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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARSHAL CASTLE and LUANNE CASTLE,) 1 CA-CV 10-0427
husband and wife,)
) DEPARTMENT D
Plaintiffs/Appellants,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
IMAGINE AUDIO VIDEO, L.L.C., a) of Civil Appellate
limited liability company; BRIAN) Procedure)
and JO ANDERSON, husband and wife,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-054439

The Honorable Brian R. Hauser, Judge

REVERSED AND REMANDED

Porter Law Firm Phoenix
By Robert S. Porter
Attorneys for Plaintiffs/Appellants

Gallagher & Kennedy, PA Phoenix
By Mark Deatherage
and Christopher Thompson
Attorneys for Defendant/Appellee, Imagine Audio Video, L.L.C.

Brian and Jo Anderson, Phoenix
Defendants/Appellees, *In Propria Persona*

N O R R I S, Judge

¶1 Plaintiffs/appellants Marshal and Luanne Castle timely appeal from a judgment of the superior court dismissing their action against defendants/appellees Imagine Audio Video, L.L.C., and Brian and Jo Anderson (collectively, unless otherwise specified, "IAV"), after finding the parties had reached a binding agreement to settle their disputes. We agree with the Castles that, as a matter of law, the parties did not enter into such an agreement. We therefore reverse the judgment of the superior court dismissing the Castles' action against IAV and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Castles hired IAV to install an integrated electronic system and components in their residence ("the Project"). Brian Anderson provided the programming for the operation of the system on behalf of IAV; the programming included an object or source code. A dispute arose between the parties, with the Castles contending the system and components failed to operate as intended.

¶3 The parties engaged counsel in an attempt to settle the matter. In a March 30, 2009 letter to Susan Trujillo, the Castles' counsel, Mark Deatherage, IAV's attorney, recounted the negotiations and then proposed:

To date, IAV offered to provide the Castles with the source code and free consultation with their new AV company in exchange for

\$15,000 (the amount still owed plus a nominal amount for interest and attorneys' fees) and a complete release. . . . The Castles responded to IAV's offer with a demand for the source code, but with no payment towards the outstanding balance.

We propose that the parties meet halfway. The terms would be as follows:

- The Castles will pay IAV \$7,500.
- IAV will provide the Castles and their new AV contractor, Desert Sound & Security (DSS) with the source code for the project. . . . The agreement would include a provision that the source code will be used only for and in conjunction with the Castles' residence, and the Castles and DSS would commit that the source code will not be used for any other project or purpose and will not be provided or released to anyone else.
- The Castles will fully release and discharge IAV, Bruce Thompson [IAV President], and their employees and agents from any claims, causes of action, liabilities, damages, or other responsibility for the project, including without limitation warranty claims and responsibilities.
- IAV will release the Castles from the remaining amounts still owed on the project.
- Bruce Thompson will agree to provide DSS with up to four hours of free consultation during April 2009 to assist with the transition and to help DSS understand the work that has been done and the equipment that has been installed.

¶4 Trujillo responded by letter dated April 9, 2009:

[T]he Castles do not accept IAV's offer.

As previously offered, the Castles would accept the source code as a full settlement of any claims between the parties and would agree not to pursue their past costs, the costs they are now incurring to bring the system to full operability, and their own legal fees incurred in bringing this project to completion. They would also agree to use the code only for and in conjunction with their residence and the Castles and Desert Sound & Security would commit that the source code will not be used for any other project or purpose.

Trujillo followed with a May 4, 2009 e-mail, asking whether IAV would release the source code.

¶5 Deatherage responded by e-mail on May 8, 2009, and made the following proposal ("May 8 proposal"):

[M]y client will modify his most recent offer by agreeing to walk away for payment just of the \$1500 still owed to his programmer, Brian Anderson. . . . [I]f Mr. Castle will provide us with a check payable to Brian Anderson for \$1,500, we will provide him with the source code. This would be subject to all of the other terms and conditions outlined in our earlier correspondence. If your clients want to settle, please send me a draft settlement agreement.

