

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

TIMOTHY BROE, ELEANOR BROE, and BROE
REHABILITATION SERVICES, INC.,

Defendants-Appellees.

UNPUBLISHED

July 22, 2010

No. 290133

Oakland Circuit Court

LC No. 2004-063179-CK

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order granting defendants' motion to enforce a settlement agreement and denying plaintiff's motion for release of bond. We reverse.

I. BASIC FACTS

The underlying litigation in this matter involved plaintiff's claims against defendants for insurance fraud, fraud, payment by mistake of fact, breach of contract, unjust enrichment and violation of the no-fault act, MCL 500.3101, *et seq.* After a jury trial, the jury found defendants liable on certain of plaintiff's claims and awarded plaintiff three million dollars. The trial court awarded plaintiff \$12,129.29 in costs and \$245,057.39 in judgment interest. This Court affirmed the judgment and jury verdict on August 21, 2008.¹ Defendants moved for reconsideration of this Court's opinion.

In the interim, settlement negotiations ensued. In a letter dated October 13, 2008, defendants' counsel wrote to plaintiff's counsel:

¹ *Allstate Ins Co v Broe*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2008 (Docket No. 274809).

Considering the merits of the parties' positions and current posture of this litigation, I believe a settlement of 65% of the total outstanding judgment would be reasonable.

My client has authorized me to make an offer to settle this matter for a cash payment of 2.4 million dollars to Allstate, inclusive of all interest and attorney fees.

On October 20, 2008, this Court denied defendants' motion for reconsideration.² The next day, plaintiff's counsel responded to defense counsel's October 13th letter:

[M]y client is willing to accept the judgment amount in this matter as set forth in the Judgment of September 20, 2006. . . .

My client considers it more than reasonable to waive approximately \$450,000 in return for the immediate payment of the judgment amount. *This discount, however, is contingent upon the immediate payment of this Judgment* and avoids for your client not only the continued accumulation of interest at an enormous rate but recognizes his expenditure of attorney fees.

* * *

I look forward to hearing from you in the next few days. As I am sure you can appreciate, the filing of the Application for Leave to Appeal and the time and expense necessary to prepare and respond to such Leave to Appeal changes the posture of the case dramatically and, therefore, *this suggestion for settlement cannot extend beyond the filing of an Application for leave to Appeal to the Supreme Court.* [Emphasis added.]

Defense counsel responded in a letter, dated November 19, 2008:

After a careful review, Dr. Broe has authorized me *to offer 2.7 Million Dollars in full and final resolution of this matter. We are prepared to tender this money before the end of the month.*

Of course, if it becomes necessary to incur legal fees in the preparation of the Application for Leave to Appeal, this offer will be withdrawn. [Emphasis added.]

Plaintiff's counsel responded in writing on November 25, 2008:

[Plaintiff] has decided to avail itself of your offer and accepts the payment of \$2.7 million dollars [sic] in full and final resolution of this matter.

² *Allstate Ins Co v Broe*, unpublished order of the Court of Appeals, entered October 20, 2008 (Docket No. 274809).

. . . . [T]he check is to be made payable to Hewson & Van Hellemont, P.C. The Releases will be signed by my client and myself on behalf of my firm but the funds are definitely to be made payable to this firm, and disbursed from my firm. I look forward to discussing this matter with you and receiving your proposed Settlement Agreement, which, I believe, can be as simple as my client accepting \$2.7 million dollars [sic] and *your client agreeing to waive any further appellate rights that he, his wife, and the company have.* [Emphasis added.]

Plaintiff did not receive payment of the settlement amount by the end of November and on December 1, 2008, the time period in which defendants could file an application for leave to appeal with the Supreme Court expired. On December 9, 2008, defense counsel e-mailed plaintiff's counsel indicating that he had spoken to defendant Dr. Timothy Broe and would follow-up as soon as he had more information. Plaintiff's counsel responded via e-mail:

It was my understanding that Timothy Broe would be providing the information, and the funds, for the payment of the settlement. My client has been very understanding regarding the delay in payment, but is not required to be so understanding, especially in light of the fact that the interest on this sum is substantial. The agreement, as set forth in your letter, was that the money would be paid by the end of November and we are now eight full days past that.

If this matter is not resolved by tomorrow, my client will enforce all its options.

Defendant failed again to remit payment and, the very next day, December 10th, defendants' counsel sent to plaintiff's counsel a copy of a release, which also included a confidentiality clause. Included in that release was a provision that stated, "By entering into this Full and Final Settlement Agreement and Release, Broe [Rehabilitation] does not admit to liability as to any claims asserted by [plaintiff] in the Civil Action or otherwise." Plaintiffs' counsel responded by e-mail:

At this point my client wishes to go forward with the Motion scheduled for next Wednesday. The offer and acceptance were not acted on, by your clients, within the time set forth in your letter, and have not been acted on to date. The agreement is therefore void.

That same day, December 10, 2008, plaintiff moved for release of bond. Several days later, on December 15, 2008, defendants moved to enforce the settlement agreement.

