STATE OF MICHIGAN

COURT OF APPEALS

OMAR HAQQANI and EMILY HAQQANI,

Plaintiffs/Counterdefendants-Appellees,

v

WARREN BRANDES and LISA BRANDES,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
October 21, 2021

No. 355308
Oakland Circuit Court
LC No. 2020-181237-CH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Defendants/counterplaintiffs (defendants) appeal as of right the trial court's order granting plaintiffs/counterdefendants' (plaintiffs) motion to enforce the settlement agreement. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

This case arises from an alleged settlement agreement between the parties regarding the underlying litigation in this real property dispute. Plaintiffs and defendants are neighbors, with defendants' property bordering the eastern boundary line of plaintiffs' property. Plaintiffs purchased their property in 2019,[1] and defendants acquired their property in 1997.

Plaintiffs initiated this action on May 14, 2020. In their complaint, plaintiffs alleged that a driveway and driveway maintenance easement existed over a specific portion of plaintiffs' property. The easement existed for purposes of providing ingress and egress to defendants' property and for purposes of maintaining, repairing, and replacing that driveway. These

[1] As the parties agreed in the trial court, Omar Haqqani is the record owner of the real property and Emily Haqqani is Omar's wife. We refer to the property as "plaintiffs' property" merely for the sake of convenience and simplicity.

easements, burdening plaintiffs' property and benefitting defendants' property, were described in a written instrument titled "Agreement and Grant of Easements" dated September 15, 1989, and recorded with the Oakland County Register of Deeds. Plaintiffs alleged in their complaint that they sought to plant trees along the eastern boundary line of their property but defendants interfered with these efforts. According to plaintiffs, defendants claimed that the driveway maintenance easement did not permit the planting of trees within the bounds of the easement. Plaintiffs alleged that they were not prohibited from planting trees within the driveway maintenance easement. In their complaint, plaintiffs sought declaratory relief and permanent injunction against defendants, as well as asserting a claim for trespass.

Defendants subsequently filed a counterclaim. Defendants alleged that on the establishment of the development in which defendants' and plaintiffs' properties were located, a Declaration of Building and Use Restrictions and Easements dated June 19, 1974, was recorded. This declaration had most recently been amended in a Fifth Modification of Declaration of Building and Use Restrictions and Easements dated May 8, 2020, and recorded with the Oakland County Register of Deeds. Additionally, according to the affidavit of William Hubner, who was plaintiffs' neighbor on the west side of plaintiffs' property, plaintiff Omar had informed Hubner that he planned to close a shared driveway that went across plaintiffs' property and provided road access to Hubner's property. Hubner further averred that Omar told him that he would instead have to use the "west entrance" to access his house. Approximately one month before plaintiffs initiated the present lawsuit, Omar and Hubner had settled a separate lawsuit that Hubner had filed against Omar in March 2020 to resolve their driveway dispute.

It was after this settlement, and approximately one week before plaintiffs initiated this lawsuit, that the above mentioned Fifth Modification of Declaration of Building and Use Restrictions and Easements was executed by defendants, Hubner, and Victor Ubom, which, according to defendants, comprised "collectively owners of a requisite number of parcels required to amend or extend the Declaration with respect to the subject matters of the Fifth Modification." Defendants alleged that the Fifth Modification contained provisions that had been requested by defendants, Ubom, and Hubner, including that "all parcels within the Development shall observe a 16-foot setback from neighboring parcels for any new plantings that do not replace existing plantings, unless approved by the owner of the neighboring parcel (provided that under no circumstances shall boundary lines of individual parcels be rigidly defined by straight line plantings)."

With respect to their specific causes of action asserted in their counterclaim, defendants alleged that plaintiffs could not plant trees along plaintiffs' eastern boundary line as they planned because doing so was prohibited by local ordinance, the recorded easements, and the Fifth Modification. Further, relying in part on an affidavit by Ted Schreiber and Michelle Schreiber, who were the previous owners of plaintiffs' property, defendants claimed that they had "openly, exclusively and continuously used, without permission, the Side Yard [west of defendants' home] for the entire duration of Schreiber's ownership of the Subject Property [now owned by plaintiffs], which spanned more than 15 years." Defendants described how they had improved and used the side yard, including the installation of an underground-irrigation system, and asserted that their use of the portion of the side yard overlapping the driveway maintenance easement had exceeded the scope of the granted easement. Consequently, defendants argued that they had obtained title to the side yard, which included the area subject to the driveway maintenance easement, by adverse

possession or by acquiescence. Defendants also argued they had obtained a prescriptive easement over the side yard.

Approximately three months into this litigation, plaintiffs filed a motion to enforce a settlement agreement the parties purportedly entered into to dispense of all the claims underlying the litigation. According to plaintiffs, the parties entered into a binding settlement agreement through an e-mail exchange between the parties' respective counsel. Plaintiffs attached copies of these emails to the motion, the relevant portions of which we will discuss here.

First, on August 3, 2020, the attorney who represented defendants at that time[2] sent an email to plaintiffs' counsel stating, "Here is our offer, revised a bit per my discussion with you . . . ." The email continued by stating that "[m]y clients would concede all issues pending before the court" and stating those specific issues in detail. In general terms, the email addressed issues concerning where defendants would agree to plaintiffs planting trees and locating other landscaping features relative to the driveway maintenance easement and the boundary line between the parties' properties. The email also stated:

> My clients would agree to the removal of the 5th Modification of the Declaration from the record and would endeavor to obtain the support of Hubner and Ubom for such removal (Brandes, Hubner and Ubom constituting a sufficient number of parcel owners needed to effectuate such removal). My clients would acknowledge and agree, and endeavor to obtain the acknowledgement and agreement of Hubner and Ubom, that the restrictions contained in the original Declaration expired in 1999 (except of course the perpetual easements referenced therein which may be amended in the future in accordance with the terms of the Declaration). The foregoing items shall be included in one instrument, which my clients would be responsible for preparing. Haqqani would agree to remove from the record the affidavit he recorded (and the revocation he solicited from Ubom which was attached thereto).

The email additionally provided that defendants' concession was subject to "[a]ll pending litigation (including as to Schreiber and Hubner)" being "dismissed with prejudice," with "the parties bear[ing] their own costs, expenses and attorney fees relating to the disputes." These costs, expenses, and attorney fees included plaintiffs' "claim for $95,000." The email also provided that defendants' concession was subject to "[t]he parties execut[ing] a mutual release that would cover all known and unknown claims relating to the current condition of either of their respective properties."

Plaintiffs' counsel responded the same day with an email message stating in relevant part:

> I need to know that you are going to deliver the withdrawal of the fifth modification and the acknowledgment that the declaration of restrictions expired in 1999 in recordable form.

[2] As will be discussed, defendants retained different counsel later in the litigation.

> Where is the uncertainty?
>
> Have you confirmed that Hubner is in agreement on the two items?

Defendants' counsel responded the same day with an email message providing in relevant part as follows:

> My client is definitely on board with terminating the 5th Amendment, as well as agreeing that the restrictions (excepting the perpetual easements) expired in 1999. We're not in a position to absolutely guaranty what Hubner and Ubom will do (we can't control them), but we will prepare the instrument and present it to them with the plan to have it recorded. . . . I recognize that elimination of the 5th Amendment and the expiration of the restrictions are a lynchpin to the overall settlement. Without that, there is no settlement. I just didn't want the Brandeses to affirmatively agree to do something (i.e. get Hubner and Ubom signatures) on the off chance that one of those individuals refuses to cooperate, and then Brandes has breached the settlement contract. . . . I recognize that any settlement agreement would be conditioned upon us producing those signatures and recording the instrument. I assume you're not looking for us to procure signatures and record an instrument before our respective clients have actually executed a settlement agreement. I'll keep this moving along on my end. I expect to have a draft recordable instrument in a day or two, and I will circulate it to you [and the others] for review and approval.

Plaintiffs counsel responded in relevant part as follows by email the next day, August 4, 2020:

> Thank you for that clarification. With your acknowledgement below that the lynch pin of the settlement is obtaining a fully executed document in recordable form withdrawing the 5th modification to the declaration of restrictions and acknowledging that the original declaration of restrictions (not including the permanent easements) expired in 1999, the settlement offer is accepted. As you noted, "without that, there is no settlement." Can you please share with me a draft of the two recordable documents that you propose under the terms of your email.

This email from plaintiffs' counsel also contained language at the bottom of the email stating: "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."

