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# IN THE
# COURT OF APPEALS OF INDIANA

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| JON C. SPURR, d/b/a SPURR LAW OFFICES, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 83A01-0602-CV-77 |
| | ) | |
| KAREN PERRY, VIRGINIA HOLLOWELL, JULIA CONRADO and ROSE SPARKS, | ) | |
| | ) | |
| | ) | |
| Appellees-Plaintiffs. | ) | |

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Robert Lowe, Special Judge
Cause No. 83C01-0411-PL-15

**November 16, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

John C. Spurr, d/b/a Spurr Law Offices ("Spurr") brings this interlocutory appeal of the trial court's denial of his motion for summary judgment in the action brought against him by Karen Perry, Virginia Hollowell, Julia Conrado, and Rose Sparks (collectively, "the Plaintiffs").

We reverse.

## ISSUE

Whether the trial court erred in denying Spurr's motion for summary judgment.

## FACTS

In the fall of 2002, Spurr met with 93-year-old Rena Ferro at her home to discuss Ferro's desire to have Spurr draft a will for her. Based on Ferro's instructions to him, Spurr drafted a will and mailed it to Ferro on November 6, 2002. This will would have devised certain items of personal property to Ferro's surviving siblings – Virginia Hollowell, Rose Sparks, and Julia Conrado – and her niece, Hollowell's daughter, Karen Perry; sundry personal items to other named individuals; $2,000 for grave services; and $2,000 to a church; and one-quarter of her residuary estate to each of Hollowell, Sparks, Conrado, and Perry. Ferro paid Spurr $110 for drafting the will. Ferro never signed the will, and she died intestate on April 12, 2003.

Ferro's estate was administered, with Perry serving as personal representative. The estate was distributed in late 2003. Heirs receiving distributions were Ferro's three surviving siblings – Hollowell, Sparks, and Conrado – and the nephew, great-nephews, and great-nieces who had survived her deceased siblings.

On November 15, 2004, the instant complaint was filed against Spurr by Ferro's three surviving sisters and Perry. The complaint asserted one count of negligence. The Plaintiffs alleged that Spurr had "indicated that he would" not only draft a will for Ferro but that he would "return to her home to complete the making of the will by assisting her in executing" it; that on the will sent to her by Spurr, his name was typewritten below one of the witness signature lines; and that Spurr had not responded to several telephone messages from Ferro's housekeeper. (App. 50). The Plaintiffs asserted that Ferro's "will was never completed by [Spurr]," and due to "Spurr's negligent failure to complete Ms. Ferro's will," Perry "received no bequest from" Ferro's estate and the sisters' distributions from Ferro's estate were "significantly diminished from what [their] bequest[s] would have been had the will been completed." *Id.* at 51, 53.[1] In addition, the Plaintiffs claimed that Spurr had breached his "contract with Ms. Ferro," of which the Plaintiffs were third party beneficiaries. *Id.* at 54.

Spurr answered the complaint, and on October 20, 2005, Spurr filed a motion seeking summary judgment on both counts. Spurr submitted his affidavit stating that Ferro "hired [him] to draft a will and provide it to her for her to review"; and that he had charged her an hourly rate and billed her for his time, had drafted and mailed a will to her on November 6, 2002, and had neither received any "communication from" nor "was . . . asked to do anything more for her" by Ferro thereafter. *Id.* at 31. Spurr's brief asserted that the Plaintiffs essentially claimed that he had a duty to the Plaintiffs, "as third party

[1] The complaint included attachments evidencing the distribution of Ferro's estate.

beneficiaries under a non-executed will, to force . . . Ferro to sign and otherwise properly execute said potential will." *Id.* at 7. Spurr argued that he had owed no duty to the Plaintiffs, and that he "performed and completed" his contract with Ferro "to draft a will and to deliver said draft" to her. *Id.* at 10, 15.

On November 16, 2005, the Plaintiffs filed their brief in opposition, submitting therewith the deposition of Edna Burke, Ferro's housekeeper. The brief drew the trial court's attention to testimony by Burke that (1) when Spurr left the house after meeting with Ferro, he "said that he would come back and he would get it all signed after she made sure . . . everything was all right";[2] and (2) in December of 2002, Burke had placed three telephone calls to Spurr's office and left messages for Spurr to call Burke "about Renee Ferro," but Spurr never returned the calls. *Id.* at 110, 142. The Plaintiffs argued that there were genuine issues of material fact as to whether Spurr "owed a duty to" the Plaintiffs and whether he "materially breached his contract with Ms. Ferro," proximately causing "the Plaintiffs, as third party beneficiaries of the contract, to sustain substantial damages." *Id.* at 33, 34.

Spurr filed a reply brief in support of his motion for summary judgment. Spurr asserted that negligence "cannot be established by inferential speculation alone," and that the Plaintiffs were asking the trial court "to speculate as to why Rena Ferro did not sign her will and indeed that Rena Ferro ever intended to sign the will" drafted by Spurr. *Id.* at 151. Spurr referred to Burke's testimony that she "d[id] not" know why Ferro "chose

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[2] According to Burke's deposition, Ferro met privately with Spurr in Ferro's kitchen – while Burke mowed the yard. However, Ferro called her back into the house, and it was at this point that Burke heard Spurr speak to Ferro.

not to sign" the will during the months that it was in Ferro's possession, and that Ferro had not asked Burke to call Spurr on her behalf during January, February, March or April of 2002. *Id.* at 152. Spurr also argued that because an unexecuted, unprobated will is "wholly inoperative for any purpose," *Crowell v. Himes*, 117 Ind. App. 56, 69 N.E. 2d 135, 140 (1962), there was no "existing contract" from which the Plaintiffs could claim to be third-party beneficiaries. *Id.* at 154.

On December 20, 2005, the trial court held a hearing on the motion for summary judgment.[3] The CCS reflects that on January 12, 2006, the trial court denied Spurr's motion for summary judgment.[4] Spurr asked the trial court to certify its order for interlocutory appeal. The trial court did so, and we accepted appellate jurisdiction.

DECISION

When we review the appeal of a decision by the trial court to deny a motion for summary judgment, our standard of review

> is the same as that used in the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

*Corr v. American Family Ins.*, 767 N.E.2d 535, 537 (Ind. 2002); *see also* Indiana Trial Rule 56(C). All facts and inferences drawn from those facts are construed in favor of the nonmoving party. *Id.*

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[3] No transcript of this hearing was submitted with Spurr's appeal.

[4] Apparently the trial court did so by minute entry, inasmuch as no order to that effect is contained in either the Appendix or Spurr's Appellate brief. *See* Indiana Appellate Rules 50(A)(2)(b), 46(A)(10).

We begin by considering what the contract between Spurr and Ferro was. We do so because this is dispositive in addressing both the Plaintiffs' claim that Spurr breached his contract with Ferro and their negligence claim – Spurr's alleged "negligent failure to complete Ms. Ferro's will." (App. 53).

A valid contract requires an offer, an acceptance, consideration, and the manifestation of mutual assent. *Family Video Movie Club v. Home Folks, Inc.*, 827 N.E.2d 582, 585 (Ind. Ct. App. 2005). An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Zimmerman v. McColley*, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981)). The acceptance of an offer must be made by an overt act and must meet the terms of the offer in every respect. 6 I.L.E. *Contracts* § 10 (2000). For an oral contract, both parties have to agree to all terms of the contract. *Fox Development, Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005). Whether a set of facts establishes a contract is a question of law. *Id.* The elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages. *Breeding v. Kye's, Inc.*, 831 N.E.2d 188, 191 (Ind. Ct. App. 2005). A party breaches a contract when it fails to "perform all of its contractual obligations." *Strodtman v. Integrity Builders, Inc.*, 668 N.E.2d 279, 292 (Ind. Ct. App. 1996), *trans. denied*.

According to the designated evidence, Spurr met with Ferro in her home on one occasion in the fall of 2002. Burke's deposition and Spurr's affidavit indicate that the purpose of the meeting was Ferro's desire to have Spurr draft a will for her. The only

persons present for their discussion were Ferro and Spurr. After their meeting, as Spurr was departing, Burke heard him state that he would send her the will. Spurr drafted a will for Ferro and mailed it to her. Based on his time spent at his hourly rate, Spurr charged Ferro $110 for his work for her, and she paid him that amount. Thus, we must agree with Spurr that there was a contract between Spurr and Ferro for him to draft a will for her and that he did so. Upon Ferro's receipt of the will drafted for her by Spurr, he had completed his contractual duty. Because Spurr did what he was contractually obligated to do, he did not breach his contract with Ferro. *See Strodtman*, 668 N.E.2d at 282.

It is true that Burke's deposition indicates that she heard Spurr say that "he would come back and he would get it all signed after she made sure . . . everything was all right." (App. 110). However, this appears to have been an offer on Spurr's part that was not accepted by Ferro. Spurr's affidavit states that he "received no communication from . . . Ferro after November of 2002, nor was [he] asked to do anything more for her." (App. 31). Burke testified to having placed three calls to Spurr's office in December of 2002. However, Burke acknowledged that she never spoke directly with Spurr. Burke had left messages asking Spurr to call Burke "about" or "regarding" Ferro, (App. 142), but Burke did not testify that she left any message about – or even knew – why Ferro wanted to speak to Spurr. Thus, there was no evidence indicating that Spurr had been aware that Ferro desired him to do anything more for her on the will or to assist her with execution of the will. Further, Burke acknowledged that Ferro did not ask her to contact Spurr during the months of January, February, March and April of 2003. Thus, the reasonable

inference from the designated evidence is that Ferro did not accept Spurr's offer to provide further legal assistance to her in regard to the will he had drafted.

The Plaintiffs also appear to argue that the contract between Spurr and Ferro contemplated further action by him with respect to the will because what he sent her was "a draft." Plaintiffs' Br. at 3. However, the document does not state that it is a draft, and they do not contend that it is legally inadequate in any way. Similarly, they direct our attention to Spurr's typewritten name appearing on the will as a witness. They assert that by doing so, Spurr "made himself a necessary witness for [the will's] valid execution." Plaintiffs' Br. at 14. However, they cite no authority for the proposition that the fact that his name was typed on the will as a witness required that he witness it in order for the will to be validly executed. Ferro was free to seek whomever she desired to witness the will drafted for her by Spurr.

The designated evidence before the trial court established that Spurr completed his contractual obligation to draft a will for Ferro. Thus, the Plaintiffs' claims that he (1) negligently failed to complete his contract or (2) breached his contract with Ferro must fail. Accordingly, the trial court erred when it denied Spurr's motion for summary judgment.

Reversed.

NAJAM, J., and FRIEDLANDER, J., concur.