On December 17, 2008, the trial court heard oral argument on plaintiff's motion; defendants' motion was not before the court at the time. The trial court granted plaintiff's motion in part, releasing 2.7 million dollars of the escrowed fund to plaintiff. On January 14, 2009, the trial court held another hearing on defendants' motion to enforce the settlement agreement. During the hearing, the court ordered the parties to re-attempt settlement negotiations. The parties' efforts were unsuccessful and that trial court entered an order the next day granting defendants' motion to enforce the settlement agreement and denying plaintiff's motion to release the remainder of the amount held in the bond. It is from this order that plaintiff now appeals.

II. CONTRACT FORMATION & SUBSEQUENT BREACH

Plaintiff argues that no valid settlement agreement existed. We disagree. An agreement between parties to settle a lawsuit is a contract governed by the principles of contract construction and interpretation. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). As such, the question of whether a legally binding and enforceable settlement agreement existed in the present matter is reviewed de novo. *Id.*

A. SETTLEMENT AGREEMENT

A valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Id.* at 452-453. An offer is "the manifestation of willingness to enter into a bargain . . .," while "an acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer" *Id.* at 453-454 (citations and quotation marks omitted). A counter proposition, an offer to accept, or an acceptance differing from the terms offered operates as a rejection of the offer, or a counteroffer, and precludes a meeting of the minds. *Giannetti v Cornillie*, 204 Mich App 234, 237; 514 NW2d 221 (1994), rev'd on other grounds 447 Mich 998 (1994). The essential terms of a settlement agreement include the parties to be bound, the amount agreed upon, and some form of consideration. See *Kloian*, 273 Mich App at 454 (indicating a meeting of the minds had been reached as to "[t]he essential terms [of a settlement agreement, which] were the payment of \$ 48,000 by defendant in exchange for a dismissal with prejudice and a release."); *Zucher v Herveat*, 238 Mich App 267, 284-285; 605 NW2d 329 (1999) (noting the essential terms for a contract of sale of land include the parties, the amount, and consideration). Further, a contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of MCR 2.507(G). *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). That rule requires that the settlement be placed on the record or set forth in a writing subscribed by the party against whom it is to be enforced or by his attorney.

Here, defendants first offered to settle the matter on October 13th for 2.4 million dollars. Plaintiff rejected this offer in its October 21st letter, stating that it is willing to accept "the judgment amount," and waive costs and interests in return for immediate payment and an understanding that "this suggestion for settlement cannot extend beyond the filing of an Application for leave to Appeal to the Supreme Court." In effect, plaintiff's rejection constituted a counteroffer. Defendants did not accept the terms of this counteroffer. Instead, on November 19th, defendants' counsel wrote to plaintiff, making another counteroffer:

After a careful review, Dr. Broe has authorized me to offer 2.7 Million Dollars in full and final resolution of this matter. We are prepared to tender this money before the end of the month.

Of course, if it becomes necessary to incur legal fees in the preparation of the Application for Leave to Appeal, this offer will be withdrawn.

On November 25th, plaintiff responded in writing, indicating that it “has decided to avail itself of your offer and accepts the payment of \$2.7 million in full and final resolution of this matter.” Plaintiff’s counsel stated in this same letter, “I look forward to discussing this matter with you and receiving your proposed Settlement Agreement, which, I believe, can be as simple as my client accepting \$2.7 million dollars [sic] and your client agreeing to waive any further appellate rights that he, his wife, and the company have.”

The November 25th correspondence reveals that plaintiff accepted the essential terms of defendants’ offer, i.e., to forgo the full judgment amount and accept 2.7 million dollars by November 30th in exchange for defendants’ promise that the settlement would be in full and final resolution of the litigation. It is explicitly clear that plaintiff and defendants mutually agreed as to the parties involved, the settlement amount of 2.7 million dollars, and the date by which that amount was to be received. Further, an objective view of the parties’ communications reveals that they also agreed to the bargained for exchange. *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005) (“[C]onsideration [is] a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other.” (citations and quotation marks omitted)). “A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Kloian*, 273 Mich App at 454 (citation and quotation marks omitted). Here, defendants offered to settle the lawsuit in “full and final resolution of this matter,” while plaintiff agreed to this term and proposed a simply drafted settlement agreement in which defendants agreed “to waive any further appellate rights” An agreement to waive appellate rights and an agreement to settle in “full and final resolution” of the litigation are synonymous. A settlement is by definition “a compromise of a disputed claim,” *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009), and if a claim is no longer disputed because it has been resolved by settlement, there can be nothing to appeal. Thus, under the circumstances, as of November 25th, there was a meeting of the minds as to all of the settlement agreement’s essential terms.

B. MATERIAL BREACH & RESCISSION

When defendants failed to enter a stipulation and order for a release of 2.7 million dollars of the escrowed funds, or otherwise pay the settlement amount by November 30th, they materially breached the agreement. See *Woody v Tamer*, 158 Mich App 764, 771-772; 405 NW2d 213 (1987) (explaining that failure to perform a contractual duty when performance is due constitutes a breach of contract). At the outset, we would note that “[t]he rule in Michigan is that one who first [substantially] breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (citation and quotation marks omitted). Accordingly, it was erroneous for the trial court to enforce the settlement agreement against plaintiff since defendants were the first to breach the agreement, and, thus, could not maintain an action against plaintiff for its failure to perform under the agreement.

When one party breaches a contract, the typical remedy is to put the nonbreaching party in as a good a position as if the breach had not occurred. *Roberts v Farmers Ins Exch*, 275 Mich App 58; 737 NW2d 332 (2007). However, a party may rescind a contract for a substantial or material breach. *Hisaw v Hayes*, 133 Mich App 639, 642; 350 NW2d 302 (1984). A party must

invoke its right to rescind the contract promptly. *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958).

Plaintiff's communication with defendants a mere nine days after defendants materially breached the agreement constituted a prompt response.³ Plaintiff's counsel notified defense counsel that plaintiff was no longer going to accept defendants' delay in performance and that defendants had until December 10th, 2008, to perform. Defendants failed to remit the funds and instead waited until 4:45 p.m. on December 10th to send a proposed settlement agreement, which agreement contained additional terms not agreed to by the parties. No funds were disbursed to plaintiff. Plaintiff promptly rescinded the agreement for defendants' breach the next morning by declaring the agreement "void" in an e-mail and by filing its motion to release bond. Because plaintiff promptly rescinded the agreement, we conclude that the agreement was void and both parties were free of their obligations under the agreement.

III. WAIVER & MODIFICATION

Defendants argue that any timing provision of the agreement was waived through plaintiff's course of conduct when it waited nine days for payment and indicated in an e-mail that it had been patient with defendants' delay. We disagree.

Our Supreme Court summarized the law in regard to waivers and modifications of contracts in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003):

[P]arties to a contract are free to *mutually* waive or modify their contract . . . because of the freedom to contract. However, . . . the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract.

This mutuality requirement is satisfied where a waiver or modification is established through *clear and convincing evidence* of a written agreement, oral agreement, or *affirmative conduct establishing mutual agreement to modify or waive the particular original contract*. In cases where a party relies on a course of conduct to establish waiver or modification, the law of waiver directs our inquiry and the significance of written modification and anti-waiver provisions regarding the parties' intent is increased.

. . . . *Mere knowing silence generally cannot constitute waiver*. [Emphasis added.]

Clear and convincing evidence, the most demanding level of proof in civil cases, is evidence that produces in a factfinder's mind "a firm belief or conviction as to the truth of the allegations

³ This is especially true given the intervening Thanksgiving holiday.

sought to be established” *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (citation and quotation marks omitted).

Here, plaintiff did not receive payment from defendants on November 30th, as promised under the settlement agreement. Instead, on December 9th, defendants’ counsel wrote an email to plaintiff’s counsel indicating that he had spoken to Dr. Broe and would be in contact with plaintiff’s counsel as soon as he had more information. In an e-mail response that same day, plaintiff’s counsel wrote:

It was my understanding that Timothy Broe would be providing the information, and the funds, for the payment of the settlement. My client has been very understanding regarding the delay in payment, but is not required to be so understanding, especially in light of the fact that the interest on this sum is substantial. *The agreement, as set forth in your letter, was that the money would be paid by the end of November and we are now eight full days past that.*

If this matter is not resolved by tomorrow, my client will enforce all its options. [Emphasis added.]

The only reasonable interpretation of plaintiff’s counsel’s e-mail is that it recognizes the agreement has been breached and provides a specific date for performance. Plaintiff’s mere silence for nine days after payment was due does not constitute a waiver and modification. *Quality Prods & Concepts Co*, 469 Mich at 365. There is no question that plaintiff was not seeking to waive the timing requirement. Rather, an objective reading of the e-mail establishes that plaintiff’s counsel was seeking to *enforce* the payment. Clear and convincing evidence of an agreement to waive and otherwise modify the timing provision of the settlement agreement is lacking.

Further, even if the December 9th e-mail were viewed as a waiver of the original timing requirement and a modification providing for a new timing requirement, defendants still failed to perform under this modified contract. All that was required was for defendants to submit by the next day a stipulation and order for release of the funds. Given that the effort to do so would be quite minimal, it is unclear what prevented defendants from performing under the circumstances. Instead of releasing that portion of the escrowed funds, or simply paying the settlement amount, defendants instead only provided plaintiff with a release form containing essential terms different than those agreed upon. Thus, in either instance, defendants materially breached the agreement and plaintiff was entitled to rescind the agreement and pursue its other options.

IV. EQUITABLE ESTOPPEL

Finally, we find no merit in defendants’ argument that the settlement agreement was enforceable on the basis of equitable estoppel. While that doctrine may be applied to preclude a party from challenging the existence or validity of a contract when he has accepted the benefits of that contract, 31 CJS, Estoppel & Waiver, § 164, p 542, or from enforcing a specific provision of the contract, *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 203-204; 702 NW2d 106 (2005), there is nothing inequitable in permitting a party to rescind a contract due to the material breach by the other party.

Reversed.

/s/ William B. Murphy

/s/ Kirsten Frank Kelly