Defendants' counsel responded the same day, in relevant part:

> Ok. Good news. So let's proceed to the preparation of a settlement agreement. I can send you a draft of the instrument addressing the 5th Amendment. I assumed you would prepare the other instrument nullifying the Haqqani affidavit (and Ubom revocation).

At some point within a relatively short period after this email, defendants decided to retain different counsel. After defendants' original counsel moved to withdraw, plaintiffs filed the

aforementioned motion to enforce the settlement agreement based on the series of email messages quoted above. Plaintiffs argued that plaintiffs' counsel had unequivocally accepted the settlement offer proposed by defendants' counsel, that defendants' counsel had confirmed the settlement agreement in an email response, and that the parties had thereby reached a binding agreement. Plaintiffs attached to their motion a document titled "Settlement Agreement," which they claimed was consistent with the offer that they allegedly accepted by email, and plaintiffs requested that the trial court enter an order requiring defendants to execute the settlement agreement. Plaintiffs also requested costs and attorney fees for the motion.

Defendants opposed the motion, arguing that the emails reflected settlement negotiations but did not establish a binding contract. Defendants cited language in both parties' emails disavowing any intent to be contractually bound by the emails, including plaintiffs' counsel's disclaimer that "[t]his email does not establish a contract." Additionally, defendants argued that the agreement of nonparties Hubner and Ubom to terms involving certain subdivision easements and restrictive covenants was a condition precedent to any binding settlement agreement in this case. Defendants further argued that, even if the parties had entered into a settlement agreement through the e-mail exchange, the settlement agreement plaintiffs submitted to the trial court to be enforced differed materially from the proposed terms in the email exchange.

Defendants also attached a copy of the email exchange at issue, but defendants included two additional emails exchanged within an hour of the last email included by plaintiffs with their motion. As noted above in this opinion, the last part of this exchange that plaintiffs included was the email by defendants' counsel beginning, "Ok. Good news. So let's proceed to the preparation of a settlement agreement. . . ." Plaintiffs' counsel responded with the following email less than 15 minutes later:

> How about if I work on the draft settlement agreement and you prepare the proposed documents to record with the register of deeds.

The bottom of this email from plaintiffs' counsel also contained the same disclaimer language quoted above, stating in pertinent part that "[t]his email does not establish a contract . . . ."

Defendants' counsel responded to this email approximately 15 minutes later with the following email message:

> We actually began drafting a settlement agreement for your review and approval. Needless to say, the deal embodied by our exchange of emails is subject to a fully executed settlement agreement.

As previously noted, defendants retained new counsel at some point after the email exchange at issue concerning settlement. In responding to plaintiffs' motion to enforce the settlement agreement, defendants' new counsel also attached an affidavit by defendants' original attorney who had actually participated in the subject email exchange. In his affidavit, defendants' original attorney averred that he "never received a reply" to the above email in which he had indicated the need for a fully executed settlement agreement, and defendants' original attorney further averred that plaintiffs' counsel "never told [him] that he disagreed with [his] description of the status of the negotiations."

The trial court entered an order granting plaintiffs' motion to enforce the settlement agreement. The order indicated that oral arguments had been waived pursuant to MCR 2.119(E)(3). However, the order did not provide any elaboration regarding the court's findings, reasoning, or conclusions, nor did the order provide any details or explanation of its ruling. The trial court merely indicated its decision by marking a box next to the word "granted".

Defendants now appeal as of right.

II. STANDARD OF REVIEW

"An agreement to settle a pending lawsuit is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts." *Clark v Al-Amin*, 309 Mich App 387, 394; 872 NW2d 730 (2015) (quotation marks and citation omitted). "The 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).

Furthermore, "[a] contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of [MCR 2.507(G)]."[3] *Kloian*, 273 Mich App at 456. Under MCR 2.507(G),

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

This Court has explained that MCR 2.507(G) "is in the nature of a statute of frauds." *Kloian*, 273 Mich App at 456. "Whether a statute of frauds bars enforcement of a contract is a question of law that we review de novo." *Id*. at 458. "A court cannot force settlements upon parties or enter an order pursuant to the consent of the parties which deviates in any material respect from the agreement of the parties." *Id*. at 461 (quotation marks and citations omitted).

