FOURTH DIVISION
February 9, 2017

No. 1-15-2460

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

POST CONCRETE REPAIR & WATERPROOFING SUPPLY, INC. Plaintiff-Appellee, v. WILLIAMS DEVELOPMENT LTD. d/b/a PRAIRIE FORGE GROUP, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 15 M1 102291 Honorable Jessica A. O'Brien, Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Reversed. Written document did not constitute valid contract, where defendant's response to plaintiff's offer included additional conditions and thus was not valid acceptance of offer.

¶ 2 Defendant Williams Development Ltd., d/b/a Prairie Forge Group (Prairie Forge), appeals from a $9,843 judgment in favor of plaintiff Post Concrete Repair and Waterproofing Supply, Inc. (Post), following a bench trial on Post's breach of contract action.

¶ 3 Post proposed to perform construction work at a public pool in Bartlett, Illinois, a project that Prairie Forge was managing. Prairie Forge contends that Post failed to prove the existence of

an enforceable contract because, in responding to Post's proposal—which included a specific cost for its services—Prairie Forge added language saying that the final cost of the project was "contingent on final discussions with the Bartlett Park District." Prairie Forge argues that the insertion of the contingency could not be construed as an acceptance of the proposal's price term, and that it is more properly understood as a counteroffer.

¶ 4 We agree. Acceptance of an offer must adhere precisely to the terms of the offer in order to form a contract. Any variation or additional terms will constitute a counteroffer, not acceptance. In light of Prairie Forge's alteration of the proposal, the trial court erred in concluding that Prairie Forge had accepted the offer. We reverse the trial court's judgment and remand for consideration of Post's remaining claims.

¶ 5 I. BACKGROUND

¶ 6 On January 27, 2015, Post filed a three-count complaint against Prairie Forge for breach of contract, unjust enrichment, and *quantum meruit*. In the three counts, Post alleged that Prairie Forge, as the construction manager for Bartlett Park District, had hired Post to perform work on a public pool in Bartlett and then refused to pay Post for the work it performed.

¶ 7 Post attached the May 1, 2014 work proposal it had submitted to Prairie Forge to the complaint. The proposal said that Post would remove, prepare, and replace 386 running feet of joint in the lazy river of Bartlett's aquatic center. Post listed the cost of labor and materials as $9,843. The proposal also stated, "Please return one copy of proposal signed for acceptance," and, "Net cash due upon completion."

¶ 8 Dave Stermetz of Prairie Forge signed the proposal on May 2, 2014. The proposal also contained handwritten language stating, "Authorization to proceed. Final cost contingent on final discussions with the Bartlett Park District."

¶ 9 The trial court held a bench trial on May 20, 2015. While no verbatim transcript of the proceedings was taken, the parties agreed to a statement of facts pursuant to Illinois Supreme Court Rule 323(d) (eff. Dec. 13, 2005).

¶ 10 According to the agreed statement of facts, Sam and Steve Post testified for Post, and Stermetz testified for Prairie Forge. Stermetz testified that he received the proposal on May 1, 2014, without handwritten notations or signatures. On May 2, 2014, Stermetz signed the document next to the line where it stated, "Acceptance: Please return one copy of the contract signed for acceptance." He also inserted the handwritten statement, "Authorization to proceed. Final cost contingent on final discussions with the Bartlett Park District."

¶ 11 The trial court found the terms of the document ambiguous and allowed the parties to introduce extrinsic evidence of the meaning of the handwritten clause inserted by Stermetz. Post introduced a May 2, 2014, email exchange between representatives for Post and Prairie Forge. In the first email, sent at 4:00 p.m. on May 2, 2014, Post asked Prairie Forge if there was "any word on moving forward with the joints," adding that there was "a crew ready to go out there tomorrow and Sunday to get it all done." Prairie Forge responded one minute later, stating, "Yes, please proceed, I am in the process of discussing the final payment with the park district."

¶ 12 Prairie Forge argued that the insertion of the additional handwritten phrase constituted a counteroffer and rejection of the price term. Post argued that the additional language did not constitute a counteroffer or a rejection. Post asserted that, if the inserted language created an ambiguity, it must be construed against the drafter. Moreover, the email exchange cured any ambiguity and showed that an enforceable contract was formed. According to Post, Prairie Forge's directive to Post to begin the work, and its allowance of Post to complete the work, showed Prairie Forge agreed to the terms of the contract.

