

with the handlebar of the Greenhalghs' motorcycle. Mr. Greenhalgh sustained physical injuries from the accident. Mrs. Greenhalgh sustained severe physical injuries and subsequently died.¹

The Greenhalghs made a claim against Keegan, and the issue before the Court is whether a settlement ever occurred. On July 16, 2010, the Greenhalghs made a demand to Keegan's automobile insurance company, American Commerce Insurance Company (ACIC), for the policy limit of \$100,000. (Pls.' Mem. Ex. D.). The demand included liability releases that were not previously approved by ACIC. (Pls.' Mem. Ex. E.). Eventually, the releases were rejected by ACIC, and new releases were proposed to the Greenhalghs on August 19, 2010. (Pls.' Mem. Ex. F.). The Greenhalghs rejected the new ACIC releases on August 30, 2010 and resubmitted the July demand with the original liability releases. (Pls.' Mem. Exs. G, H.). The next day, ACIC again rejected the demand, stating that the proposed releases did not adequately protect the insured and a joint tortfeasor release was required. (Pls.' Mem. Ex. I.).²

On October 14, 2010, the Greenhalghs commenced this litigation. On November 12, 2010, the Greenhalghs made a settlement demand of \$99,800, including the same liability releases from the July demand. (Pls.' Mem. Ex. K.). This demand was forwarded to Joel Gerstenblatt (Attorney Gerstenblatt), the attorney reviewing the settlement offers. (Pls.' Mem. Ex. K.). On December 7, 2010, Attorney Gerstenblatt phoned Max Wistow (Attorney Wistow), the Greenhalghs' attorney. The pair discussed the offer and a third-party lien by Ingenix. The exact details of the communication are the center of this dispute. Following the conversation, Attorney Wistow sent a fax to Attorney Gerstenblatt stating that Attorney Gerstenblatt rejected the November demand by making a counteroffer, which required protection from the Ingenix

¹ Keegan pled guilty on December 7, 2012 to DUI-Death Resulting and DUI-Serious Bodily Injury Resulting.

² Keegan does not claim that this constituted a settlement. It is related here to provide the appropriate background to the parties' dispute.

lien. (Pls.' Mem. Ex. M.). On December 8, 2010, Attorney Wistow received a fax, with a letter dated December 7, 2010, from Attorney Gerstenblatt, claiming that he had accepted the demand and only inquired about the Ingenix lien. (Pls.' Mem. Ex. N.). That same day, Attorney Wistow was informed by an analyst from Ingenix that ACIC had inquired as to the status of the Ingenix lien that very morning. (Pls.' Mem. Ex. O.). The analyst informed ACIC that the lien had been settled. Attorney Wistow claims that Attorney Gerstenblatt's December 7, 2010 letter was back dated in an attempt to make it appear as though Attorney Gerstenblatt accepted the offer prior to seeking the status of the third-party lien from Ingenix.

The parties continued to dispute whether a contract was formed on December 7, 2010 or whether ACIC made a counteroffer to the November demand. On August 27, 2012, Mr. Greenhalgh made a demand of \$50,000 to settle only his personal injury claims. (Pls.' Mem. Ex. S.). In a letter dated September 14, 2012, ACIC "accepted" the demand, but submitted different releases, which released all of the claims Mr. Greenhalgh had against Keegan. (Pls.' Mem. Ex. T.). Mr. Greenhalgh rejected this counteroffer on October 11, 2012. (Pls.' Mem. Ex. U.). The parties disagreed as to whether ACIC's September letter constituted an acceptance or a counteroffer as well. ACIC claimed that it was custom to discuss the form of the release, and it was willing to settle the case. (Pls.' Mem. Ex. X.). On February 6, 2014, Keegan moved to deposit \$100,000 into the court registry; the request was granted on April 11, 2014, and the funds were subsequently deposited.

In summary, Keegan alleges that a valid settlement agreement was first reached on December 7, 2010, when Attorney Gerstenblatt accepted the Greenhalghs' offer after inquiring about a third-party lien. Additionally, Keegan posits that a second valid settlement agreement was reached in regards to Mr. Greenhalgh's claims in September of 2012.

The Greenhalghs, on the other hand, deny that any settlement ever occurred between the parties. First, the Greenhalghs argue that the issue is not properly before the Court because “release” is an affirmative defense that must be pled in the answer or other responsive pleading. Second, Plaintiffs argue that the contents of the communications between the attorneys in this case cannot be taken as true because the Greenhalghs failed to prove the truth of the contents with a supporting affidavit. Third, Plaintiffs contend that even if the issue was properly before the Court, a settlement never occurred between the parties because ACIC made counteroffers to both offers by requiring conditions that were not stated in the offers. Fourth and finally, Plaintiffs argue that a possible settlement cannot be enforced because settlements must be written and this alleged settlement was never memorialized.

II

Standard of Review

Under Rule 56 of the Superior Court Rules of Civil Procedure, a party may move for summary judgment if it contends that “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Rule 56(a) specifically allows for summary judgment in any party’s favor “on all or any part” of a claim. The party opposing the motion must “prov[e] by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.”³ Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009). The court views the evidence in the light most favorable to the nonmoving party. Sacco v. Cranston School Dep’t, 53 A.3d 147, 150 (R.I.

³ Our Supreme Court has observed that “[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he must demonstrate that he has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (citing Gallo v. Nat’l Nursing Homes, Inc., 106 R.I. 485, 489, 261 A.2d 19, 21-22 (1970)).

2012). Summary judgment is recognized as an “extreme remedy” that should only be entered when there are truly no material facts in dispute. Sullo v. Greenberg, 68 A.3d 404, 407 (R.I. 2013). However, if, upon examining the evidence presented, the Court concludes that there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law, the Court must grant the motion for summary judgment. See Avco Corp. v. Aetna Cas. & Sur. Co., 679 A.2d 323, 327 (R.I. 1996).

III

Analysis

A

Introduction

If one reads the transcript of oral argument, one might have the impression that what is before the Court are the duties and responsibilities of insurers to their insureds. The argument was replete with reference to Asermely v. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999) and insurer bad faith. The Defendant’s counsel thrust with the charge that Attorney Wistow’s offer was a “pretext.” Attorney Wistow parried that he had a “strategy,” and he was “hoping, hoping, that the insurance company has a misstep” While this duel was well fought, it is probably just the trailer for a drama that will unfold some time later.

Rather this case poses at most two simple questions. First, was there a settlement agreement on December 7, 2010? If not, the second question arises—was a partial settlement reached on September 14, 2012? Usually, when determining whether an agreement exists, the Court’s analysis focuses on the intent of the parties. In this matter, the Court needs to discern the meaning of the words and actions of the parties’ attorneys, which it will proceed to do.

B

Waiver of Argument

The Greenhalghs posit that the issue of whether a settlement occurred between the parties is not properly before this Court because Keegan failed to plead the affirmative defense in her answer or another responsive pleading. Rule 8(c) of the Superior Court Rules of Civil Procedure lists both “accord and satisfaction” and “release” as affirmative defenses that must be set forth in a responsive pleading. Our Supreme Court has construed Rule 8(c) to mean that “the failure to raise an affirmative defense in a timely manner constitutes a waiver of that defense.” Hanley v. State, 837 A.2d 707, 711 (R.I. 2003) (quoting World-Wide Computer Res., Inc. v. Arthur Kaufman Sales Co., 615 A.2d 122, 124 (R.I. 1992)). “[T]he special pleading of an affirmative defense protects the complaining party from unfair surprise at trial.” World-Wide Computer, 615 A.2d at 124.

This action was filed on October 14, 2010. Keegan answered the complaint on November 1, 2010. The main settlement demand at issue was made by the Greenhalghs on November 12, 2010, and Keegan asserts that the settlement was reached on December 7, 2010. Therefore, the affirmative defense of a settlement agreement was not available to Keegan at the time she filed her answer. By the start of 2011, it was evident to the parties that there was a dispute as to whether a settlement occurred. See Pls.’ Mem. Exs. P-R. In late August of 2012, the Greenhalghs made another demand to Keegan and reiterated their position as to the settlement negotiations that took place in November and December 2010. (Pls.’ Mem. Ex. S.). Keegan reiterated her position on the earlier negotiations as well. (Pls.’ Mem. Ex. T.). Another dispute arose regarding the chain of events that occurred with the 2012 settlement offer. The parties continued to argue their positions through October and November of 2012. See Pls.’

Mem. Exs. V-Y. This Court was apprised of a possible settlement on February 6, 2014 when Keegan filed a motion to deposit funds into the court registry. The motion was granted on April 11, 2014 and the funds subsequently deposited.

Rule 8(c) requires the pleading of an affirmative defense to avoid an unfair surprise at trial. In Hanley, 837 A.2d at 711, the defendant argued for the first time in his summary judgment motion that he was immune from liability based on the recreational use statute. The case had been ongoing for approximately four years. Id. The Supreme Court acknowledged that affirmative defense pleading requirements are at odds with Rule 15, which permits amendments to pleadings absent a showing of extreme prejudice. Id.; see also World-Wide Computer, 615 A.2d at 124 (“In resolving such a conflict, we must necessarily take into account such elements as the extent of prejudice, as well as the question of a defendant’s knowledge of circumstances that should have alerted him or her to the existence of such a defense.”). The Court ultimately permitted the affirmative defense because the defendant had pled “immunity” in his answer and the plaintiffs were aware of the defendant’s reliance on the statute three months prior to the summary judgment hearing. Hanley, 837 A.2d at 711. The Court held that the plaintiffs did not suffer any prejudice or unfair surprise to prevent the defendant’s defense. Id.

The record demonstrates that the Greenhalghs were well aware that there was a dispute as to whether a settlement had occurred. In addition, the issue was brought to the Court’s attention approximately seventeen months before Keegan filed her motion for summary judgment when she moved to deposit funds to cover the alleged settlement amount into the court registry. As a result, the Greenhalghs were also conscious to the fact that Keegan intended to rely on the alleged settlement at some point during the proceedings. The settlement allegations are in no way a surprise to the Greenhalghs.

The Greenhalghs claim that they will suffer prejudice if this settlement is considered because substantial time has passed since the settlement discussion occurred. Therefore, they believe that they will need to expend additional resources to conduct discovery and may face difficulties from faded memories and unavailable witnesses. While a significant time has passed, it is not persuasive that this passage will cause prejudice to the Greenhalghs. As stated above, at issue are the conversations between Attorney Wistow and Attorney Gerstenblatt. Attorney Wistow provided a sworn affidavit of his rendition of the events without any added difficulty in July. In addition, Attorney Gerstenblatt is still an attorney in Rhode Island, working from Warwick. The Greenhalghs have not presented any evidence to this Court that Attorney Gerstenblatt would have difficulty recalling his version of events. The necessary witnesses are not unavailable and, considering the constant discussion in this case as to whether a settlement occurred, their memories do not appear to have faded. The issue of settlement is not waived as the Plaintiffs have failed to prove that they will suffer any prejudice or unfair surprise if the Court considers this issue.

C

Defendant's Motion for Summary Judgment

Both parties move for summary judgment on the basis of whether a settlement occurred in this case—the Greenhalghs arguing that there has not been a settlement, Keegan arguing that there has been.

Settlements are considered contracts and are governed by the general rules of contract law. See Furtado v. Goncalves, 63 A.3d 533, 538 (R.I. 2013). It is well-settled that a valid contract must have “competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.” DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I.

2007) (quoting R.I. Five v. Med. Assocs. of Bristol Cnty., Inc., 668 A.2d 1250, 1253 (R.I. 1996)). Mutual assent requires both offer and acceptance. See Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989). “The general rule is that where . . . there is an offer to form a bilateral contract, the offeree must communicate his acceptance to the offeror before any contractual obligation can come into being.” Ardente v. Horan, 117 R.I. 254, 258-59, 366 A.2d 162, 165 (1976). Acceptance does not occur if the offeree merely possesses the intent to be bound. Id. The acceptance must actually be communicated to the offeror. Id. Furthermore, an acceptance that poses different terms than the original offer is a rejection of the original offer and a subsequent counteroffer. Ardente, 117 R.I. at 259-60, 366 A.2d at 165. Such a counteroffer requires acceptance from the original offeror to create a valid contract. Id. However, “an acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition.” Id. In other words, a mere inquiry or suggestion on a collateral matter does not terminate the original offer and create a counteroffer.

If there was a settlement, it had to occur during the December 7, 2010 telephone conversation between Attorney Wistow and Attorney Gerstenblatt. Attorney Wistow denied that there was a settlement in his affidavit. But examining contemporaneous evidence, the Court must conclude that Attorney Wistow could not have believed that there was a settlement because he withdrew his outstanding offers almost immediately after the conversation. At 4:40 p.m. on December 7, 2010, Attorney Wistow sent the following via fax:

“I write with regard to your call earlier today seeking ‘protection’ against what you claimed to be a ‘lien’ by Ingenix. This, in our view, represents a counteroffer to our offer contained in my November 3, 2010 letter to Ms. Gifford and, consequently, a rejection of our offer. Our offer is no longer outstanding.”

This evidence looked at in the light most favorable to the non-moving party (in this case the Greenhalghs), demonstrates that there is a genuine issue of material fact, and Defendant's motion for summary judgment must be denied as to the December 7, 2010 alleged settlement.

The Court turns now to Defendant's request for summary judgment on the issue of whether a settlement occurred in the Summer/Fall of 2012. The August 2012 offer makes clear that the offer is *only* to settle Mr. Greenhalgh's personal injury claim. ACIC responded by letter that the offer was accepted; however, the release submitted released all of Mr. Greenhalgh's claims. In fact, ACIC claimed that it was industry custom to discuss the terms of the release. While such discussions are undoubtedly commonplace in settlement negotiations, there is no binding contract until those discussions are concluded.⁴ Since the terms of the acceptance varied from the terms of the offer, a counteroffer was created. See Ardente, 117 R.I. at 259-60, 366 A.2d at 165. This counteroffer was never accepted and explicitly rejected on October 11, 2012. Defendant has failed to present sufficient evidence that a settlement occurred in 2012, and thus summary judgment must be denied.

D

Plaintiffs' Motion for Summary Judgment

The Greenhalghs seek partial summary judgment, asking this Court to grant a judgment as a matter of law that a settlement did not occur. Both parties concede that the Ingenix lien was mentioned during the December 7, 2010 conversation. However, the exact details surrounding

⁴ Plaintiffs briefly assert in their Reply that a contract can be formed even if all of the details are not worked out. While this proposition is true, all essential obligations and conditions of the contract must be certain. See 15A C.J.S. Compromise and Settlement § 7, at 79 (West 2012). However, here, the parties devoted much discussion to including a joint tortfeasor release clause in the general release. This clause was more than a mere collateral term to the agreement. It was a clause that was repeatedly preventing the parties from reaching an agreement. The Court is not convinced that this condition is so miniscule that an agreement could have been reached without determining the form of release.

the discussion are unknown. Keegan claims in her memorandum that ACIC merely inquired into the status of the Ingenix lien, but ultimately accepted the November 2010 offer unequivocally. On the other hand, the Greenhalghs argue that the conversation concluded in one of two ways: (1) the offer was still on the table at the end of the conversation, but withdrawn via the fax discussed directly above before it was accepted;⁵ or (2) the offer was rejected by way of a counteroffer when Attorney Gerstenblatt demanded protection from the Ingenix lien.⁶

Attorney Wistow, as mentioned above, has submitted a detailed affidavit describing his rendition of the December 7, 2010 conversation. The Greenhalghs argue that Keegan has failed to submit sufficient evidence to present a genuine issue of material fact. Namely, the Greenhalghs allege that there is no sufficient evidence to support Keegan's allegation that acceptance of the November 2010 offer occurred. Specifically, they argue that Keegan is unable to rely on the contents of Attorney Gerstenblatt's letter which states that acceptance occurred because it is unsupported by an affidavit attesting to the truth of the contents. In other words, the Greenhalghs claim that the content of the letter is inadmissible hearsay. The Court need not reach this issue, because the content of Attorney Gerstenblatt's December 7/8, 2010 letter actually supports the Greenhalghs' position that a settlement did not occur.

⁵ Although Attorney Gerstenblatt sent a letter dated December 7, 2010, the letter was not dispatched until December 8, 2010. Therefore, according to the well-settled mailbox rule, even if the letter accepted the offer, the acceptance was not effective until dispatch the December 8, 2010—a day after the offer was withdrawn.

⁶ Defendant attempts to argue that the Ingenix lien is irrelevant because the lien was already satisfied when the December 7, 2010 conversation occurred. This argument is unavailing as it appears that the Defendant was not even aware that the lien had been settled when the December 7, 2010 conversation occurred. Likewise, if Defendant demanded protection from the Ingenix lien, or any lien for that matter, the Plaintiffs had the right to reject this additional condition—no matter whether a lien was present, plausible, possible, or less.

Attorney Gerstenblatt's December 7/8, 2010 letter makes it clear that at the conclusion of the December 7, 2010 conversation, the November offer remained on the table. Attorney Gerstenblatt's letter states, in pertinent part:

“During our conversation I indicated to you that the defendant's insurance carrier had notice of an Ingenix lien. You responded that you did not have knowledge of this lien and that I could *accept or reject your offer* and do ‘what you want.’ We had no further discussions concerning protection of this lien or otherwise other than providing you with notice of the lien.” (Emphasis added)

Noticeably absent from this trail of events is any mention that Attorney Gerstenblatt accepted the offer after being told to “do what he wants.” Even considering Attorney Gerstenblatt's own letter, there is no evidence that acceptance occurred during this conversation. Attorney Gerstenblatt, in paraphrasing Attorney Wistow, is stating that he knew that in Attorney Wistow's mind no agreement was reached. Attorney Gerstenblatt says that Attorney Wistow told Attorney Gerstenblatt that he “could accept or reject” If there already was an agreement, such a statement would make no sense. Attorney Gerstenblatt fails to state that he then accepted the offer. Rather, the offer remained open for a window of time. However, the window did not remain open for very long, and it was withdrawn at 4:40 p.m. on December 7, 2010. As a result, summary judgment is appropriate in favor of the Plaintiffs in regards to the lack of a settlement on December 7, 2010.⁷

In relation to the 2012 settlement, summary judgment is also appropriate in favor of the Plaintiffs. The offer sent to Keegan in 2012 was to settle only Mr. Greenhalgh's personal injury claims. However, the release returned to Mr. Greenhalgh released all of his claims against Keegan. It is well-settled that the terms of the acceptance must mirror the terms of the offer; otherwise, the offer is rejected by the different terms and a counteroffer is created. See *Ardente*,

⁷ In light of this conclusion, the Court need not address the Greenhalghs' contention that there could not be an agreement because there was no writing.

117 R.I. at 259-60, 366 A.2d at 165. Since Keegan's attempted acceptance varied from the terms of the offer, the offer was rejected and a counteroffer was created. Therefore, a genuine dispute of material fact does not remain as to whether a settlement occurred in 2012. Summary judgment is appropriate on this issue in favor of the Plaintiffs.

IV

Conclusion

Summary judgment in favor of the Defendant should be denied because taking the evidence in the light most favorable to the non-moving party, a genuine issue of material fact exists. Partial summary judgment, however, should be granted in favor of the Plaintiffs on the issue of whether a settlement occurred in 2010 or 2012. No genuine dispute of material fact exists as to whether the November 2010 or August 2012 offers were accepted. Counsel shall submit the appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: James I. Greenhalgh, Jr., et al. v. Alecia Keegan

CASE NO: PC 2010-5993

COURT: Providence County Superior Court

DATE DECISION FILED: December 15, 2015

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

For Plaintiff: Max Wistow, Esq.; Michael J. Stevenson, Esq.

For Defendant: Mark T. Nugent, Esq.