STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No.: 2018-CP-04-02003
Appeal No.: 2019-000856

Debra O'Connor, as Personal Representative of the Estate of Sandy Lynn Shook.....Appellant

v.

Aaron Collier.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENT'S MOTION TO ENFORCE SETTLEMENT IN FINDING THAT RESPONDENT COMPLIED WITH APPELLANT'S OFFER OF COMPROMISE BY DELIVERING A SECOND CHECK TO APPELLANT AFTER THE DEADLINE SET FORTH IN THE OFFER OF COMPROMISE AND DELIVERED SAID CHECK TO A LOCATION NOT SET FORTH IN PLAINTIFF'S OFFER OF COMPROMISE?

STATEMENT OF THE CASE

This case was brought on behalf of the Estate of Sandy Lynn Shook, whose decedent was a single mother who raised three self-sufficient children. Tragically, on July 22, 2017, her life came to an end when a motorcycle driven by Aaron Collier left the roadway outside of Greenville County and crashed, killing Sandy.

At the time of the accident, Defendant was insured under a policy of insurance with Progressive Northern Insurance Company. On September 26, 2018, Plaintiff sent an offer of compromise (the "demand" or "Offer") to Progressive via email, offering to settle her claims against Defendant, on a covenant not to execute, in exchange for payment of Progressive's applicable policy limits. The offer of compromise included a deadline for compliance of October 12, 2018 and stated:

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release at this time. Instead, we require payment of the policy limits of all applicable policies[1], under which you insure Mr. Collier in a form that will not prejudice our client's right to seek recovery from any other insurance carriers. This offer of compromise requires that policy limits are **RECEIVED**[2] no later than 5:00 p.m. EDT on October 12, 2018, and requires that Mr. Collier provide a sworn and notarized statement that there is no other insurance coverage available to him that could pertain to this loss. **THIS OFFER OF COMPROMISE INCLUDES A TIME-LIMITED DEMAND FOR PAYMENT OF POLICY LIMITS, AND, AT 5:00 P.M. EDT ON OCTOBER 12, 2018, THIS OFFER WILL BE WITHDRAWN AND WE WILL OBTAIN AN EXCESS JUDGMENT AGAINST YOUR INSURED(S) WHICH WILL, IN TURN PROVIDE YOUR INSURED(S) WITH A CLAIM AGAINST PROGRESSIVE PURSUANT TO TYGER RIVER PINE CO. v. MARYLAND CASUALTY CO., 170 S.C. 286, 170 S.E. 346 (1933) and MAYES v. PAXTON, 313 S.C. 109, 437 S.E.2d 66 (1993).** Please be aware that our demand for policy limits is not negotiable and that ALL conditions of this offer of compromise must be met by the specified time limit. ***If any condition is not met, or if any additional condition is imposed by Progressive, including but not limited to conditions of indemnification or the waiver of any rights or claims not specified herein, this offer of compromise will be withdrawn, and we will obtain an excess judgment against your insured and enforce it against Mr. Collier's assets.*** This offer of compromise does not include the resolution of any claims for any persons or entities other than those injury and property damage claims made by Sandy's family. ***Accordingly, any request for a release of claims for other persons or entities and/or any request for indemnification will constitute a counteroffer and rejection of this offer of compromise.[3] If you include indemnification or a release of claims that could be made by other persons or entities in the proposed Covenant you send to us, it will constitute a counteroffer and rejection of this offer of compromise even if you claim in a cover letter or other documents that you send to us***

[1] "Applicable Policies" would include, but not necessarily be limited to, bodily injury, property damage, PIP, MedPay, umbrella, or any other types of coverages or policies that would cover the losses herein described.

[2] Settlement funds must be paid by Cashier's Checks, or Certified Bank Checks (not drafts) issued by your insurance company as follows: Debra O'Conner as PR for the Estate of Sandy Shook and the Anastopoulo Law Firm, LLC. The checks must be **RECEIVED** in my office no later than 5:00pm EDT on October 12, 2018. Anastopoulo Law Firm, LLC's Tax I.D. Number is 452775649. For your convenience, our firm's W-9 is also attached. These funds should be mailed to 32 Ann Street, Charleston, SC 29403. We agree to hold these funds in trust until the settlement is court approved, as required by statute.

The offer further stated that "any attempted counteroffer by Progressive will be deemed a rejection of our offer of compromise and will result in the immediate and permanent withdrawal of our offer of compromise." (R. p. 000030) (underline in original). It further stated "[w]e have done everything reasonable to warn you that this offer of compromise includes a time-limited demand for the payment of policy limits" as well as "[f]ailure to meet the deadline for any reason will be a rejection of this offer of compromise and will result in the immediate and permanent withdrawal of this offer of compromise." Id.

