

position would have recognized it merely as an excited, nonbinding utterance.

It is important to distinguish language that constitutes an offer from that which merely solicits or invites offers. Such proposals, although made in earnest, lack the intent to enter into a contract and are therefore not deemed offers. As a result, a purported acceptance does not bring about a contract but operates only as an offer. Proposals

that invite offers include preliminary negotiations, advertisements, and auctions.

Practical Advice

Make sure that you indicate by words or conduct what agreement you wish to enter.

CATAMOUNT SLATE PRODUCTS, INC. v. SHELDON

SUPREME COURT OF VERMONT, 2004
2003 VT. GOOD 112, 845 A.2D 324

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=vt&vol=/supreme/&invol=2002-487>

FACTS The Reed Family owns and operates Catamount Slate Products, Inc. (Catamount), a slate quarry and mill, on 122 acres in Fair Haven, Vermont. The Sheldons own neighboring property. Since 1997, the parties have been litigating the Reeds' right to operate their slate business and to use the access road leading to the quarry. In 2000, the parties agreed to try to resolve their disputes in a state-funded mediation with retired Judge Arthur O'Dea serving as mediator. Prior to the mediation, Judge O'Dea sent each party a Mediation Agreement outlining the rules governing the mediation. Paragraph nine of the Mediation Agreement stated that

i. all statements, admissions, confessions, acts, or exchanges ... are acknowledged by the parties to be offers in negotiation of settlement and compromise, and as such inadmissible in evidence, and not binding upon either party unless reduced to a final agreement of settlement. Any final agreement of settlement must be in writing and signed by every party sought to be charged.

The mediation was held on September 5, 2000. Judge O'Dea began the session by reaffirming the statements made in the Mediation Agreement. After ten hours, the parties purportedly reached an agreement on all major issues. Judge O'Dea then orally summarized the terms of the resolution with the parties and counsel present. The attorneys took notes on the terms of the agreement with the understanding that they would prepare the necessary documents for signature in the coming days.

The resolution required the Reeds to pay the Sheldons \$250 a month for the right to use the access road, with payments to commence on October 1, 2000. The parties also agreed to a series of terms governing the operation of the slate quarry. These terms were to be memorialized in two distinct documents, a Lease Agreement and a Settlement Agreement.

On September 7, 2000, two days after the mediation, the Sheldons' attorney, Emily Joselson, drafted a letter outlining the terms of the settlement and sent copies to James Leary, the Reeds' attorney, and Judge O'Dea. Within a week, Leary responded by letter concurring in some respects and outlining the issues on which the Reeds disagreed with Joselson's characterization of the settlement.

On October 1, 2000, the Reeds began paying the \$250 monthly lease payments, but, since the settlement agreement was not final, the parties agreed that the money would go into an escrow account maintained by the Sheldons' counsel. The check was delivered to the Sheldons' attorney with a cover memo stating, "This check is forwarded to you with the understanding that the funds will be disbursed to your clients only after settlement agreement becomes final. Of course, if the settlement agreement does not come to fruition, then the funds must be returned to my clients." The parties continued to exchange letters actively negotiating the remaining details of the Lease and Settlement Agreements for the better part of the next five months.

In February 2001, while drafts were still being exchanged, Christine Stannard, the Reeds' daughter, saw a deed and map in the Fair Haven Town Clerk's Office, which led her to believe that the disputed road was not owned by the Sheldons, but was a town highway. The Reeds then refused to proceed any further with negotiating the settlement agreement. A written settlement agreement was never signed by either party.

The Sheldons then filed a motion to enforce the settlement agreement. The trial court granted the option, finding that the attorneys' notes taken at the end of the mediation and the unsigned drafts of the Lease and Settlement Agreements sufficiently memorialized the agreement between the parties and thus constituted an enforceable settlement agreement.

DECISION Judgment of the trial is reversed and remanded.

OPINION Skoglund, J. The question before us is whether the oral agreement reached at mediation, when combined with the unexecuted documents drafted subsequently, constituted a binding, enforceable settlement agreement. Parties are free to enter into a binding contract without memorializing their agreement in a fully executed document. [Citation.] In such an instance, the mere intention or discussion to commit their agreement to writing will not prevent the formation of a contract prior to the document's execution. [Citations.]

"On the other hand, if either party communicates an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." [Citation.] The freedom to determine the exact moment in which an agreement becomes binding encourages the parties to negotiate as candidly as possible, secure in the knowledge that they will not be bound until the execution of what both parties consider to be a final, binding agreement.

We look to the intent of the parties to determine the moment of contract formation. [Citation.] Intent to be bound is a question of fact. [Citation.] "To discern that intent a court must look to the words and deeds [of the parties] which constitute objective signs in a given set of circumstances." [Citation.] In [citation], the Second Circuit articulated four factors to aid in determining whether the parties intended to be bound in the absence of a fully executed document. [Citation.] The court suggested that we "consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." [Citations.]

The language of the parties' correspondence and other documentary evidence presented reveals an intent by the mediation participants not to be bound prior to the execution of a final document. First, the Mediation Agreement Judge O'Dea sent to the parties prior to the mediation clearly contemplates that any settlement agreement emanating from the mediation would be binding only after being put in writing and signed. Paragraph nine of the Agreement expressly stated that statements made during mediation would not be "binding upon either party unless reduced to a final agreement of settlement" and that "any final agreement of settlement [would] be in writing and signed by every party sought to be charged." Further, Judge O'Dea reminded the parties of these ground rules at the outset of the mediation. The Reeds testified that they relied on these statements and assumed that, as indicated, they would not be bound until they signed a written agreement.

