The following constitutes the order of the Court.

Signed December 29, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
GPR HOLDINGS, L.L.C.,	§	CASE NO. 01-36736-SAF-11
DEBTOR(S).	§	
	§	
MICHAEL R. BUCHANAN, TRUSTEE FOR THE GPR HOLDINGS LIQUIDATING TRUST,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 03-3622
	§	
KERR-McGEE ENERGY SERVICES CORP.,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

On August 12, 2003, the plaintiff, Michael R. Buchanan, trustee for the GPR Holdings Liquidating Trust, filed this adversary proceeding against the defendant, Kerr-McGee Energy Services Corp. In the complaint, the trust, as successor to the debtor, GPR Holdings, L.L.C., pursuant to a confirmed plan of

reorganization, seeks to recover a money judgment of $2,575,253.41 for the principal and interest allegedly due for the purchase of natural gas by Kerr-McGee, which formerly conducted business as HS Energy Services, Inc.

By order entered September 1, 2004, the court granted summary judgment to Buchanan without prejudice to Kerr-McGee's affirmative defenses of waiver and estoppel based on the parties' prior business dealings. The court granted Kerr-McGee leave to file an amended answer to raise those affirmative defenses. In the summary judgment ruling, the court determined that Kerr-McGee could not setoff amounts owing to Kerr-McGee by Aurora Natural Gas LLC and Western Natural Gas, LLC, affiliates of GPR, against the amounts Kerr-McGee owed GPR, making the Kerr-McGee debt to GPR under their contract due and owing. The court found that it has jurisdiction over this adversary proceeding, with venue proper in this district. The court denied Kerr-McGee's request to dismiss the complaint for failure to state a claim upon which relief could be granted. The court concluded that Kerr-McGee abandoned its affirmative defense of recoupment.

On November 16, 2004, the court conducted a trial of Kerr-McGee's affirmative defenses of waiver and estoppel based on course of dealing. At trial, Kerr-McGee also requested that the court reconsider its decision regarding no mutuality for setoff and its conclusion that Kerr-McGee abandoned its recoupment

affirmative defense. With the trial, the court also conducted a final hearing on a motion for relief from the automatic stay filed by Kerr-McGee in the underlying bankruptcy case.

The complaint raises a non-core matter. Kerr-McGee has not consented to the entry of a final order or judgment by the bankruptcy court. 28 U.S.C. § 157(c)(2). Consequently, this memorandum opinion contains the court's proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c)(1). The motion to lift stay constitutes a core matter over which the bankruptcy court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(G) and 1334.

Waiver/Estoppel

Kerr-McGee contends that Buchanan must be estopped from challenging the propriety of the setoff by HS Energy because of the course of dealing by GPR and its affiliates and HS Energy.

As explained in the memorandum opinion on summary judgment, the propriety of the setoff turns in considerable measure on guarantees executed by GPR. The parties stipulate that Oklahoma law governs the guarantees. Accordingly, the court applies Oklahoma law.

Kerr-McGee contends that GPR waived any objection to the setoff of Western and Aurora debt to Kerr against Kerr's debt to GPR. Waiver occurs when a party either intentionally relinquishes a known right or engages in intentional conduct

inconsistent with claiming the right. Barringer v Baptist Healthcare, 22 P.3d 695, 700-01 (Okla. 2001); Faulkenberry v. Kansas City Southern Ry. Co., 602 P.2d 203, 206-07 (Okla. 1979). A party's express renunciation of a known right may constitute a waiver. Barringer, 22 P.3d at 700-01. Waiver can be accomplished either expressly or implicitly. Id.; Crowell v. Thoreau Center, Partnership, 631 P.2d 751, 752 (Okla. 1981). An implied waiver can be established by action or conduct which warrants an inference of intent to relinquish. Barringer, 22 P.3d at 700-01. However, to make out a case of implied waiver of a legal right, there must be a clear, unequivocal and decisive manifestation of the party's relinquishment of the right. Id. When the evidence concerning waiver is conflicting or disputed, or when more than one reasonable inference may be drawn from the evidence, the existence of waiver is a question of fact. Kincaid and Associates v. Black Angus Motel, Inc., 983 P.2d 1016, 1021 (Okla. 1999). However, when the facts are not disputed and are subject to only one interpretation, the question of waiver becomes one of law. Barringer, 22 P.3d at 701; General Finance Corp. v. Jackson, 296 P.2d 141, 143 (Okla. 1956).

