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1. Commercial Escrow Company vs. Rockport Rebel, Inc.
2. Cayetano J. Apablasa vs. Merritt & Company
3. Green Civil Code Section 1624 (2003).

COMMERCIAL ESCROW COMPANY, APPELLANT, v. ROCKPORT REBEL, INC., APPELLEE

No. 13-89-004-CV

Court of Civil Appeals of Green, Thirteenth District

August 31, 1989

JUDGES: Norman L. Utter, Robert J. Seerden, and Fortunato P. Benavides, J.J.

OPINION BY: UTTER

OPINION: Rockport Rebel, Inc., the plaintiff, brought suit against Commercial Escrow Company, the defendant, alleging that defendant had disbursed funds they were holding in escrow for plaintiff without plaintiff's prior authorization. A jury found appellants liable for negligence. Based on the jury's findings, the trial court ordered Rockport Rebel, Inc. recover from Commercial Escrow Company ("Commercial Escrow") the total amount of $25.000.00 plus pre- and post-judgment interest. We affirm the judgment of the trial court.

Rockport Rebel, Inc. ("Rockport Rebels") owned a Best Western motel. Since Rockport Rebel was having difficulty obtaining long-term financing for the motel, they decided to sell the motel if they could find a buyer. TDL Development Company (TDL) subsequently offered to purchase the property and sought financing through Citywide Financial Services ("Citywide"). Citywide, however, required a $ 25,000.00 loan commitment fee be placed in escrow with Commercial Escrow before they would proceed. TDL was unable to put up that amount. Since Rockport Rebel needed to sell the motel, they agreed, as the seller, to put up the twenty-five thousand dollars.

On or about July 10, 1986, Rockport Rebel entered into a contract to sell The Best Western Rockport Rebel Motel to TDL. As agreed between the parties, because of TDL's inability to pay $ 25,000.00 in earnest money, Rockport Rebel agreed to put that amount into an escrow. An escrow agreement was drawn up and signed which was entitled "Addendum to Contract to Purchase the Best Western Rockport Rebel." The Addendum further stated that "seller will deposit into an escrow account . . . the sum of $ 25,000.00 as required in this contract and can be released only upon the written approval of the seller . . . [and] that if this contract is not completed (funded, closed, consummated), then this money will be fully refunded to seller. . ." The cashier's check for $ 25,000.00 which was accepted and deposited by Commercial Escrow listed "Best Western Rebel Rockport" as remitter.

On July 21, 1986, Commercial Escrow issued an escrow receipt improperly showing that the money had been received from TDL. Rockport Rebel notified Commercial Escrow of its error around the end of July. However, on August 13, 1986, Commercial Escrow released the money to Citywide, the party with whom TDL

filed an application for financing the purchase of the motel. Commercial Service did so without Rockport Rebel's prior knowledge or approval. On September 19, 1986, Rockport Rebel learned that the money had been released to Citywide. Since that time, Citywide has ceased to exist and the sale of the motel was not completed. Commercial Escrow, however, refused to return the $ 25,000.00 in accordance with the Addendum. Plaintiff subsequently filed this suit for negligence.

Discussion:

Negligence is conduct which falls below the standard established by law for the protection of others." (Rest.2d Torts, § 282.) "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." (§ 1714, subd. (a).)

A. Duty of care: The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. (Rest.2d Torts, § 281. "Courts, however, have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act ....' " (Thompson v. County of Alameda (1980) 27 Cal.3d 741, 750).

A defendant owes a duty of care to all foreseeable plaintiffs. In a sense, judges draw an imaginary line around the defendant and say that she owes a duty to the people within this circle, but not to people outside it. A plaintiff is foreseeable if he was located within the foreseeable zone of danger. A defendant also owed the plaintiff a duty of care where a contractual relationship between the parties requires the defendant to act in a certain way towards the plaintiff. Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986). Lastly, the defendant owes the plaintiff a duty to act with care in cases where she voluntarily assumes the duty to act by promising to the plaintiff to behave in a certain way.

Here, Commercial Escrow owes Rockport Rebel a duty to strictly follow instructions of funds disbursement pursuant to a contractual provision in the "Addendum to Contract to Purchase the Best Western Rockport Rebel." Also, Commercial Escrow owes Rockport Rebel a duty because Rockport Rebel was a foreseeable plaintiff within the zone of danger. Commercial Escrow and Rockport Rebel entered into a contract that called upon Commercial Escrow to maintain control over Rockport Rebel's $25,000 deposit to facilitate the consummation of the sale transaction between Rockport Rebel and TDL. The escrow instructions specifically required Commercial Escrow to obtain the pre-approval from Rockport Rebel before releasing any of that deposit. Hence, it was foreseeable to Commercial Escrow that if it were to release the funds

without the permission of Rockport Rebel, then Rockport Rebel could potentially lose control over those funds.

B. Breach of duty of care: To prove negligence, a plaintiff is required to show not only that the defendant owed him a duty of care, but also that he had breached his duty of care to the plaintiff. Generally, a defendant owes the plaintiff a duty to act as would an ordinary prudent person under the same or similar circumstances. Specifically, in performing services for a client, an escrow company has the duty to strictly follow instructions drafted in the escrow instructions.

Here, the jury had ample evidence to conclude that Commercial Escrow breached its duty of care to the plaintiff. The escrow instructions that were provided to Commercial Escrow specifically required Rockport Rebel's consent before the $25,000 funds held in escrow could be released to anyone. Commercial Escrow failed to live up to that instruction and hence has breached its duty of care owed to Rockport Rebel.

C. Causation: Third, to prevail, a plaintiff must demonstrate that there is a causal connection between the negligent conduct and the resulting injury. To determine whether the defendant's negligence has caused plaintiff's injuries, the plaintiff must demonstrate that but for the defendant's negligence, the plaintiff would not have sustained the loss. Here, but for Commercial Escrow's failure to follow the escrow instructions, the $25,000 would have remained in escrow and Rockport Rebel would have been able to recover it from Commercial Escrow once the sale transaction with TDL collapsed.

D. Damages: Lastly, the plaintiff must demonstrate that she sustained actual loss or damage resulting from the negligence. Here, following the collapse of the sale transaction between Rockport Rebel and TDL, Rockport Rebel lost its $25,000 deposit that was transferred to Citywide bank.

The judgment is affirmed.

CAYETANO J. APABLASA, Appellant, v. MERRITT & COMPANY (a Corporation)., Respondent

Civ. No. 24046

Court of Appeal of Green, Second Appellate District, Division One

December 29, 1999

JUDGES: Lillie, J. Wood, P. J., and Fourt, J., concurred.

OPINION BY: LILLIE

OPINION: Plaintiff's action for damages for breach of contract is predicated on a written contract entered into September 20, 1995. Hearing the case without a jury, the trial judge directed that the issue of the existence of the contract first be tried; and at the close of plaintiff's case the judge entered a judgment decreeing that no contract was entered into, existing, or was ever executed.

Contending that the record discloses the formation of a contract upon a series of correspondence passing between the parties, appellant argues that respondent, by letter dated August 24, 1995 made an offer which he accepted by letter of September 20, 1995.

We conclude that no reasonable construction of the evidence will admit a binding contract between the parties; and that the correspondence amounts to nothing more than an offer that was never accepted relating to various plans directed toward evolving a practical program to produce, merchandise and market plaintiff's invention.

The genesis of the controversy is found in a set of letters growing out of defendant's interest in a device invented by plaintiff. On August 24, 1995, the first letter was written by defendant to plaintiff:

"I wish to thank you very much for the courtesy and time extended to me in your office yesterday.

"I think you have a very fine invention. Undoubtedly with the right design worked out for the various models, proper sales brochures, and a concentrated direct-sales effort, the returns should be most gratifying. I would like to offer to purchase your invention for $100,000 as a bonus payment to be paid from twenty percent of the net earnings, and when this has been paid, that you should receive a continuing percentage of the net earnings at the rate of ten percent. In this way the product would pay its way out for all concerned and would give you a much greater return as well as a permanent income.

"Trusting this would be acceptable to you, and looking forward to hearing from you quite soon, I am

Sincerely yours,"

On August 27, 1995, plaintiff, referring to defendants' letter of August 24, responded in part:

"After careful consideration I have decided to accept your proposition as outlined in your letter to me of August 24th, 1995 with this proviso: that you

agree to put this product in production within a definite period of time from the date of the signing of any agreement between us.

"I would welcome an opportunity to discuss this matter with you at your earliest convenience."

That the letter dated August 27, 1995, could not constitute an acceptance finds support in well-established authority and in the only reasonable interpretation that can be given to the writing itself.

It is fundamental that without consent of the parties, which must be mutual (Civ. Code, § 1565), no contract can exist (Civ. Code, § 1550). Consent cannot be mutual unless all parties agree upon the same thing in the same sense (Civ. Code, § 1580). Hence, terms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract (Laird v. McPhee, 90 Cal.App. 136 [265 P. 501]; Caldwell v. Dalaray Mines, Inc., 68 Cal.App.2d 180 [156 P.2d 52]; American Aeronautics Corp. v. Grand Central Aircraft Co., 155 Cal.App.2d 69 [317 P.2d 694]); and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer (Niles v. Hancock, 140 Cal. 157 [73 P. 840]; Civ. Code, § 1585; Hunkins-Willis etc. Co. v. Los Angeles etc. Co., 155 Cal. 41 [99 P. 369]; Patterson v. Clifford F. Reid, Inc., 132 Cal.App. 454 [23 P.2d 35]; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300 [266 P.2d 856]; American Aeronautics Corp. v. Grand Central Aircraft Co., 155 Cal.App.2d 69 [317 P.2d 694]). An offer "must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counteroffer (Alexander v. Bosworth, 26 Cal.App. 589 [147 P. 607]). A counteroffer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing (Cooper v. Stansbury, 28 Cal.App. 444 [152 P. 948])." (Ajax Holding Co. v. Heinsbergen, 64 Cal.App.2d 665, 669 [149 P.2d 189]; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300 [266 P.2d 856].) "Where a person offers to do a definite thing and another introduces a new term into the acceptance, his answer is a mere expression of willingness to negotiate or is a counter proposal, and in neither case is there a contract; if it is a new proposal and it is not accepted it amounts to nothing (citations)." (American Aeronautics [*727] Corp. v. Grand Central Aircraft Co., 155 Cal.App.2d 69, 80 [317 P.2d 694].)

To argue that the word "proviso" used by plaintiff in his alleged acceptance refers only to a "suggestion for better terms" and not to a new and different proposal varying with, and completely modifying, the terms of the original alleged offer is to ignore any reasonable construction of the latter writing. Nowhere mentioned therein was any proposal to manufacture or produce the machine -- only a plan to merchandise and market it through an exclusive sales promotion. Obviously production by defendants was not contemplated. Plaintiff's alleged acceptance contains the first mention that defendants are "to put this

product in production," introducing a completely new proposal for their consideration. It is one thing to merchandise and market an item, quite another to assume the burden of producing it -- requiring equipment, cost outlay, raw materials, designs, patterns, samples, etc. And what plaintiff means by the term "production" is not clear, but by the "proviso" he seeks to specifically place on defendants the burden of putting "this product into production" within a definite time to be later determined.

An analysis of plaintiff's letter points up inescapable conclusion: a new offer modifying defendants' original plan to merchandise and market the invention was introduced for the first time by plaintiff -- its "production".

We find nothing in the record before us evidencing any meeting of the minds of the parties on any matters relating to the manufacture, production, development, merchandising or marketing of plaintiff's invention. No binding contract ever came into existence.

The judgment is affirmed.

GREEN CIVIL CODE

DIVISION 3. Obligations
PART 2. Contracts
TITLE 2. Manner of Creating Contracts

§ 1624. Statute of frauds; Qualified financial contracts; Personal property leases

The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.