Even more compelling evidence of the Reeds' lack of intent to be bound in the absence of a writing is the statement in the cover letter accompanying the Reeds' \$250 payments to the Sheldons' attorney saying, "This check is

forwarded to you with the understanding that the funds will be disbursed to your clients only after settlement agreement becomes final. Of course, if the settlement agreement does not come to fruition, then the funds must be returned to my clients." This factor weighs in favor of finding that the Reeds expressed their right not to be bound until their agreement was reduced to a final writing and executed.

Because there was no evidence presented of partial performance of the settlement agreement, we next consider the third factor, whether there was anything left to negotiate. ***

As stated by the Second Circuit in [citation], "the actual drafting of a written instrument will frequently reveal points of disagreement, ambiguity, or omission which must be worked out prior to execution. Details that are unnoticed or passed by in oral discussion will be pinned down when the understanding is reduced to writing." (internal quotations and citations omitted). [Citation.] This case is no exception. A review of the lengthy correspondence in this case makes clear that several points of disagreement and ambiguity arose during the drafting process. Beyond the location of seismic measurements and the definition of "overblast," correspondence indicates that the parties still had not reached agreement on the term and width of the lease, acceptable decibel levels and notice provisions for blasts, the definition of "truck trips," and whether all claims would be dismissed without prejudice after the execution of the agreement. Resolution of these issues was clearly important enough to forestall final execution until the language of the documents could be agreed upon. In such a case, where the parties intend to be bound only upon execution of a final document, for the court to determine that, despite continuing disagreement on substantive terms, the parties reached a binding, enforceable settlement agreement undermines their right to enter into the specific settlement agreement for which they contracted.

The fourth and final factor, whether the agreement at issue is the type of contract usually put into writing, also weighs in the Reeds' favor. Being a contract for an interest in land, the Lease Agreement is subject to the Statute of Frauds and thus generally must be in writing. ***

In conclusion, three of the four factors indicate that the parties here did not intend to be bound until the execution of a final written document, and therefore we hold that the parties never entered into a binding settlement agreement.

INTERPRETATION The intent of the parties to be bound to a contract is determined by an objective standard of what a reasonable person would have believed based on the words and conduct of the parties.

CRITICAL THINKING QUESTION Does the decision rendered by the court establish a policy that is best for society? Explain.

Preliminary Negotiations If a communication creates in the mind of a reasonable person in the position of the offeree an expectation that his acceptance will conclude a contract, then the communication is an offer. If it does not, then the communication is a preliminary negotiation. Initial communications between potential parties to a contract often take the form of preliminary negotiations, through which the parties either request or supply the terms of an offer that may or may not be made. A statement that may indicate a willingness to make an offer is not in itself an offer. For instance, if Brown writes to Young, "Will you buy my automobile for \$3,000?" and Young replies, "Yes," there is no contract. Brown has not made an offer to sell her automobile to Young for \$3,000. The offeror must demonstrate an intent to enter into a contract, not merely a willingness to enter into a negotiation.

Advertisements Merchants desire to sell their merchandise and thus are interested in informing potential customers about the goods, terms of sale, and price. But if they make widespread promises to sell to each person on their mailing list, the number of acceptances and resulting contracts might conceivably exceed their ability to perform. Consequently, a merchant might refrain from

making offers by merely announcing that he has goods for sale, describing the goods, and quoting prices. He is simply inviting his customers and, in the case of published advertisements, the public, to make offers to him to buy his goods. His advertisements, circulars, quotation sheets, and displays of merchandise are *not* offers because (1) they do not contain a promise and (2) they leave unexpressed many terms that would be necessary to the making of a contract. Accordingly, his customers' responses are not acceptances because no offer to sell has been made.

Nonetheless, a seller is not free to advertise goods at one price and then raise the price once demand has been stimulated. Although as far as contract law is concerned the seller has made no offer, such conduct is prohibited by the Federal Trade Commission as well as by legislation in most states. Moreover, in some circumstances a public announcement or advertisement may constitute an offer if the advertisement or announcement contains a definite promise of something in exchange for something else and confers a power of acceptance on a specified person or class of persons. The typical offer of a reward is an example of a definite offer, as is the situation presented in the landmark *Lefkowitz v. Great Minneapolis Surplus Store, Inc.* case, which follows.

LEFKOWITZ V. GREAT MINNEAPOLIS SURPLUS STORE, INC.

SUPREME COURT OF MINNESOTA, 1957
251 MINN. 188, 86 N.W.2D 689

FACTS On April 6, 1956, Great Minneapolis Surplus Store published an advertisement in a Minneapolis newspaper reporting that "Saturday, 9:00 A.M. sharp; 3 brand new fur coats worth up to \$100; first come, first served, \$1 each." Lefkowitz was the first to arrive at the store, but the store refused to sell him the fur coats because the "house rule" was that the offers were intended for women only and sales would not be made to men. The following week, Great Minneapolis published a similar advertisement for the sale of two mink scarves and a black lapin stole. Again Lefkowitz was the first to arrive at the store on Saturday morning, and once again the store refused to sell to him, this time because Lefkowitz knew of the house rule. This appeal was from a judgment awarding the plaintiff the sum of \$138.50 as damages for breach of contract.

DECISION Judgment for Lefkowitz affirmed.

OPINION Murphy, J. The defendant *** relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and

on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which, therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms. [Citations.] ***

On the facts before us we are concerned with whether the advertisement constituted an offer.

The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested."

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. [Citations.] We are of the view