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### Chapter 3 Case Briefs

Case Name: Speedy Ketcherside vs. McLane (2003) Mo. App. LEXIS 1732

#### **Factual Background**

In this case, Defendant owned and rented property in Missouri. The Defendant's tenant quit possession of the property. Defendant bought back the equipment in the store. Defendant wanted to sell the equipment in an auction. In early July 2000, Defendant's agent contacted Plaintiff (an auctioneer) to conduct the auction. The agent stated that the auction needed to be conducted "as soon as possible" because new tenants would be moving into the store. Plaintiff claimed that the agent told him to "proceed with the auction and get it going." Plaintiff communicated to the agent that his commission would be ten percent of the total sales made the day of the auction. The agent communicated to Plaintiff "I want you to handle the auction." Advertising was discussed and an agreement was reached regarding the limit that would be placed on said advertising before spending any money.

Plaintiff inventoried the store. Plaintiff photographed the equipment and made detailed lists so as to advertise the make, model, and features of the equipment. Plaintiff used the foregoing information to draft a preliminary proof of the sale bill, which would advertise everything offered at the auction. Plaintiff promoted the sale at other auctions. Plaintiff additionally claimed he "had everything ready to go," and his "work was done all except the actual auction... and delivering the sale bill." Plaintiff claimed that "the actual auction itself is not the biggest deal."

Later, however, Plaintiff was informed that Defendant "elected to go with another auction company." From early July to July 15, Plaintiff was never told that other auction companies were being considered for the sale. It was on July 14 that Plaintiff was told to submit a proposal in writing (contract or bid). A few days later, Plaintiff was informed that another auctioneer received the job. Plaintiff then filed a breach of contract lawsuit. The trial court entered judgment in favor of Plaintiff. The court found that "the contract entered into by the parties was by its nature, a unilateral contract and when Plaintiff began performing pursuant to the directions of...Walker (agent), the unilateral contract became enforceable." The court awarded Plaintiff \$5,516.75. Defendant appealed.

#### **Issue**

Did the promise/action of Plaintiff and Defendant constitute the formation of a unilateral contract? If so, did Defendant's actions thereafter equate to a breach of said contract?

#### **Rule and Analysis**

Defendant contended that parties never agreed to essential terms, namely: 1) the commission Plaintiff would receive, 2) the date of the auction, 3) which equipment would be sold, and 4) the method of advertising to be used. Defendant argue that conversations between Plaintiff and Defendant's agent were negotiations. Secondly, Defendant alleged no breach of contract occurred because "a contract was never formed, due to the absence of acceptance by performance in that... the offer was rescinded before

Plaintiff began to perform.”

The reviewing court proffered, “the essential elements of a contract are: 1) competency of the parties to contract; 2) subject matter; 3) legal consideration; 4) mutuality of agreement; and 5) mutuality of obligation.” *Baris v. Layton*, (2001) 43 S.W.3d 390, 396. As such, the term “mutuality of agreement” implies a mutuality of assent or a meeting of the minds to the essential terms of a contract. *Smith v. Hammons*, (2002) 63 S.W.3d 320, 325. Negotiations or preliminary steps towards the formation of a contract do not satisfy this element. *Id.* at 325. “A unilateral contract is a contract in which performance is based on the wish, will, or pleasure of one of the parties.” *Cook v. Coldwell Banker*, (1998) 967 S.W.2d 654, 657. The promisor receives no promise in return as consideration for the original promise. *Id.* at 657. The contractual relationship arises when the conduct of the parties supports a reasonable inference of a mutual understanding that one party perform and the other party compensate for such performance. *Commercial Lithographing Co. v. Family Media, Inc.*, (1985) 695 S.W.2d 936, 939. “An offer to make a unilateral contract is accepted when the requested performance is rendered.” *Cook*, 967 S.W.2d at 657. The offer cannot be revoked where the offeree has made substantial performance. *Id.* at 657.

Defendant claimed that parties were negotiating, and they lacked mutuality of agreement because they had not agreed upon many essential terms. The reviewing court found ample evidence to support the lower courts judgment. The reviewing court highlighted testimony to from Plaintiff that Defendant's agent told him to “get it going” and “I want you to handle the auction.” The reviewing court found that the auction was to be conducted as soon as possible. Defendant's agent stated that everything in the store was to be sold. The two further discussed advertising and agreed upon a limit therein. Plaintiff told Defendant's agent that his commission was ten percent. Mutuality of agreement is determined by looking to the intentions of the parties as expressed or manifested in their words or acts. *Hammons*, 63 S.W.3d at 325. The reviewing court found that it was reasonable for the trial court to conclude a contract was formed.

