

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1154

Filed: 15 December 2020

Cumberland County, No. 18 CVS 7460

ELITE GUARD, INC., a North Carolina Corporation, Plaintiff,

v.

VETERANS ALTERNATIVE, INC., a Florida Corporation, Defendant,

v.

HAKIM IDRIS ISLER, individually, Third Party Defendant.

Appeal by Plaintiff and cross-appeal by Defendant from order entered 5 August 2019 by Judge William W. Bland in Cumberland County Superior Court. Heard in the Court of Appeals 11 August 2020.

Sharon A. Keyes for the Plaintiff.

Hopler & Wilms, LLP, by Adam J. Hopler, for the Defendant.

BROOK, Judge.

Elite Guard, Inc. (“Plaintiff”) appeals from the trial court’s order in favor of Veterans Alternative, Inc. (“Defendant”) after the conclusion of a one-day bench trial. Defendant cross-appeals from the same order. We affirm the order of the trial court because no valid contract existed between the parties.

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I. Background

On 12 May 2017, Brian Anderson, the Chief Executive Officer of Defendant, executed two copies of a thirteen-page document entitled “Lease Agreement” and sent both to Defendant. After receiving these documents, Hakim Isler, the sole owner of Plaintiff, took one of the copies of the partially-executed Lease Agreement and struck through every instance of the corporate name, Elite Guard, Inc., and substituted his individual name instead, including on the cover and signature page. Mr. Isler owns the real property in Fayetteville, North Carolina, that was the subject matter of the proposed Lease Agreement.

The Lease Agreement contemplated that Defendant would make certain improvements to the real property in lieu of rent, such as installation of an HVAC system and an upstairs bathroom. After receiving the version of the Lease Agreement in which Mr. Isler signed on his individual behalf after striking through every instance of Plaintiff’s name, Defendant undertook efforts to estimate the cost of making these improvements, such by obtaining quotes from contractors, engaging a civil engineer to create drawings of the proposed improvements, and discussing the permits required with the City of Fayetteville. Once Defendant understood the scope of the undertaking and approached Plaintiff to discuss a different arrangement than that contemplated in the version of the Lease Agreement in which Mr. Isler signed on his own behalf, Mr. Isler was unreceptive.

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Plaintiff initiated this action for breach of contract on 20 November 2018 in Cumberland County Superior Court. On 25 January 2019, Defendant filed an answer, counterclaim, and third-party complaint against Mr. Isler in his individual capacity. Mr. Isler answered on 29 March 2019 and Plaintiff answered the counterclaim the same day.

The matter came on for trial on 31 July 2019 before the Honorable William W. Bland in Cumberland County Superior Court. Judge Bland presided over a one-day bench trial. On 5 August 2019, the trial court entered an order denying Plaintiff's claim for breach of contract and all other claims, concluding that there was no valid contract between the parties.

Plaintiff appealed from the trial court's order on 27 August 2019 and Defendant cross-appealed on 5 September 2019.

II. Analysis

A. Validity of Contract

The primary issue presented by this appeal is whether there was a valid contract between the parties. We hold that there was not.

i. Standard of Review

Issues of contract interpretation present questions of law, which we review de novo. *D.W.H. Painting Co. v. D.W. Ward Const. Co.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005). The issue of whether a valid contract exists also presents a

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question of law, which we review de novo. *See M Series Rebuild v. Town of Mount Pleasant*, 222 N.C. App. 59, 67-68, 730 S.E.2d 254, 260 (2012).

ii. Merits

In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Dodds v. St. Louis Union Tr. Co., 205 N.C. 153, 156, 170 S.E. 652, 653 (1933) (internal citations omitted). Acceptance is essential “because it manifests the offeree’s intent to be bound by the terms of the offer.” *Exec. Leasing Assoc. v. Rowland*, 30 N.C. App. 590, 592, 227 S.E.2d 642, 644 (1976). That way, “[a] party cannot seek to enforce one essential term when it has not agreed to other essential terms.” *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 490, 623 S.E.2d 793, 799 (2006).

Accordingly, an acceptance is not effective unless it is “(a) absolute and unconditional, (b) identical with the terms of the offer, (c) in the mode, at the place, and within the time . . . required by the offer.” *Morrison v. Parks*, 164 N.C. 197, 198, 80 S.E. 85, 85 (1913) (citation and internal marks omitted). The offeror is thus said to be “master of his offer.” *MacEachern v. Rockwell Int’l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979). As such, the offeror may “require acceptance in precise

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conformity with his offer” and also may by the terms of the offer permit acceptance “by performing a specific act rather than by making a return promise.” *Id.*, 254 S.E.2d at 265-66. Mere preparation to perform does not constitute performance, however. *See Greeson v. Byrd*, 54 N.C. App. 681, 284 S.E.2d 195 (1981).

