STATE OF MICHIGAN

COURT OF APPEALS

MEGA AIR, INC. and WALTER E. JONES d/b/a JONES AVIATION TRADING COMPANY,

Plaintiffs-Appellants,

v

USA JET AIRLINES, INC. d/b/a ACTIVE AERO GROUP,

Defendant-Appellee.

UNPUBLISHED
February 19, 2002

No. 226297
Wayne Circuit Court
LC No. 97-736814-CZ

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant in this contract action. We affirm.

Mega Air, Inc. retained aircraft broker Walter Jones to sell a Learjet and to locate and purchase a Falcon 20 aircraft equipped with a cargo door. In September 1997, Jones began negotiations with USA Jet Airlines, Inc. broker, Steve Dandeneau,[1] for the purchase of a Falcon 20 that USA Jet had for sale. In October 1997, a document titled "Offer to Purchase" was drafted and stated, in pertinent part:

> Subject to the execution of a definitive sales contract between the parties, Peregrine Aviation Services, Inc. as agent, hereafter referred to as "Agent," to the Aircraft owner USA Jet Airlines, Inc. does hereby counter your offer for the Purchase of Falcon model 20C (Cargo) serial number 057 for the full purchase price of $1,510,000.00 from Walter B. Jones, d/b/a The Jones Aviation Trading Company hereinafter referred to as "Purchaser" under the following terms and conditions:
>
> * * *

[1] Steve Dandeneau was the Executive Sales Director of Peregrine Aviation Services, Inc.

> 6. As part payment, Purchaser offers, subject to Seller's pre-purchase inspection, 1979 Learjet model 25 D serial number 268 valued at $887,500.00 free and clear of liens or encumbrances. . . . Aircraft will be delivered with all log books and historical records, all spare parts loose and fixed equipment. Aircraft will be delivered in airworthy condition with all equipment operating normally.
>
> Should the above terms and conditions be acceptable, Purchaser will place a deposit $50,000.00 with AIC Title Services in Oklahoma City, Oklahoma to be held in escrow pending the final closing of this transaction. Purchaser will make prompt arrangements to conduct a pre-purchase inspection of the Aircraft at its home base (YIP) to insure to Purchaser's satisfaction that the Aircraft is as represented. Closing and full funding of this transaction will be accomplished within a mutually agreed upon time period following the satisfactory completion of the terms and conditions of this agreement, and in the event that Purchaser's inspection of the Aircraft, or Seller's inspection of Lear 25 D s/n 268 find discrepancies that require correction or repair by his respective party, the respective party's notification that the aircraft or the Lear 25D is ready for acceptance and delivery.

On or about November 1, 1997, the pre-purchase inspections of both aircraft took place and occurred over one and one-half days. USA Jet's inspection of Mega Air's Learjet revealed seventy-two squawks,[2] twenty of which were identified as mandatory repairs, and that the Learjet was not airworthy. On November 3, 1997, USA Jet forwarded the list of squawks to Jones. On November 7, 1997, Jones forwarded a memorandum to Dandeneau regarding the list of squawks that stated, in pertinent part:

> Here is a position report on our disposition of the "circled" items on USA Jet Airline's pre-purchase inspection squawk list for 25D 268 (Items 1, 4, 5, 6, 7, 8, 31, 35, 36, 37, 38, 39, 41, 47, 52, 54, 56, 57, 58, and 62 on the list you faxed to me on 11/03/97):
>
> First, and most importantly, we find no argument with this list of squawks, and we are willing to address all 20 of them in a mutually agreed upon manner, regardless of whether we do the actual repairs, or make a price concession so that USA Jet can do their own repairs.
>
> * * *
>
> So there you have it. If we can come to an agreement based on the above, I suggest that this be incorporated into a "definitive agreement" and that we move toward a close.

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[2] "Squawks" is a term of art in the aircraft industry and refers to an identified problem or discrepancy with an aircraft.

On November 10, 1997, Dandeneau forwarded a memorandum to Jones which terminated the proposed transaction between the parties and provided, in pertinent part:

> USA Jet, Inc., the owner of Falcon 20 S/N 57, has just informed me that the aircraft is no longer for sale. The executive decision was made this morning to officially take the aircraft off the market upon the expiration of the agreement between USA Jet, Inc. and Peregrine Aviation Services, Inc.

Apparently, in telephone conversations between Jones and Dandeneau, Jones was told that the Learjet was not acceptable to USA Jet which caused the termination of the proposed transaction.

On November 14, 1997, Mega Air and Jones commenced this action against USA Jet seeking specific performance or, in the alternative, damages for breach of contract for failure to deliver the Falcon 20. Subsequently, defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), alleging that no enforceable contract existed between the parties because a definitive sales contract and a satisfactory pre-purchase inspection were conditions precedent that had to be satisfied before defendant was obligated to perform under the Offer to Purchase.

In response, plaintiffs primarily argued that there was an enforceable sales contract between the parties and that the transaction was governed by the Uniform Commercial Code (UCC) because it was a transaction between merchants. However, the trial court agreed with defendant and summarily disposed of the case holding that there was (1) an essential failure of the contract, (2) a condition precedent in that an inspection of the airplane meet the satisfaction of the defendant prior to negotiating an ultimate sale of the airplane, and (3) not a meeting of the minds so as to culminate in an ultimate contract. Plaintiffs' motion for reconsideration was denied and this appeal followed.

First, plaintiffs argue that an enforceable contract existed between the parties because plaintiffs made an offer to purchase the Falcon 20 and defendant accepted the offer. We disagree. This Court reviews a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under MCR 2.116(C)(10), the documentary evidence is considered in a light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Ritchie-Gamester v Berkley*, 461 Mich 73, 75; 597 NW2d 517 (1999); *Spiek*, *supra*.

An enforceable contract is not created unless there is mutual assent, i.e., an offer and acceptance, on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). 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." *Id*., quoting Restatement Contracts, 2d, § 24. An acceptance of the offer must be unambiguous and in strict compliance with the offer.

In this case, contrary to plaintiffs' contention, the document at issue, titled "Offer to Purchase," was not an offer made by plaintiffs to defendant but, by its express terms, was a

purported counteroffer tendered by defendant to plaintiffs. The purported counteroffer, however, was conditional. There were two specific and controlling conditions[3] – "the execution of a definitive sales contract between the parties" and "Seller's pre-purchase inspection" of the Learjet. Because a counteroffer constitutes a new offer, it must also confer a power of acceptance in the offeree. See *Eerdmans, supra* at 365. Accordingly, the counteroffer must manifest a willingness to enter into a bargain.

Here, defendant's willingness to enter into a bargain with plaintiffs was expressly conditioned on the execution of a definitive sales contract and a satisfactory pre-purchase inspection of the Learjet. Consequently, the purported counteroffer did not confer a power of acceptance in the offeree; rather, the purported counteroffer was more comparable to an invitation to negotiate than an offer, i.e., a promise to enter into a bargain. See *Id*. Therefore, even plaintiffs' acceptance of defendant's purported counteroffer would not create an enforceable contract, at least until fulfillment of the conditions. See *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 668; 66 NW2d 92 (1954). Further, since there was a failure of at least one of the conditions, particularly that of the execution of a definitive sales contract, defendant had no duty to perform; accordingly, defendant had the right to revoke the counteroffer. See *Id*. at 668-669. A court cannot create a contract for the parties where none exists; therefore, the trial court properly granted defendant's motion for summary disposition. See *Kamalnath, supra* at 549, quoting *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960).

Our conclusion is supported by several factors. First, the language of the document itself reflects that defendant did not intend the counteroffer to be an enforceable contract absent the fulfillment of the conditions contained within it. The first sentence of the document states: "[s]ubject to the execution of a *definitive sales contract between the parties . . . .*" which necessarily implies that the proposed transaction will not occur until the conditions contained within the counteroffer are fulfilled and only then would the negotiations culminate in the execution of a binding sales contract.

Second, the circumstances surrounding this proposed transaction lead to the conclusion that it was only in the preliminary stage of negotiations. Defendant was selling an aircraft for $1,510,000 and plaintiffs were offering as part payment an aircraft valued at $887,500. Neither party had seen or inspected the other's aircraft before defendant's conditional counteroffer was extended. Further, both Jones and Dandeneau testified in their depositions that, as was custom in the industry, if either party was not satisfied with the aircraft, they could reject it.

Third, plaintiffs' actions reflect that the proposed transaction had not culminated into an enforceable contract. Jones' memorandum to Dandeneau on November 7, 1997, included language consistent with that of a transaction still being negotiated. Referencing the Learjet repairs, the memorandum included that they will be addressed in "a mutually agreed upon manner" and that some of the repairs could be negotiated. The memorandum concluded as follows: "[i]f we can come to an agreement based on the above, I suggest that this be

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[3] The conditions were denoted by the words "subject to." See, e.g., *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 550; 487 NW2d 499 (1992).

incorporated into a 'definitive agreement' . . . ." Therefore, Jones acknowledged that the conditional counteroffer was not intended to be a binding contract.

Alternatively, plaintiffs argue that the "contract" was governed by the Uniform Commercial Code (UCC). However, the trial court did not rule on this issue and generally issues not ruled on in the trial court cannot be presented or considered on appeal absent a miscarriage of justice. *Kamalnath*, *supra* at 551. In any event, plaintiffs' argument is without merit because, even if the UCC did apply, defendant's conditional counteroffer did not confer a power of acceptance in plaintiffs for the reasons discussed above; therefore, no enforceable contract existed between the parties.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad