Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.

United States District Court for the District of Kansas

November 17, 1989, Decided and Filed

Civil Action No. 88-2224 S

Reporter
1989 U.S. Dist. LEXIS 15036 *; 1989 WL 151919

KANSAS CITY POWER & LIGHT COMPANY and KANSAS GAS AND ELECTRIC COMPANY, Plaintiffs, v. THE PITTSBURG AND MIDWAY COAL MINING COMPANY; KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; ENVIRONMENTAL PROTECTION AGENCY; and MORRIS KAY, Defendants

Case Summary

Procedural Posture
Plaintiff buyers filed a motion to reconsider the court's order of May 23, 1989 and for summary judgment, defendant Kansas Department of Health and Environment (KDHE) filed a motion for summary judgment, and defendant seller filed a motion for summary judgment the buyers' action, seeking declaratory judgment and seeking excuse from performance of and rescission and reformation of its contract to buy coal from the seller on various theories.

Overview
The buyers contended that the testimony of the KDHE former director and another official showed that the buyers' power plant was exempt from the sulfur emission regulation. The court denied the buyers' motion to reconsider because even considering the supplemental deposition evidence, the court remained convinced that the order granting summary judgment for the federal defendants was correct and supported by the evidence. The court granted KDHE's motion for summary judgment because the reasons supporting summary judgment for the federal defendants equally applied to the KDHE. The court granted in part the seller's motion for summary judgment on the buyers' claim for rescission because the court found that the parties' agreement was not illegal to enforce and was not against public policy. The court denied, in part, the seller's motion for summary judgment because the buyers' gave prompt notice to the seller of the alleged force majeure occurrence. The court denied the buyers' motion for summary judgment because at trial, the seller might have been able to show that it was entitled to damages under either anticipatory repudiation of the contract or breach of contract.

Outcome
The court granted KDHE's motion for summary judgment. Thus, KDHE was dismissed as a party defendant in the lawsuit. The court granted, in part, and denied, in part, the seller's motion for summary judgment. The court denied the buyers' motion for summary judgment.

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Opinion by: SAFFELS

Opinion

MEMORANDUM AND ORDER

DALE E. SAFFELS, UNITED STATES DISTRICT JUDGE

This matter is before the court on several motions: plaintiffs' motion to reconsider this court's Memorandum and Order of May 23, 1989; defendant Kansas Department of Health and Environment ("KDHE")'s motion for summary judgment; defendant Pittsburg and Midway Coal Mining **[*2]** Co. ("P&M")'s motion for summary judgment; and plaintiffs' motion for summary judgment. In Count I of the complaint, plaintiffs seek declaratory judgment on when, if ever, the emission standards for sulfur dioxide (SO2) applied to Unit No. 1 of their power plant located near LaCygne, Kansas ("LaCygne Unit No. 1"). In the remaining counts of the complaint, plaintiffs seek excuse from performance of and rescission and reformation of their contract to buy coal from P&M on various theories. Defendant P&M has filed a counterclaim, seeking damages for breach of contract and for plaintiffs' alleged anticipatory repudiation of the contract.

I. MOTION TO RECONSIDER

In our Memorandum and Order of May 23, 1989, reported at *715 F. Supp. 309*, we granted defendants EPA and Morris Kay's motion for summary judgment on Count I of the complaint. The court found that the LaCygne Unit No. 1 was never exempt from the sulfur emissions regulation set out in K.A.R. 29-19-31(C). *Id. at 312*.

In their motion to reconsider, plaintiffs submitted portions of transcripts of deposition testimony of Melville Gray, former Director of Environment for KDHE, and Norman Saiger, former executive secretary of Kansas **[*3]** Air Quality Conservation Commission. Saiger was responsible for originally drafting the regulations at issue in this case. Plaintiffs argue that the testimony of these officials shows that LaCygne Unit No. 1 was exempt from the sulfur emission regulation.

The court has reviewed the cited portions of these depositions and finds that they do not warrant a reconsideration of our earlier order. In fact, the testimony of these former KDHE officials supports the court's findings in the earlier order. The testimony of these witnesses shows that under their interpretation of the regulations LaCygne, Unit No. 1 was an existing unit under the regulations; that LaCygne Unit No. 1 was eligible for an exemption from the SO2 emissions standards; and that plaintiffs never submitted sufficient data to qualify for this exemption. Therefore, even considering the supplemental deposition evidence, the court remains convinced that the Order of May 23, 1989, granting summary judgment for the federal defendants is correct and supported by the evidence. Thus, plaintiffs' motion to reconsider will be denied.

II. DEFENDANT KDHE'S MOTION FOR SUMMARY JUDGMENT

Like the federal defendants, KDHE is a party **[*4]** only with regard to Count I. Based on our May 23, 1989 Memorandum and Order, reaffirmed above, KDHE seeks summary judgment. The court finds that the reasons supporting summary judgment for the federal defendants equally apply to defendant KDHE. Therefore, the court will grant KDHE's motion for summary judgment for the reasons outlined in the May 23, 1989 Memorandum and Order.

III. P&M'S MOTION FOR SUMMARY JUDGMENT

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. *Fed. R. Civ. P. 56(c)*; *Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir. 1985)*. The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*. The moving party has the burden of showing the absence of a genuine issue of material fact. This burden "may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)*. "[A] party opposing a **[*5]** properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 474 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* The court must consider factual inferences tending to show triable issues in the light most favorable to the party opposing the motion. *Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).*

The following facts have been established for purposes of this motion. In the late 1960s, plaintiff Kansas City Power and Light ("KCPL") proposed the construction of a new coal-fired power plant to be located near LaCygne, Kansas. The plant was to be a "mine-mouth plant," which means it would be located near the mine supplying its coal. Defendant P&M controlled coal reserves near the proposed plant. KCPL and P&M entered into negotiations on a long term coal supply agreement. Kansas Gas & Electric ("KG&E") later became KCPL's partner on the construction of LaCygne Unit No. 1, **[*6]** because it too needed a new generating plant. Plaintiffs jointly developed and built LaCygne Unit No. 1, with KCPL acting as the operating partner.

The coal from the Midway Mine near LaCygne is relatively cheap low quality coal. The coal is high in ash and sulphur content. In July of 1970, plaintiffs and P&M signed a long term coal supply agreement. This agreement obligated P&M to supply and plaintiffs to purchase specified quantities of coal each year, beginning in 1973 and ending in 2002. The agreement states that plaintiffs are to purchase 1,630,000 tons of coal each year until 1996, 1,340,000 tons in 1996, and 1,260,000 tons each year for 1997 through 2002.

The coal supply agreement contains a force majeure clause. This clause states:

If, because of a force majeure; . . . buyers cannot buy, receive, handle, or use the coal to be supplied hereunder at LaCygne Station, or if either party is unable to carry out any of its obligations under this Agreement . . . then the obligation of the party giving such a notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated insofar as possible **[*7]** with all reasonable dispatch. (Agreement, Section 11.2)

The agreement defines "force majeure" as including "acts or orders of any court, regulatory agency or administrative body having jurisdiction." (Agreement, Section 11.3).

In 1977 and 1985, the parties executed written amendments to the original contract. The 1977 Supplemental Agreement resulted from geological slips in the coal seams at P&M's Midway Mine. The Supplemental Agreement allowed P&M to deliver coal higher in ash and sulphur content than had been previously agreed (up to 28% from 24%). Also, the base price of Midway Mine coal was increased. In each amendment, the parties reaffirmed the terms of the original contract.

The applicable SO2 emissions standards have been discussed above and detailed in our Memorandum and Order of May 23, 1989. Those standards have applied to LaCygne No. 1 since it went on line in 1973. When plaintiffs began building the plant in 1969, they were aware that environmental regulations might be adopted and applied to their plant. Plaintiffs installed an air quality system to accomplish what they thought would allow the plant to operate in the future and still comply with the environmental regulations. **[*8]** Plaintiffs contend that they did not believe that the SO2 emission standard, enacted by the State of Kansas in 1971, applied to LaCygne Unit No. 1 until 1981, when the exemption to the emission standards was repealed.

In 1977, plaintiffs hired an engineering firm to conduct emission tests in August of 1977. At that time, plaintiffs were burning only P&M coal. The six measurements indicated that the unit was emitting less than three pounds of SO2 per million BTU (the limit imposed by the emission regulations in K.A.R. 28-19-31(C)).

On September 10, 1985, KDHE notified plaintiffs that the agency would probably issue an order or regulation requiring a monitoring device to be installed in the stack of LaCygne Unit No. 1 to begin continuous monitoring of emissions. The regulation was subsequently issued and KDHE required installation of the continuous emission monitor in November of 1987. *See* K.A.R. 28-19-19.

In 1987, plaintiffs again conducted emission tests while burning 100% P&M coal. Two of the seven readings made in December of 1987 showed the unit emitting less than the three pound limit (2.98 and 2.89 pounds per million BTU). The remaining readings were above the three pound **[*9]** limit (3.01 to 3.18 pounds per million BTU) P&M contends that consultants have advised plaintiffs that they can use P&M coal and comply with the emission standard by using lime as a reagent in the power plant's emission removal process. P&M also contends that plaintiffs can comply with the regulations and use only P&M coal by constructing a new air quality control system. Plaintiffs argue that this approach would cost them over $ 140 million, and thus is cost prohibitive.

On April 25, 1988, plaintiffs filed this lawsuit seeking declaratory relief. Count I of the complaint requested a declaration of when, if ever, the sulfur emission regulation applied to LaCygne Unit No. 1. The court decided this matter in the May 23, 1989 Memorandum and Order, which have reaffirmed above. In Count II, plaintiffs seek a declaration that their performance is excused because of the force majeure clause of the contract. In Count III, plaintiffs seek rescission of the contract based on five theories: the contract is unconscionable, the contract violates public policy, compliance with the contract is commercially impractical, performance is excused because of commercial frustration, and performance is **[*10]** excused because of mutual mistake. In Count IV, plaintiffs ask the court to reform and rewrite the terms of the contract based on mutual mistake of fact, the gross inequities provision of the contract, and commercial impracticability and frustration. In its motion for summary judgment, P&M seeks summary judgment on Counts II, III, and IV of plaintiffs' complaint. P&M also seeks summary judgment on Count II of its counterclaim, which alleges that plaintiffs breached their contract by refusing to purchase the quantities of coal called for in the coal supply agreement.

A. The Force Majeure Clause

Regarding Count II of plaintiffs' complaint, defendant P&M argues that summary judgment should be entered in its favor because the evidence shows no force majeure situation exists to justify the invocation of the force majeure clause. P&M contends that evidence shows plaintiffs have complied with the sulfur emissions standards while burning only P&M coal, and that it is possible for plaintiffs to comply with the standards and use P&M coal by using new methods in their emissions process or by installing new equipment.

The court finds that material questions of fact remain about whether plaintiffs' **[*11]** nonperformance is excused by the force majeure clause. Although the 1977 tests of emissions showed that LaCygne Unit No. 1 could burn 100% P&M coal and comply with the environmental standards, plaintiffs have pointed out that since that time the contract has been amended to allow P&M to deliver higher sulfur coal and that the 1977 tests were conducted under optimum performance conditions. Furthermore, a 1987 KDHE regulation now requires plaintiffs to continuously monitor their

emissions of SO2. As for P&M's contention that plaintiffs can install new equipment and thus continue to use only P&M coal, plaintiffs have presented evidence that such equipment could costs plaintiffs about $ 140 million. Thus an issue exists whether this is feasible or required under the contract's force majeure clause.

Finally in regard to Count II, P&M argues that summary judgment is in order because plaintiffs failed to give timely notice of the invocation of the force majeure clause. Although the court has found plaintiffs were bound to comply with the emission standard required by K.A.R. 28-19-31(C) from the start of LaCygne Unit No. 1's operation, there is evidence that plaintiffs were not required to **[*12]** continuously monitor the emissions until late 1987 and that tests conducted in December of 1987 indicated an inability to comply continuously with the standard and still use only P&M coal. Plaintiffs gave notice of this alleged force majeure occurrence and of the invocation of the force majeure clause in March of 1988. Therefore, the court finds facts have been presented that would allow a finding of prompt notice, and thus summary judgment on this ground will be denied.

For all the above reasons, the court finds that summary judgment on Count II of plaintiffs complaint would not be appropriate.

B. Count III: Plaintiffs' Claims for Rescission of the Contract

In Count III of the complaint, plaintiffs seek rescission of the coal supply agreement based on five theories. Defendant P&M moves for summary judgment on each theory. plaintiffs failed to present any response regarding the theories of unconscionability and mutual mistake of fact. Therefore, P&M's motion for summary judgment on those theories for rescission will be granted as uncontested. D. Kan. Rule 206(g).

1. Public Policy

Count III asserts that the contract should be rescinded because it violates public policy. Plaintiffs **[*13]** claim that the mining and consumption of P&M's coal violates federal and state environmental regulations. Under Kansas law, a contract that is illegal to enforce is void as against public policy. *In re Shirk's Estate, 186 Kan. 311, , 350 P.2d 1, 13 (1960)*. A contract is not void unless it is injurious to or contravenes the public interest. Illegality of a contract under public policy depends on the facts and circumstances of a particular case. *Id.* A contract is presumed legal and the burden is on the one denying a contractual obligation to show the contract's illegality. *Id.* The court finds that the contract at issue, a long term coal supply agreement, cannot be characterized as one against public policy. Although the enforcement of the contract may create a great economic hardship on plaintiffs and may be improvident to them, the enforcement of this contract is not necessarily injurious to the public interest. *See Resources Investment Corp. v. Enron Corp., 669 F. Supp. 1038, 1040 (D. Colo. 1987)*. If plaintiffs burn only P&M coal, they may violate certain environmental laws, but the contract does not require them to burn solely P&M coal at their plant; instead, **[*14]** the contract only requires that plaintiffs purchase certain quantities of coal each year. The court finds that this agreement is not illegal to enforce and is not against public policy. Thus, the court will grant P&M's motion for summary judgment on plaintiffs' claim for rescission based on this theory.

2. Commercial Impracticability

Defendant P&M contends that under *K.S.A. 84-2-615* (a section from the Kansas codification of the Uniform Commercial Code ("UCC")), relief under the theory of commercial impracticability is a remedy available only to sellers. Since plaintiffs are buyers under the coal supply agreement, P&M argues that plaintiffs cannot assert this theory in their attempt to rescind the contract. P&M is correct that the language of *K.S.A. 84-2-615* speaks of a "seller" availing themselves of the remedy of commercial impracticability. [1]

[*15] Nonetheless, Official Comment 9 of *section 2-615 of the UCC* states that a buyer may assert commercial impracticability when the "contract is in reasonable commercial understanding conditioned on a

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[1] *K.S.A. 84-2-615(a)* states, in part:

Delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach of his duty under a contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order."

definite and specific venture or assumption . . ." *K.S.A. 84-2-615*, Official Comment 9; *see also Nora Springs CO-OP v. Brandau, 247 N.W. 2d 744, 748 (Iowa 1976)*. Moreover, the court notes that a respected commentary on the UCC points out that buyers may avail themselves of common law remedies in addition to the remedies addressed in Article 2 of the UCC. White and Summer, *Uniform Commercial Code* 128 (2d ed. 1980); *see K.S.A. 84-1-103*. The commentary states that "[u]nlike the text of 2-615, neither the cases nor the Restatement distinguished between buyers and sellers" regarding who may seek relief under theory of commercial impracticability. White and Summers, *supra*, at 128. The court, therefore, finds that plaintiffs may assert the theory of commercial impracticability in their attempt to excuse their nonperformance and to rescind the contract. Thus, the court will proceed to the merits of the commercial impracticability assertion.

Under Kansas law, a party asserting commercial **[*16]** impracticability to excuse performance must establish that the performance, as agreed to in the contract, has become objectively impractical as a result of a particular event or condition, which the parties assumed would not occur. *See Sunflower Electric, 7 Kan. App. 2d 131, 138-39, 638 P.2d 963, 969 (1981)*. Performance that has become merely more difficult or unprofitable is not enough to establish objective impracticability. *Columbian Nat'l Title Ins. v. Township Title Service, 659 F. Supp. 796, 802-03 (D. Kan. 1987)*.

For the reasons discussed above regarding the force majeure clause, the court finds that plaintiffs have presented sufficient evidence to raise material questions of fact about whether their performance under the contract became objectively impracticable. Specifically, the 1987 Kansas regulation requiring continuous monitoring, the foreseeability of such a regulation, the December 1987 emissions tests indicating that the plant that during certain tests runs, LaCygne Unit No. 1 could not comply with the environmental regulations, and the costs of installing new equipment to achieve compliance while burning only P&M coal, create questions of fact about the commercial **[*17]** practicality of plaintiffs' performance. Therefore, the court will not grant summary judgment for defendant on this theory.

3. Doctrine of Frustration of Purpose

Plaintiffs also assert the doctrine of frustration of the contract's purpose as a basis for rescinding the coal supply agreement. The elements of this doctrine are quite similar to the elements of the doctrine of commercial impracticability. However, under the doctrine of frustration, performance remains possible but is excused because a fortuitous event supervenes to cause a failure of the consideration or a total destruction of the expected value of the performance of the contract. *See Columbian Nat'l, Title Ins. v. Township Title Service, 659 F. Supp. 796, 804 (D. Kan. 1987)*. The doctrine of commercial frustration excuses a breach of contract only if the purpose of the contract is frustrated or its enjoyment is prevented by law. *Id.* (quoting *Berline v. Walkschmidt, 159 Kan. 585, 588, 156 P.2d 865, 867-68 (1945))*. P&M argues that summary judgment should be entered on this theory because the emission regulations limiting sulfur emissions were reasonably foreseeable by the plaintiffs when they entered into the **[*18]** contract.

The court, however, finds that questions remain whether the KDHE imposition of a continuous monitoring regulation was reasonably foreseeable. For the reasons discussed above regarding the force majeure clause and commercial impracticability, P&M's motion for summary judgment on the claim of rescission based on frustration of the contract's purpose must be denied.

4. Timeliness

A party must elect the remedy of rescission and give notice to the other party within a reasonable time after knowledge of the existence of cause for rescission. *Baker v. Penn Mutual Life Ins. Co., 788 F.2d 650, 662 (10th Cir. 1986)*. For reasons discussed above regarding the timeliness of the notice of invocation of the force majeure clause, the court finds sufficient evidence has been shown to preclude summary judgment on the ground that plaintiffs' notice of rescission was untimely. Plaintiffs have pointed to facts showing that notice of rescission was made shortly after learning that they allegedly could not comply with the sulfur emissions standards while using only P&M's coal in light of the December, 1987 emissions tests. *See Baker, 788 F.2d at 662* (notice three years after discovery **[*19]** of alleged grounds for rescission is sufficient).

C. Count IV: Reformation of the Contract

In Count IV, plaintiffs seek reformation of the coal supply agreement under three theories. P&M seeks summary judgment on each theory. Plaintiffs failed to respond to defendant's motion for summary judgment on the theories of the gross inequities clause of the contract and on the grounds of commercial impracticability and frustration of purpose. Thus, the court will grant, as uncontested, P&M's motion for summary judgment on plaintiffs' claim for reformation based on these theories. D. Kan Rule 206(g).

1. Mutual Mistake of Fact

The remaining theory for reformation asserted by plaintiffs is mutual mistake of fact. In 1977, the parties entered into a Supplemental Agreement amending the coal supply agreement. This amendment was based in part on the discovery of certain geological "slips" in the seams of the Midway Mine. P&M asserted that these slips would make the mining process more difficult to mine the type of coal called for in the contract. Plaintiffs agreed to accept lower quality coal. The use of the lower quality coal affects the amount of sulfur emissions from the power plant.

[*20] Plaintiffs seek reformation of the contract because of a mutual mistake of fact. Plaintiffs argue that the geological slips which are present in the mine were not as great a difficulty as the parties had expected. Plaintiffs argue that because the parties were mutually mistaken about the effect of the geological slips on the mining process, the 1977 amendment to the contract should be reformed to require that the quality specifications of the coal be returned to the level required before 1977.

Kansas law recognizes a right to equitable relief if the parties made a mutual mistake of fact. *See Campbell v. Fowler,* Kan. , , 520 P.2d 1285, 1289 (1974). Courts must exercise great caution when dealing with the extraordinary relief of reforming a contract made by the parties. A party seeking this relief must show that the "mistake" must relate to the facts as they exist at the time of making the contract. "A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here." *Baker v. Penn Mutual Life Ins. Co., 788 F.2d 650, 662 (10th Cir 1986)* (quoting *Restatement (2d) Contracts § 151(a)*).

The court **[*21]** finds that plaintiffs have shown only that the parties may have been mistaken in their prediction of the future effect of the geological slips in the mine. They were not mistaken about the fact that P&M did encounter slips in the mine. Under Kansas law, an error in judgment about future events, such as the effect of the geological slips on the mining process, is an insufficient basis for claiming a mutual mistake of fact. Since plaintiffs have failed to show evidence of a mutual mistake of fact, the court will grant P&M's motion for summary judgment on Count IV of the complaint.

D. P&M's Motion For Summary Judgment On Its Counterclaim

In the discussions above, the court has found that questions of fact remain on some of plaintiffs' claims alleging that they are excused from their obligations under the contract. Therefore, summary judgment on P&M's counterclaim for breach of contract is precluded. Thus, the court will deny this motion.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Finally, the court will address plaintiffs motion for summary judgment. In their motion, plaintiffs seek summary judgment on Counts I and II of defendant P&M's counterclaim. Plaintiffs argue that **[*22]** P&M seeks damages only under the theories of anticipatory repudiation and total breach. Plaintiffs argue that there is no evidence to support such claims, and that in fact they have not repudiated the contract. Plaintiffs contend that they have given P&M adequate assurances of their intent to perform if the ultimate decision of this litigation is that they are bound to accept the quantities of coal called for in the contract. Also, plaintiffs contend that their reliance on the force majeure provision of the contract prevents P&M from asserting a claim for anticipatory repudiation even if they have relied on that provision erroneously.

First, the court finds that P&M has preserved a claim for breach of contract as a counterclaim. The pretrial order filed on September 22, 1989, states that P&M asserts a counterclaim because plaintiffs "have repudiated *and breached* their contract with P&M." (document 176, at

p. 11) Thus, P&M's counterclaim is not limited to the theory of anticipatory repudiation and total breach.

Moreover, the court finds that there is sufficient evidence to prevent summary judgment on P&M's anticipatory repudiation theory of recovery. Plaintiffs contend that no **[*23]** repudiation has occurred and that adequate assurances were given to P&M of plaintiffs' intention to comply with the contract. Plaintiffs claim they have informed P&M on numerous occasions that they will comply with any order of this court and will fully perform under the contract if obligated to do so. Plaintiffs argue that they are not obligated to perform because of the existence of a force majeure situation -- their claimed inability to burn 100% P&M Midway Mine coal and still comply with the governmental emissions regulations, especially in light of the continuous monitoring requirement.

In response, P&M argues that sufficient facts exist to show that plaintiffs did repudiate the contract. Plaintiffs failed to purchase the minimum quantity of coal required by the contract in 1988 and 1989 (1,630,000 tons each year). On March 28, 1988, plaintiffs locked the gates to their fuel yard, where P&M was to deliver the coal. In letter correspondences, plaintiffs indicated they would not be able to purchase the required quantity of coal and also comply with the government-imposed emissions standards. On February 8, 1988, P&M demanded that plaintiffs give adequate assurances of their intention **[*24]** to fully comply with the terms of the contract. In response to this demand, plaintiffs wrote P&M on March 3, 1988, stating that it was their intent to perform "to the extent such performance is practicable and to the extent we are reasonably able to do so and still comply with the applicable emissions regulations." Plaintiffs started using lower sulfur coal from other suppliers and as a result lacked space in their fuel yard for the coal from P&M. On March 24, 1988, plaintiffs informed P&M that they were invoking the force majeure clause of the coal supply agreement. Plaintiffs refused to accept any more coal from P&M in 1988. In 1989, plaintiffs purchased 475,000 tons of coal from the Midway Mine (below the 1,630,000 tons required by the contract).

An anticipatory repudiation of a contract is an overt communication of intention which "reasonably indicates a rejection of the continuing obligation." *K.S.A. 84-2-610*, Kansas Comment 1983. Conduct can constitute repudiation if it is positive and unequivocal. *Commonwealth Edison Co. v. Decker Coal Co., 612 F. Supp. 978, 981 (10th Cir. 1974)*.

The court finds that sufficient facts exist to prevent summary judgment in plaintiffs' favor **[*25]** on the repudiation counterclaims. The court believes that, at trial, P&M may be able to show that it is entitled to damages under either anticipatory repudiation of the contract or breach of contract. The crucial issue yet to be determined is whether plaintiffs can show that their nonperformance of the coal supply agreement is excused, such as by the existence of a force majeure situation.

Plaintiffs further contend that their invocation of the force majeure clause forecloses P&M's claim of anticipatory repudiation. The force majeure clause will excuse plaintiffs' nonperformance if they ultimately prevail in showing that they properly invoked the provision. An erroneous invocation of the clause, however, may result in an anticipatory repudiation of the contract. *See Phillips Puerto Rico Core, Inc. v. Tradex Petroleum Ltd., 782 F.2d 314, 321 (2d Cir. 1985)* ("Phillips' earlier refusal to pay on the grounds of force majeure constitutes an anticipatory breach of the contract."). Thus, the court will deny plaintiffs' motion for summary judgment on P&M's counterclaims.

IT IS BY THIS COURT THEREFORE ORDERED that plaintiffs' motion to reconsider this court's Memorandum and Order of May **[*26]** 23, 1989 is denied.

IT IS FURTHER ORDERED that defendant KDHE's motion for summary judgment is granted. Thus, KDHE is dismissed as a party defendant in this lawsuit.

IT IS FURTHER ORDERED that P&M's motion for summary judgment is granted in part and denied in part as more fully detailed in the above memorandum.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is denied.

DATED: This the *17* day of November, 1989, at Topeka, Kansas.

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