III. ANALYSIS

At the outset, we note that the trial court's cursory manner of resolving a dispositive motion by simply checking the box next to "granted," without providing any rationale or other explanation

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[3] At the time this Court issued its opinion *Kloian*, the relevant provision was contained in MCR 2.507(H). *Kloian*, 273 Mich App at 456. That provision, which was substantially similar to the current provision, provided:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney. [*Id*., quoting former MCR 2.507(H) (quotation marks and emphasis omitted).]

of its ruling, interferes with the process of providing meaningful appellate review. Nonetheless, in this case, it is clear from our review of the record and applicable law (1) that the first issue at this juncture is whether the email exchange between the parties' attorneys resulted in the formation of a contract, (2) that the record is sufficiently complete to adjudicate this issue, and that deciding this issue fully resolves the primary question presented on appeal and allows us to reach a complete disposition of the appeal in this matter. In light of these observations and the fact that our review of the existence of a contract is de novo, we find it appropriate to proceed to the merits despite the deficiencies in the trial court's order.

The creation of a contract requires an offer and acceptance. *Clark*, 309 Mich App at 394. "Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Id*. (quotation marks and citation omitted). "An attorney has the apparent authority to settle a lawsuit on behalf of his or her client." *Kloian*, 273 Mich App at 453.

In this case, defendants' attorney began his initial email by stating, "Here is our offer, revised a bit per my discussion with you, to elaborate about the preparation and recording of the instrument used to terminate the 5th Amendment, and to address the expiration of the restrictions." In the remainder of the email, defendants' attorney listed the concessions and agreements defendants agreed to make, as well as conditions on those concessions and agreements, which essentially amounted to actions that plaintiffs would agree to take or refrain from taking. As became particularly relevant in the subsequent emails that were part of this email exchange, this initial email from defendants' attorney indicated (1) that defendants agreed to the removal of the Fifth Modification from the record and that certain restrictions in the original Declaration had expired in 1999, (2) that defendants would agree to "endeavor to obtain" the agreement of Hubner and Ubom with respect to the removal of the Fifth Modification and the expiration of certain restrictions in the original Declaration, and (3) that these particular matters would be effectuated in a single instrument. Defendants' attorney ended his email by stating,

> We feel that the terms above are eminently fair to your client. I think the judge(s) in this matter would find our offer to be extremely generous, and equitable for all parties concerned. Thank you, and I look forward to your response. (You indicated I should hear back from you by Wednesday.)

"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 that bargain is invited and will conclude it." *Kloian*, 273 Mich App at 453. The initial email from defendants' attorney to plaintiffs' attorney clearly indicated at the beginning and the end that it constituted an offer from defendants for settling the case, the email outlined the terms and conditions of the offer, and the email ended by clearly inviting the assent of plaintiffs' attorney to the offered terms that defendants' attorney characterized as fair and equitable. This email constituted an offer. *Id*.

Plaintiffs' counsel responded by email that he "need[ed] to know that you are going to deliver the withdrawal of the fifth modification and the acknowledgment that the declaration of restrictions expired in 1999 in recordable form." Thus, although defendants had offered to "endeavor to obtain" the agreement of Hubner and Ubom with respect to those items, plaintiffs' attorney responded by demanding a guaranteed result on those matters or, at the very least, requesting a modification to this term as proposed in defendants' offer. "[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." *Kloian*, 273 Mich App at 453-454 (quotation marks and citation omitted; alteration in original). "Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id*. at 452 (quotation marks and citation omitted). Accordingly, because this response by plaintiffs' counsel was not in strict conformance with the offer and did not manifest an intent to be bound by the offer as presented, it was not an acceptance sufficient to form a contract. *Id*. at 452, 453-454.

Defendants' attorney responded by email and clearly declined to change the original offer to include the guaranteed result that plaintiff's attorney requested. Instead, defendants' attorney reiterated the offer with respect to this term consistent with the original offer, explaining as follows:

> My client is definitely on board with terminating the 5th Amendment, as well as agreeing that the restrictions (excepting the perpetual easements) expired in 1999. We're not in a position to absolutely guaranty what Hubner and Ubom will do (we can't control them), but we will prepare the instrument and present it to them with the plan to have it recorded. . . . I recognize that elimination of the 5th Amendment and the expiration of the restrictions are a lynchpin to the overall settlement. Without that, there is no settlement. I just didn't want the Brandeses to affirmatively agree to do something (i.e. get Hubner and Ubom signatures) on the off chance that one of those individuals refuses to cooperate, and then Brandes has breached the settlement contract. . . . I recognize that any settlement agreement would be conditioned upon us producing those signatures and recording the instrument. I assume you're not looking for us to procure signatures and record an instrument before our respective clients have actually executed a settlement agreement.

Plaintiffs' counsel replied:

> Thank you for that clarification. With your acknowledgement below that the lynch pin of the settlement is obtaining a fully executed document in recordable form withdrawing the 5th modification to the declaration of restrictions and acknowledging that the original declaration of restrictions (not including the permanent easements) expired in 1999, the settlement offer is accepted. As you noted, "without that, there is no settlement." Can you please share with me a draft of the two recordable documents that you propose under the terms of your email.

This email from plaintiff's counsel also included the disclaimer at the bottom that "[t]his email does not establish a contract . . . ."

Focusing solely on the phrase "the settlement offer is accepted," plaintiffs argue that this email constituted an acceptance of the settlement offer sufficient to create a binding contract. However, despite the fact that plaintiffs' counsel stated that the offer is "accepted," the additional explanation included in the response of plaintiffs' counsel makes clear that the acceptance was not in "strict conformance" with the offer as required to form a contract. *Kloian*, 273 Mich App at

452. Both of the emails written by defendants' counsel that preceded plaintiffs' alleged acceptance email were unambiguous in stating that defendants only offered to attempt to obtain the agreement and signatures of Hubner and Ubom relative to the Fifth Modification and original Declaration issues. The second email from defendants' counsel was clear in stating that defendants were not offering to guarantee that they could obtain the agreement of Hubner and Ubom. Defendants' counsel expressed his understanding that this issue was of crucial importance to plaintiffs and finalizing the settlement agreement. Yet, defendants' attorney still did not offer to commit to guaranteeing the procurement of Hubner's and Ubom's agreement, apparently necessary to effectuate the desired outcomes with respect to the Fifth Modification and the original Declaration.

Despite defendants' attorney maintaining that the offer was to attempt to secure the agreement of Hubner and Ubom, the purported acceptance email from plaintiffs' counsel included the proviso that there was no settlement agreement unless a "fully executed document in recordable form withdrawing the 5th modification to the declaration of restrictions and acknowledging that the original declaration of restrictions (not including the permanent easements) expired in 1999" was actually obtained. It is apparent from these email discussions that "fully executed" meant that the document was signed and agreed to by Hubner and Ubom. Thus, this email from plaintiffs' counsel also did not constitute an acceptance sufficient to form a contract because it did not unequivocally express an intent to be bound by the actual terms of the offer. *Kloian*, 273 Mich App at 452, 453-454.

Moreover, "a contract requires mutual assent or a meeting of the minds on all the essential terms." *Clark*, 309 Mich App at 394 (quotation marks and citation omitted). Here, it was evident from the parties' focus on the issues involving the agreement of Hubner and Ubom relative to the Fifth Modification and the expiration of restrictions in the original Declaration that these were essential terms to the agreement, on which there had to be a meeting of the minds in order to form a contract. *Clark*, 309 Mich App at 394. "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kloian*, 273 Mich App at 454 (quotation marks and citation omitted). An objective view of the express words in the parties' emails reveals that plaintiffs' attorney wanted a guaranteed result regarding the agreement of Hubner and Ubom and the obtainment of a fully executed and recordable document, while defendants' attorney only offered to attempt to secure this result; thus, there was never a meeting of the minds on these terms, regardless of what each may have subjectively believed. *Id.* No contract was formed. *Clark*, 309 Mich App at 394.

We additionally note that the disclaimer language regarding establishing a contract by email that was included in the email of plaintiffs' attorney also belies the claim that a contract was formed. Plaintiffs contend that this language is only intended to prevent a "contract or engagement" from being formed with the sending attorney and does not prevent attorneys from establishing contracts on behalf of their clients. It should have been up to the trial court to make findings on this issue, however in absence of any findings, we conclude that this Court need not decide the precise meaning or effect of this language in this case because even without that disclaimer, the purported "acceptance" was insufficient to form a contract for the reasons already discussed.

At most, the email exchange seems to indicate a general intention by both parties to resolve the litigation through a settlement, with many of the terms having been generally agreed upon.

However, as we have already explained, there were material terms involving the Fifth Modification and the original Declaration, as well as the agreement of other nonparties with respect to those issues, that the parties never agreed upon. As our Supreme Court has explained:

> It is well-recognized that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement. In such a case, where agreement is expressed on all essential terms, the instrument is considered a contract, and is considered a mere memorial of the agreement already reached. It is further to be noted, however, that If the document or contract that the parties agreed to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called contract to make a contract is not a contract at all. [*Prof Facilities Corp v Marks*, 373 Mich 673, 679; 131 NW2d 60 (1964) (quotation marks and citations omitted).]

In *Prof Facilities*, the plaintiff sued the defendants to recover a fee under a written contract and alleged that the terms of the contract obligated the defendants to pay the plaintiff a 2% fee on money that the plaintiff was to obtain from an investor and that was to be used by the defendants to build and finance a nursing home. *Id*. at 674-675. The plaintiff alleged that it had procured an investor to finance the project but that the defendants informed the plaintiff that they refused to proceed with the deal and had instead obtained alternative financing. *Id*. at 675. The plaintiffs sought "judgment for $3,200, being 2% of the sum of $160,000 which plaintiff alleged was the amount agreed upon between them for the project." *Id*. After reviewing the language of the alleged contract, our Supreme Court stated that it was "at most, a memorandum of intention to reach an agreement later." *Id*. at 678. The Court noted that the plaintiff's attorney had acknowledged in the trial court that the alleged contract only obligated the defendants to pay the plaintiff 2% of the amount of funds requested or accepted by the defendants but that the alleged contract "left it open for defendants to decide how much to request or accept" without specifying any particular amount of financing. *Id*. The Supreme Court concluded that the alleged contract was "not a contract at all" because "a material term had not yet been agreed upon." *Id*. at 679. The Court reasoned:

> The agreement, if any, of defendants to pay plaintiff, as expressed in the words 'Two (2%) percent of the amount of the funds requested or accepted' could never ripen into an obligation to pay until defendants should request or accept funds. While plaintiff's declaration alleged that the amount of financing agreed upon was $160,000, the instrument alleged by plaintiff to be the contract on which suit was brought, refutes the allegation by disclosing that no amount was agreed upon. There is no allegation that defendants ever requested or accepted a certain amount. The conditions upon which defendants' liability for a fee were to depend are not alleged to have been fulfilled at any time. [*Id*. at 678.]

In this case, because the parties never reached an agreement on the material terms related to the issues involving the Fifth Modification, original Declaration, and the agreement of other nonparties with respect to those matters, a contract was never formed. *Id*. at 678-679.

Accordingly, because no contract was formed regarding the proposed settlement, and the trial court erred by granting plaintiffs' motion to enforce the settlement agreement.[4]

Defendants additionally argue the trial court erred by awarding attorney fees to plaintiffs. "Michigan follows the 'American Rule,' which states that attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Skaates v Kayser*, 333 Mich App 61, 84; 959 NW2d 33 (2020) (quotation marks and citation omitted). Here, although plaintiffs requested attorney fees in their motion to enforce the settlement agreement, they did not identify any basis for being entitled to attorney fees. Moreover, the trial court did not cite any basis permitting it to award attorney fees. As previously noted, the trial court's order merely stated that plaintiffs' motion was "granted," which presumably included plaintiffs' request for attorney fees. As there was no identifiable source, such as a statute, court rule, or valid contract permitting the trial court to award plaintiffs attorney fees, the trial court erred by awarding attorney fees to plaintiffs. *Id*.

Finally, defendants argue that the trial court's order to enforce the settlement agreement was erroneous for other reasons as well. However, in light of our conclusions above, we need not address these arguments.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant having prevailed is entitled to costs. MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[4] We recognize that plaintiffs claim to have obtained the cooperation and consent of the necessary nonparties with respect to the Fifth Modification and original Declaration. However, plaintiffs do not claim to have fully executed, recordable documents relative to these matters, which would presumably also require defendants' signatures. Regardless, the issue at this juncture is not whether certain actions were actually performed. Instead, the sole issue is whether the email exchange evidences the formation of an enforceable contract. For the reasons already discussed, no contract was formed such that either party as of yet is obligated to perform any particular acts. Although "[c]ourts enforce contracts according to their unambiguous terms," *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), there is no contract in this case to enforce.