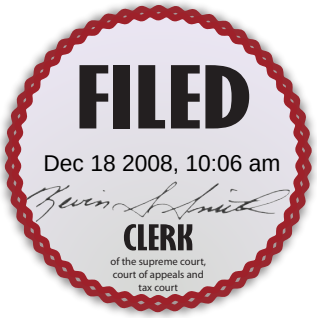

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IN THE
COURT OF APPEALS OF INDIANA

TIMBERLAND LUMBER CO., *et al*	)	
	)	
Appellant-Respondent-Cross Plaintiff,	)	
	)	
vs.	)	No. 61A05-0805-CV-285
	)	
MARRILL GETCHE	)	
	)	
Appellee-Petitioner-Cross Defendant.	)	

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swain, Judge
Cause No. 61C01-0712-SC-391

December 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Tim Boone and Timberland Home Center (collectively, Timberland, unless otherwise indicated) appeal a judgment in favor of Marrill Getche in Getche's small claims action against Timberland and A & B Windows for breach of contract. Timberland presents the following consolidated, restated issue for review: Did a contract exist between Getche and Timberland?

We affirm.

The facts favorable to the judgment are that a May 2004 storm significantly damaged the deck of Getche's home and it was determined that the deck boards would need to be replaced. Getche's homeowner's insurer, the Hartford Company, agreed that it would cover the cost of replacing the cedar deck. After bids were submitted for the job, A & B Windows was selected to replace the deck. Getche chose Timberland to supply the lumber for the job primarily because Getche had known Tim Boone, a Timberland salesman, for twenty years. Boone brought a sample of the wood he proposed to supply, custom clear grade, which was a higher grade lumber than was used in constructing the deck that was being replaced. Getche agreed. As for payment, Getche's insurer paid Getche the covered amount of the claim, Getche then paid A & B Windows for materials and labor, and A & B Windows in turn paid Timberland for the materials.

Timberland delivered the lumber to be used on the project to A & B Windows. Dave Funk of A & B Windows inspected the lumber and was concerned about several boards that were marred by a row of marks crossing them. He called Getche and asked him to inspect the boards and decide whether they were satisfactory. After inspecting the six affected

boards, Getche determined that they were unacceptable and notified Boone of this fact. Timberland delivered replacement boards to A & B Windows and the new deck was installed. Almost immediately after installation, Getche noted that the boards used on the deck contained as many as fourteen or fifteen knots apiece – far more than the three or so that were on the original boards used in the deck being replaced, and certainly more than custom clear grade boards were supposed to contain. In fact, it was at this point that Getche learned Timberland had supplied custom knotty boards, which was of lesser quality than custom clear grade boards. Getche contacted Boone and advised him of the situation. After a series of communications, Boone informed Getche via a December 6, 2007 letter that Timberland would replace only six of the existing boards, and if all boards were cleaned and re-stained, it "would be an adequate deck." *Transcript* at 9. As it turned out, according to Getche,

> A & B had agreed to put down a new deck, take the old deck off, and put the new deck down, but they weren't going to stand good on any of the boards. They thought that was Tim's obligation to do. Tim felt that it was A & B's obligation to a certain degree[.]

Id. at 12.

Ultimately, Timberland refused to pay for replacing the custom knotty boards installed by A & B Windows with higher grade custom clear boards. On December 10, 2007, Getche commenced a small claims action against Timberland and A & B Windows by filing a notice of claim naming both as defendants in the Parke County Circuit Court, Small Claims Division. Following a small claims trial, the trial court entered judgment in favor of Getche with respect to the claim against Timberland, but in favor of A & B Windows with respect to that claim. Timberland appeals.

In small claims actions, "'the trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.'" *Truck City of Gary, Inc. v. Schneider Nat'l Leasing*, 814 N.E.2d 273, 277 (Ind. Ct. App. 2004) (quoting Ind. Small Claims Rule 8(A)). Therefore, when reviewing the judgment in a small claims action, our standard of review is "particularly deferential". *Olympus Props., LLC v. Plotzker,* 888 N.E.2d 334, 335 (Ind. Ct. App. 2008). Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). The clearly erroneous standard applies to appellate review of facts determined in bench trials, and we give due regard to the opportunity of the trial court to assess witness credibility. Ind. Trial Rule 52(A); *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065 (Ind. 2006). Questions of law, however, are reviewed de novo. *Olympus Props., LLC v. Plotzker,* 888 N.E.2d 334.

In this case, the trial court effectively determined that an oral contract existed between Timberland and Getche, calling for Timberland to supply custom clear cedar board for replacing Getche's deck. Timberland contends the trial court erred in determining that a contract existed between the two parties because (a) there was no privity between Getche and Timberland with respect to the purchase of the wood in question; (b) Getche was merely a third party beneficiary to the contract for purchase of the wood from Timberland, and therefore not entitled to sue under the contract; and (c) there was no "meeting of the minds" sufficient to form a contract between Getche and Timberland in the first place.

The principles by which this action must be resolved are well settled.

Contracts are formed when parties exchange an offer and acceptance. For an

> oral contract to exist, parties have to agree to all terms of the contract. If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed. A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract. Whether a set of facts establishes a contract is a question of law.

Fox Dev., Inc. v. England, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005) (citations omitted).

In the instant case, Getche has adequately proven the existence of an oral contract with Timberland for the sale of custom clear grade board for use on his deck. Getche was the one responsible for selecting Timberland to supply the wood. He expressed his preference to Funk that Timberland be the supplier and Funk agreed. Getche then contacted Timberland's agent, Boone, and informed Boone of his needs and wishes with respect to replacement deck boards. This direct solicitation and contact between Getche and Boone (Timberland) defeats Timberland's argument that no privity existed between Getche and Timberland.

Further, the evidence favorable to the judgment reveals that Boone showed a sample of custom clear grade board to Getche and assured Getche that such would be used on Getche's deck. Clearly, this was sufficient to demonstrate a meeting of the minds with respect to the subject of the contract, i.e., custom clear grade lumber for Getche's deck. The fact that Timberland delivered the boards to the installer, A & B Windows, and not Getche, is irrelevant on the issue of whether an oral contract existed between Getche and Timberland.

Finally, as Getche indicated at the trial, the price of the wood grade in question would not have been the subject of negotiation and therefore was easily ascertainable. Thus, it cannot be deemed a missing essential term that would defeat the existence of a contract. We note in this regard that Ind. Code Ann. § 26-1-2-305 (West, PREMISE through 2008 2nd Regular Sess.) of Indiana's Uniform Commercial Code provides that parties can conclude a

contract for sale even though the price is not settled "if they so intend". In such cases, the price will be "a reasonable price at the time for delivery … if nothing is said as to price", "fixed in terms of some agreed market", or "fixed by the seller … in good faith". I.C. § 26-1-2-305(1), (1)(c), and (2), respectively. In this case, as discussed above, we conclude that Getche and Boone did "so intend", and that the price of the lumber was Timberland's standard price for custom clear cedar boards, a price which clearly meets the good faith requirement. Thus, the failure to discuss the price term was not fatal to the formation of a contract between Getche and Timberland.

Although framed in slightly different terms, the remaining issues presented by Timberland also essentially represent challenges to the existence of a contract. Having determined that the small claims court did not err in determining that the parties did indeed enter into a contract for the purchase of custom clear cedar boards, we need not address them.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur