IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CORPORATION SERVICE COMPANY, d/b/a CSC THE UNITED STATES CORPORATION COMPANY, a Delaware corporation,	)	
Plaintiff,	)	
5.	)	C.A. No. 99C-12-210-JRS
KROLL ASSOCIATES, INC., a Delaware corporation,	)	
Defendant.	)	

Date Submitted: April 6, 2001
Date Decided: June 15, 2001

DECISION AFTER NON-JURY TRIAL
AND POST-TRIAL MEMORANDA.
JUDGMENT FOR PLAINTIFF.

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SLIGHTS, J.

I. INTRODUCTION

In this case, the Court addresses the all-too-familiar consequences when parties to a purported contract for services fail to memorialize in writing the terms of their relationship before the work commences. Plaintiff, Corporation Service Company ("CSC"), alleges that it performed certain

public records research (e.g. judgments, tax liens, UCC filings, etc.) at the request of defendant, Kroll Associates, Inc. ("Kroll"), for which Kroll agreed to pay CSC its usual and customary fees. Kroll admits that it requested CSC to perform public records research but denies that it agreed to pay CSC its so-called "customary" rate for services. Instead, Kroll alleges that its initial written request for CSC's assistance set forth Kroll's understanding of the fee CSC would charge for services rendered. According to Kroll, CSC never indicated that Kroll's statement of anticipated fees was inaccurate. Needless to say, the parties' understanding of the terms of their agreement, such as it existed, was never committed to writing.

CSC advances three alternative claims for relief: (1) the parties entered into a binding express oral agreement pursuant to which CSC would provide specified public records research for Kroll at CSC's customary rate for such services; (2) the parties, through their conduct, evidenced an intent to be bound by an implied in fact contract pursuant to which CSC would provide public records research for Kroll at CSC's customary rate for such services; or (3) to avoid Kroll's unjust enrichment, the Court should imply in law a contract pursuant to which Kroll will compensate CSC for its public records research at the fair market value for such services. Kroll has alleged by counterclaim that CSC misrepresented certain facts with respect to pricing at the outset of the relationship.[1] A bench trial was held on February 7, 2001. The parties' filed their last post-trial letter memoranda on April 6, 2001. To follow are the Court's findings of fact, conclusions of law, and verdict.

[1]This claims runs counter to the evidence adduced at trial and, based on the absence of any reference to the counterclaim in Kroll's post-trial submission, it appears to be an abandoned claim. In any event, as explained below, the Court concludes that there was no misrepresentation involved in the parties' negotiations. Consequently, the factual predicate for Kroll's counterclaim is missing and the claim will not be addressed further.

II. FINDINGS OF FACT

The parties' relationship began on April 9, 1999, when a representative of Kroll, Mary Curry ("Curry"), contacted CSC by telephone to determine whether CSC could perform expedited public records searches in three states to be completed within six days. Curry was told that CSC could perform the work. She then sent a facsimile to CSC on that same day confirming the scope of the work and her understanding of the fees: "We understand that you charge $25.00 per name per district searched." (Joint Ex. 2 at KR-0004)

Curry's stated understanding of CSC's fee structure was not accurate. CSC did not customarily charge on a "per name/per district" basis. Instead, consistent with industry practice, CSC charged on a "per name/per index" basis. Translated to lay terms, CSC would charge its clients a fee ($25) for each name it searched multiplied by the number of indices it searched.[2] There are several indices (e.g. judgment dockets, UCC filings, etc.) located in each "district" (or, more aptly, jurisdiction). Accordingly, CSC customarily would charge substantially more than $25 per district to perform public records research with respect to each name searched. The amount customarily charged depended, of course, on the number of names and indices searched.

