

IN THE STATE COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA


Beverly Logan, Clerk
Clarke County, Georgia

AARON PIERCE,
Plaintiff,

versus

Case Number: **ST-21-CV-0686**

**KYNDYL YVETTE BANKS AND
OCTAVIUS AVERY SMITH,**
Defendants.

ORDER

On October 4, 2021, Plaintiff filed a Complaint seeking damages. Defendants filed Answers asserting the defense of accord and satisfaction. Plaintiff filed a Motion for Partial Summary Judgment as to Defendants' defense of accord and satisfaction. Defendants responded and filed a Motion to Enforce Settlement Agreement. On April 27, 2022, the Court held a hearing on both motions.

Findings of Fact

On February 8, 2021, a vehicle operated by Kyndyl Banks or Octavius Smith caused a collision with a motorcycle operated by Aaron Pierce. Mr. Pierce sustained injuries. Trexis One Insurance Corporation ("Trexis") insured Ms. Banks and/or Mr. Smith at the time of the collision.

On June 25, 2021, Natanya Brooks, attorney for Mr. Pierce, sent Trexis an offer to settle pursuant to O.C.G.A. § 9-11-67.1. On July 28, 2021, attorney Alexandra Svoboda

responded. The response did not include the required affidavit and was a counteroffer. Plaintiff did not accept the counteroffer.

On August 30, Ms. Brooks sent Ms. Svoboda a second offer to settle pursuant to O.C.G.A. § 9-11-67.1. The offer to settle required Trexis to provide written acceptance of the offer and complete the terms. The offer to settle did not require either Ms. Banks or Mr. Smith to consent to the agreement.

On September 3, 2021, Ms. Svoboda replied by letter that Trexis had authorized her to accept the demand and terms in their entirety. Ms. Svoboda included a check for \$25,000 and a limited release. The limited release indicated that “Aaron Pierce acknowledges notice in writing of the lack of consent of Kyndyl Banks and Octavius Smith to this compromise . . .”. No evidence has been provided that either Ms. Banks or Mr. Smith consented to the agreement.

On September 9, 2021, Ms. Brooks received the letter, release, and payment. On September 28, 2021, Ms. Brooks sent an email to Ms. Svoboda that the reply was not identical to the offer. Six days later, Mr. Pierce filed this action asserting claims against both Ms. Banks and Mr. Smith.

Contentions of the Parties

Defendants contend that Ms. Svoboda’s September 3 response met every condition of Plaintiff’s August 30 offer to settle creating an enforceable contract. The terms of the contract included Plaintiff executing a limited release of Defendants. Defendants seek an order enforcing the settlement agreement.

Plaintiff contends that the September 3 response presented a counteroffer because it varied from the requirements of the offer and imposed new conditions. Specifically,

Plaintiff argues three variations. First, Trexis included the \$25,000 payment with the September 3 letter when the offer stated that “payment must be received 15 days after Trexis’ written acceptance of the offer of compromise.” Second, the check contained an impermissible restriction that it would be “VOID AFTER 180 DAYS”. Third, the check listed “Aaron Pierce and Brooks Injury Law LLC” instead of “Aaron Pierce and Brooks Injury Law, LLC”. Plaintiff also contends that Trexis did not accept the offer in writing.

Issue Presented

Did Trexis and Plaintiff form an enforceable contract?

Discussion and Analysis

Settlement offers under O.C.G.A. § 9-11-67.1¹ are subject to the general rules of contract formation, and an offer may require acceptance by performance in addition to the required written acceptance.² If an offer requires an act, the offer can be accepted only through the completion of that act.³ Also, the offer must be accepted without variance and without imposing any new conditions because an acceptance that varies or imposes a new condition is a counteroffer.⁴ In this case, the Court must decide if Trexis completed the acts required to accept the offer and whether Trexis varied from any term or imposed any new conditions.

¹ This cause of action arose under the 2013 version of O.C.G.A. § 9-11-67.1. The 2021 amendment, effective July 1, 2021, applies to causes of action for personal injury, bodily injury, and death arising from the use of a motor vehicle on or after July 1, 2021.

² *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 858 (2017).

³ *Pritchard v. Mendoza*, 357 Ga. App. 283, 288 (2020).

⁴ *Id.* at 287-88.

Did Trexis complete the acts required to accept the offer?

O.C.G.A. § 9-11-67.1 (a) sets out five material terms that an offer of settlement must include. Plaintiff's August 30, 2021 offer contained all five terms. Further, Plaintiff's offer required that Trexis accept the offer in writing.

Time Period

Plaintiff required Trexis to accept the offer within 31 days from receipt of the offer. Trexis received the offer on September 2, 2021. Trexis's written acceptance, payment, and limited release were delivered to Plaintiff on September 9, 2021 within the 31 days provided.

Amount of Payment

Plaintiff required payment of \$25,000. Trexis provided a check for \$25,000.

Release

Plaintiff provided specific instructions as to the type of release that he was willing to execute and as to the parties and claims that he was willing to release. Trexis delivered a limited release complying with the specific instructions of the Plaintiff.

Written Acceptance

The August 30, 2021 offer provided that "Trexis must accept each of the aforementioned material terms in writing within 31 days from its receipt of this offer." On September 3, 2021, Ms. Svoboda replied in writing that "Trexis One Insurance

Corporation has authorized me to accept your demand dated August 30, 2021, and its terms in their entirety.” Plaintiff’s attorney received the letter on September 9, 2021.

Plaintiff argues that the language responding that Trexis “has authorized me to accept your demand” did not amount to a written acceptance. The Court disagrees. The letter indicated Trexis’s intention in writing to accept the offer’s “terms in their entirety.” Assuming arguendo that the language in the letter created any ambiguity whether Trexis actually accepted the terms, the inclusion of payment and the limited release dispelled any doubt the letter served as written acceptance by Trexis of Plaintiff’s offer.

Plaintiff also argues that this acceptance did not comply with O.C.G.A. § 9-11-67.1 (b) and that Ms. Banks and Mr. Smith did not accept the offer in writing. Neither argument affects Trexis’s acceptance of Plaintiff’s offer. First, O.C.G.A. § 9-11-67.1 (b) does not require written acceptance. It only provides that a recipient of an offer “may accept” an offer by providing written acceptance. Second, Plaintiff’s settlement offer did not require either Ms. Banks or Mr. Smith to accept the offer in writing or otherwise.⁵ The offer required only Trexis to provide written acceptance. The Court finds that Trexis did provide written acceptance of all material terms as required by Plaintiff.

Brief Answer

By delivering the letter, check, and limited release, the Court finds that Trexis completed all acts required to accept Plaintiff’s offer.

⁵ The offer contemplated that Ms. Banks and Mr. Smith might not even consent to the compromise and permitted Trexis to include that language in the limited release. Trexis included the language in the limited release provided. No evidence has been presented that Ms. Banks or Mr. Smith agreed to the compromise.

Did Trexis vary any term or impose any new conditions?

Plaintiff argues that Trexis varied or added new conditions in three ways. Trexis argues that it complied with the terms without variation and did not impose any new conditions. The Court will look at each issue raised by Plaintiff.

Receipt of Payment

The offer provided that “[a]s an act necessary to accept this offer, payment must be received 15 days after Trexis’ written acceptance of this offer of compromise”. Plaintiff argues that Trexis “did not satisfy this act necessary for acceptance because it sent the check simultaneously with the purported acceptance.”⁶ Plaintiff argues that instead “Trexis needed to *deliver* payment 15 days after sending written acceptance.”⁷

However, Plaintiff’s offer letter does not require Trexis to deliver payment 15 days after written acceptance to accept the offer. In drafting this term, Plaintiff utilized the passive voice. When using passive voice, a drafter inverts a typical sentence structure making the object of an act the subject of the sentence while distancing or hiding the actor.⁸ If used in contracts, a passive sentence structure can create ambiguities because the drafter does not identify the actor.⁹

In this sentence, Plaintiff required that “payment must be received 15 days after Trexis’ written acceptance of this offer of compromise” making the action to be completed

⁶ Pl.’s Br. Summ. J. 7.

⁷ *Id.* (emphasis supplied).

⁸ See Karen J. Sneddon & David Hricik, *Pondering Passive Voice*, 14 NO. 7 GA B.J. 70, 71 (June 2009) (“Because passive voice distances the actor from the action being performed, it can be difficult for the reader to identify who or what is the actor of the sentence. In fact, with passive voice constructions, the actor of the sentence may be omitted entirely.”).

⁹ See M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ALWD 79, 105 (2008) (“Contracts must use active voice to express the responsibilities of the parties. Passive voice avoids directly stating who is doing what to whom and, therefore, it can be ambiguous.”).

the receiving of payment. Correspondingly, the Plaintiff placed the object of the act to be completed, “payment”, as the subject of the sentence and omitted the actor entirely. The unnamed actor was Brooks Injury Law, LLC and not Trexis.¹⁰

As drafted, this sentence did not require Trexis to “deliver” payment 15 days after written acceptance. It required the law firm to receive payment 15 days after written acceptance. No dispute exists that the law firm received payment at the time it received Trexis’ written acceptance, and therefore, the law firm had also received payment 15 days after Trexis’ written acceptance. The law firm’s receipt of payment at the time Trexis accepted the offer did not vary the terms because no provision in the letter prevented Trexis from tendering payment at that time.¹¹ Trexis complied with this term without any variance or imposing new conditions.

“Void after 180 Days” on Check

Plaintiff’s offer letter contained the term that the settlement payment “must not include any terms, conditions, descriptions, expirations, or restrictions that are not expressly permitted in this offer.” The check tendered by Trexis contained the language “VOID AFTER 180 DAYS”. Plaintiff argues that language constituted an impermissible restriction and expiration.

However, Trexis did not impose the condition that the check would be void after 180 days. The Uniform Commercial Code did. U.C.C. § 4-404 provides that a “bank is

¹⁰ Using the active voice, the sentence would read that the law firm must receive payment 15 days after written acceptance.

¹¹ Plaintiff drafted the offer with very explicit terms, conditions, and requirements that Trexis needed to meet to accept the offer. If Plaintiff intended to require Trexis to deliver payment only on the 15th day after written acceptance or if Plaintiff intended to prohibit delivery at the same time as written acceptance, Plaintiff could have written those requirements in the offer letter. However, Plaintiff did not do so.

under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date”.¹² Whether the language was included on the check or not, Bancorp as payor bank had no obligation to pay the check after 180 days.¹³ The fact that Bancorp included the language on the check only informed the payee of Bancorp’s obligation for payment pursuant to the U.C.C.

O.C.G.A. § 9-11-67.1 (f) (5) allowed Trexis to provide payment by bank check.¹⁴ By allowing payment by bank check, the Georgia Legislature had to contemplate that any payment by this method would still be subject to the laws and provisions governing negotiable instruments. Here, the language on the check outlined the standard condition set by the U.C.C. and Georgia law as to the payor bank’s obligation to pay the check. This language did not affect the validity of the payment or the ability of Plaintiff to negotiate the instrument.¹⁵ The Court finds that Trexis did not vary acceptance or impose any new conditions or restrictions due to this language being on the check.

¹² This provision has been adopted by Georgia (the state where the check was tendered) at O.C.G.A. § 11-4-404, Tennessee (the location of Trexis on the check) at Tenn. Code Ann. § 47-4-404, and Delaware (the state where The Bancorp Bank (Bancorp), payor bank, is chartered according to the FDIC <https://banks.data.fdic.gov/bankfind-suite/bankfind/details/35444> (last visited July 8, 2022)) at 6 Del. C. §4-404.

¹³ Even if Trexis had included a certified check or another form of payment drawn on a bank or financial institution, the payment would have been subject to the expiration date as set by the payor for the instrument or the time frame set by state law applicable to abandoned property and potential surrender to the state. No check or certified check remains eternally valid without expiration.

¹⁴ Plaintiff’s offer also anticipated the possibility of this payment method by providing how the payee should be listed.

¹⁵ The 180 day language on the check did not change the validity of the check when delivered to Plaintiff or include a term, condition, or restriction any more than the other language on the front of the check “DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK” or the language on the back of the check that instructed “DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE”.

Name of Payee

Plaintiff's offer required that "payment must be made to 'Aaron Pierce and Brooks Injury Law, LLC.'" [sic].¹⁶ Trexis sent payment to "Aaron Pierce and Brooks Injury Law LLC".

Plaintiff cites language included later in the offer stating "any variance at all from the quoted language above, even if accidental, will be a rejection of this offer." However, this provision does not change the analysis. A comma is not language. A comma is punctuation. The lack of a comma on the check did not change either payee or vary the required language. The payees remained the same. The lack of a comma did not affect the negotiability of the check or either payees' receipt of payment. Trexis made payment to the payees required and complied with this term without any variance.

Brief Answer

The Court does not find that Trexis varied any term or imposed any new condition in delivering the letter, payment, and the limited release.

Conclusion

In considering Plaintiff's Motion for Partial Summary Judgment, the Court must look at the evidence in the light most favorable to Defendants. For this motion, the Court finds that the evidence is sufficient to create a jury question on the issue of accord and satisfaction. Therefore, Plaintiff's Motion for Partial Summary Judgment is denied.

¹⁶ Whether inadvertent or intentional, Plaintiff placed a period inside the quotation marks. Punctuation marks should be placed inside quotation marks "only if they are part of the original text." The Bluebook: A Uniform System of Citation R. 5.1 (b) (iv) at 83 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

In considering Defendants' Motion to Enforce Settlement Agreement, the Court must look at the evidence in the light most favorable to Plaintiff. For this motion, the Court finds the evidence establishes that Trexis completed the acts required to accept Plaintiff's offer and Trexis did not vary any term or impose any new condition that would constitute a counteroffer rather than acceptance. No evidence exists to create a jury question on the enforceability of the contract. Therefore, the Court finds that as a matter of law Trexis accepted the Plaintiff's offer of settlement creating an enforceable contract. Defendants' Motion to Enforce Settlement is granted.

SO ORDERED, this 8 day of July, 2022.

A handwritten signature in cursive script that reads "Charles E. Auslander, III". The signature is written in black ink and includes a horizontal line extending to the right from the end of the name.

Charles E. Auslander, III
Judge, State Court of Athens-Clarke County

CERTIFICATE OF SERVICE

Copies of the foregoing Order (ST-21-CV-0686) have been served by mail and through PeachCourt upon:

(X) Counsel for Plaintiff:

Ashley B. Fournet / Ben C. Brodhead, III
Brodhead Law, LLC
3350 Riverwood Parkway SE, Suite 2230
Atlanta, GA 30339

ashley@brodheadlaw.com
ben@brodheadlaw.com

(X) Counsel for Defendants:

Alexandra M. Svoboda / Rakhi D. McNeill
Waldon Adelman Castilla Hiestand & Prout
900 Circle 75 Parkway SE, Suite 1040
Atlanta, GA 30339

asvoboda@wachp.com
rmcneill@wachp.com

William S. Cowsert
Cowsert Heath, LLP
PO Box 627
Athens, GA 30603-0627

bill.cowsert@cowsertheath.com

This 8th day of July, 2022.

Walter Weis
State Court of Athens-Clarke County