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# IN THE
# COURT OF APPEALS OF INDIANA

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| SIMON FIRE EQUIPMENT & REPAIR, INC., | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 67A04-0702-CV-78 |
| | ) | |
| TOWN OF CLOVERDALE, INDIANA, | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0605-PL-178

**September 18, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Simon Fire Equipment and Repair, Inc. ("Simon") appeals the Putnam Circuit Court's grant of summary judgment in favor of the Town of Cloverdale, Indiana ("the Town") in Simon's breach of contract action. Upon appeal, Simon claims: (1) that the trial court erred in failing to consider evidence it designated in its cross-motion for summary judgment, and (2) that the trial court erred in granting the Town's motion for summary judgment.

We reverse and remand for proceedings consistent with this opinion.

**Facts and Procedural History**

In April 2005, the Cloverdale Town Council ("the Council") published a legal notice in the local newspaper soliciting bids for a fire truck. Simon submitted two bids, one offering the sale of a new fire truck, the other offering the sale of a truck which had been used for demonstration. Simon offered the demonstration truck for sale for $229,990.63. On June 8, 2005, the Council met to consider the bids. Council member Judy Whitaker made a motion to "accept the . . . bid of $229,990.63 subject to financial availability." Appellant's App. p. 31. After discussion of financing, which was a concern to some of the other members, the Council passed a restated motion "to accept the bid of Simon for the 2001 demo truck in the amount of $229,990.63 subject to favorable financing after sitting down with the financial advisors and making sure that the Town is comfortable with the financial arrangements." Id. The motion passed by a three-to-one vote, with one member abstaining.

On July 5, 2005, John Davis, then president of the Council, sent a letter to Simon which stated in relevant part:

> Attention: Dale Bush, Simon Fire Representative
> Subject: Bid acceptance
>
> Mr. Bush,
>
> The Town Council of Cloverdale, Indiana held a Special meeting on June 8, 2005 and accepted the bid of Simon Fire and its $229,990.63 bid for the 2001 Demo Fire truck subject to favorable financing. After reviewing the financial standings with our financial advisor . . . following that meeting, the majority of the Board was comfortable and permitted the financial arrangements to go forward for the purchase. The Town is working with Rural Development for financing and steps have been taken to move this action along. We anticipate a quick response from Rural Development and their steps necessary in this process so we might finalize this transaction.
>
> We are pleased to accept this bid. We feel this truck will be a tremendous asset to our community and its fire protection needs.

Appellant's App. p. 113.

On July 19, 2005, the Council held another special meeting to discuss financing the purchase of the fire truck by issuing a bond. Council member Judy Whitaker moved to approve an ordinance authorizing the bond issuance. The motion failed by a vote of two to three. Whitaker asked to discuss the issue and to reconsider. She warned that the Town might be liable for failing to go through with the purchase of the truck and noted that the interest rate being offered was low. The motion to reconsider did not pass.

On May 18, 2006, Simon filed a complaint alleging that the Town had breached a contract for the sale of the fire truck. On October 17, 2006, the Town filed a motion for summary judgment, a designation of materials relied upon, and a memorandum in support of summary judgment. On October 26, 2006, the trial court set the matter for a hearing to be held on December 15, 2006. On December 8, 2006, Simon filed a motion to continue the summary judgment hearing. Two days later, the Town filed a response and moved to strike issues of material fact which it contended Simon was attempting to

present. The trial court, on December 12, 2006, denied Simon's motion to continue, noting that Simon had not filed a response to the Town's motion for summary judgment or a request for an extension of time. In this order, the trial court also granted the Town's motion to strike those portions of Simon's motion "that refer to plead[ed] matters alleged to be matters of genuine issue of fact due to the filing being outside the time limit for filing a response pursuant to Trial Rule 56 . . . ." Appellee's App. p. 13.

On December 14, 2006, the day before the scheduled hearing on the Town's motion for summary judgment, Simon filed a cross motion for partial summary judgment on the issue of liability, along with a designation of materials relied upon and a memorandum in support thereof. The day of the scheduled summary judgment hearing, the Town moved to bar introduction of any evidence designated in Simon's cross motion for summary judgment. At the hearing, the Town again objected to the consideration of any evidence designated by Simon. On January 8, 2007, the trial court issued an order granting summary judgment in favor of the Town, also concluding "the Court does not need to address [Simon]'s motion for partial Summary Judgment . . . due to the Court's finding for the Defendant that, as a matter of law, a contract was not formed." Appellant's App. p. 9. Simon now appeals.