¶6 On May 26, 2009, Trujillo e-mailed Deatherage, stating: "Attached is a draft settlement agreement for IAV's review. Please let me know if you have any questions or suggested revisions." The attached draft settlement agreement

("original draft agreement") generally required IAV and the Castles to release each other from all liability related to the Project. The original draft agreement further provided:

2. Payment.

The Castles shall provide IAV's counsel with: (1) a fully executed form of this Settlement Agreement; and (2) a check made out to Brian Anderson in the amount of One Thousand Five Hundred dollars (\$1,500). Upon receipt of those materials, IAV will provide the Castles' counsel with: (1) a fully executed form of this Settlement Agreement; and (2) the most current AMX programming, touch panel and remote files for the system installed at the Residence, as well as any other programming files for the system in IAV's possession. The Castles affirm that these files will not be used for any other project or purpose and will not be provided or released to any other person or entity with the exception of any person or entity hired to work on the Residence's whole house electronics system and/or its separate components.

The original draft agreement also included a confidentiality provision, as follows:

7. Confidentiality.

The settlement of this Action is made on the condition that the facts surrounding this dispute and Agreement are to remain confidential. Except as required by law, subpoena, court order, or to obtain legal or accounting advice, the Parties agree that neither they nor their representatives will disclose to or discuss with any person not a party to this Agreement the terms of this Agreement, and that neither they nor their representatives will take action to publicize the claims asserted, the sums

payable, or the terms and conditions of the Settlement Agreement reached herein.

On June 1, 2009, Trujillo e-mailed Deatherage, asking whether he and IAV had reviewed the original draft agreement, and stating: "The Castles would prefer to get it signed soon so that they may provide the code to Desert Sounds for repair work."

¶7 Deatherage responded by e-mail on June 8, 2009, stating Bruce Thompson was out of the country, but that he (Deatherage) had had "a chance to forward your draft to him and get some input." Deatherage attached a copy of the original draft agreement to his e-mail with "our red-line revisions." As relevant here, Deatherage's e-mail stated:

If we can get this finalized this week, Bruce can sign it when he is back on Monday and get the programming delivered.

In section 2, I'll have to confirm with Bruce exactly what he will be delivering. I'll let you know if any of the highlighted sentence needs to be revised. Also, a confidentiality provision was not part of the agreement. However, I think Bruce would agree to that provision, but we would want a corresponding non-disparagement clause, which I have included.

. . . .

Let me know if the attached revisions are ok.

¶8 The revisions contained in the revised agreement prepared by Deatherage ("revised agreement") required the Castles to release the owners, members, and principals of IAV,

including Bruce Thompson, from liability; the parties to represent that they had not sold, conveyed, transferred, or assigned any claims or rights they might have toward each other; the Castles to represent the materials provided by IAV would be used solely for the Project; and the Castles to provide written instructions to the contractor hired to work on the Project (and to include in the contract with that contractor) that the contractor recognized IAV's proprietary interest in the files and materials and agreed not to use them for any other project or to disseminate them. Finally, although the revised agreement retained the confidentiality provision, it added a non-disparagement provision:

8. Non-disparagement.

Neither of the Parties or their principals will disparage, defame, or besmirch the reputation, character, image, or services of the other Party or of any of its principals, or make any comments or statements that reflect adversely or negatively upon the reputation, character, image, or services of the other Party or any of its principals. This paragraph will not be construed to prevent any Party or principal from making truthful statements in response to direct questions asked pursuant to a valid and binding subpoena during any future legal proceedings, or from making truthful statements in connection with the fulfillment of any reporting, disclosure, or similar obligations; provided, however, that if any Party or principal receives a valid and binding subpoena or similar request or order that would seek or require such Party or principal to make statements or provide

information about any other Party or principal, such Party or principal shall provide written notice and a reasonable opportunity to object.

¶9 On June 16, 2009, Deatherage e-mailed Trujillo and explained Bruce Thompson had returned from his trip, confirmed the language in the revised agreement, and signed it.

Deatherage further noted:

Attached is a copy that incorporates the revisions I sent to you, with Bruce's signature on behalf of IAV.

. . . .

Please have the Castles sign the Agreement, date it at the top of the first page, and send me fully executed copies/originals, together with the \$1,500 check to Brian Anderson.

¶10 On June 23, 2009, Trujillo e-mailed Deatherage as follows:

The Castles did not approve the redlined changes you sent on June 6th and are not interested in continuing to negotiate this settlement agreement at this time. They continue to demand the source code, as they paid for the product uniquely designed for their home, and note that IAV's refusal to provide this code would likely increase the Castles' damages should litigation result.

¶11 Deatherage immediately responded: "What revisions do they take issue with?" Trujillo answered: "They simply did not approve the changes and do not want to continue these negotiations at this time." Deatherage responded:

None of our proposed revisions materially change the agreement the parties had reached. I conveyed our counter-offer by email of May 8, 2009, and concluded by stating that if your clients want to settle on those terms, please send me a draft settlement agreement. You responded on May 26 with the Castles' acceptance of those proposed settlement terms and sent me a draft Settlement Agreement. Subject only to non-materials [sic] revisions, my client signed the Settlement Agreement you sent.

Please let the Castles know that I will be looking into filing a motion to enforce the settlement contract the parties reached, together with a claim for costs and attorneys' fees arising out of the enforcement of that contract and their transparent lack of good faith. Please encourage them to honor the settlement they agreed to so this will not be necessary.

¶12 On June 29, 2009, Trujillo informed Deatherage a new attorney would be representing the Castles in their dispute with IAV. After additional communications between Deatherage and new counsel regarding whether the parties had actually settled their dispute, on August 26, 2009, Deatherage wrote to the Castles' counsel as follows:

The parties in fact did reach a settlement. Susan Trujillo, the attorney for the Castles who negotiated the settlement on their behalf, was the person who added a term to her draft settlement agreement that had not been discussed, i.e. a confidentiality clause. We responded that if a confidentiality clause was to be added, it should be accompanied by a non-disparagement clause. We also stated, however, that we would sign the agreement without either of those provisions if that was the Castles'

preference.^[1] We did not add any material terms, and remain willing to sign the settlement agreement with or without those clauses. My client is entitled to have the settlement agreement signed and honored.

IAV offered to remove the provision requiring the payment of the \$1500 and to let the Castles choose whether to include the confidentiality and non-disparagement clauses "if it [would] get the deal done."

¶13 In October 2009, asserting breach of contract claims, the Castles sued IAV, the Andersons, and a third party not involved in this appeal. IAV filed a Motion to Confirm and Enforce Settlement Agreement and Motion to Dismiss; the Andersons joined the motion. IAV attached to its motion copies of the letters and e-mails memorializing the settlement discussions, as well as copies of the May 8 proposal, the original draft agreement, the revised agreement, and the agreement signed by Bruce Thompson. IAV argued these materials demonstrated the parties had reached a settlement.

¶14 Without holding oral argument and over the Castles' objection and argument that, as a matter of law, the parties had not reached a settlement, the court granted IAV's motion to

¹The record does not contain any written corroboration IAV made this proposal to sign without either of the provisions at any time before the August 26, 2009 letter.

enforce the settlement agreement and to dismiss. The court explained:

The matters raised by Plaintiffs in opposition to settlement are minor, tangential and immaterial to the terms of the core agreement reached by the parties as reflected in the draft agreement attached to Plaintiffs' counsel's June 1, 2009 e-mail^[2] to defense counsel.

The court subsequently entered judgment in favor of IAV. The judgment deemed the Castles to have signed the revised agreement, directed the parties to perform the material obligations of the revised agreement, and dismissed the Castles' claims against IAV. We have jurisdiction over this appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

I. Standard of Review

¶15 When, in a motion to dismiss for failure to state a claim, matters outside the complaint are presented to and not excluded by the court, the motion is converted to a motion for summary judgment under Arizona Rule of Civil Procedure ("Rule")

²Trujillo attached the original draft agreement to a May 26, 2009 e-mail. On June 1, 2009, Trujillo sent an e-mail to Deatherage that stated the original draft agreement was attached, but that specific attachment is not included in the record.

56(c).³ Ariz. R. Civ. P. 12(b)(6); *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519-20, 591 P.2d 1005, 1007-08 (App. 1979). Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the superior court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App.

³IAV contends its motion to dismiss was not converted to one for summary judgment and argues that, under *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991), the superior court could decide fact issues unrelated to the merits of the dispute by considering matters outside the pleadings without converting the motion to one for summary judgment. *Swichtenberg* and the cases on which it relies, however, concern whether a court has jurisdiction over the case. *Id.*; see also *Bonner v. Minico, Inc.*, 159 Ariz. 246, 253-54, 766 P.2d 598, 605-06 (1988); *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506-07, 744 P.2d 29, 33-34 (App. 1987). Dismissals for lack of subject-matter or personal jurisdiction fall under Rule 12(b)(1) and 12(b)(2) respectively, not under Rule 12(b)(6), and so are not subject to the rule regarding conversion into a motion for summary judgment. See *Gatecliff*, 154 Ariz. at 506, 744 P.2d at 33 (discussing distinction between Rules 12(b)(1), (2) and Rule 12(b)(6) and court's ability when determining jurisdiction to consider matters outside a motion to dismiss without converting it to a motion for summary judgment). Whether the Castles' action was precluded because of settlement did not raise an issue of jurisdiction. IAV's motion fell within Rule 12(b)(6) and was converted to a motion for summary judgment based on the superior court's consideration of material attached to the motion. See *Canyon Contracting Co. v. Tohono O'odham Hous. Auth.*, 172 Ariz. 389, 390, 837 P.2d 750, 751 (App. 1992) (superior court's enforcement of settlement agreement based on arguments of counsel and documentary evidence in the record in effect granted summary judgment as to existence and terms of alleged agreement).

2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

II. Merits

¶16 On appeal, the Castles argue that, as a matter of law, the parties never entered into a binding settlement agreement.⁴ They further argue that, if the original draft agreement sent by Trujillo to Deatherage constituted an offer, IAV never unequivocally accepted it because, in response, IAV proposed the revised agreement. IAV counters the original draft agreement was an acceptance of the May 8 proposal and the additional terms included in the original draft agreement were immaterial. Whether the original draft agreement was an offer or a response to the May 8 proposal, the record fails to demonstrate the parties reached a final, enforceable agreement on settlement terms.

¶17 The construction and enforcement of settlement agreements are governed by general contract principles. *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585

⁴At oral argument, the Castles' counsel stated the superior court should not have granted summary judgment because whether the parties had entered into a binding settlement presented a triable issue of material fact. In their briefing on appeal, however, the Castles asserted that, as a matter of law, the parties had never entered into such an agreement.

(App. 1998). An enforceable contract requires an offer, an acceptance, consideration, and sufficiently specified terms so the parties' obligations can be understood. *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). Under general contract principles, an acceptance of an offer must be unequivocal and must be on virtually the exact terms as the offer; any attempt to accept on terms materially different from the original offer constitutes a counteroffer. *Clark v. Compania Ganadera de Cananea, S.A.*, 94 Ariz. 391, 400, 385 P.2d 691, 697 (1963); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 270-71, 681 P.2d 390, 422-23 (App. 1983); see Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.").

¶18 To form a binding contract, the parties must mutually assent to all material terms. *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990). "A distinct intent common to both parties must exist without doubt or difference, and until all understand alike there can be no assent." *Id.* Mutual assent is determined based on objective evidence, not the hidden intent of the parties. *Id.* at 474, 799 P.2d at 815.

¶19 The original draft agreement specified the Castles would pay \$1500 to IAV's programmer, Brian Anderson; IAV would release the Castles for the remaining amount owed on the Project; IAV would provide the source code to the Castles; and the Castles would release IAV and its employees and agents from any claims arising from the Project. Although Deatherage had first proposed (or incorporated) these terms in the May 8 proposal, Trujillo inserted a provision titled "Confidentiality" in the original draft agreement, which Deatherage had not included in the May 8 proposal. Consequently, even if we view the original draft agreement as an "acceptance" of the May 8 proposal, the original draft agreement nevertheless inserted a new term into the settlement discussions, and under the authorities discussed above, constituted a counteroffer.

¶20 IAV contends the original draft agreement was not presented as a counteroffer, however, because Trujillo did not include any language in her accompanying e-mail to the effect the Castles were rejecting the offer and offering alternative provisions. IAV also argues the original draft agreement was not a counteroffer because the confidentiality provision was not a "material" term, contending that no objective evidence demonstrates the provision was important to the Castles or that they had conditioned settlement on IAV's agreement to this term.

¶21 These arguments are belied by the confidentiality provision itself, which begins, "The settlement of this Action is made on the condition that the facts surrounding this dispute and Agreement are to remain confidential." The plain language of the proposed provision demonstrates the Castles considered confidentiality to be essential and material to any settlement with IAV. IAV's arguments are also undercut by its response to the confidentiality provision. In his June 8, 2009 e-mail, Deatherage noted the provision "was not part of the agreement" and, although he believed his client would agree to it, stated IAV would want a "corresponding non-disparagement clause," which he inserted into the revised agreement, along with other revisions.

¶22 IAV cites *Storms ex rel. Storms v. O'Malley* in support of its argument the confidentiality provision was not material and therefore did not preclude enforcement of the agreement. 779 A.2d 548 (Pa. Super. Ct. 2001). In *Storms*, parties in a medical malpractice case reached an oral agreement regarding payment, which was approved by the court, but the defendant's attorney sent a release that included a provision sealing the record and a reduced payment amount. *Id.* at 555, ¶¶ 11-12. The trial court granted the plaintiffs' motion to enforce the original settlement, *id.* at ¶ 13, and the appellate court affirmed because the record revealed the parties had not

discussed sealing the record or the basis for the reduction at the settlement conference and these issues had been raised only after the trial court had approved the settlement agreement. *Id.* at 558, ¶¶ 22-23. The appellate court stated the defendants could not “seek to invalidate the agreement by asserting essential terms . . . after settlement negotiations were complete.” *Id.* at ¶ 23.

¶23 IAV contends, as in *Storms*, the parties did not discuss the confidentiality clause while negotiating the settlement and, therefore, had reached a binding settlement agreement. But, unlike the situation in *Storms*, the parties had not reached agreement on the terms of settlement before Trujillo drafted and conveyed to Deatherage the original draft agreement containing the confidentiality provision. At that point, the Castles had not accepted the terms contained in the May 8 proposal and could have rejected them. Instead, the Castles received the May 8 proposal, and, through the original draft agreement, proposed a confidentiality provision that conditioned settlement on the parties’ agreement that “the facts surrounding this dispute and Agreement are to remain confidential.” By including the confidentiality provision in the original draft agreement, the original draft agreement became a counteroffer. Although eventually IAV accepted the confidentiality provision,

it did so only if the Castles accepted the non-disparagement clause, which they never did.

¶24 Finally, IAV contends the non-disparagement clause was not a material term but simply complemented the confidentiality provision. Whether complementary or not, the Castles never accepted the non-disparagement clause just as they never unconditionally accepted, as discussed above, any of IAV's settlement offers. Just as the confidentiality provision was material, *see supra* ¶¶ 20-21, the non-disparagement clause, which IAV requested in response to the Castles' request for the confidentiality clause, was also material because it prohibited the parties from making certain statements not necessarily encompassed by the confidentiality provision. Thus, the record demonstrates that, as a matter of law, the parties never reached a binding agreement to settle their dispute.

¶25 The superior court, therefore, should not have entered judgment against the Castles and dismissed their complaint against IAV. We thus reverse the superior court's judgment against the Castles and remand for further proceedings consistent with this decision.

¶26 The Castles have requested an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003). Because the successful party in this matter has yet to be determined, in the exercise of our discretion, we deny their request. At the

conclusion of the case, the superior court may consider the fees incurred by the parties in deciding whether to award fees under this statute. We grant the Castles their costs on appeal, however, subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶27 For the foregoing reasons, we reverse the judgment in favor of IAV and against the Castles and remand to the superior court for further proceedings consistent with this decision.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

/s/
PATRICIA A. OROZCO, Judge