STATE OF MICHIGAN

COURT OF APPEALS

LAFORCE, INC., Plaintiff-Appellant,	UNPUBLISHED September 27, 2011
v	No. 299848 Kent Circuit Court
PIONEER GENERAL CONTRACTORS, INC. a/k/a PIONEER CONSTRUCTION, Defendant-Appellee.	LC No. 09-007369-CK

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Plaintiff LaForce, Inc. ("LaForce") appeals as of right the trial court's August 6, 2010, order granting summary disposition to defendant Pioneer General Contractors, Inc. ("Pioneer"), pursuant to MCR 2.116(C)(10). The parties dispute whether a contract existed between them under section 2-207 of the Uniform Commercial Code (UCC), MCL 440.2207. The trial court concluded that no contract existed. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2009, Pioneer acted as the construction manager of a student housing project for Grand Valley State University. Pioneer also acted as a subcontractor on the project, specifically the portion of the project described under "Work Category 21" of the specifications and plans for the project ("Specifications"). In its role as subcontractor, Pioneer solicited bids from numerous suppliers, including LaForce. All bids had to comply with the Specifications, which required, among other things, satisfaction of LEED[1] credit EQ 4.4.

On April 2, 2009, LaForce submitted a written bid to Pioneer for doors and frames. The bid listed a base cost for the materials, as well additional costs for alternate options. It noted, however, that after September 30, escalation charges could go into effect. The bid also noted that the entire order would be delivered in one shipment and that the wooden doors would "not

[1] LEED is an abbreviation for Leadership in Energy & Environmental Design, a building certification system.

contribute to credit EQ 4.4." The bid stated: "Please contact us for a revised price if wood veneer is preferred in lieu of embossed hardboard faces to allow for contribution to credit EQ 4.4." Later the same day, Robert VanderHave of Pioneer called Ryan Tobin of LaForce to discuss the bid. VanderHave explained that certain terms included in the bid were "not acceptable" to Pioneer, specifically the price escalation clause, delivery of the materials all in one shipment, and failure to satisfy LEED credit EQ 4.4.

VanderHave and Tobin spoke again on April 8. VanderHave indicated, among other things, that Pioneer needed the materials delivered in multiple shipments, rather than in one shipment for the entire project. Tobin agreed and on April 13, sent VanderHave an email confirming that LaForce could make multiple shipments. During a telephone conversation on April 22, VanderHave and Tobin discussed the price escalation clause in LaForce's bid. They agreed that if LaForce "received approval" by September 30, the price would be fixed for the duration of the project. According to VanderHave, Tobin also agreed that LaForce would comply with the Specifications, including the LEED requirements. During their conversation, VanderHave stated that Pioneer would prepare a purchase order.

Later on April 22, Pioneer prepared a purchase order, which was received by LaForce on April 27. The purchase order stated that materials must be furnished "as per plans and specifications prepared by the Architect" and in accordance with LaForce's April 13 email, and that the prices would be "good until job completion." The order further stated that it must be "fully executed," i.e., signed and dated, and returned to Pioneer within one week of issuance, or it would be "considered null and void." LaForce did not sign or return the purchase order.

After his April 22 telephone conversation with VanderHave, but before LaForce received Pioneer's purchase order, Tobin entered the order in LaForce's computer system, which generated a "Notice of Contract" and confirmation letter, which Tobin sent to Pioneer. But the letter included the terms of LaForce's original bid, rather than the terms subsequently discussed by the parties. According to Tobin, the letter included the original terms by default. The letter also stated that it was subject to the terms and conditions attached to the bid. Those terms and conditions stated, in part: "Any response to this quotation which does not expressly reject it, and any order or any of the work, labor, or material described herein shall constitute acceptance of all of the provisions, terms and conditions of this quotation."

According to Pioneer, VanderHave received LaForce's confirmation letter on April 28. VanderHave noticed that the terms in the letter conflicted with those discussed by the parties and included in the purchase order. He stated in his affidavit that he was troubled by LaForce's apparent attempt to disregard the parties' negotiations, simply reiterate the terms Pioneer had already rejected, and condition LaForce's acceptance on Pioneer's assent to the conflicting terms. He believed that LaForce had been disingenuous and that Pioneer could not risk working with such a company. Later on April 28, VanderHave prepared a letter to LaForce stating that due to the term changes in the confirmation letter, Pioneer was voiding its purchase order. Enclosed with the letter was a subcontractor change order stating the same. LaForce did not immediately receive the letter.

