SLIP OPINION

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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 10-778

	Opinion Delivered APRIL 13, 2011
RUBBER & GASKET COMPANY OF AMERICA APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTEENTH DIVISION [NO. CV-2007-11386]
V.	HONORABLE ELLEN B. BRANTLEY, JUDGE
TIMOTHY ZIMMERMAN APPELLEE	REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

Appellant Rubber & Gasket Company of America (RGA) appeals from a summary judgment enforcing a settlement agreement between it and its former employee, appellee Timothy Zimmerman. For reversal, RGA argues that fact questions remain as to whether the parties reached a meeting of the minds on a settlement. We agree and reverse and remand.

Timothy Zimmerman was a board member and executive vice-president of RGA with an annual salary of $267,572.50. He owned stock in RGA's Employee Stock Ownership Plan (ESOP), plus 8,181.75 shares outside the ESOP and an option to buy another 2,877 shares. In July 2007, RGA fired Zimmerman, and he retained attorney Charles Schlumberger to pursue a claim for wrongful termination. RGA engaged attorney Robert Smith as its legal representative. The two attorneys engaged in settlement negotiations and discussed five critical

SLIP OPINION

points: 1) Zimmerman's severance pay; 2) the disposition of Zimmerman's 8,181.75 shares of non-ESOP stock; 3) the disposition of Zimmerman's ESOP stock; 4) the amount owed to Zimmerman on his option to purchase additional stock; and 5) the terms of a non-compete/confidentiality agreement for Zimmerman.

After the settlement meetings, Schlumberger sent Smith a letter on August 8, 2007, setting out Zimmerman's "final position" as to each of the five critical issues. The letter reads, in pertinent part, as follows:

> The terms of the shareholders agreement will govern the disposition of Mr. Zimmerman's non-ESOP stock (five years, with the interest rate at prime);
>
> On the severance pay . . . Mr. Zimmerman's final proposal is that he would agree to . . . $14,865.14 in monthly payments, but that those payments would last for 24 months instead of 18 months.
>
> On the stock option, [Zimmerman] is agreeable to RGA's proposal—it will be based upon the difference between the stock value as of June 30, 2007 and $290,577, with a minimum price to be agreed as you and I discussed, and it will be payable over five years. However, we do request interest at prime, the same as for the non-ESOP stock buyout.
>
> The ESOP will be rolled over and paid out in accordance with the terms of the ESOP plan.
>
> As for the covenant not to compete . . . if RGA will agree to all of the aforementioned terms, [Zimmerman] will agree to RGA's demand for a five-year covenant not to compete (which is a non-solicitation agreement with a no-ownership-interest-in-competitor clause). However, Mr. Zimmerman must be permitted to work for manufacturers of products like those sold by RGA; he needs the option to go to work for a manufacturer . . . or a Master Distributor . . . or a Manufacturer's Representative . . . that only sells through distributors like RGA and not directly to the end-user as RGA does. As I told you, Mr. Zimmerman is 44 years old and has devoted his entire career in this industry, and this will permit him to use the skills and knowledge he has developed without competing with RGA.

SLIP OPINION

According to Zimmerman, this letter constituted an offer, which was the parties' first step in forming a settlement contract.

On August 10, 2007, Smith responded as follows:

> 1. RGA is agreeable, *subject to the execution of a definitive settlement agreement*, to the terms in your letter concerning Mr. Zimmerman's non-competition agreement that would generally constitute a non-solicitation/non-ownership covenant, but would permit him to work for a manufacturer.
>
> 2. I have clarified with my client that the proposed interest rate of 6% to be paid on the purchase of the non-ESOP shares is a condition of the offer of severance payments to Mr. Zimmerman. With respect to those amounts, my client has confirmed that payments would be based on annual compensation of $267,572.50, but that RGA's offer of 12-months salary paid in equal installments over 18 months is final (*i.e.*, payments of $14,865.14 per month).
>
> 3. With respect to the proposed payments relating to Mr. Zimmerman's expired options, RGA is willing to assure Mr. Zimmerman that the per share value (to be compared to the exercise price of $101) would not be less than 90% of the June 30, 2006 [sic] valuation of $178 per share. RGA will also require a 6% interest rate on this payout over 5 years. [This interest provision deleted by subsequent email]

(Emphasis added.) Zimmerman contends that Smith's letter operated either as an acceptance of the terms in the August 8, 2007 letter or, to the extent that Smith varied the terms of the August 8 letter, a counteroffer.

On August 14, 2007, Schlumberger emailed Smith that he had discussed the August 10 letter with Zimmerman and that "[*s*]*ubject to working out the language of the documents* which you and I discussed during our meeting, Mr. Zimmerman accepts those terms." (Emphasis added.) Zimmerman's position is that this email served as his acceptance of the terms in the August 10 letter and thus completed the settlement contract between the parties.