**Standard of Review**

Summary judgment is appropriate only where the designated evidence reveals no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. Garneau v. Bush, 838 N.E.2d 1134, 1140 (Ind. Ct. App. 2005), trans. denied. The moving party bears the burden of showing that there are no genuine issues

of material fact; if the moving party meets its burden, then the burden shifts to the non-moving party to set forth facts showing the existence of a genuine issue for trial. Id. In determining whether the trial court properly granted summary judgment, we give careful scrutiny to the pleadings and designated materials, construing them in the light most favorable to the non-movant, while also clothing the trial court's decision with a presumption of validity. Davis v. LeCuyer, 849 N.E.2d 750, 752 (Ind. Ct. App. 2006), trans. denied.

**Discussion and Decision**

Simon claims that the trial court erred in failing to consider Simon's December 14 cross-motion for partial summary judgment. The Town argues that the trial court properly rejected Simon's motion because Simon failed to follow the time limits set forth in Trial Rule 56(C). The relevant part of this rule states that "[a]n adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits." Here, Simon made no response to the Town's October 17, 2006 motion for summary judgment until December 11, 2006, when it sought to continue the summary judgment hearing. This is well beyond the thirty-day time limit provided for in Trial Rule 56(C). When a non-moving party fails to respond to a motion for summary judgment within thirty days—either by filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F)—the trial court cannot consider summary judgment filings of that party subsequent to the thirty-day period. Borsuk v. Town of St. John, 820 N.E.2d 118, 123 n.5 (Ind. 2005); Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 974 (Ind. 2005).

Simon seeks to avoid operation of this rule of law by claiming this is not a case of it failing to timely respond to the Town's motion, but instead a case of it filing a separate cross-motion for summary judgment. Simon argues that there are no deadlines for filing cross-motions for summary judgment because Trial Rule 56(A) provides that "[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty [20] days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Simon therefore claims that, as the claimant, it may file its own motion for summary judgment any time after the expiration of twenty days from the commencement of the action or after service of the Town's motion for summary judgment.

We acknowledge that Trial Rule 56(A), standing alone, might support Simon's position. However, Trial Rule 56(A) must be read in conjunction with the rest of the Rule. Trial Rule 56(C), as explained above, has been interpreted to require the non-moving party to act upon an adverse motion for summary judgment within thirty days after being served therewith, either by requesting a continuance or filing a response. Borsuk, 820 N.E.2d at 124; Monroe Guar., 829 N.E.2d at 974. To read Trial Rule 56(A) as Simon would have us would be to allow a party who missed the thirty-day deadline imposed by Trial Rule 56(C) to make an end run around this rule and belatedly respond to a motion for summary judgment at any time by deeming a response as its own cross motion for summary judgment. This would effectively eviscerate the rule explained in

Borsuk and Monroe Guaranty. We therefore cannot say that the trial court erred in failing to consider any material designated by Simon in its cross-motion for summary judgment.

Simon next argues that, even if the trial court considered only the Town's evidence, summary judgment in favor of the Town was nevertheless inappropriate. Simon's cause of action is based upon the Town's alleged breach of contract. The essential elements of claim for breach of contract are: (1) the existence of a contract, (2) the defendant's breach thereof, and (3) resulting damages. Rogier v. Am. Testing & Eng'g Corp., 734 N.E.2d 606, 614 (Ind. Ct. App. 2000), trans. denied. A valid contract requires offer, acceptance, consideration, and manifestation of mutual assent. Family Video Movie Club, Inc. v. Home Folks, Inc., 827 N.E.2d 582, 585 (Ind. Ct. App. 2005). As the defendant, for the Town to prevail upon its motion for summary judgment, it must show that the undisputed facts negate at least one element of Simon's claim or show that it has a factually unchallenged affirmative defense barring Simon's claim. Dietz v. Finlay Fine Jewelry Corp., 754 N.E.2d 958, 966 (Ind. Ct. App. 2001) (citing Dible v. City of Lafayette, 713 N.E.2d 269, 272 (Ind. 1999)). The parties here argue only about the element of acceptance; the Town claims that the Council never accepted the bid offer, thus negating Simon's claim of breach of contract, whereas Simon argues that the Council did accept its bid offer. We therefore limit our discussion to the element of acceptance.

Simon refers to two pieces of evidence to support its claim that the Town accepted its bid offer. The first is the minutes of the June 8, 2005 meeting where the Council

ultimately passed a motion to "accept the bid of Simon for the 2001 demo truck . . . subject to favorable financing after sitting down with the financial advisors and making sure that the Town is comfortable with the financial arrangements." Appellant's App. p. 31. The other is the July 5, 2005 letter from then-Council president John Davis in which he communicated the bid's acceptance "subject to favorable financing . . . ."[1] Appellant's App. p. 113. Each party views this evidence differently. Simon claims it shows that the Town accepted its bid with favorable financing as a condition precedent. The Town claims it shows no acceptance at all. We agree with Simon.

Under contract law, a condition precedent is a condition which must be performed before the agreement of the parties becomes a binding contract or which must be fulfilled before the duty to perform a specific obligation arises. AquaSource, Inc. v. Wind Dance Farm, Inc., 833 N.E.2d 535, 539 (Ind. Ct. App. 2005). Here, according to the minutes of the June 8 Council meeting, the Council "accepted" Simon's bid, but conditioned the acceptance upon "favorable financing" and the Town being "comfortable" with the financing. The July 5 letter to Simon similarly accepted the bid "subject to favorable financing." Thus, the Town accepted the bid with the conditions precedent of favorable or "comfortable" financing. See AquaSource, Inc., 833 N.E.2d at 539 (provision in contract stating that it was "subject to approval" by board of directors was a condition

[1] As already discussed, because of Simon's untimely response to the Town's motion for summary judgment, we will consider only the evidence designated by the Town. The July 5 letter was not listed in the Town's designation of evidence in support of summary judgment. Nevertheless, it was cited in the Town's memorandum in support of summary judgment and referred to by the Town at the summary judgment hearing. See Appellee's App. p. 3; Tr. p. 4. A party may designate evidence by way of a memorandum in support or opposition to summary judgment. See AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 46 (Ind. Ct. App. 2004), trans. denied. We therefore consider the letter upon appeal.

precedent); Ind. State Highway Comm'n v. Curtis, 704 N.E.2d 1015, 1018 (Ind. 1998) (provision in settlement agreement stating that it was subject to approval by Department of Transportation was a condition precedent); Blakely v. Currence, 172 Ind.App. 668, 671, 361 N.E.2d 921, 922 (1977) (provision that purchase agreement was subject to loan approval was a condition precedent).

A party may not rely on the failure of a condition precedent to excuse performance where that party's action or inaction caused the failure. AquaSource, Inc., 833 N.E.2d at 539 (citing Hamlin v. Steward, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993)). Thus, the Town may not rely upon failure to obtain "favorable financing" or not being "comfortable" with the financing if it caused such failure. See id. Indeed, it has been held that when a party retains control over whether a condition will be fulfilled, that party has an implied obligation to make a reasonable and good-faith effort to satisfy that condition. Id. (citing Hamlin, 622 N.E.2d at 540).

Simon claims that the designated evidence reveals that the conditions precedent of "favorable financing" and the Town being "comfortable" with the financing were met, giving rise to an enforceable contract. However, given the record before us, we cannot say as a matter of law that these conditions precedent were fulfilled. Rather, there appear to be genuine issues of material fact as to whether these conditions were fulfilled or whether the Town made a reasonable and good-faith effort to fulfill them. Because of this, summary judgment in favor of either party was improper; the Town has not designated evidence negating a material element of Simon's claim of breach of contract. For this reason, the trial court should not have granted summary judgment in favor of the

Town. Upon remand, these issues will be among those to be determined by the trier of fact. We therefore reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for proceedings consistent with this opinion.

NAJAM, J., and BRADFORD, J., concur.