Turning to the second point, Defendant claimed that Plaintiff failed to accept the offer because he did not substantially perform. The court dispatched with that argument by noting that Plaintiff testified he “had everything ready to go,” and his “work was done all except the actual auction... and delivering the sales bills.” Moreover, he testified: “The actual auction itself is not the biggest deal. You have more hours spent prior to.” He also testified as to the details of his preparatory work. The trial court was free to believe this evidence. Consequently, Defendant was not entitled to revoke the offer. *Cook*, 967 S.W.2d at 657.

## **Conclusion**

The court found substantial evidence to support the trial court's judgment that Defendant breached a unilateral contract with Plaintiff. The judgment of the trial court was affirmed.

Case Name: Cook's Pest Control, Inc. vs. Rebar (2002) 852 So.2d 730

## **Factual Background**

On August 28, 2000, Cook's Pest Control and the Rebars entered into a one-year renewable “Termite Control Agreement.” The agreement contained a mandatory binding arbitration provision. When the initial term of the agreement was about to expire, Cook's Pest Control notified the Rebars and requested that they renew the agreement for another year by paying the renewal fee. On August 16, 2001, Mrs.

Rebar submitted a payment to Cook's Pest Control; with the payment she include an insert entitled “ Addendum to Customer Agreement.”

The addendum proposed new terms for the agreement and notified Cook's Pest Control that continued service or negotiation of the renewal payment check by Cook's Pest Control would constitute acceptance of those new terms. After it received the addendum, Cook's Pest Control negotiated the Rebars' check and continued to perform termite inspections and services at the Rebars' home.

On August 30, 2001, the Rebars filed an action against Cook's Pest Control. The Rebars alleged fraud, negligence, breach of contract, breach of warranty, breach of duty, unjust enrichment, breach of the duty to warn, negligent training, supervision and retention of employees, and bad-faith failure to pay and bad-faith failure to investigate a claim. Cook's Pest Control moved to compel arbitration of the Rebars claims. In support of its motion, Cook's Pest Control relied upon the arbitration provision contained in the agreement. The Rebars opposed the motion to compel arbitration, asserting that a binding arbitration agreement no longer existed. The Rebars asserted that a binding arbitration agreement no longer existed because the agreement between the parties had been modified when it was renewed in August 2001. On December 18, 2001, the trial court denied Cook's Pest Control's motion to compel arbitration. Cook's Pest Control filed a motion to reconsider, that motion was denied by operation of law. Cook's Pest Control appealed.

### **Issue**

Did Cook's Pest Control's actions regarding the August 16, 2001 agreement constitute an acceptance of a contract? As such, is Cook's Pest Control entitled to mandatory binding arbitration of the Rebars' claims?

### **Rule and Analysis**

Cook's Pest Control argued that the trial court incorrectly found that it accepted the terms included in the addendum by continuing to inspect and treat the Rebars' home after it received the addendum and negotiated the Rebars' check for the renewal fee. Cook's Pest Control argues that, under the terms of the agreement, it was already obligated to continue inspecting and treating the Rebars' home. Cook's Pest Control also argues that the addendum was an improper attempt to unilaterally modify an existing contract. The reviewing court rejected those arguments. The court noted that the parties original agreement was due to expire on August 28, 2001; Cook's Pest Control had already sent the Rebars a notice of this expiration and had requested that the Rebars renew the agreement by submitting the annual renewal fee.

The court expounded that upon receiving notice that the agreement was up for renewal, the Rebars responded to Cook's Pest Control's offer to renew that contract with an offer of their own to renew the contract but on substantially different terms. This response gave rise to a counteroffer or a conditional acceptance by the Rebars. The terms “counter-offer” and “conditional acceptance” are really no more than different forms of describing the same thing. *Corbin on Contracts* § 3.32 at 478-80; § 3.35.

### **Conclusion**

The reviewing court concluded that due to the opposition to arbitration proffered by the Rebars, the trial court properly denied Cook's Pest Control's motion to compel arbitration. The order of the trial court was affirmed.