[Cite as *Bergey v. HSBC Bank, USA*, 2010-Ohio-2736.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

RICHARD BERGEY	C.A. No. 24986
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
HSBC BANK USA, TRUSTEE, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2008-07-4929

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

MOORE, Judge.

{¶1} Appellant, Richard Bergey, appeals from the decision of the Summit County Court of Common Pleas. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} Richard Bergey tried to purchase a home at 652 Orlando Road in Akron, Ohio, from the owner of record, HSBC Bank. Tracy Jones and Remax were HSBC's broker and agent for the sale of the property (collectively referred to as "Jones"). The home was eventually sold to someone else. On July 11, 2008, Richard Bergey filed a complaint for damages, an injunction, and specific performance against HSBC Bank, Tracy Jones, and Remax Realty for breach of contract and interference with a contract.

{¶3} On June 22, 2008, Bergey, through his real-estate agent, submitted to Jones a proposed purchase agreement for the property. Jones received multiple offers, and, as a result,

requested that all the potential buyers submit their highest and best offer by June 24, 2008. On June 24, 2008, Bergey modified his proposed purchase price from $45,151 to $55,101. Jones submitted all the offers to HSBC's servicer and attorney-in-fact. The highest offer was from John and Susan Randolph for $56,000, but it was contingent upon financing. Although Bergey's offer of $55,101 was not the highest, it was a cash offer, and HSBC's servicer authorized Jones to accept the $55,101. Jones emailed Bergey's real-estate agent to inform him that the offer had been accepted and that she would send addenda and instructions.

{¶4} Subsequently, the Randolphs, who had offered $56,000 contingent upon financing, contacted Jones to remove the contingency. Jones relayed the modification to HSBC's servicer, who then authorized Jones to accept the $56,000 cash offer. Jones informed Bergey's real-estate agent that she had "jumped the gun" when she previously emailed him to accept Bergey's offer. On July 3, 2008, Jones informed Bergey's real-estate agent that another offer had been accepted. HSBC completed the sale of the property to the Randolphs. Eventually, Bergey purchased the property from the Randolphs.

{¶5} HSBC and Jones filed motions for summary judgment. The trial court granted the motions, concluding that because HSBC did not accept Bergey's offer, no contract was formed, thus there could be no breach of contract or interference with the contract. Bergey timely appealed from this decision, raising one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT."

{¶6} In his sole assignment of error, Bergey contends that the trial court erred in granting summary judgment. We agree.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} In the instant case, HSBC and Jones moved for summary judgment arguing, in part, that Bergey and HSBC never entered into a written purchase agreement. The trial court agreed, concluding that "[t]here is no evidence that HSBC ever accepted the B[e]rgey Offer." Accordingly, the trial court held that because there was never a contract, there could be no breach of contract or interference with the contract. We do not agree.

{¶11} The elements necessary to form a contract "'include an offer, acceptance, contractual capacity, consideration, *** a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414.

Verbal Modification of the Offer

{¶12} On June 23, 2008, Bergey, through his real-estate agent, submitted an offer to purchase the property. The offer in the amount of $45,151 was made via a written proposed purchase agreement. Later, in response to Jones' email request to submit his highest and best offer, Bergey responded via email simply with "55,101[.]" HSBC and Jones contend that Bergey's offer for $55,101 was an invalid modification of his initial offer because it violated the terms of his own original proposed purchase agreement.[1] We do not agree.

{¶13} If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214; *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322; *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241. HSBC and Jones complain that Bergey's modified offer was invalid because any changes to the initial offer were required to be in writing. A review of the offer, however, does not support this

[1] Both HSBC and Jones contend that the email containing the new price term was a modification of the original offer. Neither party contends that the $55,101 price constituted a new offer. As we are limited to the issues raised in the motions for summary judgment, we do not discuss this issue here.

conclusion. The specific provision to which HSBC and Jones point states:

> "BINDING AGREEMENT[:] Upon written acceptance and then either written or verbal notice of such acceptance to the last-offering party, this offer and any addenda listed below shall become a LEGALLY BINDING AGREEMENT UPON BUYER AND SELLER and their heirs, executors, administrators and assigns and shall represent the entire understanding of the parties regarding this transaction. All counter-offers, amendments, changes or deletions to this AGREEMENT shall be in writing and be signed by both BUYER and SELLER."

{¶14} HSBC and Jones interpret this provision to relate to terms of the offer. This provision does not contemplate modifications to the terms of the offer, but rather, contemplates modifications to the "legally binding agreement[.]" Bergey made an initial offer, and then later modified his price term *prior to* HSBC's email indicating that it accepted his offer. The record reflects that Bergey modified his price term at the request of HSBC to present his highest and best offer. This request stated that HSBC wanted "no more paperwork please[.]" Thus, HSBC anticipated a simple modification of the multiple offers it had already received. In their summary judgment motions, HSBC and Jones only point to the last sentence of this paragraph, without reference to the proceeding sentence. Read in context, however, the paragraph contemplates a written acceptance of an offer, thus constituting a legally binding agreement. The paragraph then discusses how the parties may make changes to the *agreement.* Accordingly, this Court concludes, as a matter of law, that the modification of the price term was made at the offer stage and was not invalid pursuant to the unambiguous terms of Bergey's proposed purchase agreement.

Acceptance

{¶15} HSBC and Jones contend that "HSBC never accepted either Plaintiff's initial [o]ffer or [m]odified offer, such as they were, so no contract was ever formed regarding the sale of the Property."

{¶16} After Bergey submitted his $55,101 price modification, Jones, as agent for HSBC submitted the offer to HSBC, via its loan servicing agent, for consideration. HSBC's servicer emailed Jones, informing her that she was "[a]pproved to accept the $55,101 cash offer." Jones then emailed Bergey and informed him that "[y]our offer has been accepted, I need to get a few things out of the way, then I will send you addendums and instructions, thanks."

{¶17} HSBC initially contends that Bergey "ignores the fact that the email itself indicates that other requirements must be satisfied before the deal is final. In other words, there was no contract." The trial court agreed, referring to this email as "conditional acceptance[.]" "A conditional acceptance is a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer; the conditional acceptance is, aside from cases involving the Uniform Commercial Code, itself a counteroffer and operates to reject the original offer." *Purdin v. Hitchcock* (Jan. 21, 1993), 4th Dist. No. CA 531, at *3, citing 2 Lord, Williston on Contracts (4 Ed.1991) 104-105, Section 6:13.

{¶18} Jones' emailed acceptance simply stated that she would send Bergey the addenda and instructions. "Addendum" is defined as "[s]omething to be added, esp. to a document; a supplement." Black's Law Dictionary (8th ed. 2004) 41. Thus, at most, Jones' email contained a request to add something to the contract. "An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." Restatement of the Law 2d, Contracts, (1981), Formation of Informal Contractions, Section 62. HSBC's acceptance of Bergey's offer was not made to depend upon Bergey's assent to the "addendums and instructions[.]" HSBC's acceptance, via Jones, was not a conditional acceptance. HSBC accepted Bergey's offer.

{¶19} HSBC and Jones further argue that Bergey's offer was never accepted under the terms of the offer itself. They pointed the trial court to the section of the offer entitled "Acceptance" with blanks for the seller's signature, address, phone number, date, etc. They contend that "[a]ccording to the Offer's own terms, it became a legally binding contract only upon acceptance in writing. *** The 'Acceptance' section is blank, and has not been completed by HSBC." Therefore, according to HSBC, there was no valid acceptance. It appears that HSBC and Jones contend that the only manner of acceptance, pursuant to the terms of the offer, was to fill in the blanks in the offer form. We do not agree.

{¶20} "[T]he general rule is that, where an offer prescribes the place, time, or manner of acceptance, those terms must be strictly complied with by the offeree (here, the buyer)." *Ritchie v. Cordray* (1983), 10 Ohio App.3d 213, 215, citing *Schirtzinger v. Albery* (May 25, 1971), 10th Dist. No. 9984; Restatement of the Law 2d, Contracts (1981) 147, Section 60. Here, Bergey's offer prescribed that the acceptance must be in writing ("Upon written acceptance and then either written or verbal notice of such acceptance to the last-offering party, this offer and any addenda listed below shall become a LEGALLY BINDING AGREEMENT UPON BUYER AND SELLER"). It did not, however, prescribe *how* that written acceptance was to be made. In other words, the terms did not require HSBC to fill in the blank "Acceptance" section of the offer in order to constitute a written acceptance. By stating in writing that HSBC, through its agent, accepted Bergey's offer, HSBC complied with the term of Bergey's offer requiring the acceptance to be in writing. HSBC, Jones, and the trial court's reliance upon the fact that the "Acceptance" section of the offer was blank is therefore without merit.

{¶21} We conclude that, as a matter of law, HSBC accepted Bergey's offer in writing. Accordingly, the trial court erred when it granted summary judgment, concluding that HSBC did not accept Bergey's offer.

{¶22} HSBC and Jones raised several other issues in their motion for summary judgment, including; the Statute of Frauds, failure to pay earnest money, damages, and failure to show a breach of duty on the part of Jones. Because the trial court determined that the absence of HSBC's acceptance of Bergey's offer rendered the parties without a contract, it did not determine the merits of the remaining issues. With regard to Jones' claims, the trial court stated that "[a]bsent the existence of a contract, there can be no tortious interference with a contract. Without tortious interferences B[e]rgey has no claims against Jones." As we have concluded that the basis of the trial court's conclusion was in error, we reverse and remand for the trial court to determine the remaining issues.

{¶23} Bergey's assignment of error is sustained.

III.

{¶24} Bergey's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

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