

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0448

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

THOMAS G. SMITH,

PLAINTIFF-APPELLANT,

V.

**FIRSTAR BANK EAU CLAIRE, N.A., F/K/A FIRST
WISCONSIN NATIONAL BANK OF EAU CLAIRE,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. Affirmed.

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

HOOVER, P.J. Thomas Smith appeals a judgment dismissing his complaint against Firststar Bank Eau Claire, N.A. Smith claims that the trial court erred by dismissing his claim for violating the Uniform Commercial Code's statute of frauds and concluding that Firststar's attorney did not have apparent

authority to act on Firststar's behalf. We do not address these contentions because we conclude that the parties merely made unenforceable offers to contract. Accordingly, we affirm the circuit court decision.

Firststar owned a promissory note from Defense Electronics Systems, Inc. (DESI), which was personally guaranteed by its principals and secured by collateral. DESI defaulted. Smith knew of the default and had discussions with Thomas Mihajlov, a Firststar vice-president, regarding purchasing the note. On September 4, 1982, Smith memorialized the discussions with a facsimile letter. The body of Smith's letter stated:

I am sending this letter per your request, documenting our telecon of 04 September, 1992[] at 12:05 p.m. confirming my offer and your acceptance of my offer of \$125,000.00 to assume the bank['s] position in whole for all interests in Defense Electronics Systems Inc. (DESI)

Per our conversation, the only contingent element is the timing for this transaction to be complete. Per my statement and your verbal commitment, the documentation between your bank and my bank must be complete by Sept[.] 11, 1992 3:00 p.m. I must further receive a fax confirmation from both banks of successful documentation transaction satisfying my bank['s] requirements.

If the transaction requirements are not met by the time stated above, *this offer* will be considered null and void in whole. (Emphasis added.)

Firststar's attorney, Jeffrey Guettinger, responded by letter.¹ Guettinger's response stated:

I have reviewed your fax of this afternoon to Mr. Mihajlov of First Wisconsin.[²]

¹ For purposes of our analysis, we assume Guettinger was acting with full authority from Firststar, although we do not decide that issue.

² First Wisconsin later became Firststar.

The Bank would be willing to sell to you its loan to DESI and assign its collateral in said loan to you for the sum of \$125,000, payable immediately.

Please confirm by return fax. I will then contact your lawyer to arrange for the appropriate documentation. This would be an “as is” sale with no warranty or representations.

Please advise.

Smith made no immediate reply and never confirmed Guettinger’s letter by return facsimile. Several telephone conversations ensued, but the transaction was never consummated.

Smith sued Firststar, alleging that it breached the contract for sale of the note and collateral and later filed an amended complaint. Firststar moved to dismiss the complaint. Smith filed an affidavit opposing the motion. The court granted Firststar’s motion to dismiss the complaint. It determined that the statute of frauds applied to the agreement, that Guettinger did not have the authority to bind Firststar and that the agreement was merely an unenforceable agreement to make an agreement. Smith appeals that decision.

The question before us is whether Smith’s complaint and proofs alleged a cause of action. Because Smith filed an affidavit in opposition to Firststar’s motion, we consider the motion to be for summary judgment. *See* § 802.06(2), STATS.; *M & I Bank v. Town of Somers*, 141 Wis.2d 271, 285 n.9, 414 N.W.2d 824, 829 n.9 (1987). Numerous cases set forth the procedure to be used in reviewing a circuit court’s grant of summary judgment, therefore we need not repeat it here. *See, e.g., Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). We review summary judgment rulings independently of the circuit court. *Major v. County of Milwaukee*, 196 Wis.2d 939, 942, 539 N.W.2d 472, 473 (Ct. App. 1995).

The specific question before us is whether the undisputed facts demonstrate that the parties did not enter into an enforceable contract. Smith contends that his summary judgment proofs support the basic elements of a contract. He asserts that he had agreed to purchase, and that the bank had agreed to sell, the bank's interest in DESI, and that they had agreed as to what was being sold.

The burden of establishing the existence of a contract is on the person attempting to recover for its breach. *Household Utilities v. Andrews Co.*, 71 Wis.2d 17, 28, 236 N.W.2d 663, 667 (1976). A contract consists of an offer, an acceptance and consideration. *See Gustafson v. Physicians Ins. Co.*, 223 Wis.2d 164, 173, 588 N.W.2d 363, 367 (Ct. App. 1998). An offer and acceptance exist when mutual expressions of assent are present. *See id.* Consideration exists if an intent to be bound to the contract is evident. *See id.* A contract to make a contract is not enforceable. *See Witt v. Realist, Inc.*, 18 Wis.2d 282, 298, 118 N.W.2d 85, 93-94 (1962).

Smith's amended complaint alleged that a verbal agreement existed on September 4, 1992, that was later confirmed by facsimile. He further alleged that Guettinger acknowledged and accepted the agreement's terms. Smith's claim relied on two letters that allegedly demonstrate the agreement's existence and terms. Smith characterized the letters' content, but those characterizations are not facts. We review the letters themselves.

The letters' content demonstrate that the parties had not yet reached a final agreement. At best, the letters evidence an understanding that on September 4, Firststar and Smith agreed to enter into a contract. Smith's letter confirmed that understanding and then proposed specific conditions for accepting

his offer.³ Smith conditioned the offer upon the timing of the transaction and his bank's requirements being met. Smith specified that if the documentation were not complete by 3 p.m. on September 11, his *offer* was "null and void in whole." His offer required a specified acceptance: completion of the documentation. When an offer requires acceptance by performance, a contract is created only by the offeree's performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 50 cmt. b (1981). Because the documentation was never completed, Firststar did not accept the offer.

Additionally, when we examine Firststar's September 4 response, it is apparent that Firststar did not consider the negotiations complete. It responded that it *would* be willing to sell its interest in DESI with its own conditions; immediate payment and an "as is" sale. This constituted a counter-offer as to those terms. *See Air Prods. & Chems. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 210, 206 N.W.2d 414, 423 (1973). Firststar requested Smith's confirmation of these terms by fax. Because Smith never sent the confirming fax, we cannot say that he accepted the counter-offer.⁴

Although Firststar and Smith may have agreed to have a contract to sell and assign Firststar's interest in DESI to Smith at a specific price, that contract never came to be because additional but unaccepted conditions were proposed.

³ Smith's letter belies his assertion that he considered the agreement to be binding upon both Firststar and himself as of September 4. The letter imposed conditions on the sale and noted that if the required documentation were not completed by the specified time, his offer was null and void.

⁴ Smith claims that these conditions were not in conflict with the conditions in his letter and he therefore did not respond. It is apparent, however, that even if clear in his mind, it was not equally clear to Firststar. If clear to Firststar, there was no need to set forth the conditions or request confirmation.

Smith's offer in connection with that contract required performance by a specified time or his offer would be null and void, and that performance never occurred and his offer was therefore not accepted. Nor did Smith accept the bank's counter-offer that the same be on an "as is," immediate cash payment basis. Because our decision that the contract was unenforceable disposes of the appeal, we need not decide the other issues raised. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

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