Kerr-McGee also contends that Buchanan should be equitably estopped from contesting the setoff because of GPR's conduct. Equitable estoppel usually involves a false representation or concealment of material facts. Indiana Nat. Bank v. State Dept.

of Human Services, 857 P.2d 53, 64 (Okla. 1993). But a party's conduct may constitute a basis for applying estoppel if the other party acts in justifiable reliance on the conduct of the party allegedly estopped. Id. A person's silence may be the conduct when the person should have spoken. Lacy v. Wozencraft, 105 P.2d 781, 783 (Okla. 1940). The elements of "equitable estoppel" are: (1) a false representation or concealment of material facts; (2) made with actual or constructive knowledge of the facts; (3) made to a party without knowledge, or the means of acquiring knowledge of the real facts; (4) made with the intention that it should be acted on; and (5) the party to whom it was made must have relied on or acted on it to his prejudice. Indiana Nat. Bank v. State Dept. of Human Services, 857 P.2d 53, 64 (Okla. 1993) (citing Burdick v. Independent School Dist., 702 P.2d 48, 55 (Okla. 1985) (listing the same elements)). The essential element is not intent; the essential element is "action on the part of another in justifiable reliance upon the conduct of the party allegedly estopped." Indiana Nat. Bank, 857 P.2d at 64.

Oklahoma courts also have recognized "estoppel by silence." See, Lacy, 105 P.2d at 783 (stating that "estoppel by silence" is similar to promissory estoppel: "In the one case a promise is made with the intention that it be acted upon by the promisee; in the other, a person has been silent on some occasion when he should have spoken. But in either case the party who is estopped

has in effect stood by and, in violation of his duty in equity and good conscience to warn another of the real facts, permitted the latter to take some action detrimental to his own interest."). Oklahoma also recognizes a doctrine styled "quasi-estoppel" which prevents a party from asserting inconsistent positions in different litigation. See Willard v. Ward, 875 P.2d 441, 443-44 (Okla. Ct. App. 1994)("In determining whether the doctrine of quasi-estoppel is applicable to the matter before it, a court should consider whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts."). In Willard, the party arguing quasi-estoppel attempted to prevent one party from questioning the value of property stated in a real estate appraisal after the same party allegedly relied on the appraisal in a previous condemnation proceeding. Id., at 444.

Kerr-McGee argues that GPR not only waived its right to contest the setoffs by its conduct, but that same pattern of conduct estops it from denying HS Energy's right to setoff. HS Energy delivered natural gas to Western and Aurora for nine months. Kerr-McGee asserts that in four of those months, after reconciliations, GPR paid Aurora's obligations directly. GPR did

not object to the reconciliation setoffs. Kerr-McGee argues that GPR's conduct induced HS Energy to deliver natural gas to GPR's affiliates valued at $1.5 million in May 2001 for which it was not paid. Kerr-McGee contends that GPR stood silent and induced HS Energy's reliance on its conduct and its silence, and accordingly, is estopped from denying its obligation for Western's and Aurora's debts and its conduct with respect to the setoffs.

GPR contends that Kerr-McGee can prove neither waiver nor estoppel. GPR asserts that there is no evidence of any voluntary or intentional relinquishment by GPR of any of its rights. With respect to GPR's alleged failure to object to Kerr-McGee's taking the setoffs at issue, GPR argues there is no evidence that GPR was even aware that those setoffs had been taken before Kerr-McGee canceled its contract with GPR and GPR filed its bankruptcy petition. GPR further contends that its silence cannot be construed as evidence of intent. From the first payment due on May 26, 2001, to the cancellation of the contract in July 2001, GPR contends that the court cannot infer that GPR was aware that Kerr-McGee did not intend to pay the invoice, but that it would apply a setoff. The last two setoffs were taken after Kerr-McGee had canceled the contract. GPR had filed its bankruptcy petition before the final invoice was due August 26, 2001. GPR contends that there can be no inference that GPR

intended for Kerr-McGee to rely on its alleged failure to object to the offsets. GPR argues that even if it was aware of Kerr-McGee's unilateral action, that fact cannot be used as evidence of any waiver given the short time period involved immediately preceding its bankruptcy filing. GPR also argues that its payment of Aurora's and Western's debts have no connection to Kerr-McGee's ability to apply offsets against amounts owed to GPR. GPR's payment of Aurora's and Western's debts were made prior to the time payments were due under its contract with HS Energy. Finally, GPR argues that the "course of dealing" Kerr-McGee relies upon with respect to the payments is different than the course of dealing relating to the offsets. GPR contends that in each instance a payment was made, an accountant at GPR's affiliate would prepare a reconciliation of the amounts due which would be reviewed by HS Energy. GPR asserts that no reconciliations or other evidence of agreement relating to the offsets exist.

Beginning in 1997, HS Energy entered several contracts for the sale and purchase of natural gas with Aurora and Western. HS Energy entered its Gas Industry Standards Board (GISB) contract with Aurora on September 1, 1997. It entered its GISB contract with Western on June 1, 2000. HS Energy sold natural gas to, and purchased natural gas from, Aurora and Western.

GPR was formed on June 30, 1998, originally known as Aurora

Natural Gas & Associated Products, LLC, then Golden Prairie Resources, LLC, and ultimately GPR. On May 2, 2000, GPR executed two corporate guaranty agreements, guaranteeing to HS Energy the debts of Aurora and Western. The two corporate guaranty agreements provide that GPR: "Will fully and promptly pay, perform and discharge when due all liabilities and obligations . . . arising out of or relating to Obligor's various gas purchase agreements . . . Guarantor further agrees . . . to pay Obligee on demand, all sums due from Obligor . . ." The corporate guaranties do not provide for the offset of obligations, nor do they assume any of the liabilities of Aurora or Western. The guaranty by GPR under both corporate guaranties are only to the liabilities which come due on demand. The guaranty agreements were never revoked by GPR. At the time of the execution of the guarantees, HS Energy and GPR had not yet entered a natural gas purchase contract.

On December 28, 2000, HS Energy entered into Net Settlement Agreements with Aurora and Western providing for setoff of amounts due as a result of natural gas sales among them. GPR was not a party to those agreements. The agreements expressly do not apply to obligations of affiliated persons who were not parties to the agreements. The Net Settlement Agreements do not provide contractual authority for Kerr-McGee to offset Aurora or Western obligations against Kerr-McGee's obligations to GPR.

On January 1, 2001, HS Energy entered a GISB natural gas contract with GPR. On August 1, 2001, Kerr-McGee acquired HS Energy. Kerr-McGee purchased natural gas from GPR between April and August 2001 in the amount of $2,109,778.00. The natural gas contract between HS Energy and GPR does not provide for the setoff of obligations involving HS Energy transactions with Aurora and Western.

Nevertheless, as detailed below, HS Energy setoff amounts owed by Aurora and Western against amounts it owed GPR. On July 10, 2001, HS Energy sent a demand letter to ANG Holdings, LLC, the parent corporation of GPR. On July 16, 2001, HS Energy filed a law suit in the United States District Court for the Northern District of Oklahoma against GPR, Aurora, Western and ANG. In the complaint, HS Energy contended that after applying the setoff, the defendants owed HS Energy $1,505,137.92. HS Energy alleged, in the complaint, that it had made a demand on ANG on July 10, 2001, for the payment of that amount. HS Energy did not allege that it made a demand on GPR. HS Energy sought a judgment for $1,505,137.92, the amount due after the setoff.

Sabrina Brown, formerly the chief accounting officer of HS Energy and currently a contract employee with Kerr-McGee, prepared an exhibit summarizing the transactions among HS Energy, Kerr-McGee, GPR, Aurora and Western. See defendant's trial exhibit 29, "Aurora/Western/Golden Prairie Billing and Payment

History November 2000 through October 2001." W. Earl Crow, GPR's corporate representative, testified that the exhibit accurately reports the payment history.

In summary, Western and Aurora purchased natural gas from and sold natural gas to HS Energy from November 2000 through July 2001. In each month from November 2000 to March 2001, with one exception in February, Western and Aurora were net purchasers from HS Energy. Western paid HS Energy its own net obligations, while Aurora's net obligations to HS Energy were paid voluntarily and without condition by GPR. In February 2001, Western was a net purchaser, while Aurora was a net seller in a lesser amount. Their positions were netted against each other, with Western paying the difference to HS Energy.

April 2001 was the first month that HS Energy contends it purchased natural gas from GPR. James L. Kincaid, Jr., on behalf of HS Energy, and Dennis McLaughlin, on behalf of GPR, Western, and Aurora agreed that, as a condition to HS Energy's sale of natural gas to Western and Aurora in the Rocky Mountain region, GPR would deliver natural gas in an equivalent amount to HS Energy in the mid-continent region. The amount for each sale by GPR was due on the 26th day of the following month. In April 2001, the net purchases of natural gas by Western and Aurora were set off against the amount of HS Energy's purchases of natural gas from GPR. After netting, the balance of $80,478.80 remained

owing to GPR. HS Energy wired that amount to Aurora. GPR never objected to the setoff or to this payment. Nor did GPR claim prior to its bankruptcy that it was owed any money for natural gas it sold to HS Energy.

In May 2001, Western made net purchases of natural gas in the amount of $205,530, and Aurora made net purchases of natural gas in the amount of $2,037,407.92. GPR delivered natural gas to HS Energy valued at $737,800. HS Energy set off this amount against Western's and Aurora's purchases, leaving a deficiency owed by Western, Aurora, and GPR in the amount of $1,505,137.92. This deficiency remained essentially constant up to the time of GPR's bankruptcy filing. GPR did not object to nor complain about the setoff. Nor did GPR claim prior to its bankruptcy that it was owed any money for natural gas it sold to HS Energy. In June and July, the amounts of natural gas purchased by Western and Aurora were set off against essentially equal deliveries by GPR. GPR did not object to nor complain about the setoff. Nor did GPR claim prior to its bankruptcy that it was owed any money for natural gas sold to HS Energy.

On July 10, 2001, HS Energy sent a demand letter to Dennis McLaughlin in his capacity as officer of ANG Holdings LLC, demanding payment of $1,505,137.92, owed by Western, Aurora, and GPR. On July 16, 2001, HS Energy filed a lawsuit in the United States District Court for the Northern District of Oklahoma

against Western, Aurora, GPR, ANG Holdings LLC, and "Golden Prairie Resources LLC," seeking, among other things, to recover the sum of $1,505,137.92 from GPR under its corporate guaranty agreements.

Brown acknowledged that Western and/or Aurora had performed reconciliations and provided them to HS Energy before payments would be made. The parties discussed any discrepancies or disagreements. With GPR purchases, the parties did not engage in the reconciliation process.

Nevertheless, Crow testified that GPR did not complain to HS Energy about the manner that it satisfied amounts owing by and to HS Energy, GPR, Aurora and Western. Crow said that the Aurora, Western and GPR books credited and accounted for all payments. In March 2001, GPR paid HS Energy for gas purchased by Aurora. GPR did not assert that it mistakenly made that payment. In April 2001, GPR had sales offset by HS Energy by purchases made by Western and Aurora, with the net due paid by HS Energy to Aurora. GPR did not complain to HS Energy. In May and June 2001, HS Energy bought gas from GPR and offset amounts it owed GPR against amounts owed by Western and Aurora. Crow was not aware of any complaint lodged by GPR.