CSC's response to Curry's facsimile was the subject of disputed testimony at trial. According

[2]There are limited exceptions to this pricing. For instance, CSC would combine certain indices and charge searches in them as one search (referred to as "bundled fees"), or would provide discounts for certain types of searches or for certain types of clients. These exceptions to the customary pricing structure, however, either were not implicated by Kroll's request for services or were provided to Kroll as reflected in CSC's invoices.

to CSC, its customer service representative, Lisa Smiley ("Smiley"), left a voice message for Curry in which she explained CSC's customary fees and costs for public records research and thereby presumably corrected Curry's misunderstanding of CSC's pricing. Curry admitted that she received a voice message from Smiley but denied that Smiley said anything about per index search fees. Rather, according to Curry, Smiley simply advised her of additional costs (e.g. travel, courier, facsimile, photocopy, statutory fees, etc.) which would be incurred by CSC and passed on to Kroll as a result of the searches. Thus, according to Kroll, Curry's initial April 9 statement with respect to the anticipated fees stood uncorrected during the course of the parties' relationship until CSC submitted its first estimate of fees for services rendered at the conclusion of the work.

Although the Court has no doubt that Smiley believed she had corrected Curry's misinformed understanding of CSC's fee structure, the preponderance of the evidence suggests that she did not. According to Smiley, she received Curry's April 9 facsimile on the day it was sent. She recalls that April 9 was a Friday and that she telephoned Curry in the afternoon to confirm receipt of the facsimile but did not discuss pricing or any other issues at that time. Smiley telephoned Curry again on April 12 to review the order and to discuss pricing issues. According to Smiley's supervisor, Paula Washburn ("Washburn"), CSC policy required that Smiley keep a detailed log of all telephone conversations. Smiley testified that she did not have time to make a log entry after her calls to and discussions with Curry on April 12. This is certainly understandable; Kroll's order was large and the time frame within which CSC was to complete the work was compressed. Nevertheless, even the after-the-fact log entry prepared by Smiley once the fee dispute with Kroll surfaced says nothing about Smiley's explanation to Curry of per index search fees.

Smiley prepared a memorandum to her superiors on April 20, 1999, which appears to be her

effort to summarize her contacts with Kroll before and during the working relationship. The memorandum also is silent with respect to Smiley's effort to correct Curry's misunderstanding of CSC's fee structure. Of particular note, the

memorandum does not mention Smiley's effort to explain per index search fees or otherwise to correct Curry's stated expectation of "per district" pricing.

Smiley acknowledged during trial that she did not speak directly with Curry about fees until all of the work was completed. According to Smiley, CSC's only attempt to correct Curry's clearly stated understanding of CSC's fee structure was Smiley's April 12 voice message to Curry. And Smiley's recollection of the detail of that voice message was tremulous at best. She could not recall if she actually said that CSC would charge "per index" searched or whether she said "per jurisdiction" searched. The rush to complete the many tasks at hand after Curry's initial contact apparently has clouded Smiley's memory of the details of this most critical communication.

Documents generated by Curry contemporaneously with the events at issue further support the conclusion that Smiley did not effectively correct Curry's understanding of CSC's fee structure. For instance, on April 16, Curry requested that Smiley provide her with an estimate of fees for work performed to date. Smiley complied and forwarded an estimate of $24,500 (more than $70,000 less than CSC's final invoice). The estimate did not provide a detailed explanation for the total fee - - for instance, it did not reflect per index search fees - - but it did make clear that the estimate was preliminary and would be followed by detailed invoices as work was completed. Upon receipt of the estimate, Curry immediately e-mailed her superior, Michael Fellner, to alert him of the estimate and to advise him that she intended to pursue strategies to negotiate a discount of a fee which she clearly perceived to be higher than anticipated.

An April 18 e-mail from Curry to Fellner further confirms that Curry had no idea that CSC would be charging Kroll $25 for each index searched: "I will have a more detailed invoice from them [CSC] by late Monday, but as previously reported, right now it is at $24,500, which is a much larger number than I expected...." (Joint Ex. 10) The fact that Curry believed the estimate to be high is evidence that she did not appreciate the per index pricing structure. The evidence reveals that Curry was well aware that she was requesting CSC to search multiple indices within each "district." Thus, she readily would have calculated a substantially higher estimated fee than $24,500 had she been anticipating per index search fees.