SLIP OPINION

Following receipt of Schlumberger's August 14 email, Smith drafted and sent to Schlumberger a five-page stock-purchase agreement, a ten-page settlement-and-release agreement, and a three-page noncompetition-and-confidentiality agreement. The documents, as evidenced by their length, expounded considerably on the attorneys' previous correspondence. This was particularly true of Smith's draft of the covenant not to compete, which covered almost twenty single-spaced lines and added definitions or provisos to the language contained in the attorneys' letters. Upon receipt of the documents, Schlumberger objected that, among other things, Smith's version of the covenant went "far beyond the simple nonsolicitation agreement that has always been the extent of the noncompetition agreement." Schlumberger then made numerous revisions to the settlement documents himself, retaining much of their length and detail, and crafting his own version of the covenant not to compete, which was quite complex. Smith reviewed and rejected Schlumberger's revisions, stating that the documents he drafted on behalf of RGA contained "the final terms acceptable to my client."

On September 5, 2007, Zimmerman sued RGA to enforce the alleged settlement agreement set forth in the August 8-14, 2007 letters and emails.[1] RGA answered that the parties had not yet reached a meeting of the minds on the settlement terms and therefore had no settlement contract. On February 22, 2008, Zimmerman filed a motion for summary

[1] Zimmerman also sued RGA's president, James McGhee, for breach of fiduciary duty and breach of the covenant of good faith and fair dealing. The circuit court later dismissed these counts, and they are not at issue on appeal.

SLIP OPINION

judgment, attaching the parties' correspondence and settlement documents, and arguing that an enforceable settlement agreement had been created as a matter of law. The court originally denied Zimmerman's motion but later granted it, finding that the parties' August 8–14, 2007 correspondence evidenced a settlement agreement and that Zimmerman should receive judgment for his severance pay and part of the stock-option buyout. In a subsequent order, the court awarded Zimmerman $25,000 in attorney fees as the prevailing party, pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1999). RGA appeals from both orders.

Our standard of review is well established. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___. On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Summary judgment is not proper where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.*

The law with regard to settlement contracts is equally familiar. Settlement agreements, like other contracts, must contain terms that are definitely agreed upon and reasonably certain. *Roberts v. Green Bay Pkg., Inc.*, 101 Ark. App. 160, 272 S.W.3d 125 (2008). Mutual

SLIP OPINION

agreement, as evidenced by objective indicators, is essential. *Id.* If there is no meeting of the minds, there is no contract. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003); *Williams v. Davis*, 9 Ark. App. 323, 659 S.W.2d 514 (1983). Whether or not a meeting of the minds has occurred is an issue of fact. *Daimler Chrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008).

Applying these standards, we conclude that reasonable minds might differ as to whether Mr. Zimmerman and RGA reached a settlement agreement in the August 8–14, 2007 correspondence. With regard to the covenant not to compete—the parties' main point of contention—Smith's August 10 letter states that RGA is "agreeable" to the terms in Schlumberger's letter. But Smith qualified that statement by saying that it was "subject to execution of a definitive settlement agreement." This language could reasonably be interpreted as something less than an absolute acceptance; it could be viewed as a condition to be fulfilled before a settlement contract can be created. To create a binding contract, an acceptance must unconditionally agree to all material terms of the offer. *MDH Bldrs., Inc. v. Nabholz Constr. Corp.*, 70 Ark. App. 284, 17 S.W.3d 97 (2000). Furthermore, Schlumberger's August 14 email stated that his acceptance of the terms in Smith's letter was "subject to working out the language of the documents." Given both parties' intention to make their acceptances "subject to" further writings, it cannot be said as a matter of law that they had concluded their settlement contract.

Zimmerman asserts that a settlement may be valid notwithstanding the fact that it has not been reduced to writing, citing *Arkansas Anthracite Coal & Land Co. v. Dunlap*, 142 Ark.

SLIP OPINION

358, 218 S.W. 839 (1920). Unlike *Arkansas Anthracite*, however, this case does not involve a situation in which the parties had undisputedly reached a settlement agreement and all that remained was to memorialize it in writing. Material questions remain here as to whether the parties have fully and finally settled. Moreover, the attorneys' correspondence indicates that a future writing was not a mere formality but rather a term of the contract that must be fulfilled as a condition of settlement.

Additionally, while the August letters demonstrate that the parties agreed on some aspects of the settlement, they did not necessarily assent to all material terms, as would be required to form a contract. *See Green Bay Pkg.*, *supra*. Smith's August 10 letter, which Zimmerman characterizes as an acceptance or counteroffer, addresses some facets of the proposed settlement but not all of them. It makes no mention of the ESOP stock rollover or the non-ESOP stock's being governed by the shareholder's agreement and being paid out over five years. Although there may have been reasons for these omissions, a fact-finder could reasonably determine that the omissions were simply further proof that the parties had not yet arrived at a complete settlement.

We therefore hold that summary judgment was inappropriate and must be reversed. Because our reversal means that no prevailing party has yet emerged, we also reverse the attorney-fee award.

Reversed and remanded.

HART and HOOFMAN, JJ., agree.