The policy in question included $25,000.00 in bodily injury coverage and $25,000.00 in property damage coverage, both of which were owed and included in the Offer of Compromise, as admitted in Defendant's Motion to Enforce Settlement.

As admitted in Defendant's Motion to Enforce Settlement (the "Motion to Enforce"), "on October 11, 2018, a Progressive claims representative hand-delivered to the Anastopoulo Law Firm, LLC the requested documents including an affidavit form defendant, a covenant not to execute, and one check for $25,000.00." (R. p. 000010). Put simply, Progressive did not deliver the "payment of policy limits of all applicable policies" as required by Plaintiff's Offer. According to Defendant, the Progressive claims representative "inadvertently left the second check for $25,000.00 out of the packet of materials that were hand delivered to Anastopoulo Law Firm." Id. at ¶ 11.

On October 16, 2018, a formal letter rejecting Progressive's counteroffer of half of the applicable policy limits was sent by Plaintiff with the $25,000.00 check enclosed and on the very next day the lawsuit was filed. (R. p. 000073). Defendant answered the suit on November 7, 2018 and responded to Plaintiff's Requests to Admit on December 17, 2019.

On October 17, 2018, Progressive delivered a second check for $25,000.00 "to the Anastopoulo Law Firm." (R. p. 000011). However, and despite the plain language of the offer of compromise, the second check was delivered to 2170 Ashley Phosphate Road, North Charleston, SC, 29406 – not to 32 Ann Street, Charleston, SC 29403 as required by the offer of compromise. Defendant subsequently filed the Motion to Enforce Settlement that is the subject of this action.

Defendant's Motion to Enforce Settlement was heard before the Honorable R. Lawton McIntosh on March 20, 2019. After considering the arguments of counsel and submitted

memorandums and attachments, the Court granted Defendant's Motion to Enforce Settlement. (R. p. 000001 - 000005).

The Circuit Court's Order Granting Defendant's Motion to Enforce Settlement found that the settlement was enforceable and was not a rejection or counteroffer of the conditions placed in the plaintiff's Offer of Compromise, and was instead an "inadvertent mistake that was a product solely of human error and not a counter offer to the plaintiff's demand." Id. The Order further found that the Plaintiff "rejected Progressive's acceptance of their offer because they only received one check." Id. More specifically, the Court made the factual finding that Plaintiff's Offer of Compromise required that the $50,000 policy limits be delivered to the Anastopoulo Law Firm by 5:00 PM on October 12, 2018, and that the "arbitrary deadline" was not met. Id.

Plaintiff filed a Motion to Reconsider the Order Granting Defendant's Motion to Enforce Settlement on April 23, 2019 (the "Motion to Reconsider"). The Motion to Reconsider was heard by the Honorable R. Lawton McIntosh on April 25, 2019. The circuit court denied Plaintiff's Motion to Reconsider in a Form 4 Order filed May 3, 2019. (R. p. 000006 - 000008).

STANDARD OF REVIEW

A motion to compel or enforce settlement adds to a pending action a collateral action for specific performance of an alleged settlement agreement. Under South Carolina law, settlement agreements are viewed as contracts. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)(citing Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001). Thus, the general rules of contract construction apply to settlement agreements. Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986). "An action to construe a contract is an action at law." Byrd v. Livingston, 398 S.C. 237, 241, 727

S.E.2d 620, 622 (Ct. App. 2012). An appellate court construing a contract is "free to decide questions of law with no particular deference to the trial court." Id.

Therefore, the court must essentially consider a collateral action sounding in contract. Because the Defendant is the party alleging the existence of a contract, and requesting performance of the same, he has the burden of proof. Moreover, if there are any disputed questions of fact, those issues must be presented to a jury. See, e.g., Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997)(holding the existence of mutual assent to a contract is a question of fact to be left to a jury when ambiguities exist). Thus, a court can only enforce a contract if it finds as a matter of law that the evidence submitted gives rise to a valid and enforceable contract. Accordingly, the Court must view such a motion, essentially, as a motion for summary judgment on Defendant's claims as to the existence of a settlement agreement and its breach.

ARGUMENT

I. The Court Erred by Holding that an Enforceable Contract Existed Where There was No Meeting of the Minds Nor Mutual Assent

As set forth above, in South Carolina, settlement agreements are viewed as contracts. Pee Dee Stores, Inc., supra. The general rules of contract construction apply to settlement agreements. Mattox, supra. In sum, the circuit court could only grant Defendant's Motion if it found as a matter of law that the evidence submitted to it gives rise to a valid and enforceable contract.

In its Order Granting Defendant's Motion to Enforce, the Court indicated that its standard of review was governed by its power to enforce settlement agreements pursuant to its thirteenth-juror authority. (R. p. 000001 - 000005). No mention was made of the standard of review for finding an enforceable contract. Id. Indeed, the Order contains no mention of any law holding

that the essential terms of the contract were complied with by the Defendant save for that: (1) there was a "meeting of the minds"; and (2) the failure to deliver the full settlement funds by the deadline set forth in the Offer of Compromise and to the correct location was an "inadvertent mistake that was a product of human error and not a counter offer to the plaintiff's demand." Id.

Of course, for a contract to arise there must be an offer, an acceptance, and a meeting of the minds of the parties involved. Rushing v. McKinney, 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). To be effective, acceptance of an offer must conform to the terms of the offer. Fender & Latham, Inc. v. First Union Nat. Bank of South Carolina, 316 S.C. 48, 446 S.E.2d 448 (Ct. App. 1994). At common law, no contract is formed if the acceptance varies the terms of the offer. Johnson Co., Inc. v. Peck Industries, Inc., 304 S.C. 101, 403 S.E.2d 146 (Ct. App. 1991)(citing Sossamon v. Littlejohn, 241 S.C. 478, 129 S.E.2d 124 (1963)). Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party. Id.; Restatement (Second) of Contracts § 59 (1979). Moreover, the offeror is the master of her offer, and can withdraw it at any time before it is accepted.

Our Fourth Circuit Court of Appeals has noted that a federal district court only "retains the power to enforce **complete** settlement agreements; it does not have the power to impose, in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds. **Where there has been no meeting of the minds sufficient to form a complete settlement agreement, any partial performance of the settlement agreement must be rescinded** and the case restored to the docket for trial." Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983)(emphasis added)(internal citation omitted). Put differently, "a valid and enforceable contract requires a meeting of the minds between the parties with regard

to *all* essential and material terms of the agreement." Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct.App.2007)(emphasis in original).

There can be no dispute that the amount of payment and timing of payment are material terms to a contract. Here, and as admitted by the Defendant, the amount of payment demanded by the Plaintiff was not timely provided. This maxim can be illustrated by way of analogy. If a prospective buyer was attempting to purchase a home, and failed to provide the required amount of monies due at the time of closing as required by the seller, the seller would be well within his rights to reject the buyer's offer. Indeed, no court under such factual circumstances would force the seller to accept the insufficient funds, untimely provided by the buyer, and enforce such a contract. The same reasoning must hold true here.

Here, as a matter of law there can be no settlement agreement because there was no mirror image acceptance of Plaintiff's offer. Plaintiff's offer, by its clear terms, required acceptance not later than October 12, 2018, required the payment of all applicable policy limits actually be received by Plaintiff's counsel, and that the check(s) be delivered to 32 Ann Street, Charleston, SC 29403. The written offer explicitly stated that it would be automatically withdrawn if not accepted by the deadline. There is no evidence that the offer was accepted by October 12, 2018. In fact, it is undisputed that aside from acknowledging receipt of the offer and delivering half of the applicable policy limits, Progressive did not accept the offer prior to the deadline and instead made a counteroffer. Why Progressive did so is not meaningful.

Indeed, the court's Order cites no law indicating that the "inadvertent mistake" based upon "human error" allowed the court to find that an enforceable contract was entered into. "Inadvertent mistake" is not an excuse for failing to comply with the material terms of a contract. This is not a Motion to Set Aside Default where such a "good faith mistake" standard would apply. The sole

question before the circuit court was whether an enforceable contract was entered into between the parties. Clearly, and based upon the above, no enforceable contract was present. There is no dispute that the demanded funds were not timely delivered or delivered to the right location.

Further, the parties hereto also lacked mutual assent. To reiterate, in order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to *all* essential and material terms of the agreement. Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773 (2010). Here, Plaintiff clearly intended that the offer be open for acceptance only for a limited time. After the deadline expired, and after Plaintiff filed the lawsuit, there is no indication that Plaintiff ever indicated any willingness to settle the claim on the terms Defendant sought to enforce. Mutual assent and a meeting of the minds as to all material terms clearly did not exist.

CONCLUSION

For the reasons set forth herein, Appellant respectfully argues that the circuit court's Order Granting Defendant's Motion to Enforce Settlement constitutes reversible error, and prays that the case be remanded to the Circuit Court for a trial on the merits.

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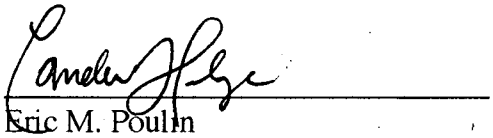
Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC



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April 1, 2020

Charleston, SC

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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