2000 Date:[20011017]
[Docket: S. BW. No. 5288]

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Himmelman v. Pare Estate, 2001 NSSC 124]

BETWEEN:

SHARON D. HIMMELMAN

Plaintiff

- and -

THE ESTATE OF THE LATE HENRI LOUIS PARE
and CHARLOTTE PAULINE PARE, sole Executrix and
Trustee of the Estate of Henri Louis Pare

Defendants

Justice A. David MacAdam Bridgewater, NS S.BW. No. 5288

D E C I S I O N

HEARD: Before the Honourable Justice A. David MacAdam, at Bridgewater, N.S., in Chambers, on September 13, 2001
Written Submissions (last filed September 17, 2001)

WRITTEN RELEASE
OF DECISION: October 17, 2001

COUNSEL: Donald H. Oliver, Q.C., counsel for the Plaintiff
Rubin Dexter, counsel for the Defendants

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MacAdam, J.:

[1] The plaintiff seeks to enforce an offer of settlement, in this proceeding, which she says was made by the defendant, through their counsel, and accepted by the plaintiff, through her counsel. The plaintiff also says the defendants' counsel did not orally withdraw its offer, prior to the plaintiff mailing written acceptance since all counsel said was, *"He had received instructions to withdraw the offer.*", rather than saying the equivalent of, *"The offer has been withdrawn."*

[2] It is agreed the offer made by the defendants was not pursuant to ***Civil Procedure Rule 41(a)*** of the ***Civil Procedure Rules*** of the Province of Nova Scotia. As such, counsel agree the determination of the validity of the plaintiff's written acceptance is to be made by reference to the common law rather than to an interpretation of the procedures for withdrawal or revocation of an offer as set out in the Nova Scotia ***Civil Procedure Rules***.

BACKGROUND

[3] Following commencement of the within proceeding, counsel for the plaintiff, following examinations for discovery, wrote counsel for the defendant offering to settle the plaintiff's claim.

[4] Counsel for the defendants responded with a counter-offer, offering to pay substantially less than the amount suggested by the plaintiff, in full settlement of all claims. Further correspondence, as well as telephone and other discussions ensued between the counsel, including a suggestion by the plaintiff counsel that his client would accept a settlement of one half of the amount contained in its initial proposal for settlement. Defendants' counsel, in reply, advised in writing that the defendants were firm in their original counter-offer and if the plaintiff was not prepared to accept they were prepared to litigate the matter *"to whatever extent necessary"*.

[5] Although the plaintiff, in her affidavit deposed in respect to this application, suggests there never had been a rejection or withdrawal of the initial counter-offer by the defendant, nor an acceptance deadline set out in the offer, it is clear the course of negotiations reflected the customary proposals and counter-proposals between parties in an effort to achieve settlement. Although the defendants maintained their original position, it is clear they repeated it in response to counter-proposals received from the plaintiff through the plaintiff's counsel.

[6] In respect to the telephone discussion between counsel on July 6, 2001, the plaintiff, in her affidavit, deposes:

> 17. THAT on the 6th day of July, 2001, my counsel had a telephone discussion with counsel for the Defendant indicating that she was not prepared to consider an increase in her offer of $5,000.00.

> 18. THAT in the same telephone call, the solicitor for the Defendant advised the solicitor for the Plaintiff that he had received instructions from his client to withdraw the offer.
>
> 19. THAT no notice was given that negotiations were coming to an end.

[7] Counsel for the defendants, in respect to the telephone conference on July 6, 2001, deposes:

> 14. . . . During the said telephone conversation with Mr. Oliver I advised him that Ms. Pare had instructed me to withdraw the said offer of $5,000.00. I further advised Mr. Oliver that my client's position was that the only way she would now agree to paying Ms. Himmelman anything would be if found liable by the Court. I suggested to Mr. Oliver that his client's only other option was to set the matter down for a trial.
>
> 15. THAT at no time prior to the withdrawl of my client's offer during said telephone communications did Mr. Oliver either accept the said offer or for that matter express to me any intention or willingness on the part of his client to accept the said offer. In fact, at the time I withdraw my client's said offer Mr. Oliver's position was that the claim should be settled for the amount of $12,000.00. Mr. Oliver's only response to my withdrawal of the previous offer was "I'm just flabbergasted".

[8] Not disputed is that later on July 6, 2001, counsel for the defendants received a Facsimile communication from counsel for the plaintiff purporting to accept the defendants' counter-offer.

[9] Although suggested by counsel for the plaintiff that the reference by defendants' counsel to having received instructions did not indicate he had formally withdrawn the offer, I am satisfied, in all the circumstances, it was clear to counsel for the plaintiff that on July 6, 2001, the defendant had withdrawn the counter-proposal. I am further satisfied that since, as deposed to by the plaintiff, there was no time limit for acceptance, it was open to the defendants to withdraw the counter-offer at any time.

[10] The issue is whether the counter-offer having been made initially in writing and, apparently, verbally repeated during some of the discussions between the two counsel, could be orally revoked.

[11] Counsel for the plaintiff references G.H. Trittle, **The Law of Contract** (7th ed.), as authority for the proposition that although an offer can be withdrawn at any time before it is accepted, the notice of withdrawal must be given and actually reach the offeree before the offer has been accepted by the offeree.

[12] Counsel also references Waddams, **The Law of Contracts** (2d), p. 80 in respect to the issue of overtaking communications:

> ...where the offeree overtakes a rejection with a speedier acceptance, there is no difficulty in giving effect to the acceptance if it arrives first. The offeree is not

> speculating, because neither party is bound until the acceptance. The offeree runs the risk at each instant until the acceptance of receiving an effective revocation from the offeror.

[13] I concur with the position of counsel for the defendant that the issue in the instant is not one of overtaking communications, but rather whether a written offer, or in this case, a written counter-offer, may be withdrawn orally or must be withdrawn in writing. In this respect, counsel for the defendant refers to Fridman, **The Law of Contract in Canada** (1976 Carswell Company Limited), at p. 62:

> At any time prior to acceptance, the offeror may withdraw his offer. Once an offer is revoked it can no longer be accepted so as to bind the offeror. Thus a tender which is submitted in response to an invitation to tender can be withdrawn before completion, unless the conditions of tender, or the tender itself otherwise stipulate in such a way as to be binding.

[14] Again, the excerpt referenced by counsel does not indicate whether the withdrawal must be in writing, but only that an offer, once revoked, can no longer be accepted so as to bind the offeror.

[15] The plaintiff then notes the decision of Justice Herold in the case of ***Dredge v. Halton (Regional Municipality) et al***., 2000 OTC Uned. 452, where it was suggested plaintiff's counsel during discussion with counsel for the defendant, had by implication, orally withdrawn an offer to settle. Justice Herold, at para. 14, stated:

> On the other hand, it is equally clear that if there was a withdrawal, it was orally and by implication only and never specifically withdrawn, even orally. The law appears to be clear that a written offer can only be withdrawn in writing and it is therefore unnecessary to make any specific findings with respect to the extent to which, if at all, there was an oral ***withdrawal***. The ***offer*** was never withdrawn in writing and accordingly remained open on April 15th.

[16] As pointed out by counsel for the defendant, Justice Herold was concerned with an offer made pursuant to ***Rule 49.09*** of the Ontario ***Rules***. He states, referencing the decision of the Ontario Court of Appeal in ***York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.*** (1989), 70 O.R. (2d) (317), that the rule requires the revocation of any offer made pursuant to the ***Rules*** to be made in writing. As such, he says, the statement by Justice Herold is not a statement of the common law, but rather of the law in Ontario applicable to the revocation of offers made pursuant to the Ontario ***Rules***.

