

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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21ST CENTURY ARCHIVES, INC.,

Plaintiff/Counterdefendant-Appellant,

v

EPI PRINTERS, INC.,

Defendant/Counterplaintiff-Appellee.

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UNPUBLISHED

June 24, 1997

No. 192528

Calhoun Circuit Court

LC No. 94-002290-CK

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court judgment dismissing plaintiff's action and ordering plaintiff to pay defendant the sum of \$41,453.84. We affirm.

This case involves a dispute over the formation and terms of a contract. Representatives of plaintiff's and defendant's respective businesses entered into discussions concerning the production of certain trading cards entitled "Terror Tales" and "Weird Tales." Following the exchange of various documents and conversations between the parties, defendant performed certain services involving the trading cards for plaintiff. Subsequently, a dispute arose over the price to be paid for the "litho prep" or "separation" services provided by defendant. Plaintiff filed a complaint against defendant seeking to compel defendant to release the trading cards held by defendant. Defendant filed a counter-complaint against plaintiff seeking a judgment of \$62,793.02 for services provided to plaintiff. Following a bench trial on August 11, 1995, the trial court entered judgment in favor of defendant, finding that a contract was formed on September 17, 1993, and ordering plaintiff to pay defendant \$41,453.84.

I

Plaintiff contends that the trial court's factual findings were clearly erroneous, and therefore, the verdict was against the great weight of the evidence. Specifically, plaintiff challenges the trial court's findings that no contract was formed between the parties on August 18, 1993, and that there was mutual assent between the parties on September 17, 1993.

Certain elements are necessary to make a contract. There must be, among other things, an offer and acceptance as well as consideration. *Kirchhoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937). Mere discussions and negotiations cannot be a substitute for the formal requirements of the contract. *Id.*

While some evidence of an agreement was presented, conflicting evidence was also presented showing that the August 18 document represented preliminary negotiations. If there is conflicting evidence, the question of credibility should be left for the factfinder. *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968). The trial court's finding that the August 18 document represented a part of the parties' preliminary negotiations and did not create a contract was not clearly erroneous.

Further, a valid contract requires a meeting of the minds on all the essential terms. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). A meeting of the minds, or mutual assent, is judged by an objective standard, looking to the express words of the parties and their visible acts, and not to their subjective states of mind. *Id.* If there is conflicting evidence, the question of credibility should be left for the factfinder. *Whitson, supra* at 601. At the hearing regarding plaintiff's motion for a new trial, the trial court acknowledged that the parties provided conflicting testimony and that, as the factfinder, he weighed the believability and credibility of the evidence presented. Evidence was presented that the parties negotiated and agreed to the September 17 document. The trial court found the testimony of William Guzy, EPI's president, to be more believable than that of Keith Cunningham, owner of 21st Century, and determined that the parties formed a valid contract based on the September 17 document. Because evidence was presented to establish that a contract had been formed on September 17, 1993, and the trial court was free to determine the credibility of such evidence, the findings of fact challenged by plaintiff were not clearly erroneous. Therefore, the verdict is not against the great weight of the evidence, and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

## II

Next, plaintiff argues that the award of damages of \$41,453.84 to defendant is excessive and plaintiff is entitled to remittitur.

In determining whether remittitur is appropriate, the proper consideration is whether the award was supported by the evidence. *Clemens v Lesnek*, 200 Mich App 456, 464; 505 NW2d 283 (1993). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). The power of remittitur should be exercised with restraint. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the award should not be disturbed. *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989).

The trial court found that the September 17, 1993, quote constituted a contract between the parties and that pursuant to that contract, plaintiff owes defendant \$41,453.84. At the hearing regarding plaintiff's motion for a new trial and for remittitur, the trial court stated that although there was expert testimony of damages totaling \$7,000, the court gave the same weight to that witness' testimony as would be afforded any other witness. The trial court denied plaintiff's request for remittitur, stating that there was no basis to enter into any type of remittitur.

The issue disputed between the parties was the cost of the litho prep service and who was responsible for payment of that cost. The September 17 document required plaintiff to pay \$39,850 for the litho prep service. EPI's president testified at trial that the current balance of plaintiff's account is \$62,793.02, less the \$13,355.77 plaintiff had been ordered to pay pursuant to a court order. This calculation would result in an award of \$49,437.25. Of this amount, \$7,983.41 represents financing charges. Plaintiff's expert witness estimated the reasonable value of the litho prep services to be \$7,000. Plaintiff argues that the only damage award supported by the evidence is the \$7,000 estimated by Altomare.

Damages based on the testimony presented at trial could range from a low of \$7,000 as argued by Altomare, to a high of \$62,793.02 as argued by defendant. While the trial court did not detail its calculation of the damage award, the amount of \$41,453.84 apparently represents the \$49,437.25 requested by defendant, less the \$7,983.41 in finance charges which the court stated were not supported by the evidence. Such an amount falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation. *Frohman, supra* at 415. Therefore, the trial court did not abuse its discretion in denying plaintiff's request for remittitur.

Affirmed.

/s/ Hilda R. Gage

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald