STATE OF MICHIGAN

COURT OF APPEALS

JONES LANG LASALLE MICHIGAN, LLC,

Plaintiff/Counterdefendant-Appellant,

v

TRIDENT BARROW MANAGEMENT 22, LLC,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
June 17, 2021

No. 353367
Oakland Circuit Court
LC No. 2018-166725-CB

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Plaintiff Jones Lang LaSalle Michigan, LLC, appeals by delayed leave granted the trial court's order denying plaintiff's motion to enforce a settlement agreement allegedly reached by the parties. We affirm.

I. BACKGROUND

Plaintiff contracted with defendant Trident Barrow Management 22, LLC, to list and sell real estate owned by defendant. Defendant terminated the exclusive listing agreement before the expiration date and subsequently entered into an agreement to sell the land to a third-party buyer. After defendant sold the land to that buyer, plaintiff sued for breach of contract to collect the commission it claimed it was due under the listing agreement. Defendant filed counterclaims.

The parties discussed settlement during the litigation. On September 20, 2019, defense counsel sent an e-mail to plaintiff's counsel that reads in pertinent part:

> I talked to my client following our call today. Trident Barrow will settle the case/ dispute in full if [REDACTED] and each party pays its own attorneys' fees. The entire case would be dismissed with prejudice. I know you said you have a funeral and family commitments this weekend and your outing on Monday. I have been instructed to keep the offer open until Tuesday morning. Thanks John.

In response, plaintiff's counsel sent an e-mail to defense counsel on Tuesday September 24, 2019. The relevant part of that e-mail states:

> JLL accepts the settlement offer as set forth below subject to a written settlement agreement that [REDACTED] and each party pays its own attorney's fees. Mutual releases and mutual dismissals with prejudice.
>
> We should inform the court that the case has been resolved.

On September 25, 2019, defense counsel sent the following e-mail to plaintiff's counsel:

> I contacted Judge Alexander's court to let them know the matter was settled and we should have it wrapped up in the next week or so. The clerk (who was very relieved) gave us a control date of 10/29 at 8:30am to enter the final order. No appearance is necessary if we get that in beforehand, which I assume will not be a problem. We're waiting on final confirmation of our draft agreement, and I will send [it] to you as soon as I have it.

On September 27, 2019, defense counsel e-mailed plaintiff's counsel a draft settlement agreement. The draft stated that defendant released and discharged plaintiff from any and all claims asserted against plaintiff in the lawsuit, but specified that defendant did not waive any claims it may have against plaintiff if defendant "determined by discovery of new information" that during the term of the listing agreement plaintiff knowingly and willingly acted in bad faith in a manner that caused damages because of decreased value of the property. Plaintiff's counsel rejected that settlement agreement and presented a draft settlement agreement that stated defendant released plaintiff "from any and all claims … whether known or unknown . . . ." Defendant rejected that proposed language, and sent plaintiff a second draft settlement agreement, which was also rejected.

Plaintiff moved to enforce the settlement agreement. Plaintiff argued that the parties reached a settlement agreement including a full mutual release of claims as stated in plaintiff's counsel's September 24, 2019 e-mail. The trial court disagreed and denied the motion. The court also denied plaintiff's motion for reconsideration, holding that no contract had been formed.

II. DISCUSSION

On appeal, plaintiff argues that the parties reached an enforceable settlement agreement. We disagree.[1]

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). "In order for a contract to be formed, there must be an offer and acceptance, as well as a mutual assent to all essential terms." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 213; 933 NW2d 363 (2019). Whether there is "mutual assent on all material terms is judged by an objective standard based on the express

[1] Settlement agreements are governed by contract law principles, and "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

words of the parties and not on their subjective state of mind." *Id*. "Acceptance must be unambiguous and in strict conformance with the offer." *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). In addition, a settlement agreement must comply with MCR 2.507(G), which requires that the agreement be made in open court or that there is "evidence of the agreement . . . in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." MCR 2.507(G); *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

Review of the record shows that the parties did not reach a meeting of the minds regarding all essential terms of the settlement agreement. The first e-mail, sent by defense counsel on September 20, 2019, stated the unknown settlement amount plus the terms that each party would pay for their own attorneys' fees and that the entire case would be dismissed with prejudice. Plaintiff's counsel's September 24, 2019 e-mail accepted those terms, but asked for a written settlement agreement and mutual releases, additional terms which effectively created a counteroffer. See *Zurcher v Herveat*, 238 Mich App 267, 296; 605 NW2d 329 (1999) ("For a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered."). According to plaintiff, counsel for both parties then engaged in a telephone conference call in which they confirmed the parties had reached a settlement, and that defense counsel would notify the trial court. Defense counsel sent an e-mail to plaintiff's counsel the next day that he had contacted the circuit court to let the court know that the matter was settled and the parties should have the action finalized in the next week or so. The September 25, 2019 e-mail states that defense counsel was waiting for approval of his draft settlement agreement and would send it to plaintiff's counsel as soon as he has it. The parties were then unable to agree on the language of the release clause.

Contrary to plaintiff's argument, the September 25, 2019 e-mail from defense counsel does not constitute an unambiguous acceptance of plaintiff's counteroffer requesting a mutual release of all claims. That e-mail did not contain a summary of the parties' agreement, nor did it refer to plaintiff's previous e-mail containing the counteroffer or make any mention of a mutual release. Indeed, it was apparently not even part of the same e-mail chain containing the counteroffer.[2] Thus, the September 25, 2019 e-mail does not show clear acceptance of plaintiff's counteroffer of a mutual release. While the parties apparently agreed to some terms of the settlement agreement, they could not reach an agreement on the scope of the release clause, i.e., an essential term. Because they did not reach a meeting of minds over the settlement's essential terms, there is no enforceable settlement agreement.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

[2] The e-mails sent by plaintiff's counsel on September 24, 2019 and defendant's counsel on September 25, 2019, had similar but different subject lines.