¶ 13 The trial court found that Stermetz's signature, and his directing Post to proceed, showed that Prairie Forge accepted Post's offer. The court also determined that Stermetz's handwritten statement, "Final cost contingent on final discussions with the Bartlett Park District," did not create a counteroffer or contingency. The court entered judgment for Post and against Prairie Forge in the amount of $9,843 with costs assessed. The court dismissed the remaining unjust enrichment and *quantum meruit* claims as moot.

¶ 14 Prairie Forge filed a motion to reconsider, which the trial court denied. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Prairie Forge contends that the trial court erred in finding that its signature on the May 1, 2014, proposal formed a contract because its insertion of additional language into its response to Post's request for payment was a counteroffer, showing that the parties never agreed on a price for Post's work.

¶ 17 Initially, Post maintains that Prairie Forge failed to provide a complete record on appeal as it did not include the email exchange between Prairie Forge and Post, which was entered into evidence and considered by the trial court when it ruled on this case. Prairie Forge, as the appellant, had the duty of providing this court with a sufficiently complete record, and any doubts arising from the incompleteness of the record will be resolved against Prairie Forge. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 18 But Prairie Forge did file a complete record. Despite the absence of the physical emails, the record contains an agreed statement of facts pursuant to Rule 323(d) that summarized the content of those emails. The attorneys for both parties signed the agreed statement of facts, and Post does not contest that the agreed statement of facts fails to capture the substance of the

emails. As an agreed statement of facts is a proper substitute for a verbatim transcript where one is unavailable (*In re Estate of DeMarzo*, 2015 IL App (1st) 141766, ¶ 15), we find that the record sufficiently details the content of those emails and allows us to address the merits of Prairie Forge's issues.

¶ 19 In this context, where the parties' dispute centers on a single written document, whether that document constitutes a contract is a question of law to be determined by the court. *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615, ¶ 38; *Doyle v. Holy Cross Hospital*, 289 Ill. App. 3d 75, 78 (1997).

¶ 20 Prairie Forge contends that its insertion of the language, "Final cost contingent on final discussions with the Bartlett Park District," into its response to Post's proposal was too equivocal to constitute acceptance of the proposal. Prairie Forge claims that, by qualifying its acceptance on the outcome of discussions with the park district, it did not signal its intent to be bound.

¶ 21 As our supreme court has long held, "[t]o constitute a contract by offer and acceptance, the acceptance must conform exactly to the offer, and, although a reply to an offer purports to accept the offer, it is not an acceptance, but is a counter offer, and does not create a contract where it adds qualifications and requires the performance of new conditions." *Snow v. Schulman*, 352 Ill. 63, 71 (1933). See also *Worley v. Holding Corp.*, 348 Ill. 420, 425 (1932) ("A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter offer. *** To constitute a contract by offer and acceptance, the acceptance must conform exactly to the offer, and, if it contains new conditions, there is no contract.").

¶ 22 This court has reiterated that "Illinois case law clearly mandates that *any* modification, however, slight, prevents the creation of a valid contract." (Emphasis in original.) *Finnin v. Bob*

Lindsay, Inc., 366 Ill. App. 3d 546, 549 (2006); see also *Mike Schlemer, Inc. v. Pulizos*, 267 Ill. App. 3d 393, 395 (1994) ("The acceptance must in every respect meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."); *Loeb v. Gray*, 131 Ill. App. 3d 793, 799-800 (1985) ("when one accepts an offer conditionally or introduces a new term into the acceptance, no acceptance occurs; rather, there is a counterproposal requiring acceptance by the offeror before a valid contract is formed."). This proposition holds true even if the changes to the offer are "non-substantive, typographical modifications" that "apparently conform[ ] to the agreement of the parties" (*Finnin*, 366 Ill. App. 3d at 549), and even where the purported acceptance simply adds a term without modifying any of the original terms of the offer (see, *e.g.*, *Wentcher v. Busby*, 98 Ill. App. 3d 775, 781 (1981) ("A purported acceptance which *** adds conditions to the offer constitutes a counteroffer rather than an acceptance.").

¶ 23 Here, Post forwarded a proposal for the work at a cost of $9,843. Prairie Forge responded by signing the proposal and authorizing Post to proceed with the work, but also said that the final cost would be "contingent on final discussions with the Bartlett Park District." Those words do not signal Prairie Forge's agreement to the price of $9,843. Rather, they suggested that Prairie Forge wanted to add a new condition to the contract—that Prairie Forge's acceptance of the contract price was contingent on the *village's* approval of that price, a condition that was not certain to occur. See Black's Law Dictionary (10th ed. 2014) ("contingent" means "dependent on something that might or might not happen in the future" or "conditional").

