

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 FOLLOWING
BENCH TRIAL**

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The plaintiff seeks specific performance and/or damages arising out of a purported purchase agreement for SDD/SDM liquor licenses, together with damages for tortious interference with his contractual relations. The defendants argue there was no binding contract to breach or interfere with and, accordingly, they did nothing wrong in consummating a separate sale/purchase of the licenses between themselves.

Following a bench trial, the court concludes that the plaintiff has failed to carry his burden of proof and that a judgment of no cause of action should enter on all claims.

Factual Findings

Based on the testimony¹ and the exhibits² admitted during a bench trial held April 8, 2015, the court finds the following facts to be true³:

For many years, Shan-Cor, Inc. owned and operated the Whistle Stop convenience store in Birch Run, which included SDD and SDM liquor licenses (the “Licenses”) issued by the Michigan Liquor Control Commission (“MLCC”). Dawn Smith (“Smith”) is the president of Shan-Cor⁴.

At some point, Smith closed the store and escrowed the Licenses with MLCC for a period of five years, expiring in late March or in April 2014⁵.

¹ Testimony was received from the Ghassen Zitouni (plaintiff), Dawn Smith (president of defendant Shan-Cor, Inc.), and Hardip Singh (representative of Reet, Inc.).

² The following exhibits were admitted during trial:

Plaintiff’s Exhibit 1: Purchase Agreement between defendant Shan-Cor, Inc. and plaintiff Ghassen Zitouni, effective February 12, 2014 (with Dawn Smith’s signature dated February 12, 2014 and plaintiff’s signature dated February 18, 2014)

Plaintiff’s Exhibit 2: Purchase Agreement between Shan-Cor, Inc. and Reet, Inc., effective March 27, 2014 (signed by Dawn Smith and Hardip Singh March 27, 2014), with the purchase price variously stated as \$40,000 (¶ 2) and \$45,000 (¶ 3.2A)

Plaintiff’s Exhibit 3: Purchase Agreement between Shan-Cor, Inc. and Reet, Inc. identical to Exhibit 2, except for correction of purchase price to \$40,000 (¶ 3.2A) and insertion of seller’s and purchaser’s corporate identify above the respective representatives’ signatures

Defendant’s Exhibit A: Dawn Smith’s handwritten notes contemporaneously memorializing discussions with plaintiff’s attorney and MLCC

Defendant’s Exhibit B: MLCC Extension of Escrow Denial Order, dated March 14, 2014

Defendant’s Exhibit C: MLCC cover letter to Shan-Cor, dated March 20, 2014, enclosing the denial order (Exhibit B) and advising of the right to a request a hearing within 20 days

³ Although the parties’ post-trial briefs included references to pre-trial discovery deposition testimony (as well as the attorneys’ personal beliefs and speculation), the court’s findings of fact are based only on evidence received during trial.

⁴ In the absence of trial testimony, the court gleans Smith’s representative capacity from the seller’s signature block located on the last page of Exhibit 1.

⁵ Although the Licenses were to presumably expire on a specific date if not renewed/extended, trial testimony provided only this indefinite approximation.

Hoping to sell the Licenses during the escrow period, Smith engaged an agent, Pro-Auctions, to help locate a buyer.

In January 2014, Smith petitioned the MLCC to extend the Licenses' escrow beyond the upcoming expiration date.

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), which included the following relevant provisions:

1. **Transfer of Licenses; MLCC License.** Seller shall transfer and Purchaser shall acquire the MLCC License and any MLCC Permits issued, subject to approval of the MLCC.

3.1 **Deposit.** Simultaneous with the execution of this Agreement, Purchaser shall deposit with Seller the sum of \$500.00, which shall be an earnest money deposit (Deposit), and shall remain in the possession of Seller. At the Closing, subject to the conditions of this Agreement, the Deposit shall be applied toward payment of the licenses.

5. **Broker's or Finder's Fees.** Seller acknowledges that Pro Auctions of 624 Brady St., Chesaning, MI 48616 are acting on behalf of Seller and will be entitled to a fee of \$2,200.00 payable by Purchaser.