Both parties agree that Smiley offered to provide an estimate to Curry on April 12 but Curry declined the offer. According to Curry, her understanding of CSC's fees was stated in her April 9 facsimile and, based on that understanding, and her expectation of the number of searches that would be required to complete the job, she was comfortable allowing CSC to proceed with the work not knowing exactly what the final fee would be.[3] From Smiley's perspective, the fact that Curry declined her offer to provide an estimate at the outset of the relationship led her to conclude that Curry understood and approved of the usual and customary CSC fee structure. Here again, the parties

[3]It is clear from the evidence that Curry was not entirely clear what the final charge from CSC would be at the conclusion of the job. She did not know what costs would be incurred and she did not know exactly how many searches would be performed. She estimated a fee in her mind that reflected an anticipated range of searches and a $25 per district search fee. The Court is also satisfied, however, that she did not expect a separate charge for each index searched and that she would not have agreed to such terms had she been made aware of them.

-- at least subjectively -- were not reading from the same page.

Based on the foregoing, the Court has reached certain conclusions of fact relevant to the disposition of this controversy: (1) CSC believed that Kroll was accepting its usual and customary charges for public records searches;[4] (2) CSC failed effectively to communicate to Kroll its expectations with respect to fees and, indeed, objectively appeared to accept Kroll's fee proposal; (3) Kroll believed that CSC would charge $25 per name per district and continued in this belief throughout the parties' business relationship; (4) Kroll effectively communicated this expectation to CSC at the outset of the relationship; (5) CSC would not have performed the work had it known that Smiley had failed to correct Curry's misunderstanding with respect to fees; and (6) Kroll would not have authorized CSC to perform the work had it known that CSC would charge its usual and customary fees.

III. CONCLUSIONS OF LAW[5]

A. Did the Parties Form an Express Contract?

CSC alleges that it entered into an express contract with Kroll pursuant to which "Kroll agreed to pay CSC its customary and regular rates." (D.I. 38 at 9) "The burden is on the plaintiff to prove by a preponderance of the evidence the existence of the contract to which the defendant is a party."[6] "In ascertaining the intent of the parties to a contract, it is their outward and objective

[4]This conclusion is based solely upon the Court's perception of Smiley's subjective view of the parties' relationship.

[5]The parties have agreed that Pennsylvania law governs this dispute.

[6]*Viso v. Werner*, Pa. Supr., 369 A.2d 1185, 1187 (1977).

manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter."[7] In the context of the facts *sub judice,* Smiley's subjective view of the parties' contract is not germane to the determination of whether a contract exists. Rather, it is her objective manifestation of intent which must direct the Court's analysis.[8]

[7] *Ingrasia Const. Co. v. Walsh*, Del. Super., 486 A.2d 478, 483 (1984)(citation omitted).

[8] *Id.*

The Court has found that Curry clearly expressed to CSC her expectations with respect to fees by her facsimile of April 9. The Court has also found that Curry's understanding of CSC's customary fees was not accurate. CSC contends that Kroll "bears the risk of mistake," particularly in light of Curry's decision to decline CSC's offer to provide an estimate at the outset of the transaction. (D.I. 42 at 4)[9] CSC's argument is advanced with little grace. Curry's April 9 facsimile contains a clear statement of Kroll's expectation with respect to fees. Curry did not state that Kroll would pay the "fair value" of CSC's services as did the defendant in the principal authority upon which CSC relies in advancing this argument.[10] Her statement was not at all vague or ambiguous. Rather, she stated Kroll's expectations with respect to fees clearly and specifically. There was no "mistake" or ambiguity as to the fee structure for the work to be performed, at least not from Kroll's perspective.

[9]In support of this proposition, CSC cites to Restatement (Second) of Contracts § 154 (1981)(stating that party to a contract bears the risk of "conscious ignorance").

[10]*Zvonik v. Zvonik*, Pa. Super., 435 A.2d 1236 (1981)(finding that party to a contract who agreed to pay "fair value" for services could not later complain when final bill was higher than expected).

The fact remains, however, that Curry's understanding of CSC's fees was not correct. The question arises, then, whether CSC's silence in the face of Curry's clearly communicated, albeit mistaken, expectations of fees constitutes an acceptance of that pricing such that a binding contract was formed.[11] "As a general rule, an offeree does not need to reply to an offer, and his silence and inaction will not be construed as an assent to an offer."[12] When the offeree through his conduct leads the offeror to conclude that he has accepted the proposal, however, the court will view silence as being tantamount to acceptance.[13] As Justice Holmes instructs, "the proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party – a principle sometimes lost sight

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[11]Pennsylvania recognizes the traditional elements of contract: offer, acceptance, and consideration. *See Atacs Corp.*, 155 F.3d at 665 (citations omitted). The parties have not alleged that the relationship between them - - however it may be characterized - - was not supported by consideration. The heart of the dispute as framed by the parties is whether there was a mutual manifestation of intent to be bound by contract and, if so, under what terms.

[12]*See Chorba v. Davlisa Enter. Inc.*, Pa. Super., 450 A.2d 36, 39 (1982)("silence will not constitute acceptance of an offer in the absence of a duty to speak"). *See also* 2 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 6:49 (4th ed. 1991).

[13]*Id.* at § 6:53.

of in the cases."[14]

[14]*Hobbs v. Massasoit Whip Co.*, Mass. Supr., 33 N.E. 495 (1893).

Here, although Curry's statement of Kroll's expectation with respect to fees was never specifically addressed by CSC, it was not followed by complete silence either. Instead, Smiley spoke with Curry by voice message on the first business day after receiving the April 9 facsimile and explained to Curry additional fees which would be incurred by CSC and charged to Kroll during the search process. By failing to address Curry's fee proposal in the context of a discussion, the purpose of which was to clarify CSC's pricing, Smiley, on behalf of CSC, objectively manifested her assent to the proposal.[15]

Based on the foregoing, the Court concludes that an express oral contract was formed as a result of the sequence of communications between the parties culminating in the April 12 telephone discussion between Curry and Smiley. The contract which was formed provided that CSC would perform public records searches at $25 per name per jurisdiction plus costs incurred.

B. Did the Parties form an Implied in Fact Contract?

[15] *Ingrasia Const. Co.*, 486 A.2d at 483(objective manifestation of assent tantamount to acceptance).

Having concluded that the parties formed an express oral contract, the Court is reluctant to analyze whether an implied in fact contract was formed by virtue of the parties' conduct (as opposed to their express manifestations of intent). Nevertheless, the Court is mindful that the line separating express manifestations of intent to be bound by contract and intent inferred by conduct is not a bright one.[16] Accordingly, the Court has viewed the facts through the lens of implied in fact contract principles to determine if recovery on this basis is appropriate here. As explained below, the Court concludes that even if CSC did not expressly accept Kroll's fee proposal, its acceptance of the proposal may be inferred from its conduct.

"Implied contracts ... arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract."[17] In view of the Court's analysis of the express contract issue, it should come as no surprise that the Court has concluded that CSC's failure even to address Curry's statement of Kroll's understanding of fees at any time, particularly when the issue of price was being discussed early in the relationship by Smiley and Curry, would be deemed "in the common understanding of men [or women as the case may be]" as evidence of CSC's intent to contract with Kroll in accordance with Curry's proposal.[18] Thus,

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[16] *See e.g. Ingrassia Const. Co., Inc.,* 486 A.2d at 483 (noting that alternative claims of implied in fact contract and express oral contract both may be viable theories of recovery where acceptance is inferred by conduct).

[17] *Pollock Indus., Inc. v. General Steel Castings Corp.,* Pa. Super., 201 A.2d 606, 610 (1964).

[18] *Id.*

whether one characterizes the parties' meeting of the minds as an express or implied in fact contract, the result is the same: CSC is bound by the terms

proposed by Curry at the outset of the parties' relationship as modified by Smiley on April 12.[19]

C. Damages

The parties focused their trial presentations on the gravamen of this dispute: did the parties form a contract and, if so, what was its terms? Neither party addressed the issue of damages in the event the Court determined that the contract contemplated a per name per district search fee.[20] Consequently, the Court cannot reach a final verdict at this time as to damages. The Court will, however, provide some guidance to the parties so that the record can be supplemented with appropriate damages evidence. Indeed, the Court is hopeful that with the direction provided below the parties can stipulate to damages (without waiving their respective rights to appellate review of all issues).

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[19]Having concluded that the parties entered into either an express or implied in fact contract, the Court need not address the parties' arguments with respect to quasi contract. *See Styer v. Hugo,* Pa. Super., 619 A.2d 347, 350 (1993)(quasi contract assumes that no express or implied in fact contract exists between the parties).

[20]CSC provided documentation to support its claim for damages on the basis of a per index per name search fee. Kroll argued generally that "an award of approximately $15,000, plus interest at the legal rate, would be appropriate in this case." (D.I. 41 at 8). Yet neither party provided any evidence (or, at least, readily discernable evidence) with respect to the number of names, "districts" and/or "jurisdictions" searched by CSC. Nor did either party present evidence to explain the out-of-pocket expenses incurred by CSC during the project.

In accordance with the terms of the contract as interpreted by the Court, Kroll will pay CSC $25 per name per district (jurisdiction) searched. This number should be easy to calculate and the Court will do so if the parties will not. If the parties will not stipulate as to the search fees incurred by CSC, the parties will supplement the record within thirty (30) days with evidence reflecting the number of names CSC searched in each jurisdiction.

The Court has already found that Smiley advised Curry that out-of-pocket expenses incurred by CSC would be passed on to Kroll and that Curry agreed to this addendum to the fee proposal. Thus, reasonable out-of-pocket expenses over and above the search fees are due to CSC in keeping with the parties' agreement.

The evidence reveals that CSC incurred out of pocket expenses in the amount of $26,060.00. (Jt. Exs. 1, 19) These expenses are not broken down or summarized in any of the exhibits submitted to the Court. A breakdown is important to insure that reimbursement of expenses is consistent with the parties' contract as interpreted by the Court. For instance, it appears that the costs identified by CSC include so-called correspondent fees. These fees, in essence, are search fees charged by sub contractors to CSC. It is difficult to determine whether the correspondent fees charged to CSC reflect per index search fees. If they do reflect per index search fees, they are not recoverable in their entirety. There may be other expenses the amount of which are

affected by a distinction between per index and per district pricing. If the parties cannot reach agreement with respect to the appropriate amount of correspondent fees (and other fees affected by the distinction just referenced), then the parties will supplement the record within thirty (30) days with evidence reflecting a breakdown of the fees charged by the correspondents, including the number of names searched in each district. Likewise, if the parties cannot agree on the amount of other out-of-pocket expenses, then the parties will supplement the record within thirty (30) days with a breakdown of such expenses.

The Court will award prejudgment interest at the legal rate as of April, 1999, the time CSC's invoices were submitted to Kroll.[21] The evidence reveals that the applicable legal rate was 9.5% (discount rate of 4.5% + 5%). Once the final amount of the verdict is determined, the interest shall be calculated to run from April 16, 1999 (the date demand for payment was rejected) to the date of the verdict.

IV. CONCLUSION

The Court has concluded that the parties entered into a contract pursuant to which CSC agreed to perform public records research for a fee of $25 per name per district searched plus reimbursement for out of pocket expenses. Accordingly, the

[21] 6 *Del. C.* § 2301.

Court will enter a verdict for CSC on its breach of contract claim and direct the Prothonotary to enter judgment in favor of CSC in an amount to be determined upon supplementation of the evidentiary record in accordance with this opinion. The Court will award prejudgment interest on the verdict at the legal rate. CSC's request for attorneys fees is denied. The Court also will enter a verdict in favor of CSC and against Kroll on Kroll's counterclaim. Costs of this action shall be paid by Kroll.

IT IS SO ORDERED.

Judge Joseph R. Slights, III