¶ 24 For example, in *Karris v. U.S. Equities Development, Inc.*, 376 Ill. App. 3d 544, 551 (2007), this court held that the parties had not formed a contract where, in response to an offer to purchase real estate, the plaintiff conditioned his acceptance on his "opportunity to analyze the

acquisition" and added an ambiguous term to the purchase price. Specifically, the plaintiff's response "was ambiguous regarding the final purchase price because it purportedly lowered the purchase price by an undetermined brokerage amount." *Id*. Because under Illinois law "[a] conditional acceptance is no acceptance" (*id*. at 550), no contract was ever formed between the parties.

¶ 25 Similarly, in this case, because Prairie Forge's response did not conform specifically to Post's offer but, instead, added a new condition on the price term, it cannot properly be characterized as an acceptance of Post's offer. Rather, it was a counteroffer requiring Post's acceptance. See, *e.g.*, *Snow*, 352 Ill. at 71; *Worley*, 348 Ill. at 425; *Karris*, 376 Ill. App. 3d at 550 (a "conditional acceptance becomes a counteroffer to the original offeror"); *Finnin*, 366 Ill. App. 3d at 549 (an "attempt to correct or modify the terms of the agreement formed a counteroffer").

¶ 26 The trial court found the handwritten contingency language to be ambiguous and resorted to parol evidence—namely the subsequent email correspondence between the parties—to determine whether Prairie Forge accepted Post's offer. We respectfully disagree with that course of action.

¶ 27 Even if this handwritten contingency language were ambiguous, there is still no denying that the acceptance by Prairie Forge failed to match the offer by Post; *some* new condition was added, even if it was not entirely clear what that condition was. As we have stated above at length, the acceptance must match the offer term for term, word for word, and Prairie Forge's acceptance did not match Post's offer. See, *e.g.*, *Karris*, 376 Ill. App. 3d at 551 (response to offer not acceptance where it created ambiguity regarding price); *Anand v. Marple*, 167 Ill. App. 3d 918, 921 (1988) (handwritten addition to contract that offer was "subject to seller's _____," even though the final word was illegible and unknown, nevertheless clearly added some new

condition, such that acceptance did not match offer, and no valid contract was formed). Regardless of whether Prairie Forge's response to Post's offer was ambiguous or unambiguous, it differed from Post's offer and, for that reason alone, cannot be construed as an acceptance of Post's offer. Thus, even if the trial court were correct that the handwritten contingency language in Prairie Forge's response was ambiguous, the proper course of action would not be to search for parol evidence—it would be to find that no contract was formed.

¶ 28 Post has not claimed, either in this court or below, that it accepted Prairie Forge's counteroffer. And even if Post had raised that argument, the record would not support it. After receiving Prairie Forge's response, Post emailed Prairie Forge and asked if there was "any word on moving forward." This communication in no way could be construed as an acceptance of the counteroffer; it was a request for an update on the progress of Prairie Forge's discussions with the park district. And in its response email, Prairie Forge told Post to proceed but also added that it was "in the process of discussing the final payment with the park district." Thus, the email communications did not resolve the uncertainty about the price term. If anything, Post again asked whether the terms of its initial proposal were agreeable, and Prairie Forge again responded by directing Post to begin working even though the "final payment" had to be worked out with the village. Without an agreement as to the price that Prairie Forge would pay Post for its work—an essential term of the contract to repair the pool—no contract could have been formed. See, *e.g.*, *Panko v. Andvanced Appliance Service*, 55 Ill. App. 3d 301, 304 (1977) (no contract for repair services could be formed where evidence "failed to establish an agreed price term," which was an "essential term").

¶ 29 We hold that no valid contract was formed between Post and Prairie Forge. We reverse the judgment entered in favor of Post on the contract claim.

¶ 30 We acknowledge that Post performed the work based on Prairie Forge's repeated directions to proceed with the project, and that Post has not received any compensation for that work. But just because we have found that no contract existed between the parties does not mean that Post has no avenues for recourse. Specifically, we express no opinion on the merits of Post's unjust enrichment or *quantum meruit* counts. Because it ruled in favor of plaintiff on the contract claim, the court dismissed those other counts as moot. As we have now reversed the trial court's ruling, those additional counts are no longer moot and should be addressed on remand. See, *e.g.*, *Evans & Associates, Inc. v. Dyer*, 246 Ill. App. 3d 231, 243 (1993) (reversing trial court determination that contractor had performed under contract and remanding for consideration of *quantum meruit* damages).

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further proceedings on the unjust enrichment and *quantum meruit* counts.

¶ 33 Reversed and remanded.