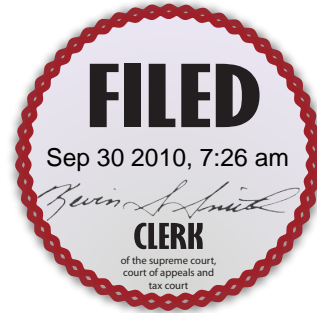


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

EDWARD P. BENCHIK
CHARLES SHEDLAK
Shedlak & Benchik Law Firm LLP
South Bend, Indiana

ATTORNEY FOR APPELLEE:

JAMES E. EASTERDAY
Easterday & Ummel
Plymouth, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BONNIE ELAINE ROCK,)

Appellant-Defendant,)

vs.)

EASTERDAY CONSTRUCTION CO, INC.,)

Appellee-Plaintiff.)

No. 50A03-0911-CV-00534

APPEAL FROM THE MARSHALL CIRCUIT COURT
The Honorable Curtis D. Palmer, Judge
Cause No. 50C01-0804-PL-12

September 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Bonnie Elaine Rock (“Rock”) appeals a judgment awarding damages to Easterday Construction Co., Inc. (“Easterday”). Rock presents two issues for our review:

1. Did the trial court err when it found a contract existed between Rock and Easterday?
2. Did the trial court err when it awarded damages to Easterday?

We affirm.

FACTS AND PROCEDURAL HISTORY

In May 2006, Rock, who resided in California, purchased a property in Plymouth, Indiana. The property was to be renovated into a residence, and the second floor was in disrepair. Rock initially contracted with Easterday for demolition work and some limited façade renovation work. On November 15, 2006, Easterday provided a proposal to Rock to renovate the second floor and turn it into a residence and artist’s studio.

Rock returned the proposal with her signature on the line that indicated she “ACCEPTED” the contract. (Appellee’s App. at 7) (emphasis in original). Below the signature line she listed six different items she testified she “wanted [Easterday] to concentrate on in order that [she] could move in there.” (Tr. at 65.) Easterday worked at Rock’s property until February 2007, when she ordered Easterday to cease construction on the property. Easterday later sent Rock a final bill for the work completed, which she refused to pay.

Easterday sued Rock for breach of contract. On July 14, 2009, a bench trial was held, and judgment was entered in favor of Easterday for \$167,842.19, which included the balance

due, interest, and attorney fees.

DISCUSSION AND DECISION

We will set aside a judgment after a bench trial only if the judgment is clearly erroneous. *Ream v. Yankee Park Homeowner's Ass'n*, 915 N.E.2d 536, 540 (Ind. Ct. App. 2009), *trans. denied*. In determining whether a judgment is clearly erroneous, we will not reweigh the evidence or judge the credibility of witnesses, but will consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. *Id.*

When a court issues written findings and conclusions, as it did here, we engage in a two-tiered review, determining first whether the evidence supports the findings, and second whether the findings support the judgment. *Id.* We will disturb the judgment only where there is no evidence supporting the findings or the findings do not support the judgment.

The court listed twenty-three findings of fact, including that Easterday submitted a proposal on November 15, 2006, to Rock for the “construction phase of the second floor remodeling project based on written plans existing at the time,” (Appellant’s App. at 7); Rock signed the proposal on the line under the word, “ACCEPTED” on November 17, (*id.*); the proposal included a clause indicating, “[a] signed, dated copy of this proposal letter shall serve as authorization to proceed,” (*id.*); Rock added six numbered items on the last page of the proposal regarding tasks she would like completed quickly, (Tr. at 65); and Easterday began work on receipt of Rock’s signed acceptance. Based on those findings, the court concluded, “a binding contract existed between the parties and that certain work was done and materials furnished by the Plaintiff at the request of the Defendant and the Defendant is

obligated to pay for that work and materials.” (Appellant’s App. at 9.)

Rock argues she and Easterday never formed a contract because her written requests at the end of the November 15 proposal amounted to a counteroffer Easterday did not accept. A contract is formed when parties exchange an offer and acceptance. *Rosi v. Bus. Furniture Corp.*, 615 N.E.2d 431, 435 (Ind. 1993). For an offer and acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect. *I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1034 (Ind. Ct. App. 1998), *trans. denied*. This is called the “mirror image rule.” *Id.* When a purported acceptance varies the terms of the offer, the new terms are considered a rejection and counteroffer, which must then be accepted by the original offeror. *Id.* at 1035.

Easterday argues Rock’s notations were indications of those parts of the project she wanted to have priority so she could move in by Christmas 2006. Rock’s own testimony supports this argument: “After having read this, I – um – signed it and dated it and then itemized what I wanted him to concentrate on in order that I could move in there.” (Tr. at 65.) The evidence supports the conclusion Rock’s signature under the word, “ACCEPTED” indicated acceptance of Easterday’s offer.

Even if the notations were a counteroffer, Easterday’s performance of the work described in the proposal demonstrates Easterday accepted Rock’s counteroffer. *See Field v. Alexander & Alexander of Ind., Inc.*, 503 N.E.2d 627, 630 (Ind. Ct. App. 1987) (A counteroffer “may be accepted by the original offeror by performing without objection under the terms contained in the counteroffer.”), *reh’g denied, trans. denied*. The trial court did not

err in determining a contract existed between Rock and Easterday because there is evidence to support the findings, and the findings support the judgment. *See Ream*, 915 N.E.2d at 540.

Even if a contract existed, Rock argues, it is not valid because it does not comport with the Home Improvement Contracts Act (“HICA”), which requires the following provisions be included in a contract before it is signed by the consumer:

- (1) The name of the consumer and the address of the residential property that is the subject of the home improvement.
- (2) The name and address of the home improvement supplier and each of the telephone numbers and names of any agent to whom consumer problems and inquiries can be directed.
- (3) The date the home improvement contract was submitted to the consumer and any time limitation on the consumer’s acceptance of the home improvement contract.
- (4) A reasonably detailed description of the proposed home improvements.
- (5) If the description required by subdivision (4) does not include the specifications for the home improvement, a statement that the specifications will be provided to the consumer before commencing any work and that the home improvement contract is subject to the consumer’s separate written and dated approval of the specifications.
- (6) The approximate starting and completion dates of the home improvements.
- (7) A statement of any contingencies that would materially change the approximate completion date.
- (8) The home improvement contract price.
- (9) Signature lines for the home improvement supplier or the supplier’s agent and for each consumer who is to be a party to the home improvement contract with a legible printed or a typed version of that person’s name placed directly after or below the signature.

Ind. Code § 24-5-11-10. The purpose of the HICA is to protect consumers by placing specific minimum requirements on the contents of home improvement contracts. *Homer v. Burman*, 743 N.E.2d 1144, 1148 (Ind. Ct. App. 2001), *reh’g denied*. “A home improvement supplier who violates this chapter commits a deceptive act that is actionable by the attorney

general or by a consumer under IC 24-5-0.5-4¹ and is subject to the remedies and penalties under IC 24-5-0.5.” Ind. Code § 24-5-11-14 (footnote added).

In support of her argument that HICA invalidates the contract, Rock cites *Benge v. Miller*, 855 N.E.2d 716 (Ind. Ct. App. 2006). In *Benge*, the homeowner claimed work was not done properly and commenced suit based on the contractor’s substandard performance. We held the homeowner could collect from the contractor because the contractor violated HICA by not providing a written contract for some of the work done, not giving a start or completion date for the work, and not obtaining the homeowner’s signature on any of the contracts.

Benge is distinguishable. Easterday sued Rock for non-payment. The court found “[t]here was no evidence produced that the work of the Plaintiff was substandard or defective in any manner.” (Appellant’s App. at 9.) The agreement between Rock and Easterday was in writing, and Rock signed it. The record indicates numerous communications between the two parties comported with the requirements of HICA, including multiple emails between the parties and their representatives regarding the manner in which the construction was to be completed. Rock’s brother and sister-in-law often visited the project site, and they reported

¹ Ind. Code § 24-5-0.5-4 states, in relevant part:

A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars (\$500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of:

(1) three (3) times the actual damages of the consumer suffering the loss;

or

(2) one thousand dollars (\$1,000).

Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in an action under this subsection.

the progress to Rock. When asked to cease work at the project site, Easterday did so, and billed Rock only for the work completed. *Cf. Homer*, 743 N.E.2d at 1148 (holding contractor in violation of HICA for exceeding scope of project, substandard performance, and failure to complete project in skillful and workmanlike manner). Rock has not demonstrated Easterday violated HICA.

Further, the trial court did not err in awarding damages to Easterday. By signing the November 15 proposal, Rock consented to Easterday's Standard Payment Terms, which indicate:

3. Easterday Construction Co., Inc. shall mail statements reflecting outstanding invoice balances. For each delinquent account, a monthly service charge equal to 1-1/2% of the past due balances will be added.
4. Easterday Construction Co, Inc. may file preliminary lien notices and mechanic's liens whenever necessary or required by law. This is company policy and is not a reflection of your credit standing.
5. Client agrees to pay all reasonable attorney fees, collection costs, and court costs incurred by Easterday Construction Co., Inc. in enforcing these terms.

(Plaintiff's Ex. 22.) This portion of the Standard Payment Terms allows Easterday to recover the past due balance plus 1.5% interest and attorney fees, and thus the trial court did not err in awarding them to Easterday.

CONCLUSION

The trial court did not err in determining a contract existed between Rock and Easterday or in assessing damages in favor of Easterday.

Affirmed.

BAILEY, J., and BARNES, J., concur.