On April 30, before LaForce received Pioneer's letter voiding its purchase order, Tobin attended a preconstruction meeting at Pioneer's job site. He had been previously invited to the

meeting, along with many other materialmen and subcontractors. According to Tobin, while at the meeting, he spoke with two representatives of Pioneer, Scott Veine and Bill Roh. Tobin confirmed that LaForce would "meet scope" and make multiple deliveries, discussed initial frame deliveries with Roh, and indicated that project manager Dave Reichwald would contact Pioneer regarding the deliveries. In his affidavit, Tobin stated that while at the meeting, he "was not informed that there was a problem with the agreement between LaForce and Pioneer." On the other hand, Veine stated in his affidavit that while at the meeting, he "advised the representatives of LaForce that there was unresolved issues with respect to LaForce's quotation and that LaForce would need to talk to Robert VanderHave in order to resolve those issues before moving forward in ordering material or in LaForce taking any other action to move forward."

According to Tobin, after the meeting, Reichwald contacted Roh about the frames. Roh indicated that Pioneer would need some of the frames during the first week of June. "Pursuant to these conversations, Reichwald entered an internal order to prerelease priority frames for fabrication on May 5, 2009." Reichwald sent an email confirmation to Roh on May 5.

On May 6, VanderHave called Reichwald and stated that Pioneer had cancelled its purchase order and would award the contract to a different supplier. According to Tobin, at that time, "LaForce had scheduled the frames and doors for the shop drawings and was working on hardware . . . . LaForce estimates that the shops were about 66 percent complete." Later that day, LaForce sent Pioneer a letter objecting to the cancellation and stating that LaForce would "continue to finalize the shop drawing submittal." According to LaForce, it received Pioneer's April 28 letter voiding its purchase order the following day, May 7. On May 18, Pioneer issued a purchase order to another supplier.

LaForce filed this breach of contract action against Pioneer in July 2009. Following discovery, Pioneer moved for summary disposition under MCR 2.116(C)(10). The parties disputed whether a contract existed between them under section 2-207 of the UCC. LaForce asserted that the writings exchanged between the parties resulted in a contract under section 2-207(1), or alternatively, that the parties' conduct established the existence of a contract under section 2-207(3). At the hearing on Pioneer's motion, the trial court stated that there was "no meeting of the minds" between the parties and granted the motion. The court subsequently entered an order granting Pioneer summary disposition and dismissing LaForce's breach of contract claim with prejudice. LaForce now appeals the trial court's order as of right.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The trial court awarded Pioneer summary disposition pursuant to MCR 2.116(C)(10). We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id*. at 119-120. If the

evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120.

MCL 440.2207 is identical to UCC § 2-207 and states as follows:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

III. THE WRITINGS EXCHANGED BETWEEN THE PARTIES

On appeal, LaForce argues that the trial court erred in granting Pioneer summary disposition because the writings exchanged between the parties resulted in a contract under UCC § 2-207(1). We disagree.

In order to determine whether a contract was formed between the parties in this case, it is necessary to determine which document constituted the offer and which document, if any, constituted the acceptance. According to LaForce, the original bid it submitted to Pioneer was an offer, which it later modified by its April 13 email. Pioneer's purchase order was a written confirmation of the parties' agreement and, therefore, constituted an acceptance of LaForce's modified offer under UCC § 2-207(1). Pioneer does not dispute on appeal that LaForce's original bid was an offer. Pioneer asserts, however, that it rejected the offer by informing LaForce that the terms were not acceptable. Thus, there was no offer on the table for LaForce to modify with its April 13 email.

The UCC does not define the term "offer." Therefore, "courts may look to sources such as the common law and the Restatement of Contracts for the definition." 1 Williston, Sales (5th ed), § 7:10, p 282. "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733

NW2d 766 (2006) (quotation marks and citation omitted). "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Id*. at 453-454 (quotation marks and citation omitted). In determining which document constitutes an offer and which constitutes an acceptance, "[c]ourts must often look beyond the words employed in favor of a test which examines the totality of the circumstances," especially when standardized forms are used. *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15, 21; 359 NW2d 232 (1984). For example, in *Challenge Machinery*, this Court determined that a plaintiff's price quotation constituted an offer based on the fact that the parties had engaged in a series of negotiations for several months before the plaintiff's issuance of the final price quotation and on the fact that the defendant accepted this offer by sending the plaintiff a purchase order that was responsive to the price quotation and made specific reference to the quotation. *Id*.

Here, once Pioneer informed LaForce of its dissatisfaction with some of the terms included in the bid, the parties engaged in a series of negotiations. On April 8, VanderHave requested, among other things, that Pioneer receive the materials in multiple shipments and Tobin agreed. Pursuant to VanderHave's request to put the agreement in writing, Tobin sent VanderHave an email on April 13 confirming that LaForce could make multiple shipments. On April 22, following additional oral negotiations, Pioneer sent LaForce its purchase order, which specifically referenced the April 13 email. The only significant factual distinction between the facts of this case and those in *Challenge Machinery* is that the parties in this case continued negotiations after the April 13 email. That said, considering the totality of the circumstances and the factual similarity between this case and *Challenge Machinery*, we conclude that LaForce's original bid, together with its April 13 email, constituted a modified offer to which Pioneer responded with its purchase order.

Next, we must determine whether Pioneer's purchase order constituted an acceptance of LaForce's modified offer, or whether it was a counteroffer. Pioneer argues that its purchase order was a counteroffer because it directly conflicted with the modified offer with respect to at least two dickered terms, specifically the price escalation clause and the LEED-certification requirements. We agree with Pioneer. As noted by the *Challenge Machinery* Court:

> At common law, the failure of the responding document to mirror the terms of the offer would have precluded the formation of a contract. The UCC, however, altered this "mirror-image" rule by providing that the inclusion of additional or different terms would not prevent [an] acceptance from being operative unless the acceptance was made conditional on the assent of the other party to those additional or different terms. [*Challenge Machinery*, 138 Mich App at 22, citing MCL 440.2207(1).]

LaForce argues in its brief on appeal that the "effect of [UCC §] 2-207 is to eliminate the common law 'mirror-image rule.'" But section 2-207 did not completely eliminate the rule; it merely "altered" it as explained in *Challenge Machinery*. Moreover, the federal and state courts that have considered this issue have held that the common law "mirror-image" rule must be applied with respect to "dickered terms." Where a response to an offer changes the description of the price or any other dickered term in the offer, courts have held that such a response is a

counteroffer, clearly indicating that section 2-207 has no application to such facts. See, e.g., *Gage Prods Co v Henkel Corp*, 393 F3d 629, 637-638 (CA 6, 2004); *Gen Electric Co v G Siempelkamp GmbH & Co*, 29 F3d 1095, 1098-1099 (CA 6, 1994).

LaForce argues that even if the common law "mirror-image" rule is applicable in regard to dickered terms, the terms in the purchase order that differed from the terms in the modified offer, specifically the price escalation clause and the LEED-certification requirements, do not qualify as dickered terms. The Sixth Circuit held in both *Gage Products* and *General Electric* that price was a dickered term. In addition to price, the *General Electric* court also referred to "terms of payment, placement of transportation responsibility, provisions for title passage, and delivery date" as dickered terms. Dickered terms have been described as those terms "that are unique to each transaction such as price, quality, quantity, or delivery terms as compared to the 'usual unbargained terms on the reverse side [of a form] concerning remedies, arbitration, and the like,'" *Matrix Int'l Textiles, Inc v Jolie Intimates, Inc*, unpublished opinion of the New York City Civil Court, issued May 5, 2005 (Docket No. 316107/03), quoting White & Summers, Uniform Commercial Code, 33 (2000), and those terms to which the parties "consciously adverted" and a "decent merchant consciously would consider," John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 Wm & Mary L Rev 1447, 1466 (1994). "'Section 2-207 of the UCC is designed to prescribe, by law, what non-negotiated terms are to be considered a part of a contract—not to exclude those terms specifically negotiated and agreed upon,'" i.e., dickered terms. *Gen Electric Co*, 29 F3d at 1099, quoting *Olefins Trading, Inc v Han Yang Chem Corp*, 9 F3d 282, 287-88 (CA 3, 1993).

