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MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY

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GARY McDANIEL, SUSAN McDANIEL, on behalf of themselves and all others similarly situated. Plaintiffs, vs. CITY OF BILLINGS, Defendant.	Cause No. DV 19-1444 **DECISION AND ORDER RE: CITY OF BILLINGS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO MONT. R. CIV. P. 56 RE PLAINTIFFS' WATER CONTRACT CLAIMS UNDER MONT. CODE ANN. § 30-2-607**

On March 10, 2020, Defendant City of Billings ("City") filed City of Billings' Motion for Partial Summary Judgment Pursuant to Mont. R. Civ. P. 56 Re Plaintiffs' Contract Claims Under Mont. Code Ann. § 30-2-607 ("Motion"). Ct. Doc. 10. On March 10, 2020, the City also filed the City of Billings' Brief in Support of Motion for Partial Summary Judgment Pursuant to Mont. R. Civ. P. 56 Re Plaintiffs' Contract Claims Under Mont. Code Ann. § 30-2-607. (" Brief"), Ct. Doc. 11. On April 17, 2020, Plaintiffs Gary McDaniel and Susan McDaniel ("Plaintiffs") filed Plaintiffs' Response to the Motion. Ct. Doc. 24. On May 1, 2020, the City filed City of Billings' Reply Brief. Ct. Doc. 30.

On March 30, 2021, the Court held a Scheduling Conference. The Court issued a Memorandum stating that the "Court concluded and counsel agreed that at this time there is no matter to be set for a hearing in this case." Ct. Doc. 74. On March 31, 2021, the City filed a Notice to Court in which the City stipulated that the present Motion may be submitted on briefs without

oral argument. Ct. Doc. 76. Plaintiffs have not requested oral argument. At a Status Hearing held on September 14, 2021, the Court affirmed with counsel that this Motion is submitted on briefs.

The Court also notes that in City of Billings' Response in Opposition to Plaintiffs' Motion for Class Certification the City suggested to the Court that for the "sake of judicial economy, the Court should decide several important threshold and potentially dispositive or limiting motions before the Court addresses class certification." Ct. Doc. 47, p. 1. This approach has been approved by other courts. *See, Sheehan v. Transit Auth.,* 155 Wn. 2d 790, 807 23 P.3d 88 (2005) ("...a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions."). In this case, the Court has not yet addressed Plaintiffs' motion for class certification. The Court points this out because in the related case of *Houser, et al. v. City of Billings,* Montana 13th Judicial Dist. Ct., Cause No. DV 19-0778, the parties agreed that notice should be given to the certified class before the Court decides motions for summary judgment. *Houser* is procedurally distinct from this case because in *Houser* the class was certified. *Houser,* Ct. Doc. 74.

On January 5, 2022, the Court entered its Decision and Order Re: City of Billings Motion for Summary Judgment (Counts II and III). Ct. Doc. 98. Subsequently, the Court entered its Partial Summary Judgment wherein the Court dismissed Count II of Plaintiffs' Complaint (breach of contract) for Plaintiffs' failure to comply with § 7-6-4301, MCA. Ct. Doc. 103. Therefore, it would appear that Plaintiffs' breach of contract claims and water claims are resolved by the Partial Summary Judgment and requires no further analysis. Ct. Doc. 103. However, because the City has also raised the issue of whether Plaintiffs are also precluded from pursuing a claim for breach of the separate water contract claim and water claims in general under the Uniform Commercial

Code ("UCC"), § 30-2-607(3)(a), MCA, the Court considers that issue for the sake of complete resolution.

BACKGROUND

On October 9, 2019, Plaintiffs filed a Class Action Complaint (Subdivision Improvement Agreement Properties). Ct. Doc. 1. In Count II of their Complaint, Plaintiffs allege that the City and its utility customers entered into individual agreements for water services, sewer services, and garbage disposal services. Plaintiffs allege that in each and every agreement there is an implied covenant of good faith and fair dealing as provided in § 28-1-211, MCA and that the City breached the implied covenant of good faith and fair dealing by billing its customers an "illegal sales tax" in the form of a "franchise fee". Ct. Doc, p. 17.

In 1992, the City's Council imposed a 4% "franchise fee" on its provisions for water, wastewater service, and solid waste disposal service. In 2004, the City raised the "franchise fees" for solid waste disposal to 5%. On May 16, 2018, a group of Billings ratepayers filed a class action suit against the City requesting a declaratory judgment and injunction and damages for breach of contract. *Houser et al. v. City of Billings,* Montana 13th Judicial Dist., Cause No. DV 19-0778. This Court certified the matter as a class action but excluded from the classes City ratepayers whose property is subject to a Subdivision Improvement Agreement ("SIA"), such as Plaintiffs in this case. *Houser,* Or. Granting Pls.' Mot for Class Certification (2019). The City appealed to the Montana Supreme Court, which affirmed this Court's Order. *Houser v. City of Billings*, 2021 MT 51, 399 Mont. 140, 458 P.3d 1031. However, this Court's decision that the SIA ratepayers were excluded from the class in *Houser* was not raised in the appeal to the Supreme Court.

There is no dispute that since 2004 Plaintiffs have resided in the Ironwood Subdivision in Billings. Their residence has been subject to an SIA during the entire time they have resided in

that subdivision. Since 2004, Plaintiffs have been consumers of water, sewer, and garbage disposal services provided by the City and have paid "franchise fees" charged by the City on those goods and services.

It is undisputed that water is a "good" under the UCC. Br., Ex. "A", Interrogatory No. 12. Plaintiffs acknowledge that water is a "good" under the UCC. Br., Ex. "A", Plaintiffs' answer to Interrogatory No. 12. Each bill that Plaintiffs received for water from the City included an amount for the "franchise fees." Br., Ex. "A", Admission No 4. Plaintiffs did not pay the "franchise fees" under protest. Br. Ex. "A", Admission No. 10. The Billings City Council voted to impose "franchise fees' on water at public hearings held between 1992 and 2018. Br. Ex. "A", Admission No. 29. Plaintiffs did not attend any of the public hearings on water rates from 2004 through 2018. Br., Ex. "A", Admission No. 47. Plaintiffs admit that they paid the "franchise fees" related to their water, pursuant to a contract. Br., Ex. "A", Admission No 19. Plaintiffs admit they never rejected any water they received from the City. Br., Ex. "A", Admission No. 35. Plaintiffs admit that they never notified the City that it had breached Plaintiffs' contract for water delivery. Br., Ex. "A", Admission No. 36. Plaintiffs admit that prior to July 2019, they did not object in writing to the payment of the "franchise fees" on their water. Br., Ex. "A", Admission No. 43.

Plaintiffs admitted that prior to filing this lawsuit they did not ask the City to refund the "franchise fees" paid for water. Br. Ex. "A", Admission No. 49. The Billings City Council has not been presented with, and has no record of, a claim or demand for repayment of "franchise fees" based on a breach of contract, a breach of the covenant of good faith and fair dealing, or any other claim for repayment from Plaintiffs. Bohlman Aff., ¶ 6. Ct. Doc. 13. The City records do not include any demand or claim upon the Billings City Council for repayment or refund of "franchise fees" paid in connection with water service. Bohlman Aff., ¶ 7. Ct. Doc. 13. Plaintiffs argue that

numerous citizens and City Council members gave notice to the City during the City's Council meetings that the "franchise fees" violated state law. Plaintiffs allege that the City breached the implied covenant of good faith and fair dealing by "imposing illegal sales taxes when billing its customers for providing water, sewer, and garbage disposal services and misrepresenting those taxes as 'franchise fees.'"

The City seeks a separate partial summary judgment on Plaintiffs' water claims.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 16, 369 Mont. 444, 299 P.3d 338 (citing M. R. Civ. P. 56(c)(3)). Summary judgment may be entered for either all or part of the claim. Mont. R. Civ. P. 56(a). Once the moving party demonstrates the absence of any genuine issue of material fact, the burden of proof shifts and the non-movant "must establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to prevail under the applicable law." *Semenza v. Kniss*, 2008 MT 238, ¶ 18, 344 Mont. 427, 189 P.3d 1188 (citation omitted). Disputed facts "are material if they involve elements of the cause of action" and the trier of fact must resolve the dispute. *Pospisil v. First Natl. Bank of Lewistown,* 2001 MT 286, ¶ 12, 307 Mont. 392, 37 P.3d 704 (citation omitted).

DISCUSSION

The City argues that the UCC applies to Plaintiffs' breach of contract claims based on the provisions for water. The City argues that Plaintiffs failed to comply with § 3-2-607, MCA, of the UCC. Section 3-2-607, MCA, provides in part:

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.

(3) Where a tender has been accepted:

(a) the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of 30-2-312) and the buyer is sued as a result of such a breach the buyer must so notify the seller within a reasonable time after the buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted....

The City argues that Plaintiffs were required to give the City notice of their alleged breach of the water contracts and did not do so. There is no dispute that a contract existed between the City and Plaintiffs for the supply of water. The City notes that Plaintiffs admit that they never notified the City that it had breached the water contract. Br., Ex. "A", Request for Admission No. 36. The City also contends that Plaintiffs did not plead that they provided notice of a breach to the City and that the evidence presented does not establish notice under § 30-2-607, MCA.

In its Reply, the City contends that documents which were referred to by Plaintiffs in their Response are not part of the record in this case. Reply, p. 2. These documents are listed by the City on page 2 of its Reply: Docs. 35, 38, 55, 64, 69, 83, 86, 80, 97, 117 and 145. *Id.* The City points out that at the time of the filing of Plaintiff's Response (April 17, 2020), the documents filed in this case ended at Document No. 27. The Court agrees with the City and will not consider

any documents which were not part of the record in this case at the time of the filing of the City's Motion.

Plaintiffs argue that notice to a seller under the UCC is not necessary when the seller has actual knowledge of the defect. Resp., p. 3, citing *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 782 (7th Cir. 2011). Plaintiffs' basis for its claim that the City breached the water contract is that the City willfully lied about the legality of the "franchise fees" imposed on its customers. The City asserts that Plaintiffs' claim appears to be based upon the theory that the City breached the covenant of good faith and fair dealing by assessing a sales tax upon its customers. Regardless of how the parties characterize Plaintiff's claim, the issue is whether the UCC precludes the City from pursing its claims for breach of the water contract by violating the covenant of good faith and fair dealing under the undisputed facts of this case.

The City argues that the water contracts at issue in this case have all been fully performed. The City asserts that it provided the water services and Plaintiffs made payment. The City notes that Plaintiffs do not allege any breach in the performance or enforcement of the contracts. The City argues that this is important because under the UCC, there is no independent cause of action for good faith. Section 30-1-203, MCA, provides that "Every contract or duty with this code imposes an obligation of good faith in its performance or enforcement." The official code comments to § 30-1-203, MCA, make it clear that this section does not create an independent cause of action:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created,

> performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

Thus, the City reasons that when Plaintiffs' claim for breach of the covenant of good faith and fair dealing is analyzed through the UCC, Plaintiffs did not comply with § 30-2-607, MCA. The City argues that Plaintiffs have not met their burden of establishing that the City had actual notice that the City breached the contracts and the covenant of good faith and fair dealing with Plaintiffs. Reply, p. 4. The City notes that while individual parties complained about the "franchise fees", primarily when they were adopted in 1992 and after *Montana-Dakota Utilities Co. v. City of Billings,* 2003 MT 332, 318 Mont. 407, 80 P.3d 1247 was decided, Plaintiffs continued buying water from the City and continued paying their bills, including the "franchise fees." Plaintiffs never notified the Public Works Department of its alleged breach and the "franchise fees" were never paid under protest. The Court agrees with the City's argument that to "fulfill the objective of good requirement in the context of [the UCC], the buyer must not act in a manner which leads the seller to believe that the contract has been properly performed when the buyer actually intends to institute a lawsuit." Reply, p. 4.

Plaintiffs' argument that the City had actual knowledge of a breach of contract or breach of the covenant of good faith and fair dealing is based upon the notion that the City knew that the "franchise fees" were a sales tax. However, the City has emphatically argued in this case that the "franchise fees" were not an illegal sales tax. Although this Court has decided that the "franchise fees" are an illegal sales tax, that decision was not made until the Court issued its Decision and Order Re: Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees (Count I) on January 5, 2022.

Whether the "franchise fees" were an illegal sales tax was a question of law. At the time that the water contract was being performed, no court had ever determined this question of law.

As the City points out, the City and the Billings City Council could not have actual knowledge of a legal ruling before one was ever made. Reply, p. 5.

During the time of the performance of the contract the issue of the legality of the "franchise fees" was subject to dispute. Some citizens claimed that the "franchise fees" were illegal. Some City officials disagreed with this assertion. A person has "notice" of a fact if they have "actual knowledge." Section 30-1-210(1) & (2), MCA. The disputed issue was not a fact, but was a question of law that had never been decided. The Court agrees with the City that the *MDU* case and citizen complaints arising from the *MDU* decision about the utility fees did not give the City actual notice as required by the UCC that the contract was breached based on the claim that the "franchise fees" were an illegal sales tax.

Plaintiffs' reliance on *Anderson* for their argument that the City had actual notice of Plaintiffs' claims of breach of contract and breach of the covenant of good faith is misplaced. *Anderson* involved a breach of warranty claim involving nonconforming goods. In *Anderson*, the Court found that Gulf Stream had received over 60 pages of warranty claims over a period of five months and had sent representatives to investigate the defects. *Anderson,* 662 F.3d at 782. Under those circumstances, the Court held that the buyer did not have to give an additional notice. *Id.* The Court held that the policy behind requiring notice is to give the seller a reasonable opportunity to cure. *Id.* at 783. In *Anderson,* plaintiffs sent numerous warranty claims describing problems and allowed Gulf Stream time to cure the defects. The policy reason for notice was satisfied. *Id.*

This case does not involve a breach of warranty or of nonconforming goods. Plaintiffs assert a claim for breach of contract and breach of the covenant of good faith and fair dealing independent of any direct breach of the contract. Unlike *Anderson*, the City does not have pages of complaints about the City breaching the covenant of good faith and fair dealing.

In *Anderson*, the Court also recognized that the "actual knowledge" standard was in contract to the analysis of UCC 2-607 in other jurisdictions. In *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 973 (5th Cir. 1976), the Court recognized the broad function of the notice requirement noting that "it is not enough under section 2-607 that a seller has knowledge of the facts constituting a non-conforming tender; he must also be informed that the buyer considers him to be in breach of contract." In *Eastern Air*, the notice requirement under UCC 2-607 is applicable to delivery delays as well as other breaches." *Id.*, 532 F.2d at 971-973.

In *Anderson*, the Court took a limited view of the purpose of the notice – that it was simply to allow for a cure. In *Eastern Air*, the Court analyzed that viewpoint and noted:

> Judge Learned Hand, for example, applied section 49 in a case in which performance had been delayed, noting:
>
> "The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice "of the breach" required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." *American Mfg. Co. v. United States Shipping Board E. F. Corp., 2 Cir., 1925, 7 F.2d 565, 566; cited with approval Whitfield v. Jessup, supra, 31 Cal.2d at 830, 193 P.2d at 4; Reininger v. Eldon Mfg. Co., supra, 250 P.2d at 8. But see Johnson v. Comptoir Franco Belge D'Exportation, etc., 1955, 135 Cal.App.2d 683, 288 P.2d 151, 156.*

Id.,532 F.2d at 972.

Plaintiffs were required to notify the City that they considered the City to be in breach of the water contracts. Plaintiffs cite nothing in the record that Plaintiffs gave the City any notice that the City had breached the covenant of good faith and fair dealing. There is no evidence that any notice was provided to the City that it had a duty to amend the contracts to eliminate the "franchise fees" when there had never been a judicial determination that the fees at issue were

illegal. The uncontroverted facts demonstrate that Plaintiffs did not give the City any notice of breach of contract or of breach of the covenant of good faith and fair dealing or of any generic notice. Neither Plaintiffs, nor Plaintiffs on behalf of the proposed Subdivision Water Class, complied with § 30-2-607, MCA.

It appears that Plaintiffs are arguing the City breached the covenant by not amending the contracts to eliminate of their express terms – the inclusion of the "franchise fees." The alleged duty to amend the contracts does not come from any contract provision. Plaintiffs' breach of the covenant is founded upon something external to the contracts themselves. Plaintiffs' attempt to assert an independent claim for breach of the covenant is not permitted under the UCC. As discussed earlier, pursuant to § 30-1-203, MCA and its official comments, a claim for breach of the covenant of good faith and fair dealing must be tied to an actual breach of contract claim. Plaintiffs did not provide notice that any provision of the contract was breached. Thus, the purported breach of the covenant claim is defective.

Plaintiffs also failed to plead that it gave the City notice of breach. The burden of proving notice is on the party claiming breach, i.e., the Plaintiffs. *Fire Supply & Service Inc., v. Chico Hot Springs*, 196 Mont. 435, 442-444, 639 P.2d 1160 (1982). Pleading notice is required for recovery. 4 Anderson U.C.C. § 2-607:21 (3d. ed.). The City raised Plaintiffs' failure to plead notice in its Brief. Plaintiffs failed to dispute or address the City's argument.

Plaintiffs' arguments on the issue raised by the City concerning the applicability of the UCC on the water contracts primarily focuses on the legality of the "franchise fees" and statements made by persons other than Plaintiffs and communications between counsel for the parties to satisfy any notice requirements under the UCC.

Section 30-2-101 et seq., MCA, UCC Article Two, governs the allegations relating to the water contracts because water is a "good". Section 30-2-102, MCA. The fact that water is a "good" is undisputed. The City's Motion is based upon § 30-2-607, MCA. The primary purpose of this statute is to prevent a buyer from accepting goods and later refusing to pay for them on the basis of an alleged breach of contract. *Hill v. Ryerson Sons, Inc.*, 165 W.Va. 22, 29-30, 268 S.E. 296, 302 (S. Ct. W. Va. 1980). Plaintiffs allege a breach of contract and seek a refund of a portion of what they paid for the water, namely the "franchise fees", from the City for over 15 years.

The City argues that Plaintiffs waived any claim for breach of contract by purchasing and paying for the water for the 15-year period while remaining silent about their breach of contract and breach of the covenant of good faith and fair dealing claims. The City's position on this issue is supported by the authority cited by the City. Reply, pgs. 15-16. Plaintiffs accepted the water from the City, used the water, paid their bills for over 15 years, and never rejected the water. At the time Plaintiffs accepted the water, they became contractually bound to pay the contract price, including the "franchise fees." Section 30-2-607, MCA. Under the UCC, if Plaintiffs disputed the City's performance of the contracts, they had the recourse to notify the City to cease the prior practice. Plaintiffs did not give such a notice.

In conclusion, Plaintiffs failed to plead and present evidence that they provided notice of breach of the covenant of good faith and fair dealing to the City, within a reasonable time. Plaintiffs failed to plead or provide evidence that Plaintiffs provided individualized notice to the City, within a reasonable time.

Concerning the applicability of the UCC to Plaintiffs' water claim, Plaintiffs bought water, received water, and paid for the water for 15 years without providing any notice that they intended to sue for breach of the covenant of good faith and fair dealing. The facts are undisputed that

Plaintiffs failed to give the requisite notice. Further, Plaintiffs conduct created a course of dealing and performance under the UCC that constitutes a waiver of their claim relating to water.

DECISION

There is no genuine issue as to any material fact under the UCC analysis and the water contracts. As to Plaintiffs' claim based upon the water contracts, Plaintiffs failed to give notice of breach to the City. Plaintiffs failed to plead such notice in their Complaint. Plaintiffs waived their claim for breach of contract by continuing to accept the water and continuing to pay for it. Under the UCC, when a buyer has "accepted" the goods (water), as Plaintiffs did here, the buyer must notify the seller of any breach. Plaintiffs' failure to give notice of breach bars Plaintiffs' claim for a breach of the covenant of good faith and fair dealing as it relates to the water contracts.

The Court noted that Plaintiffs claim for breach of contract under Count II and restitution under Count III were previously dismissed by the Court in its Decision and Order Re: City of Billings' Motion for Partial Summary Judgment (Counts II and III) for other reasons. Ct. Doc 98. Concerning the present Motion, the City is also entitled to partial summary judgment on Plaintiffs' water claims.

ORDER

IT IS HEREBY ORDERED:

1. The City of Billings' Motion for Partial Summary Judgment Pursuant to Mont. R. Civ. P. 56 Re Plaintiffs' Water Contract Claims Under Mont. Code Ann. § 30-2-607 is **GRANTED.** For the reasons stated in this Decision and Order, Plaintiffs' water claims Complaint are **DISMISSED** by means of a Partial Summary Judgment on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing and breach of contract.

2. On or before March 15, 2022, the City's counsel shall prepare a Proposed Partial Summary Judgment Plaintiffs' Complaint consistent with this Decision and Order and the relief requested by the City and submit it to the Court in Word format directly to the Court at its personal email for the Court's consideration for issuance by the Court. Counsel shall file the original Proposed Partial Summary Judgment with the Clerk of the District Court and provide a copy to Plaintiffs' counsel.

Dated March 1, 2022.

Hon. Mike Salvagni
Presiding Judge

cc: Matthew G Monforton
Doug James
Bryce Burke

MONTANA, THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Gary McDaniel, et al.	)	Case No. DV 19-1444
Plaintiffs,	)	
	)	Judge Michael Salvagni
Vs.	)	
City of Billings,	)	CERTIFICATE OF SERVICE
Defendant.	)	

On this 1st day of March 2022, the Clerk of District Court certifies that a true and correct copy of the Decision and Order Re: City of Billings' Motion for Partial Summary Judgment Pursuant to Mont. R. Civ. P. 56 Re Plaintiffs' Water Contract Claims Under Mont. Code 30-2-607 was mailed, first class, postage paid, to the following parties:

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THIRTEENTH JUDICIAL DISTRICT COURT · YELLOWSTONE COUNTY · MONTANA · SEAL

TERRY HALPIN

By: Cynthia Swenson