

DISCOVER BANK,
Plaintiff

VS.

K. RYAN,
Defendant

: IN THE COURT OF COMMON PLEAS
: OF BERKS COUNTY, PENNSYLVANIA

:
: CIVIL ACTION - LAW

:
:
: No. 16-5676

Michael J. Dougherty, Esquire
Attorney for plaintiff

Alan B. Ziegler, Esquire
Attorney for defendant

OPINION, JEFFREY K. SPRECHER, J.

MAY 22, 2018

In this second appeal, defendant now appeals the Order dated March 20, 2018 that dismissed her Emergency Motion to Enforce Settlement Agreement of March 7, 2018 as frivolous and ordered payment of \$500.00 towards plaintiff's counsel fees. This Opinion is filed pursuant to Pa. R.A.P. 1925.

FACTS

This court provided the underlying facts of this case in its Opinion of February 2, 2018, written pursuant for the first appeal of defendant, K. Ryan. Defendant first appealed the Verdict of this court dated November 8, 2017, which found in favor of plaintiff, Discover Bank, and against defendant and entered judgment in the amount of \$17,092.86. This court submitted that in the first appeal defendant waived all issues because she failed to file any post-trial motions and therefore had not preserved any issues for her appeal. Defendant also never requested a transcript, so this court was not able to address all fourteen issues raised in the Concise Statement. The Superior

Court never addressed the first appeal because it granted defendant's Motion to Discontinue Appeal on March 15, 2018.

On March 7, 2018, defendant filed an Emergency Motion to Enforce Settlement Agreement between the parties. Defendant alleges the following facts.

On February 19, 2018, the parties entered into an agreement to settle the case for \$10,500.00 to be paid by defendant to plaintiff. Defendant also agreed to withdraw the pending appeal to the Pennsylvania Supreme Court.¹ On February 19, 2018, defendant's counsel received a proposed Release and Settlement Agreement (Agreement) from plaintiff. On February 23, 2018, defendant requested three modifications to the Agreement: 1) defendant's name be modified to Kel lee Ryan a/k/a K. Ryan; 2) Paragraphs 3 and 4 include account numbers ending 5222 and 7732; and 3) Paragraphs 5 and 11 apply to both parties instead of just defendant.

On March 5, 2018, defendant received a modified Agreement adding account number 6011 0024 7951 7732 to Paragraph 3 and the wherefore clause but plaintiff refused to change defendant's name or make Paragraphs 5 and 11 applicable to both parties. Paragraph 5 reads as follows: The provisions of any state, federal, local or territorial law or statute that releases shall not extend to claims, injuries or damages which are unknown or unsuspected to exist at the time are expressly waived by Defendant. Paragraph 11 states:

Defendant agrees to keep confidential and shall not reveal and/or communicate in any way to any person, the terms of this Agreement. Defendant warrants and represents to Discover that they have not revealed to anyone the terms of this proposed settlement at any time before this Agreement was executed by all parties. Defendant agrees that, if asked, they will only reveal that this matter has been settled, and

¹ This court believes that this was a typographical error and should have referenced the Pennsylvania Superior Court.

they will not reveal any other terms of the Agreement, without the prior written consent of Discover. If Defendant is ordered by any Court to reveal information concerning this Agreement, Defendant shall give notice of such disclosure to Discover and their attorneys in this action at least 48 hours prior to any such disclosure unless otherwise ordered by the Court.

Plaintiff informed defendant by electronic mail on March 6, 2018 that if the executed release was not received by it by March 9, 2018, plaintiff would withdraw the offer of settlement.

Defendant contends in her emergency petition that plaintiff did not have the ability to withdraw the settlement offer previously accepted by defendant because the modifications requested by defendant did not prejudice plaintiff but simply clarified who the defendant is and gave defendant the same protections as plaintiff. Defendant sought counsel fees from plaintiff for dilatory, vexatious, and bad faith conduct.

This court heard argument on this petition, and denied the motion. This court found that defendant attempted to amend the Agreement, but plaintiff agreed to only one modification; therefore, the parties did not reach a final agreement.

This court further denied defendant's request for counsel fees; instead it ordered counsel fees for plaintiff due to defendant's frivolous petition.

ISSUES

Defendant raised the following issues in her Concise Statement of Errors Complained of on Appeal.²

1. Is the defendant's behavior frivolous when the defendant filed an "Emergency Motion to Enforce Settlement Agreement" after the parties agreed on the essential material terms of the settlement even though the written agreement had not

² This court has reversed the words "plaintiff" and "defendant" in the first three issues to reflect the correct parties that were erroneously listed by defendant.

yet been entered into and the plaintiff and defendant disagreed about some of the terms of the written settlement agreement and plaintiff threatened to breach and/or withdraw from the settlement agreement if defendant did not relinquish her requests sought in the written agreement?

2. Is defendant's behavior frivolous when defendant filed an "Emergency Motion to Enforce Settlement Agreement" after the parties agreed on the essential material terms of the settlement even though the written agreement had not yet been entered into and the plaintiff literally got every term it wanted in the written settlement agreement and, in spite of that, plaintiff threatened to breach and/ or withdraw from the settlement agreement if defendant did not relinquish her requests sought in the written settlement agreement?

3. Is defendant's behavior frivolous when defendant filed an "Emergency Petition to Enforce Settlement Agreement" after the parties agreed on the essential material terms of the settlement even though the written settlement agreement had not been entered into and plaintiff threatened to breach and/or withdraw the settlement agreement when the only terms in dispute was that defendant requested defendant's name be listed as Kel-lee Ryan a/k/a K. Ryan rather than just K. Ryan and that paragraphs 5 and 11 of the "Release and Settlement Agreement" which plaintiff insisted to be in the written settlement agreement were requested by defendant to be also made applicable to plaintiff thereby applying to both parties?

4. Under the facts in this case, did defendant engage in frivolous behavior by including a request for reasonable attorney fees in her "Emergency Motion to Enforce Settlement Agreement?"

DISCUSSION

This court shall address the first three issues collectively because they all assert essentially the same issue. Defendant maintains that her emergency petition was not frivolous because the parties had agreed on the essential material terms of the Agreement and had disagreed about just minor terms of the written Agreement, so plaintiff had no right to threaten to breach and/or withdraw from the Agreement if defendant did not relinquish her requests for modifications. These issues are without merit.

It is a basic principle of contract law that an acceptance must be unconditional and absolute. *Temple University v. Healthcare Management*, 764 A.2d 587 (Pa. Super. 2000). According to defendant's own allegations, the parties engaged in negotiations for a settlement. Plaintiff made a huge concession by agreeing to reduce the judgment of the Verdict from over \$17,000.00 to \$10,500.00. Defendant agreed to withdraw her appeal in exchange for the smaller obligation. That was the extent of any agreement. Plaintiff made an offer incorporating those terms in the Agreement, which defendant refused to sign unless three modifications occurred. Plaintiff agreed to only one of those amendments. It then informed defendant that it would withdraw its offer if defendant did not agree to the remaining terms. Defendant did not agree. Both parties had to believe that the changes defendant requested were material. Plaintiff did not agree to them, and plaintiff refused to sign Agreement unless they were included. A reply to an offer which purports to accept the offer, but instead changes the terms of the offer, is not an acceptance, but, rather, is a counteroffer, which has the effect of terminating the offer. An acceptance of an offer or counteroffer must be unconditional

and absolute. *Epenshade v. Epenshade*, 729 A.2d 1239 (1999). Thus, there was no agreement in the case *sub judice*. Defendant never unconditionally accepted plaintiff's offer but terminated it by making a counteroffer which plaintiff only partially accepted.

Defendant's last contention is that a request for attorney fees was warranted in this case because it was not a frivolous petition. This issue is meritless. It was a frivolous petition because there was no agreement between the parties to enforce. Simply stating that the parties had entered into an agreement does not make an agreement. Plaintiff withdrew any offer following defendant's refusal to sign the agreement without the modifications. Plaintiff did not agree to defendant's counteroffer. Thus, there was no agreement and no meeting of the minds. Defendant even admitted in her petition and Concise Statement that the parties did not agree to all the terms of the written settlement agreement. Thus, there was no unconditional acceptance and nothing for this court to enforce.

In accordance with the foregoing Opinion, this court submits that its Order should be affirmed and the appeal denied.



JEFFREY K. SPRECHER, J.