Crow became the president and sole manager of GPR on July 16, 2001. GPR filed its petition for relief under Chapter 11 of the Bankruptcy Code on August 13, 2001. GPR scheduled HS Energy

as an unsecured creditor in the amount of $1,296,642.72 (a $1,300,048.47 account payable to HS Energy less a $3,405.75 account receivable). GPR scheduled the Kerr-McGee law suit.

Western filed for bankruptcy relief on August 13, 2001. Crow testified that he signed Western's schedules as its president. Western did not schedule an account receivable from Kerr-McGee. Western reported an account payable to Kerr-McGee of $205,530. Western scheduled the Kerr-McGee law suit.

Aurora filed for bankruptcy relief on August 13, 2001. Crow testified that he signed Aurora's schedules. Aurora did not schedule an account payable to Kerr-McGee.

The total accounts payable to Kerr-McGee scheduled by GPR, Aurora and Western equals $1,502,172.72. Neither GPR nor Western amended its schedules.

Brown testified that, at the instruction of her superiors, she implemented the setoff on the HS Energy books. She testified that exhibit 29 accurately reflected the records of HS Energy, except for one correction. Those records report a total amount due to Kerr-McGee, after the setoff, of $1,505,137.92. Within $2,965.20, that amount coincides with the total accounts payable of $1,502,172.72 reported by GPR and Western on their bankruptcy schedules. Kerr-McGee sought recovery of $1,505,137.92 in its law suit filed on July 16, 2001.

Brown reported to Kincaid. Kincaid testified that he had

been the president of HS Energy until he sold the business to Kerr-McGee in August 2001. Kincaid testified that he started his business about the same time McLaughlin began Aurora's business in 1992. McLaughlin controlled GPR and its affiliated companies. Claiming to be kindred spirits, Kincaid testified that they entered a business relationship of buying and selling natural gas. When they began their business dealings, they did not break down transactions by entity.

Kincaid testified that HS Energy first took deliveries from GPR under a contract in April 2001. HS Energy did not intend to buy gas from GPR before April 1, 2001. HS Energy had no need to buy gas from GPR. Kincaid agreed to purchase gas from GPR as a means to help McLaughlin improve Western's credit, which he explained in his testimony.

Kincaid understood that HS Energy first applied the setoff to GPR, then brought the law suit for the balance due. Kerr-McGee did not issue a demand letter to GPR. Kerr-McGee did issue a demand letter to ANG.

Kerr-McGee did not file proofs of claims in the bankruptcy cases.

Kerr-McGee has established that GPR waived any objection to the HS Energy setoff of the amounts owed by Aurora and Western against the amounts HS Energy owed GPR. GPR, by its internal actions and by its silence, acquiesced in the setoff. The books

of GPR, Western and Aurora are consistent, within $2,965.20, with the HS Energy/Kerr-McGee books. Crow testified that the debtor-entities knew what they were doing and that they correctly kept their books. Kincaid confirmed that he and McLaughlin understood the setoff arrangement. There is no evidence that GPR lodged a written or oral objection. To the contrary, in response to the law suit, GPR did not plead that HS Energy had the calculations wrong. In addition, the sworn schedules filed in the bankruptcy cases are virtually consistent with the HS Energy calculation.

Kerr-McGee has also established that Buchanan must be equitably estopped from challenging the setoff. The same GPR action or silence that constitutes a waiver also constitutes a representation that GPR took no issue with and did not object to the setoff process. Kerr-McGee justifiably relied on the bankruptcy schedules, accepting the scheduled unsecured debt amounts and not filing proofs of claims.

Kerr-McGee contends that the court should also apply the doctrine of judicial estoppel to Buchanan based on GPR's and Western's schedules. Kerr-McGee did not request and the court did not grant leave to amend the answer to include that affirmative defense. The court does not consider it.

As Kerr-McGee has established the application of waiver and equitable estoppel, Kerr-McGee is entitled to a judgment dismissing the complaint.

Reconsideration; Lift Stay

For purposes of completeness, the court addresses Kerr-McGee's motion for reconsideration. In addition, in the underlying case, Kerr-McGee filed a motion for relief from the automatic stay to allow Kerr-McGee to implement the setoff. Buchanan contends that Kerr-McGee did not actually apply the setoff prior to the filing of the bankruptcy petition. Kerr-McGee responds that it applied the setoff prior to filing its law suit. But, in the alternative, Kerr-McGee requests that the court lift the stay to allow it to apply the setoff. The court set a final hearing on the motion to lift stay on November 16, 2004, with the trial of this adversary proceeding.

In its summary judgment ruling, the court held that Kerr-McGee did not make a demand on GPR for payment under the guarantees. Without a demand, the court further held that mutuality did not exist to permit a setoff.

On July 16, 2001, HS Energy filed its law suit to collect $1,505,137.92 from GPR and Western. Kerr-McGee contends that the law suit constitutes a demand for the amount due and owing under the guarantees. Under Oklahoma law, the act of seeking a judgment on a demand instrument constitutes a demand. American Nat'l Bank of Ardmore, Oklahoma v. Fox, 888 P.2d 537, 539 (Okla. Ct. App. 1994). However, the law suit seeks to recover the amount due after HS Energy applied the setoff. The law suit does

not contain a claim for setoff with a prayer for a judgment applying the setoff. Nor does the suit make a demand for the payment of the amount already setoff. Rather, the law suit seeks a judgment for the amount due after the setoff.

Kincaid testified that, as far as he was concerned, the setoff had been taken prior to the filing of the law suit. Brown understood that to be the case when she did her calculations. Consequently, the law suit does not constitute a demand under the guarantees for the setoff amount.

Kerr-McGee contends that mutuality exists for any contingent claim. This court disagrees. The guarantees required a demand. The guarantor was entitled to the demand as a notice that the principal obligor failed to pay, and that the guarantor would be called on to make the payment. Kerr-McGee skipped that step. But, as found above, Buchanan is estopped from complaining about it because of the course of dealing between GPR and Kerr-McGee.

At the time of the setoff, to the extent taken by HS Energy, mutuality did not exist. The court therefore will deny the motion to reconsider.

Kerr-McGee also requests that the court reconsider its holding that Kerr-McGee waived its affirmative defense of recoupment. The summary judgment motion put the parties' transactions squarely before the court. The parties grappled with all of Kerr-McGee's affirmative defenses. Kerr-McGee did

not pursue the recoupment defense, instead focusing on setoff. In presenting its setoff defense, Kerr-McGee implicitly raised its waiver and estoppel defenses. While the court found recoupment abandoned, the court allowed Kerr-McGee to raise the waiver and estoppel defense by an amended pleading. The court thereby allowed the actual controversy to be presented for trial. Kerr-McGee has not established that the court made a manifest error of law by holding recoupment abandoned but permitting Kerr-McGee to amend its answer to add the additional affirmative defenses.

With respect to the motion for relief from the automatic stay, the court notes that the GPR plan of reorganization has been confirmed. Rather than stay relief, Kerr-McGee actually seeks relief from the confirmation injunction. HS Energy acted pre-petition. The court has held that Kerr-McGee could not effectuate a setoff at the time, however, because of a lack of mutuality. Based on the findings of fact and conclusions of law at trial, the court holds that GPR nevertheless waived any objection to a setoff and that Buchanan, as successor to GPR, is estopped from contesting the setoff. For all practical purposes, therefore, the motion for relief from stay or the discharge injunction is moot.

Based on the foregoing,

IT IS ORDERED that the motion by Kerr-McGee for relief from

the automatic stay is **DENIED**. Counsel for Buchanan shall submit a separate order for entry in the underlying bankruptcy case.

IT IS FURTHER ORDERED that this memorandum opinion and order shall constitute the bankruptcy court's proposed findings of fact and conclusions of law, which shall be electronically served on the parties. The clerk of court shall transmit these proposed findings of fact and conclusions of law to the United States District Court. 28 U.S.C. § 157(c)(1). The parties shall proceed in accordance with Bankruptcy Rule 9033(b).

###END OF ORDER###