COURT OF APPEALS DECISION DATED AND RELEASED

NOVEMBER 19, 1996

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0752

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FRED C. HAGENY, JR.,

Plaintiff-Respondent,

v.

EDWIN A. SCHOWALTER and EDITH E. SCHOWALTER,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Edwin and Edith Schowalter appeal a judgment granting specific performance of a real estate sales contract. The Schowalters argue that the trial court's finding that the buyer accepted the seller's modifications to the sale contract was clearly erroneous. We agree and reverse the judgment.

This case was tried to the court without a jury. Fred Hageny, a logger, buys and sells forty to sixty parcels for logging each year. The Schowalters, who inherited ninety acres of land in Langlade county from their son, listed the property for sale with Bill Yoder, a realtor. The listing contract extended from August 13, 1994 through August 23, 1994. On August 19, Hageny submitted a written offer to purchase the Schowalters' property for $55,000, with a closing date on or before January 6, 1995. It also provided that the sellers shall immediately apply to remove the land from forest crop.

On August 22, the Schowalters signed the offer indicating acceptance, but with two modifications: They required Hageny to apply to remove the land from forest crop, and they changed the closing date from January 6, 1995 to September 10, 1994. They mailed the contract to the realtor on August 23.

Hageny made out a check dated August 24 and delivered it to the realtor, who was on vacation between August 23 and September 12. Hageny had the property surveyed between August 27 and September 3.

On September 2, 1994, the Schowalters sent a letter to the realtor and Hageny to indicate that they no longer wanted to sell the property. When the realtor, Yoder, returned from vacation on September 12, he found, in unopened envelopes, the signed offer to purchase, the $1,000 earnest money, and the Schowalters' September 2 letter revoking the listing contract.

The trial court found that Hageny was aware of the modifications and agreed to them by virtue of his tendering the $1,000 check and having the land surveyed. The trial court concluded that "[t]aking into account the date of the check and the actions of the surveyors, the Court finds that the check was delivered to the realtor pursuant to the offer to purchase which requires a check to be delivered to the realtor within one day of acceptance." The court concluded that on September 2, there was a valid contract between the parties and ordered specific performance. The Schowalters appeal.

A contract is based upon a mutual meeting of the minds as to terms, manifested by mutual assent. ***Household Utilities, Inc. v. Andrews Co.,*** 71 Wis.2d 17, 28-29, 236 N.W.2d 663, 669 (1976). Whether the parties reached the necessary agreement as to the terms depends upon the parties' expressed

intent. ***Bong v. Cerny,*** 158 Wis.2d 474, 481, 463 N.W.2d 359, 362 (Ct. App. 1990).

The initial question we address is whether the Schowalters' returned offer constituted an acceptance or counteroffer. The interpretation of a document is a question of law that we review de novo. *See* ***Delap v. Institute of America, Inc.,*** 31 Wis.2d 507, 510, 143 N.W.2d 476, 477 (1966). It is elementary law that the acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer and is a counteroffer. ***Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n,*** 238 Wis. 39, 42, 298 N.W. 226, 227 (1941); ***Hess v. Holt Lumber Co.,*** 175 Wis. 451, 455, 185 N.W. 522, 523 (1921). No contract is formed unless the counteroffer is accepted. This rule holds true regardless how slight the variance is. ***Leuchtenberg v. Hoeschler,*** 271 Wis. 151, 72 N.W.2d 758 (1955).

Hageny argues that the modifications the Schowalters made to his offer were insignificant and therefore do not transform the document into a counteroffer. Hageny contends that insignificant suggestions that do not amount to a condition of acceptance are not a material variation. *See* ***Hess,*** 175 Wis.2d at 455, 185 N.W.2d at 523-24. Whether a slight variation or a material variation is necessary to transform the acceptance into a counteroffer is a legal question that we need not resolve on the facts presented. Here, the Schowalters changed the closing date from no later than January 6, 1995 to no later than September 10, 1994. That change, together with the requirement that the buyer, not the seller, apply for the removal of the land from forest crop, amount to a material variation in terms. Therefore, the Schowalters rejected Hageny's offer and made a counteroffer.

As a result, the dispositive issue is whether the record supports the court's finding that Hageny accepted the Schowalters' counteroffer. This issue presents a question of fact that we review under the "clearly erroneous" standard. Section 805.17(2), STATS. We defer to the trial court's assessment of weight and credibility. ***Id.*** We search the record for evidence to support the findings the trial court made, not for findings the trial court could have made but did not. ***In re Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

The record discloses that the first time Hageny could have learned of the Schowalters' counteroffer was September 12. Yoder, the realtor, testified that when he returned from his vacation, on or about September 12, was the first time he discussed the changes the Schowalters made in Hageny's offer and that this was the first time Hageny had been made aware of the changes. He testified that he knew that no one from his office would have advised Hageny of the changes made to the offer because none of his mail had been opened. Yoder testified that as a result, the first that Hageny would have known of the changes made to his offer would have been after he had received the Schowalters' September 2 letter advising that they were withdrawing their property from the market. Schowalter testified that the first he learned that the changes he made to the offer were acceptable to Hageny was quite a while after he had withdrawn his property from the market.

Yoder's testimony stands unrefuted. Hageny testified that he did not remember when he contacted the surveyor, but that it could have been August 24 according to the surveyor's invoice. He believed that he may have received a message on his answering machine from someone in Yoder's office advising that the offer was back in the office, or that his secretary may have taken a message. Hageny made out the $1,000 earnest money check on August 24. However, he did not remember when he delivered it to Yoder's office. Hageny testified that he did not back date the check. Hageny did not recall when he first learned of the changes in the contract made by Schowalters.

Hageny testified he did not recall receiving a telephone call from Yoder's office before Yoder returned from vacation. Although he believed that he had been advised that "the offer was back in the office," he offers no basis for his belief, other than the fact that he hired a surveyor and made out an earnest money check. Yet these actions on his part do not provide a basis for refuting Yoder's testimony that the modified offer remained unopened until September 12.

Hageny argues that he would not have incurred a several hundred dollar survey bill if he was not made aware of the modifications in the offer to purchase and accepted them. The record, however, establishes unequivocally that he did just that. Perhaps he wishes that he had not done so, but his wish does not provide a basis upon which to find a valid contract.

The Schowalters' alterations to Hageny's offer constituted a rejection of his offer and a counteroffer. The Schowalters withdrew their counteroffer before Hageny was advised of its terms. Although once advised of the terms, Hageny was ready and willing to accept them, the counteroffer had been withdrawn through written communication to the real estate agent. The trial court did not reject Yoder's unrefuted testimony as incredible. Hageny's testimony did not contradict Yoder's because Hageny had no recollection of the date on which he first learned of the modification of the terms of his offer.

Hageny's payment of the $1,000 earnest money cannot be construed as an acceptance of the Schowalters' terms because he made the payment before he was informed of the terms. *Cf.* ***Schwartz v. Handorf,*** 7 Wis.2d 228, 239, 96 N.W.2d 366, 371 (1959) (tender of $500 down payment with no strings attached after buyer's attorney approved sellers' modification to buyers' offer constitutes acceptance of the sellers' counteroffer). The record is unequivocal that the terms of the counteroffer were not communicated to Hageny before September 12, well after the Schowalters withdrew the counteroffer. As a result, the trial court's determination that Hageny accepted the Schowalters' counteroffer is without support in the record. Because there was no meeting of the minds, an enforceable contract cannot be said to exist.

Next, Hageny argues that the Schowalters are equitably estopped from withdrawing their counteroffer. We disagree. Equitable estoppel requires proof of (1) action or inaction that induces, (2) good faith reliance by another, (3) to that person's detriment. ***Gillespie v. Dunlap,*** 125 Wis.2d 461, 466, 373 N.W.2d 61, 64 (Ct. App. 1985). Hageny argues that he relied on the acceptance of his offer and incurred survey expenses to his detriment. He argues that after the Schowalters signed and mailed the offer, "Someone from Yoder's office subsequently placed a call to Hageny." This argument ignores the undisputed fact that no one in Yoder's office knew of the modifications the Schowalters made on the offer until after it was withdrawn. We conclude that there is insufficient evidence that Hageny reasonably relied on the Schowalters' actions.[1]

By the Court.—Judgment reversed.

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[1] Because the court's finding that Hageny accepted the Schowalters' counteroffer is overturned, we need not reach the issue whether Hageny paid the earnest money in a timely fashion.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.