[17] Both counsel have referred to the decision of the Manitoba Court of Appeal in ***Jen-Den Investments Ltd. v. Northwest Farms Ltd. et al*** (1977), 81 D.L.R. (3d) 355. The plaintiff purchaser had submitted a written offer for the purchase of parcels of land to which the defendant had counter-offered in writing. The counter-offers were delivered to the plaintiff's real estate agent. At the time of receipt by the agent the officers of the plaintiff corporation were not available and, on returning later on Saturday evening, were told by the agent of the counter-offer that the agent had received. The plaintiff's officers then accepted the counter-offers orally and an arrangement was made to meet with the agent to have the counter-offers initialled in writing on the following Monday. However,

before the oral acceptance of the counter-offer was communicated to the defendant, he had second thoughts and advised the agent he wished to revoke the counter-offer. The trial judge found, and it was not disturbed by the Court of Appeal, that the oral withdrawal of the counter-offer by the defendant occurred on the Sunday and during the same conversation the agent advised the defendant of the oral acceptances of the counter-offer. On the Monday the agent took the written counter-offer to the plaintiff, notwithstanding the instructions he had received from the defendant, and the plaintiff signed acceptance of the counter-offer.

[18] At trial, the trial judge dismissed the plaintiff's action on the ground the defendants had withdrawn their counter-offer prior to being notified of its acceptance, stating, *"To constitute a binding contract there must be an offer, an acceptance of that offer and communication of that acceptance to the person who made the offer. Only then can it be said there is a consensus ad idem."*

[19] Justice O'Sullivan, in the reasons of the Court of Appeal, indicated concurrence with the conclusion reached by the trial judge, but for different reasons. He noted the trial judge appeared to have assumed the counter-offer could have been accepted orally, but had been revoked prior to the communication of that acceptance. At p. 357, he stated:

> It is true that Steele *(the defendant)* told the third party Warren *(the real estate agent)* that the offers were withdrawn, prior to being advised by Warren that they had been accepted. However, if an acceptance must be communicated before being effective, so must a revocation, and it is difficult to see how Warren was an agent of the plaintiff for the purpose of receiving communication of a revocation of the counter-offers. On the facts as found by the learned trial Judge, and which I accept, the revocation of the counter-offers was not communicated until Monday morning, February 5, 1973, and, if the counter-offers could be accepted orally, then there was a contract in existence by that time (subject to the possible defence of illegality under the *Lord's Day (Manitoba) Act,* R.S.M., 1970, c.L200.)

[20] The crucial question, stated by Justice O'Sullivan, was whether or not the counter-offer could be accepted orally. The court reviewed the offers relating to the sale of land and whether a written offer for the sale of land must be accepted in writing or could be accepted orally. The court stated that in Manitoba the understanding of conveyancers and lawyers was that in the case of an offer in writing made through a real estate agent, *"the normal and usual mode of acceptance is in writing"*. He then, at p. 359, continued:

> I would, therefore, hold that in the case before us, the counter-offers by Steele were not accepted by the plaintiff so as to bring into existence a complete contract on Saturday, February 3, 1973. The counter-offers were revoked by Steele and the revocation was communicated to the plaintiff on Monday morning, February 5, 1973, before the plaintiff signed acceptances of the counter-offers.

[21] Although cited by plaintiff, as well as defendants' counsel, presumably by the plaintiff in support for the proposition that an offer in writing must be accepted in writing and by defendant in support for the proposition that a written offer may be revoked orally, it appears the substance of the reasons of Justice O'Sullivan support the latter, rather than

the former. Justice O'Sullivan found that the requirement for acceptance in writing arose from the circumstance that the offer related to the sale of land and the general understanding of conveyancing among lawyers was that the normal and usual mode of acceptance of such offers was to be in writing. On the other hand, it is further clear the defendant had never, in writing, revoked the counter-offer and the court upheld the oral revocation which was communicated, again orally, to the plaintiff before they signed acceptance of the counter-offers.

[22] Here, it is not necessary to decide whether the plaintiff's acceptance of the defendants' counter-offer had to be in writing since before any acceptance, whether orally or in writing, the defendant had already revoked its counter-offer. As such, there was no contract and the plaintiffs purported acceptance is of no effect.

[23] The application of the plaintiff to nullify withdrawal of the offer to settle is therefore dismissed.

[24] In his initial pre-hearing memorandum, plaintiff counsel appears to have suggested costs in excess of $1,000.00 would be appropriate on this application and the defendant in its post-hearing submission requests costs in the amount of $1,000.00.

[25] The plaintiff's application is dismissed, with costs payable to the defendant, in any event, in the sum of $750.00, inclusive of disbursements.

J.