6. **Condition Regarding MLCC License.** This Agreement is conditioned on Purchaser's obtaining approval by the MLCC of the transfer of the MLCC Licenses from Seller to Purchaser. The Purchaser and Seller shall take all steps that are reasonably necessary to obtain the approval of the assignment of the MLCC License by making requests for such approval. With respect to the application for assignment, it is agreed:

a. If the assignment of the MLCC License is not approved by the MLCC because of any act, conduct, or other fault specifically attributed to Purchaser, including but not limited to failure to timely respond to any requests made by the MLCC, including production of adequate records regarding the source of funding the payments to be paid by Purchaser (Culpable Conduct), Purchaser shall be deemed to have caused a default.

b. If the assignment of the MLCC Licenses is not approved by the MLCC, *except as described in preceding subparagraph a. regarding Culpable Conduct*, Purchaser will not be deemed to be in default and, further, Purchaser may make demand for and be entitled to specific performance of this Agreement. Purchaser may elect this remedy or pursue liquidated damages as set forth in paragraph 8.

c. Purchaser is in the process of locating a building for the utilization of the license. If Purchaser fails to locate a building then this contract is deemed null and void.

8. Liquidated Damages. If Seller breaches any of its obligations under this agreement (Seller Breach) Seller shall pay to Purchaser an amount equal to \$15,000.00 (the Liquidated Damage). The parties intend that the liquidated damages constitute compensation and not a penalty. It is the Seller's sole liability and entire obligation and Purchaser's exclusive remedy for any Seller Breach. Liquidated damages is Purchaser's alternate remedy for Seller Breach as opposed to specific performance per paragraph 6b.

9. Closing.

9.1 Closing Date. The Closing shall be held no later than 30 days after the anticipated approval of the transfer of the MLCC License or such later date as may be agreed on by the Parties (Closing Date); however, the Closing shall take place no later than six months following the Effective Date of this Agreement unless agreed by Seller.

Smith signed the Zitouni Agreement, albeit without informing the plaintiff's attorney of the impending expiration of the Licenses' escrow and without knowing the status of her request for MLCC to extend the escrow period.

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. While there was no stated division of labor regarding obtaining MLCC's approval of the Licenses' transfer, Smith understood that the plaintiff was not responsible to help her extend escrow, if necessary.

The plaintiff's attorney's secretary contacted the plaintiff by telephone and advised him that Smith had signed the Zitouni Agreement and he was to come in to sign and provide the Deposit. The plaintiff signed and dated the Zitouni Agreement February 18, 2014 and gave the secretary \$500 which he understood she placed in his attorney's trust account. The plaintiff believed he had a valid contract at this time.

The plaintiff did not know at that time where he would ultimately utilize the Licenses, but understood that the Zitouni Agreement allowed him 6 months to locate a building (Exhibit 1, §§ 6(c) and 9.1).

During this same timeframe, Hardip Singh ("Singh"), who was interested in acquiring liquor licenses for a convenience store he already operated in Saginaw, saw the Licenses listed on MLCC's website as being in escrow (with Shan-Cor/Smith's contact information). Singh called Smith by telephone and inquired if the Licenses were for sale. Smith indicated she had already signed an agreement to sell to someone else, so the Licenses were not available. Singh advised

Smith that he would be interested in purchasing the Licenses if the existing deal didn't go through, and Smith indicated she would contact Singh if circumstances changed.

On March 14, 2014, the MLCC denied Smith's request to extend escrow of the Licenses, although notice of the action, "Extension of Escrow Denial Order" (Exhibit B), was not mailed to Smith until March 20, 2014 (Exhibit C).

On March 17, 2014, with time passing without a decision from the MLCC regarding her request to extend escrow and no communication from the plaintiff or his attorney regarding purchase of the Licenses, Smith contacted plaintiff's attorney for an update and to request a copy of the fully executed Zitouni Agreement. The plaintiff's attorney advised Smith he would have to get back to her (but did share that he thought the plaintiff would be setting up a corporation).