Here, although the parties agreed on the base price for the transaction, Pioneer's purchase order differed from LaForce's modified offer with respect to the price escalation clause. Pioneer informed LaForce that the price escalation clause, which was included in LaForce's bid, was unacceptable and that the price must remain fixed for the duration of the project. Pioneer's purchase order stated that the price would be "good until job completion." LaForce asserts that a price escalation term is not as "significant" as a price term and, therefore, cannot be deemed a dickered term. But, in this case, whether the price would remain fixed or be subject to escalation was a matter unique to this transaction that Pioneer specifically negotiated and included in its purchase order. Therefore, the price escalation term must be considered a dickered term. LaForce additionally argues that this term was not a dickered term because the parties discussed it and agreed to keep the price fixed before Pioneer issued its purchase order. Regardless of what the parties discussed orally, however, the purchase order differed from the modified offer with respect to this term. Furthermore, with regard to compliance with the LEED-certification requirements, LaForce again asserts that such compliance cannot be deemed a dickered term because it was relatively insignificant. LaForce's bid stated that the wooden doors it intended to supply would "not contribute to [LEED] credit EQ 4.4." Pioneer informed LaForce that this was unacceptable because, as a subcontractor, Pioneer was required to comply with the Specifications for the project, including the LEED-certification requirements. Accordingly, Pioneer's purchase order stated that all materials must be furnished "as per plans and specifications prepared by the Architect." This compliance term relates to the quality of the goods to be furnished and, again, was specifically negotiated by Pioneer and included in its purchase order. It is, therefore, a

dickered term. Because Pioneer's purchase order differed from LaForce's modified offer with respect to dickered terms, we hold that the purchase order constituted a counteroffer.[2]

Finally, we must determine whether LaForce accepted Pioneer's counteroffer. UCC § 2-206(1)(a) provides that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances" unless "otherwise unambiguously indicated by the language or circumstances." MCL 440.2206 is identical to UCC § 2-206. "Section 2-206 provides that a party must unambiguously indicate via the language of the offer if a special mode of acceptance is required. Barring such an explicit and clear stipulation in the offer, any 'reasonable manner of acceptance' is available to the offeree." *Extrusion Painting, Inc v Awnings Unlimited, Inc*, 37 F Supp 2d 985, 993 (ED Mich, 1999). Here, Pioneer's purchase order stated that "[a]ll subcontractors must return the Purchase Order . . . fully executed within one week of issuance or it will be considered null and void." At the bottom of the order was a section entitled "ACCEPTANCE" for Tobin to sign and date. We find that the purchase order's language unambiguously indicated that in order to accept Pioneer's counteroffer, LaForce was required to return a fully executed copy of the order to Pioneer within one week of issuance. LaForce failed to comply with this unambiguous requirement. Moreover, even if LaForce could accept the counteroffer in a manner other than that articulated in the purchase order, the only writing LaForce submitted in response to the order was its confirmation letter. The confirmation letter, which included the same terms as LaForce's original offer, differed from the purchase order with respect to dickered terms. Therefore, the letter did not constitute an acceptance under UCC § 2-207(1)

Because LaForce did not accept Pioneer's counteroffer, LaForce cannot establish that the writings exchanged between the parties resulted in a contract.

IV. THE PARTIES' CONDUCT

LaForce next argues that even if the writings exchanged between the parties did not result in a contract, the parties' conduct was sufficient to establish the existence of a contract under section 2-207(3) of the UCC. Again, we disagree.

Under UCC § 2-207(3), in cases where the writings of the parties do not establish a contract, as is the case here, "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale." See *American Parts Co v American Arbitration Assoc*, 8 Mich App 156, 176; 154 NW2d 5 (1967). Federal courts applying this section have held that it "'contemplates contract formation through performance,'" particularly through the shipping and receipt of goods, or payment for goods. *Audio Visual Assocs v Sharp Electronics Corp*, 210 F3d 254, 260 (CA 4, 2000), quoting *Avedon Engineering, Inc v Seatex*, 126 F3d 1279, 1284 n 10 (CA 10, 1997); see also *Gage Prods*, 393 F3d at 641-642, and the cases cited therein. The *Gage Products* court held that a "pattern of conduct" in which the buyer

[2] Pioneer argues in the alternative that its purchase order failed to constitute an acceptance because it was expressly made conditional on LaForce's assent to the new terms, triggering "the UCC § 2-207(1) proviso exception." We decline to address this alternative argument.

submitted numerous purchase orders to the seller, the seller shipped products in response to those orders, and the buyer received and paid the seller for those products, albeit not at the prices expected, created "a genuine issue of material fact as to whether the parties had one or more contracts for shipments." *Gage Prods*, 393 F3d at 642. But complete performance is not necessarily required to establish the existence of a contract under the plain language of the code. See, e.g., *Audio Visual Assocs*, 210 F3d at 260 (indicating that conduct other than the shipping and receipt of goods could evidence a contract); *Apex Oil Co v Vanguard Oil & Service Co, Inc*, 760 F2d 417 (CA 2, 1985); *Glasstech, Inc v Chicago Blower Corp*, 675 F Supp 2d 752 (ND Ohio, 2009).

It is undisputed that there was no delivery of goods or payment for goods in this case. Nonetheless, LaForce argues that the parties' conduct evidenced the existence of a contract. While LaForce correctly asserts that complete performance is not necessarily required under UCC § 2-207(3), the parties' conduct in this case was insufficient to establish a contract.

LaForce first points to a letter dated April 15 that Pioneer sent to LaForce. The letter was addressed to "All Subcontractors," congratulated the subcontractors on "being awarded this project," explained how submittals would be processed, and requested contact information. Notably, however, LaForce received the letter *before* Pioneer issued its April 22 purchase order, which LaForce claims was Pioneer's acceptance of its modified offer and Pioneer claims was an offer. UCC § 2-207(3) focuses on the conduct of the parties that occurs *after* the exchange of written forms. See, e.g., *Dorton v Collins & Aikman Corp*, 453 F2d 1161, 1166 (CA 6, 1972) ("If, however, the subsequent conduct of the parties—particularly, performance by both parties under what they apparently believe to be a contract—recognizes the existence of a contract, under Subsection 2-207(3) such conduct by both parties is sufficient to establish a contract, notwithstanding the fact that no contract would have been recognized on the basis of their writings alone.").

Next, LaForce points to its invitation to attend Pioneer's preconstruction meeting, as well as Tobin's conversations with representatives of Pioneer during the meeting. On April 30, before LaForce received Pioneer's letter voiding its purchase order, Tobin attended a preconstruction meeting at Pioneer's job site. He had been invited to the meeting, along with many other materialmen and subcontractors, before Pioneer received LaForce's confirmation letter and voided its order. Tobin stated in his affidavit that at the meeting, he spoke with two representatives of Pioneer, Veine and Roh. Tobin confirmed that LaForce would "meet scope" and make multiple deliveries, discussed initial frame deliveries with Roh, and indicated that Reichwald would contact Pioneer regarding the deliveries. Tobin further stated in his affidavit that while at the meeting, he "was not informed that there was a problem with the agreement between LaForce and Pioneer." On the other hand, Veine stated in his affidavit that while at the meeting, he "advised the representatives of LaForce that there was unresolved issues with respect to LaForce's quotation and that LaForce would need to talk to Robert VanderHave in order to resolve those issues before moving forward in ordering material or in LaForce taking any other action to move forward."

Additionally, according to Tobin's affidavit, after the preconstruction meeting, Reichwald contacted Roh about the frames. Roh indicated that Pioneer would need frames during the first week of June. On May 5, Reichwald entered an internal order to prerelease

priority frames for fabrication, pursuant to Reichwald's conversations with Roh. The record includes a May 5 email confirmation Reichwald sent to Roh. Tobin further stated in his affidavit that at on May 6, when VanderHave informed LaForce that Pioneer had cancelled its purchase order, "LaForce had scheduled the frames and doors for the shop drawings and was working on hardware . . . . LaForce estimates that the shops were about 66 percent complete."

While LaForce took steps toward supplying Pioneer with frames and doors by attempting to establish a delivery date, issuing a prerelease for fabrication, scheduling frames and doors for shop drawings, and working on hardware, UCC § 2-207(3) focuses on the conduct of *both* parties and whether their conduct recognized the existence of a contract. The evidence of Pioneer's conduct is insufficient to prove that a contract existed between the parties. While Pioneer did not immediately inform LaForce of its decision to cancel its purchase order and permitted LaForce to attend the preconstruction meeting, LaForce's attendance at the meeting does not, in and of itself, evidence a contract. Moreover, there is no record evidence that Pioneer's representatives made any unequivocal statements either during or after the meeting indicating that an agreement had been formed. When LaForce contacted Pioneer after the meeting about frame delivery, Pioneer's representative indicated that frames would be needed the first week of June. But, this is merely a statement about when Pioneer would need frames to be delivered, not a statement confirming an agreement between the parties, and it is not sufficient to establish a contract. LaForce points to no other actions taken by Pioneer that evidenced a contract.

Viewing the evidence in the light most favorable to LaForce, there is no genuine issue of material fact in regard to the parties' conduct. Accordingly, we conclude that the trial court properly granted summary disposition to Pioneer.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering