STATE OF VERMONT
WINDSOR COUNTY, SS

Gilcris Enterprises, Inc. Plaintiff v. Gary Bowen d/b/a Bowen Enterprises Defendant	SUPERIOR COURT Docket No. 714-10-07 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for trial by court on November 12, 2008. Plaintiff Gilcris Enterprises, Inc. was represented by its attorney of record, Stephen Ankuda, Esq. Defendant Gary Bowen was present and represented by his attorney, T. Lamar Enzor, Esq. Based upon the evidence at hearing, the court issues the following findings of fact, conclusions of law and order:

Findings of Fact

Plaintiff is a Vermont corporation which operates a gravel pit in Proctorsville, Vermont. Defendant is an excavating contractor from Castleton, Vermont.

In connection with his business, Defendant obtained crushed gravel and fill from Plaintiff's gravel business in August and September 2006. Defendant obtained $13,207.60 of material from Plaintiff. Plaintiff claims it was never paid for this material. After repeated attempts at collection, Gilcris added a 1% per month interest charge on top of the $13, 207.60 it claimed it was owed.

Defendant claims he hauled material to Plaintiff's place of business, specifically bank-run gravel and topsoil, as a barter arrangement for the material he received. Defendant also claims that he should receive a credit for this material against sums due to Plaintiff, and that the amount of his credit more than offsets the amount claimed due by Plaintiff; according to Defendant, Plaintiff actually owes him money. No counterclaim has been filed by Defendant.

Richard Gilcris operates Gilcris Enterprises. Gilcris Enterprises is involved in building log homes and milling and selling lumber in addition to the gravel business. The business has been operating for about 45 years. The gravel operation is grandfathered under Act 250. As a result, it is limited to removing 15,000 yards of gravel per year without an Act 250 permit. This requires Gilcris Enterprises to keep records of materials removed from the gravel pit on an annual basis for review by the Agency of Natural Resources.

Richard Gilcris is in charge of the gravel pit. He works in it every day running the loader, and fills out slips for loads of material as they are removed from the pit. Prior to 2006, Gilcris does not believe he had done any business with Gary Bowen.

In connection with Bowen's removal of material from the pit, Richard Gilcris made out slips as the loads were being taken. Those slips were introduced into evidence as Plaintiff's 1. From those slips, invoices to Bowen were prepared by Richard's wife, Joanne Gilcris (Plaintiff's 4, 8 & 9). Mrs. Gilcris is the bookkeeper for the business. She and her husband actually live in the gravel pit.

Gilcris charges on a per-yard basis for material. The material slips are nearly always prepared by Richard Gilcris, although on rare occasions Richard's son, Wayne, will fill out slips. Demand was repeatedly made by Gilcris for Bowen to pay the invoice with no response being received by Richard or Joanne Gilcris.

The first gravel was taken by Bowen on August 4, 2006; the last was taken in early September 2006. Bowen was using 14 yard trucks to haul material from the gravel pit. At the beginning Bowen dropped off three loads of fill at Gilcris's pit. This was done without any agreement from Gilcris to pay for it. Other than the three loads, nothing was left at Gilcris's pit.

Gilcris's attorneys wrote a demand letter to Bowen in August 2007. No response was received by Gilcris directly, although Bowen claims he called the attorney to discuss it with him. Regardless of any response at that time, Bowen refused to make payment. Thereafter, law suit was filed. Prior to suit being filed, Defendant never responded directly to Plaintiff to any demand from them.

Only after this suit was filed did Plaintiff first learn that Defendant was claiming an offset for material allegedly brought to the gravel pit. Defendant does not dispute he received the material claimed by Gilcris.

Plaintiffs screen their own topsoil in connection with their gravel business. They have far more topsoil and gravel than they ever need and have no reason to buy any. Gilcris admits he let Bowen leave three loads of bank run gravel in the pit at the beginning of Bowen's taking of crushed gravel from Gilcris.

Disposing of fill is an expense to an excavator. On occasion Gilcris will let St. Pierrre Sand and Gravel drop ledge at his pit for recrushing if it is material suitable for that purpose. This is done to allow St. Pierre a place to leave its material. Gilcris does not pay for this and does not trade material on this basis.

Bowen is claiming he left 1512 yards of topsoil at the Gilcris pit and 868 yards of bank run gravel. This would be 170 loads with a 14 yard truck; far more than the three loads Richard Gilcris acknowledges was brought in. Mrs. Gilcris received notice of the three

truckloads of material initially left by Bowen. She received nothing indicating another 167 loads of material had been trucked into the pit.

Gary Bowen does excavation work and has done so for about 40 years. He is headquartered in Castleton, Vt.

In late 2005, Bowen was working at the Gill Terrace expansion in Ludlow, a few miles from the Gilcris pit in Proctorsville. Bowen claims he sent his foreman, Gerald Catterall to approach Gilcris about leaving material at the pit in a barter arrangement. There was waste or excess material at the Gill Terrace job which Bowen needed to remove. Bowen also needed crushed gravel to use at the Gill Terrace project. Catterall reported back to Bowen that Gilcris was agreeable to bartering. Catterall also admits he approached Richard Gilcris about buying material, as it was needed for the Gill Terrace job even if Gilcris would not barter.

Catterall says Gilcris agreed to price material on a barter system. Catterall does not remember when he talked with Gilcris but says he did it when Gilcris was sitting in a loader at the pit. He says Gilcris said there was no problem with bringing in the material and Gilcris designated an area for the material to be dropped. This conversation was brief and Catterall doesn't remember if Gilcris even shut off the machine. Catterall says there was no discussion of the amount of material they wanted to bring in to the Gilcris pit. According to Catterall, there was no discussion of how the number of loads would be trucked in either direction.

Bowen believed the arrangement, as communicated by Catterall, was that for every two loads of bank run Bowen left at the pit they could receive one load of crushed gravel. Catterall confirms this. Gary Bowen never spoke with Richard Gilcris directly and no document confirming the arrangement was ever created. Bowen does not know what arrangements were made concerning top soil in terms of any barter with Gilcris, although he now claims 108 loads of top soil was left at the Gilcris pit.

A great deal of the excess material at the Gill Terrace job was top soil. Gary Bowen claims this top soil was the best quality he had ever seen in 40 years of excavating work. This Court does not find credible that an excavator would leave over 1500 yards of the highest quality topsoil at a gravel pit with no understanding as to how or if such material would be applied against material being taken from the pit. Bowen believes the first loads from the Gill Terrace job went into the Gilcris pit in May 2006 and the last loads went in about September 2006.

Catterall says he brought in at least six loads to the Gilcris pit in one day and was taking out either sand or crushed gravel. He thinks he brought in about 15 of the 62 loads of the bank run gravel they claim were brought in to the Gilcris pit. Catterall confirms that Richard Gilcris was always in the pit when he came. Catterall would have helped load the remainder at Gill Terrace and he thinks the 62 loads of bank run gravel claimed by Bowen is accurate. He did not truck in any of the topsoil, but feels he loaded 50-60 loads

of the 108 loads of topsoil Bowen claims went to the Gilcris pit. Catterall says most every time when material was brought into the pit, material was taken out.

Catterall is mistaken that the Bowen trucks would leave the pit loaded nearly every time they delivered material to the pit. Using the numbers supplied by Bowen, comparing the amount of material claimed to have been left at the Gilcris pit with that claimed to have been taken out, Bowen's trucks would have made nearly 70 trips to the pit to drop off material without a loaded return trip.

Further, if the barter arrangement insofar as Bowen understood it was two bank run loads for one crushed gravel load, insufficient bank run (868 yards) was left at the Gilcris pit for the crushed gravel taken from the pit which totaled approximately 1500 yards. Under Bowen's understanding, the bartering of bank run for crushed gravel would have only covered 434 yards of crushed gravel. This arrangement would not account for the approximately 1000 additional yards of crushed gravel received by Bowen nor the 1512 yards of highest quality topsoil he claims he left at the Gilcris pit.

Defendant's A is the answer filed by Bowen, which sets forth the claimed bank run gravel and topsoil left at the pit totaling 2380 yards. This answer was filed on October 12, 2007, over a year after the first invoice for payment was sent by Gilcris.

To calculate the amount of loads made by his drivers, Bowen claims he used the driver's timesheets, which were destroyed after the drivers were paid. At the time the answer was filed, Bowen had known for over a year that a dispute existed over the materials in/out of the Gilcris pit. How Bowen calculated the numbers of loads into the Gilcris pit a year after the records supporting such deliveries were destroyed was not satisfactorily explained. In any event, no documentation was produced in discovery or at trial supporting the delivery of material into the Gilcris pit. Bowen says the sheet from which he claims he calculated the amount delivered into the Gilcris pit as reflected in his answer was also thrown out, even though he knew he was being sued when the answer was prepared.

Bowen did not personally deliver any loads to Gilcris, nor did he speak to anyone from Gilcris confirming any barter arrangement. After he received one or more invoices from Gilcris claiming over $13,000 due, Bowen's response was minimal. He claims he made one call to Gilcris to speak with Richard Gilcris but never got a call back. He made little or no effort to discuss the barter arrangement and never made any claim for an offset, in writing or otherwise, until after suit was filed. While he claims he thought money was not involved in the arrangement with Gilcris, Bowen did not explain his lack of response to the payment demands by Gilcris, his failure to raise the barter issue earlier, or the how the discrepancies with respect to amounts of material and the topsoil affected the barter arrangement.

This Court does not find the claim that a barter arrangement existed to be credible. Aside from the lack of documentation and lack of clarity with respect to essential terms, there is little reason why Gilcris would agree to such an arrangement. Gilcris has ample material

on site already and is in the business of selling material, not exchanging it. In this respect, a barter agreement as suggested by Bowen, which admittedly did not include the high quality topsoil, is distinctly one-sided. The Court finds the testimony that only three loads of material was delivered into the Gilcris pit by Bowen, and that no barter arrangement was ever made, to be credible.

Conclusions of Law

In the instant case, there was no discussion between the parties as to the amount to be charged by Gilcris Enterprises, Inc. for the material Bowen received from the Gilcris gravel pit. Gilcris did not know how much material would be requested by Bowen and did not discuss terms with Bowen. As a result, no express contract was formed between the parties.

The terms "express contract" and "contract implied in fact" indicate a difference only in the mode of proof. A contract implied in fact is implied only in that it is to be inferred from the circumstances, the conduct, acts, or relation of the parties, rather than from their spoken words. *Bliss v. Hoyt's Estate*, 70 Vt. 534 (1898); *Raymond v. Sheldon's Estate*, 92 Vt. 396 (1918); see also *In re Bryant's Estate*, 73 Vt. 240 (1901).

Here, while the parties did not expressly state the terms of their agreement, the conduct of the parties created an implied contract by virtue of their conduct. Bowen sent his trucks to the Gilcris pit to be loaded and trucked off the material. Implied in that conduct is the promise by Bowen to pay for the material used. An actual contract was formed by the conduct of the parties, although they did not express its terms in words. Bowen's conduct in taking and carrying away the material for his own use, on a repeated basis, implied his promise to pay the value of the material. *Morse v. Kenney*, 87 Vt. 445 (1914).

After Bowen's receipt of the material, Gilcris promptly billed Bowen for the materials received. There has been no evidence before the Court that the price charged for the materials used was unfair in any respect.

This Court has found there was no agreement by Gilcris to receive materials in a barter arrangement. The three loads of material which Gilcris agreed to accept was not taken in exchange for other material, but as an accommodation to Bowen. Accordingly, Bowen is entitled to no offset from the amount demanded by Gilcris. *Kinzer v. Degler Corp.*, 145 Vt. 410 (1985).

Gilcris attempted to impose a 1 % per month interest charge for monies claimed to be due. Although not part of any express bargain between the parties, Vermont law provides for pre-judgment interest where the claim is for a sum certain or a readily ascertainable amount. V.R.C.P. 54(a); *Bull v Pinkham Engineering Assoc., Inc.*, 170 Vt. 450 (2000). Here the sums claimed by Gilcris were readily ascertainable, at least as early as the October 1, 2006 invoice. As a result, Gilcris is entitled to pre-judgment interest here from October 1, 2006 until the date of judgment.

ORDER

Plaintiff is entitled to recover from Defendant $13,207.60, plus prejudgment interest from October 1, 2006 until date of judgment, together with its costs of action. Plaintiff's counsel is to submit a proposed judgment order within five days. Defendant shall have five days thereafter to object to the form of the proposed judgment.

Dated at Woodstock this 17th day of November, 2008.

Harold E. Eaton, Jr.
Superior Court Judge