On March 20, 2014, Smith again contacted the plaintiff's attorney office as a follow-up to her March 17, 2014 request for a copy of the signed Zitouni Agreement, but he was not in. Smith then contacted the MLCC by telephone to ask about the status of her escrow extension request. She was advised that her efforts to sell the Licenses were insufficient and that her request to extend escrow had been denied. Smith faxed her copy of the Zitouni Agreement (signed by her alone) to the MLCC to demonstrate a pending sale, together with a letter appealing the adverse decision. Upon subsequent inquiry, Smith was advised by the MLCC that the faxed document was "questionable" because it had been signed by only the seller and not the buyer. Smith contacted the plaintiff's attorney office to advise him of the MLCC developments, but she was again advised he was not in. Smith left her name and telephone number. Not hearing back by the end of the business day, she called the plaintiff's attorney's office again and left a voice mail message relating the MLCC denial of her request for an escrow extension (her first notice to the plaintiff or his attorney that there could be a problem with the Licenses) and again requested a fully signed copy of the Agreement.

On March 21, 2014, the plaintiff's attorney returned Smith's telephone call, upset, wondering why she sent the Zitouni Agreement to the MLCC. Although Smith explained the MLCC needed proof that someone was interested in the Licenses, the plaintiff's attorney again failed to advise Smith that plaintiff had signed the Zitouni Agreement or [offer to] provide her a copy. Smith never heard from the plaintiff's attorney again (until the present lawsuit was filed).

About this time, Smith changed her mind about trying to sell the Licenses to the plaintiff because of his attorney's lack of communication with her, and her belief that, in the absence of receiving a fully signed version of the Agreement, there was no valid contract with plaintiff (as indicated by the MLCC's rejection of the partially signed Zitouni Agreement).

Confirming what she was told on the telephone by the MLCC on March 20, 2014, Smith received by certified mail a cover letter (Exhibit C) and the formal "Extension of Escrow Denial Order" (Exhibit B), concluding that she "has not demonstrated good cause as listing the license on one auction website [(i.e. ProAuctionsPay.com)] doesn't demonstrate actively marketing the license for sale". Smith did not send a copy of either document to the plaintiff or his attorney.

Under the circumstances (i.e. unsatisfactory communications with the plaintiff's attorney, no evidence that the plaintiff had signed the Zitouni Agreement, lack of receipt/knowledge of the \$500 deposit (although never demanding the Deposit, and understanding that it would be a credit at closing), and the imminent expiration of the Licenses' escrow if she could not demonstrate a viable purchase agreement to the MLCC to justify extending escrow), Smith telephoned Singh on or about March 21-23, 2014, and inquired whether he was still interested in purchasing the Licenses. When Singh indicated he was still interested, Smith said she would have an attorney prepare the necessary documents and "we'll go from there" (without coming to any agreement on price at that time).

On March 24, 2014, Smith first met her attorney and asked him to send a letter to the plaintiff's attorney "voiding" the Zitouni Agreement. Until being advised by his attorney that Smith was backing out of the Zitouni Agreement, this was the first indication the plaintiff had that there was any problem with the sale of the Licenses to him.

On March 26, 2014, Singh discussed price with Smith, eventually agreeing on \$40,000 for the Licenses.

On March 27, 2014, Singh, on behalf of Reet, Inc.⁶, and Smith on behalf of Shan-Cor, met at her attorney's office and signed a purchase agreement (the "Reet Agreement") (Exhibit 2). When Smith pointed out inconsistencies in the purchase price (¶ 2.1 erroneously stated \$45,000, while ¶ 3.2 correctly stated \$40,000), the attorney directed his secretary, with Smith's permission, to correct the typographical error and a new page one was substituted (Exhibit 3).

On April 1, 2014, Smith appeared before the MLCC and presented a copy of the fully executed Reet Agreement (Exhibit 2 or 3) to demonstrate she had a party willing to purchase the Licenses. As a result, the MLCC extended the Licenses' escrow until September 20, 2014. The Reet transaction was then processed without incident and the Licenses transferred to Reet with MLCC approval.

On May 13, 2014, the plaintiff filed the present action. The plaintiff's Second Amended Complaint states causes of action for breach of contract against defendant Shan-Cor (requesting specific performance and/or \$15,000 in liquidated damages under the Agreement) and tortious interference with an advantageous business relationship against defendant Reet (requesting indefinite money damages exceeding \$25,000).

Burden of Proof

In civil cases such as this one, issues of fact are to be determined in accordance with the preponderance of the evidence with the burden of persuasion placed upon the party asserting the claim. McCormick, Evidence (2d ed), § 339, p 793; 30 Am Jur 2d, Evidence, § 1163, p 337; *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 89; 367 NW2d 1 (1985); M Civ JI 8.01.

⁶ Although trial testimony did not indicate Singh's relationship to Reet, presumably he enjoys some capacity with the corporation as suggested by his signature on Exhibits 2 and 3.

Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence. *Martucci v Detroit Police Comm'r*, 322 Mich 270, 274; 33 NW2d 789 (1948).

Analysis

In asserting a breach of contract against Shan-Cor, the plaintiff must establish by a preponderance of the evidence that (1) there was a contract (2) which Shan-Cor breached (3) thereby resulting in damages to the plaintiff. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

The essential elements of a valid contract are: “(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005).

The element of mutuality of agreement or mutual assent requires an offer and acceptance. *Eerdmans v Maki*, 226 Mich App 360; 573 NW2d 329 (1997). “An offer is . . . 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.” *Id.* “Acceptance must be unambiguous and in strict conformance with the offer.” *Id.*

Whether there is mutuality of agreement or “[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 v Domino’s Pizza LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006) (citation and quotation marks omitted).

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.

As a general rule, “the offeree’s promise must be communicated to the offeror. Clearly, the offeree, as a reasonable man, should understand that the offeror expects to know that the offeree has made the requested return promise so that he may guide his conduct accordingly”. Calimari and Perrillo, *Contracts*, § 30, p 45. “[I]t is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror or that the offeror receive the

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.

acceptance seasonably.” Restatement Contracts, 2d, § 56⁹. In accord, see *Blackburne & Brown Mortg Co v Ziomek*, 254 Mich App 615, 626-627; 692 NW 2d 388 (2004).

Here, there is no evidence that the plaintiff exercised reasonable diligence in notifying Smith of his acceptance of the Zitouni Agreement. In the weeks that passed following submission of the offer on February 12, 2014, the plaintiff never communicated his reciprocal promise to Smith. Indeed, even Smith’s direct requests for a copy of a fully executed Zitouni Agreement and direct inquiries about the status of the transaction were unavailing. Under the circumstances, Smith did not know or have reason to know that the plaintiff had accepted her offer. Smith conducted herself accordingly.

In the absence of an effective acceptance, Smith could legally revoke her offer, which she did via a March 24, 2014 letter from her attorney to the plaintiff’s attorney. Restatement Contracts, 2d, §§ 36, 42; *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).

Having decided that there was no enforceable contract between the plaintiff and Shan-Cor, it follows that the tortious interference claim against Reet cannot be maintained. *Weitting v McFeeters*, 104 Mich App 188, 196; 304 NW2d 525 (1981).¹⁰

Conclusion

The plaintiff claims that defendant Shan-Cor breached an agreement to sell him liquor licenses, and that defendant Reet improperly interfered with that relationship. The defendants argue that the plaintiff never effectively accepted the purported agreement before the offer was revoked, thus precluding the present action.

The court concludes the plaintiff has failed to prove an essential element of his breach of contract claim; specifically, that acceptance of the offer was communicated to Shan-Cor to establish the necessary mutual assent to be bound.

⁹ The Comments to Restatement Contracts, 2d, § 56 elaborate:

b. Failure of communication. It is sometimes said that the acceptance must be communicated to the offeror, and when the parties deal face to face communication is ordinarily required. The rule is more accurately stated as on requiring reasonable diligence on the part of the offeree, however, since in cases of misunderstanding acceptance turns on what each party knew or had reason to know. * * *

¹⁰ Under the circumstances, the court need not address several other issues the case presents (including whether payment of the Deposit was a covenant or a condition precedent; whether the plaintiff’s payment of the Deposit into his attorney’s trust account rather than directly to Shan-Cor was sufficient; whether Smith effectively waived her right to hold the Deposit; whether the plaintiff’s ability to nullify his obligations by failing to locate a building precludes the necessary contract element of “mutuality of obligation”; whether the liquidated damages provision of the parties’ contract was enforceable; whether circumstances justify the requested equitable relief; whether there was sufficient proof of Reet’s tortious interference with the plaintiff’s relationship with Shan-Cor; etc.).

