THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

LEONARD K. BRUNDAGE, et al.	:	**TRIAL DIVISION- CIVIL**
Appellants	:	**August Term, 2010**
	:	**No. 3954**
VS.	:	
INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 401, et al.	:	**Superior Court No. 2279 EDA 2011**
Appellees	:	

OPINION

PROCEDURAL HISTORY

Plaintiffs Leonard Brundage, Walter Franklin and Christian Williams (hereinafter "Plaintiffs") appeal this Court's Order dated August 11, 2011, granting the Motions for Summary Judgment submitted by Defendants Cornell & Company, Inc., Roma Steel, Northwest Erectors, Inc., Bensalem Steel Erectors, Inc., Delaware Valley Erectors, Inc., and by International Association of Bridge, Structural and Ornamental Ironworkers, Local 401 (hereinafter "Defendants") and denying Plaintiffs' Cross-Motions for Summary Judgment, thereby dismissing Plaintiffs' Complaint.

FACTUAL BACKGROUND

Plaintiffs commenced this action by filing their Complaint on September 28, 2010 alleging breach of a settlement agreement. The settlement agreement arose out of a

lawsuit[1] filed by Plaintiffs on September 7, 2000 in the United States District Court for the Eastern District of Pennsylvania on the basis that Defendants deprived the Plaintiffs of job opportunities and earnings based on race. (Complaint, ¶ 11). On December 17, 2007, the parties attended a settlement conference at the request of Judge Diamond. Defendants agreed to pay Plaintiffs $45,000, and in exchange, Plaintiffs would never again use the Union hiring hall for referrals or seek employment with Cornell & Company, Inc., Roma Steel, Northwest Erectors, Inc., Bensalem Steel Erectors, Inc., and Delaware Valley Erectors, Inc. (hereinafter collectively referred to as "Defendant Employers"). (Defendant Employers' Motion for Summary Judgment).

On January 28, 2008, counsel for the Defendant Employers sent Plaintiffs' counsel a formal Release and Settlement Agreement. *Id.* On February 11, 2008, Plaintiffs' counsel replied with requests to make the confidentiality provisions mutual and to make the check payable to the law firm. *Id.*

In March 2008, Plaintiffs' counsel further advised Defendant Employers' counsel that Plaintiffs were unhappy with the no right to rehire provision and counter-offered some alternatives. *Id.* On March 21, 2008, Defendant Employers' counsel replied that the Employers had rejected the proposed exclusion of the no right to rehire provision. *Id.* On March 24, 2011, Plaintiffs' counsel inquired via email whether or not the original "deal" was still available because one plaintiff "will now take it," and the other two "may be on board with the original deal." *Id.*

On April 1, 2008, Plaintiffs' counsel advised that only one Plaintiff would sign the original Release and Settlement Agreement, and Defendant Employers' counsel replied that Defendants required the inclusion of the no right to rehire provision *and* the

[1] Civil Action No. 00-CV-4549

signatures of all three Plaintiffs. *Id.* On April 3, 2008, Plaintiffs' counsel returned the Release and Settlement Agreement with the signature of only one Plaintiff. *Id.*

On October 23, 2009, almost eighteen months after the last communication between counsel and twenty-two months after the settlement conference, Plaintiffs' counsel returned the Settlement Agreement and Release with the signature of all three Plaintiffs and a cover letter stating "our clients have finally acquiesced and have signed the settlement agreement." *Id.* On April 20, 2010, Defendants refused payment of the settlement amount. (Complaint, ¶ 15).

Plaintiffs filed their Complaint on September 28, 2010 for breach of the settlement agreement, claiming damages in the amount of the settlement plus interest at the legal rate of six percent simple since the date of the settlement. (Complaint, ¶ 16). Defendant, International Association of Bridge, Structural and Ornamental Ironworkers, Local 401 (hereinafter "Local 401") answered Plaintiffs' Complaint on November 10, 2010. (See Docket). Defendant Employers filed an Answer to Plaintiffs' Complaint with New Matter on January 21, 2011. *Id.*

Local 401 filed its Motion for Summary Judgment on July 5, 2011, and the remaining Defendants did so on July 7, 2011. *Id.* In both Motions for Summary Judgment, Defendants asserted that the settlement agreement was unenforceable due to Plaintiffs' rejection of the agreement and counteroffer. (Defendants' Motion for Summary Judgment, ¶ 14). In the alternative, Defendants claimed that the agreement was unenforceable because Plaintiffs did not accept within a reasonable time, thus negating the power to accept. *Id.* at ¶ 15.

