judgment on the pleadings pursuant to Civ.R. 12(C) is appropriate when a court (1) construes all material allegations in the complaint in favor of the nonmoving party and (2) finds beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Mayfield Clinic, Inc. v. Fry*, 1st Dist. Hamilton No. C-030885, 2004-Ohio-3325, ¶ 6. While a Civ.R. 12(B)(6) motion to dismiss must be determined on the face of the complaint alone, a Civ.R. 12(C) motion permits a court to consider the complaint and the answer in deciding whether the movant is entitled to a judgment as a matter of law. *Euvrard v. The*

Christ Hosp., 141 Ohio App.3d 572, 574-75, 752 N.E.2d 326 (1st Dist.2001), citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996). The court may consider not only the pleadings themselves, but the exhibits attached thereto. *See Schmitt v. Educational Serv. Ctr. of Cuyahoga Cty.*, 2012-Ohio-2208, 970 N.E.2d 1187, ¶ 10 (8th Dist.). Because Civ.R. 12(C) motions test the legal basis for the claims asserted in a complaint, our standard of review is de novo. *Pontious* at 569.

Appellant has alleged only breach of contract as a cause of action. "To prevail on such a claim, a claimant must establish the existence of a contract, performance on its part, breach by the other party, and its own damage or loss." *Tidewater Fin. Co. v. Cowns*, 197 Ohio App.3d 548, 2011-Ohio-6720, 968 N.E.2d 59, ¶ 12 (1st Dist.), quoting *Ward v. Cent. Invest. L.L.C.*, 1st Dist. Hamilton Nos. C-100080 and C-100081, 2010-Ohio-6114, ¶ 12. In its amended complaint, appellant alleged that "[b]y charging Plaintiff and each putative member a fuel surcharge that does not adjust to reflect changes in the fuel costs it incurs, Rumpke has breached the written contracts at issue and failed to fulfill its obligations." They claimed that the contract required Rumpke to adjust the fuel surcharge in accordance with the actual fuel cost incurred in the performance of its contract. Thus, in order to establish a breach-of-contract claim, appellant had to point to a provision in the contract that required Rumpke to adjust the fuel surcharge to reflect such changes in its actual fuel costs. But the contract contained no such provision.

The contract states that "[a]ll services are subject to fuel surcharges (see www.rumpke.com for additional information)[.]" The contract further spells out that "Rumpke may adjust the rates hereunder to reflect and pass through to the Customer any new or additional generation or disposal fees, taxes, and/or surcharges levied on Rumpke by federal, state, or local government [entities]. Rumpke reserves

the right to adjust rates charged hereunder to reflect changes in CPI, processing, fuel, or increased transportation."

Appellant asserts that the contract "establishes that Rumpke may adjust rates to 'reflect and pass through' certain additional costs it incurs in providing services, including increased fuel costs." Appellant contends that this "reflect and pass through" language required Rumpke to adjust the fuel surcharge based on costs Rumpke actually incurred and passed on to the customer. But the "reflect and pass through" language refers only to "new or additional generation or disposal fees, taxes, and/or surcharges levied on Rumpke by federal, state or local government [entities]." The contract then separately sets forth that Rumpke "reserves the right to adjust rates charged hereunder to reflect changes in CPI, processing, fuel, or increased transportation"; but that language does not indicate that those adjustments would be tied to actual costs or usage. In fact, that sentence specifically notes adjustments due to changes in the Consumer Price Index, which is a figure generated by the Bureau of Labor Statistics. That factor would not be tied to Rumpke's performance costs; it is a contractual measure tied to general statistical costs in the region. There is nothing preventing Rumpke from using statistical data to estimate costs rather than using actual cost figures. And that is what this contract provides.

Further, the contract says that information on the fuel surcharges, to which all services are subject, can be found on the website. The website states that

> The fuel surcharge is related directly to the national diesel fuel prices as reported by the Energy Information Administration of the U.S. Department of Energy (EIA/DOE) in its Retail On-Highway Diesel Price Index for the Midwest Region. This index is available to the public and is widely recognized in trucking and transportation industries. Rumpke updates the fuel surcharge monthly, and bases the

> surcharge amount on the corresponding diesel fuel price per gallon each month according to the EIA/DOE prices.

The website also lists the history of those prices and the corresponding fuel surcharge percentages.

Appellant has pointed to nothing in the contract that demonstrates that the fuel surcharge is contractually limited to the actual costs of the fuel used by Rumpke. The contractual language demonstrates just the opposite. The trial court properly determined that appellant could not demonstrate that Rumpke breached a provision of the contract. We overrule appellant's first assignment of error.

In light of the resolution of the first assignment of error, this court need not address the question of whether appellant voluntarily paid the billed amounts, and was thereby barred from recovery by the voluntary-payment doctrine. We therefore decline to address appellant's second and third assignments of error, and we affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and **POWELL, JJ.**

STEVEN W. POWELL, from the Twelfth Appellate District, sitting by assignment.

To the clerk:

Enter upon the journal of the court on December 5, 2018

per order of the court _____.

Presiding Judge