Where a party “purports to accept but changes or modifies the terms of the offer, . . . [the] reply . . . is actually a counteroffer and a rejection of the [offeror’s] offer.” *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (internal citations omitted). Of course, “[t]o create a counter-offer, a change in the original offer must be material; it must alter the legal relationship of the parties to the contract.” *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 705, 279 S.E.2d 858, 862 (1981). Once made, however, a counteroffer terminates the offeree’s power of acceptance over the original offer. *Normile v. Miller*, 63 N.C. App. 689, 694, 306 S.E.2d 147, 150 (1983), *aff’d as mod.*, 313 N.C. 98, 326 S.E.2d 11 (1985). And where a reply to an offer is actually a counteroffer, unless the counteroffer is accepted, whether by assent or performance, *MacEachern*, 41 N.C. App. at 76, 254 S.E.2d at 265-66, “there is no contract,” *Quantum Corporate Funding*, 175 N.C. App. at 489-90, 623 S.E.2d at 798.

The subject of this dispute is a Lease Agreement that was signed by Defendant on 12 May 2017 and one week later by the owner of Plaintiff, on 19 May 2017. Defendant mailed two copies of the partially executed Lease Agreement to Plaintiff

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in May of 2017. Plaintiff then took one of these copies and struck through every instance of its corporate name, Elite Guard, Inc., and substituted the name of Plaintiff's sole owner, Mr. Isler, including on the cover and signature page. Thus, rather than accept Defendant's offer to lease Plaintiff's premises made by executing its portions of the partially executed Lease Agreement, Plaintiff, Mr. Isler chose to substitute himself with Plaintiff as a party in an attempted acceptance of Defendant's offer.

We hold that the substitution of a party in an attempted acceptance constitutes a material variation between the acceptance and offer and negates the element of mutual assent required to form a contract. Mr. Isler's decision to substitute himself with Plaintiff as a party in the attempted acceptance terminated Plaintiff's power of acceptance over Defendant's offer, *see Normile*, 63 N.C. App. at 694, 306 S.E.2d at 150, and, therefore, constituted a counteroffer, *Quantum Corporate Funding*, 175 N.C. App. at 489-90, 623 S.E.2d at 798. Defendant undertook efforts to prepare to perform in the manner contemplated by Mr. Isler's counteroffer, such as by obtaining quotes from contractors and engaging a civil engineer to prepare drawings of the improvements required to install an HVAC system and bathroom on the second floor of Plaintiff's building, but these efforts constituted mere preparation to perform, and did not constitute acceptance of Mr. Isler's counteroffer by performance. And once Defendant understood the scope of the potential undertaking and approached

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Plaintiff to discuss a different arrangement than that contemplated by Mr. Isler's counteroffer, Mr. Isler refused to engage in the conversation. Defendant thus never accepted Mr. Isler's counteroffer.

B. Rule 52 of the North Carolina Rules of Civil Procedure

The parties dispute whether remand is required in this case because of the absence of specific findings in the trial court's order, as required by Rule 52 of the North Carolina Rules of Civil Procedure. Rule 52 states that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon[.]" N.C. Gen. Stat. § 1A-1, Rule 52(a) (2019). However, where the trial court's order does not contain findings of fact because neither party requested the same, "it is presumed that the trial court found facts sufficient to support its order[.]" *Padron v. Bentley Marine Grp.*, 262 N.C. App. 610, 614, 822 S.E.2d 494, 498 (2018) (internal marks and citation omitted). In such cases, "our role on appeal is to review the record for competent evidence to support the[] presumed findings." *Id.*

We hold that competent evidence supports the trial court's presumed findings that Plaintiff never accepted Defendant's offer to lease the premises and that Defendant never accepted Plaintiff's counteroffer. Mr. Isler's testimony that he struck through Plaintiff's name and substituted his own before signing the partially executed Lease Agreement was competent evidence that Plaintiff did not accept

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Defendant's offer. The testimony of Mr. Anderson was competent evidence that Defendant did not accept Plaintiff's counteroffer, though Defendant did go to considerable expense preparing to perform and in an attempt to obtain enough information to negotiate a compromise with Plaintiff and Mr. Isler. Accordingly, remand is unnecessary in this case because neither party requested an order with findings of fact and competent evidence supports the trial court's presumed findings.

III. Conclusion

We affirm the order of the trial court because Defendant never accepted Plaintiff's counteroffer to lease Defendant the premises.

AFFIRMED.

Judge STROUD concurs.

Judge BRYANT concurs by separate opinion.

Report per Rule 30(e).

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No. COA19-1154 – *Elite Guard, Inc. v. Vet. Alt., Inc.*

BRYANT, Judge, concurring in result only.

I concur in the majority opinion affirming the order of the trial court that no valid contract existed between the parties. However, I write separately as it appears the trial court’s judgment was based on its determination that the parties did not assent to the same material terms in the contract; not, as the majority suggests, that a substitution of a party constituted a material variation, such that the element of mutual assent did not exist.

I believe the distinction arises because this is a judgment following a trial on the merits. The appeal is from a verdict in a bench trial, with the judge as the sole trier of fact. It is not an appeal of an order on summary judgment. Were that the case, I would fully concur in the majority’s analysis. As, on appeal from summary judgment, if the trial court ruled correctly as a matter of law, even if the ruling was based on other analysis, we could still uphold summary judgment.

Therefore, I do not think we can ignore the basis of the trial court’s verdict that exists in the record.

Here, the trial court’s 5 August 2019 order provides the following:

The initial (first) issue or question presented for determination by the trier of fact is “Did . . . plaintiff and . . . defendant enter into a contract?” . . . This question would be the same for the counterclaims by . . . defendant against

. . . plaintiff and . . . for all claims by . . . defendant against . . . third-party defendant, Hakim Idris Isler.

Only if the answer to this first issue or question is in the affirmative, i.e., “yes,” are subsequent issues or questions to be considered.

On this first issue the burden of proof is on . . . plaintiff (or defendant as the complainant in its counterclaim and third-party complaint). This means that the party with the burden of proof must prove, by the greater weight of the evidence, two things:

First, that the parties . . . mutually assented to the same material terms for doing or refraining from doing a particular thing.

Second, that the mutual assent of the parties was supported by an adequate consideration.

Upon hearing and considering carefully all the evidence presented, including any exhibits properly admitted, and considering the arguments and presentations of counsel and the self-represented party, the [court] as trier of fact is not convinced by the greater weight of the evidence that the parties (either . . . plaintiff and . . . defendant or . . . defendant and . . . third-party defendant) mutually assented to the same material terms for doing or refraining from doing a particular thing and therefore answers the first issue or question presented (“Did the parties enter into a contract?”) in the negative: “no.”

The trial court’s order does not state specific findings of fact in support of its conclusion that the parties did not assent to the same material terms. However, the record evidence does support the trial court’s ultimate judgment.

Again, the trial court does not make substantial findings of fact, but there are sufficient findings that support the reasoning of the trial court, and I think we are bound by the reasoning.

It is clear that plaintiff and defendant sought to enter into a lease agreement whereby plaintiff would provide a space for defendant to operate its non-profit organization and defendant would make renovations to the property by installing a bathroom and a HVAC system. Per the Lease Agreement signed by the parties,

[defendant] agrees to pay for certain renovations of the structure during the lease period including installation of bathroom facilities and related plumbing costs and a new commercial air conditioning system. Further, [defendant] agrees that it will contract for construction of the bathroom facilities within 30 days of execution of the lease and will contract for the installation of a new air conditioning system within 90 days of the execution of the lease.

The record before this Court contains an unsigned letter from third-party defendant Isler to defendant's board members dated 1 February 2018. In it, third-party defendant Isler encourages defendant to honor the lease agreement defendant had signed. Third-party defendant Isler states, "a restroom was to be installed at a quote of \$6,000; and installation of an air conditioning system at a quote of \$17,000." At trial, Anderson testified that the quotes he received for the installation of a bathroom and a HVAC system amounted to \$21,000.00. However, the uncontradicted evidence provides that after defendant signed the lease agreement, third-party defendant Isler informed defendant that electricity and plumbing for the second-floor property would

need to be connected directly to municipal services. Before defendant could have made the agreed upon renovations (bathroom and HVAC installation) design, approval, and construction would be required to meet the current building code for tenant use. The cost estimates for such a design and construction exceeded \$130,000.00. Requiring defendant to install a new, independent electrical system and plumbing system in order to satisfy the provisions of the lease agreement—to install a bathroom and a HVAC system—was well beyond what a reasonable person would consider during the lease agreement negotiations. *Cf. Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985) (“When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning.” (citation omitted)); *Howell v. Smith*, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (“[T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.” (citation omitted)).

Because I would affirm the trial court’s conclusion on the basis that the evidence does not support a finding of mutual assent between the parties, I concur in the result.