

STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

GHASSEN ZITOUNI,

Plaintiff,

v

SHAN-COR, INC, a Michigan corporation,
and REET, INC, a Michigan corporation,

Defendants.

Case No. 14-023058-CK

Judge: M. Randall Jurrens (P27637)

**OPINION and ORDER
DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION**

SHINNERS & ELLSWORTH, PLC

By: John J. Shiners (P41337)

Attorneys for Plaintiff

60 Harrow Lane, Suite 4

Saginaw, Michigan 48638

Telephone: (989) 249-4900

MAHLBERG, BRANDT, GILBERT
& THOMPSON

By: Mark T. Mahlberg (P16991)

Attorneys for Defendants

715 Court Street

Saginaw, Michigan 48602

Telephone: (989) 790-2870

Following an April 8, 2015 bench trial, the court took this matter under advisement and ultimately rendered a written Opinion on June 5, 2015. The Opinion was then confirmed in a June 29, 2015 Order submitted pursuant to MCR 2.602(B)(3). On July 16, 2015, the plaintiff filed a "motion for reconsideration".

Although denominated as a "motion for reconsideration", such motions are generally brought under MCR 2.119(F)¹ (a subrule within MCR 2.119, *Motion Practice*) which governs

¹ For a motion under MCR 2.119(F) to be granted, "[t]he moving party must demonstrate palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

requests for reconsideration of court decisions (seemingly particularly, reconsideration of decisions on parties' motions), "unless another rule provides a different procedure for reconsideration".

Here, given the context, the court will assume that the plaintiff is seeking relief under MCR 2.611, *New Trials; Amendment of Judgments*. In this regard, although the plaintiff's motion is silent as to the relief being requested, MCR 2.611(A)(2) provides:

On a motion for a new trial in an action tried without a jury, the court may

- (a) set aside the judgment if one has been entered,
- (b) take additional testimony,
- (c) amend findings of fact and conclusions of law, or
- (d) make new findings and conclusion and direct the entry of a new judgment.

To obtain any form of relief, however, a movant must establish at least one of several enumerated grounds, *MCR 2.611(A)(1)*:

- (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
- (b) Misconduct of the jury or of the prevailing party.
- (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
- (d) A verdict clearly or grossly inadequate or excessive.
- (e) A verdict or decision against the great weight of evidence or contrary to law.
- (f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.
- (g) Error of law occurring in the proceedings, or mistake of fact by the court.
- (h) A ground listed in MCR 2.612 warranting a new trial.

While the plaintiff does not specify which of the several grounds his motion is based on, the court perceives that he is asserting an "error of law . . . or mistake of fact by the court", *MCR 2.611(A)(1)(g)*, given various statements in the motion:

- "In reviewing the Opinion it appears that the court is (sic) looking strictly at the Purchase Agreement 'the written document' that was prepared for submission to this (sic) Michigan Liquor Control Commission"
- "The offer and acceptance are not all contained in that document"
- "This case deals with the single concept of offer and acceptance"
- "No particular form of offer is required"
- "Zitounie made an offer to Shan-Cor, which was accepted by Shan-Cor"
- "The offer made to [Shan-Cor through its representative] Dawn Smith by the Plaintiff was unambiguous and became binding as soon as it was accepted by Ms. Smith"

The plaintiff's suggestion that there is no single manner of contract formation is correct: i.e. there are express contracts where the parties declare their agreement by words (either orally

or in writing), and there are implied contracts where parties manifest their agreement by conduct. Trentacosta, *Michigan Contract Law*, 2d ed, § 2.5, p 13. But in any event, for a contract to be formed there must be mutuality of agreement, “[a] meeting of the minds [] judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Kloian v Domino’s Pizza LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006) (citation and quotation marks omitted). This aspect of contract formation is commonly characterized by an “offer” and “acceptance”, the former being “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.” *Eerdmans v Maki*, 226 Mich App 360; 573 NW2d 329 (1997).

Here, with due respect, the court is simply not persuaded that the evidence admitted at trial established the plaintiff was the offeror and Ms. Smith (on behalf of Shan-Cor) was the offeree². As stated in the court’s Opinion:

Here, Shan-Cor, through Smith, manifested its offer to sell the Licenses to the plaintiff by signing the Zitouni Agreement⁷. In turn, the plaintiff seemingly accepted the offer by subsequently signing the agreement and paying the Deposit (albeit into his attorney’s trust account⁸). Unfortunately, the plaintiff’s affirming acts were never made known to Smith.

The Opinion’s footnotes added:

⁷ The court rejects the plaintiff’s position that “[t]he offer was made by Plaintiff’s attorney on behalf of Plaintiff in his office on February 12, 2014” (Plaintiff’s Closing Brief, p 2) and, similarly, that “Plaintiff made an offer to Shan-Cor [and] . . . [t]his offer was accepted by Shan-Cor through its owner Dawn Smith” (Plaintiff’s Supplemental Closing Brief, p 3). Rather, the plaintiff’s attorney tendered an unsigned form he drafted on behalf of his client which, even though adopted and signed by Smith, could not justify an understanding that the bargain was concluded absent sufficient manifestation of the plaintiff’s intent to be bound as well.

⁸ ¶ 3.1 of the Zitouni Agreement unambiguously requires that “Purchaser shall deposit with Seller” (not the purchaser’s attorney) the requisite \$500 earnest money deposit.

² The court’s Factual Findings upon which its Opinion is based include, at pp 3-4:

In early February 2014, Smith was contacted by the plaintiff’s lawyer asking her to come to his office to discuss a possible sale/purchase of the Licenses. At their February 12, 2014 meeting, the plaintiff’s attorney (without the plaintiff present) presented Smith with a written Purchase Agreement (the “Zitouni Agreement”) (Exhibit 1)* * * Smith signed the Zitouni Agreement. * * * Leaving the attorney’s office, Smith assumed the plaintiff would sign the Agreement and tender to her the \$500 earnest money deposit (the “Deposit”) (¶ 3.1 of the Zitouni Agreement), and all documents necessary to effectuate the transaction would be filed with MLCC.

To posit that the plaintiff was the offeror and Ms. Smith's signature on the purchase agreement represented "acceptance" necessarily assumes the papers presented to her by the plaintiff's attorney would be sufficient to justify an understanding that her assent would conclude the bargain. *Eerdmans, supra*. But the plaintiff's own act of subsequently signing the purchase agreement dispels the notion.

Rather, Ms. Smith was the offeror (albeit using the plaintiff's chosen vehicle to manifest the parties' express contract, a written purchase agreement), but she never received any indication of the plaintiff's intent to be bound: i.e. the plaintiff's signature was never published to her, the plaintiff did not pay the required earnest money deposit to Ms. Smith, and Ms. Smith's repeated inquiries regarding the transaction's status were to no avail.

Without any reason to know of the plaintiff's "return promise", Ms. Smith could continue to wait on the plaintiff or, alternatively, she could revoke her offer prior to receiving any evidence of the plaintiff's acceptance. She chose the latter, as was her right. Calimari and Perrillo, *Contracts*, § 30, p 45; Restatement Contracts, 2d, §§ 36, 42, and 56; *Cooper v Lansing Wheel Co*, 94 Mich 272, 54 NW 39 (1892); *Board of Control v Burgess*, 45 Mich App 183, 186-187, 206 NW2d 256 (1973).

After careful consideration, the court concludes that the plaintiff has failed to demonstrate any "error of law [] in the proceedings, or mistake of fact by the court". Accordingly, there is no reason to grant relief from the court's June 5, 2015 Opinion Following Bench Trial or the June 29, 2015 Order. Therefore, the plaintiff's motion for reconsideration is being denied.

IT IS SO ORDERED.

Date: August 7, 2015

_____/s/_____
M. Randall Jurrens, Circuit Judge (P27637)