Plaintiffs filed Answers to both Motions for Summary Judgment on August 4, 2011. *Id.* Plaintiffs also filed two Cross-Motions for Summary Judgment on August 8, 2011. *Id.* Plaintiffs claimed that a valid, binding settlement agreement was reached at the settlement conference on December 17, 2007, which could not be affected by the passage of time or by any proposed modifications by the Plaintiffs. (Plaintiffs' Cross-Motion for Summary Judgment, pgs. 18-19).

On August 11, 2011, the Court granted the Motions for Summary Judgment submitted by Defendants Cornell & Company, Inc., Roma Steel, Northwest Erectors, Inc., Bensalem Steel Erectors, Inc., Delaware Valley Erectors, Inc., and International Association of Bridge, Structural and Ornamental Ironworkers, Local 401 and denied Plaintiffs' Cross-Motions for Summary Judgment, thereby dismissing Plaintiffs' Complaint. *Id.* Plaintiffs timely appealed and filed their Statement of Matters Complained of on Appeal on September 19, 2011. *Id.*

The issue on appeal is whether this court erred in concluding that the settlement agreement originally contemplated at the settlement conference attended by the parties in December 2007 was unenforceable because the power of acceptance was terminated by Plaintiffs' proposal of a substituted agreement or, in the alternative, by the lapse of an unreasonable period of time.

LEGAL ANALYSIS

Summary Judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which states,

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
> (1) whenever there is no genuine issue of any material fact as to a

> necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. 1035.2

In determining whether summary judgment is proper, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue of material fact exists are resolved against the moving party. *Pennsylvania State Univ. v. County of Centre*, 532 Pa. 142, 615 A.2d 303, 304 (Pa. 1992). The appellate court's scope of review is plenary. *O'Donoghue v. Laurel Savings Ass'n*, 556 Pa. 349, 728 A.2d 914, 916 (Pa. 1999). A trial court's decision to grant or deny a motion for summary judgment will only be reversed where the lower court committed an error of law or abused its discretion. *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 248 (Pa. 1995).

In their 1925(b) Statement of Matters Complained of on Appeal, Plaintiffs allege that this Court erred in concluding that the settlement agreement was unenforceable because the power of acceptance was terminated by Plaintiffs' proposal of a substituted agreement or, in the alternative, by the lapse of an unreasonable period of time.

The enforceability of settlement agreements is governed by principles of contract law. *Century Inn, Inc. v. Century Inn Realty, Inc.*, 358 Pa. Super. 53, 516 A.2d 765, 767 (1986). The Court will enforce the settlement if all of the material terms of the bargain are agreed upon. *McDonnell v. Ford Motor Co.*, 434 Pa. Super. 439, 445, 643 A.2d 1102 (1994).

Pursuant to Restatement (Contracts) § 36, Methods of Termination of the Power of Acceptance, "An offeree's power of acceptance may be terminated by: (a) rejection or counter-offer by the offeree, or (b) lapse of time."

The facts demonstrate that Plaintiffs' suggested elimination of the no right to rehire clause and proposal of alternative terms constituted a rejection and counteroffer.

"An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer or to take it under further advisement." *Yaros v. Trustees of the University of Pennsylvania*, 1999 Pa. Super. 303, P11, 742 a.2d 1118, 1123 (1999). A counteroffer is made by the offeree to the offeror and concerns the same matter as the original offer but proposes a substituted bargain. Restatement (Contracts) § 39. "If defendant's reply did not unequivocally accept the terms of plaintiff's offer, no contract resulted and there was nothing to submit to a jury; the question was one of law for the court." *Alexanian v. Fidelity-Philadelphia Trust Company*, 152 Pa. Super. 23, 25-26, 30 A.2d 651, 652 (1943).

In March of 2008, Plaintiffs' counsel contacted Defendants' counsel to advise him that the Plaintiffs were dissatisfied with the no right to rehire provision and to propose alternative arrangements. On March 24, 2011, after Defendant Employers' counsel advised Plaintiffs' counsel that the Employers would reject any modification to the agreement excluding the no right to rehire provision, Plaintiffs' own counsel expressed doubt as to the continued viability of the settlement agreement, inquiring via email whether or not the original "deal" was still available because one plaintiff "will now take it," and the other two "may be on board with the original deal."

On April 1, 2008, Plaintiffs' counsel advised Defendant Employers' counsel that only one Plaintiff would sign the original Release and Settlement Agreement, and Defendant Employers' counsel replied that Defendants required the inclusion of the no right to rehire provision *and* the signatures of all three Plaintiffs. On April 3, 2008, Plaintiffs' counsel returned the Release and Settlement Agreement with the signature of only one Plaintiff.

On October 23, 2009, almost eighteen months after the last communication between counsel and twenty-two months after the settlement conference, Plaintiffs' counsel returned the Settlement Agreement and Release with the signature of all three Plaintiffs and a cover letter stating "our clients have finally acquiesced and have signed the settlement agreement."

In the case at hand, the objection by Plaintiffs to the no right to rehire clause and subsequent refusal to sign the settlement agreement demonstrates that they did not unequivocally accept the Settlement Agreement and Release. The material terms had not yet been agreed upon as required for an enforceable agreement because inclusion of the right to rehire provision was still at issue. After counsel for the Defendant Employers confirmed that the Defendants insisted upon the inclusion of the no right to rehire clause, Plaintiffs' counsel asked whether the original agreement was still available, demonstrating that counsel was unsure whether or not acceptance would be valid. After Defendant Employers' counsel informed Plaintiffs' counsel that Defendants required the signature of all three Plaintiffs, Plaintiffs' counsel returned the agreement with the signature of just one Plaintiff, again demonstrating that acceptance was not unequivocal.

Then, eighteen months later, Plaintiffs' counsel returned the agreement with the signatures of all three Plaintiffs, after the time for acceptance had long since passed.

The facts further demonstrate that because the release and settlement agreement was not accepted within a reasonable time, Plaintiffs no longer possessed the power to accept.

"Where an offer does not specify an expiration date or otherwise limit the allowable time for acceptance, it is both hornbook law and well-established in Pennsylvania that the offer is deemed to be outstanding for a reasonable period of time." *Yaros v. Trustees of the University of Pennsylvania*, 1999 Pa. Super. 303, P6, 742 A.2d 1118, 1121 (1999); *Textron, Inc. v. Froelich*, 223 Pa. Super. 506, 302 A.2d 426 (1973). Where the time for acceptance is clearly reasonable or clearly unreasonable such that it is clear and free from doubt, the question is one of law for the court. *Vaskie v. West Amer. Ins. Co.*, 383 Pa. Super. 76, 81-82, 556 A.2d 436, 439 (1989).

The 22-month lapse between the settlement conference and the return of the signed Settlement Agreement and Release was clearly unreasonable and thus constituted a question of law for the court. After two out of the three Plaintiffs rejected the no right to rehire provision, there was no communication between counsel for the parties for a period of 18 months, entitling counsel for Defendants to believe that the time for acceptance had lapsed.

Therefore, the Plaintiffs' power of acceptance was terminated by either their rejection of the settlement agreement and counteroffer proposing substitutes for the no right to rehire provision, or in the alternative, by the lapse of 22 months between the original offer and the attempted acceptance.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendants Cornell & Company, Inc., Roma Steel, Northwest Erectors, Inc., Bensalem Steel Erectors, Inc., Delaware Valley Erectors, Inc., and International Association of Bridge, Structural and Ornamental Ironworkers, Local 401's Motions for Summary Judgment be **AFFIRMED**.

BY THE COURT:

January 18, 2012

DATE **ALLAN L. TERESHKO, J.**

cc:
All counsel
Alan B. Epstein, Esq/Nancy Abrams, Esq. for Appellants
Regina C. Hertzig, Esq. for Appellee Iron Workers, Local 401
Walter H. Flamm, Jr., Esq/Robert J. Krandel, Esq., for Appellees Cornell & Co, Roma Steel, Northwest Erectors, Bensalem Steel Erectors, Delaware Valley Erectors