CAUSE NO. DC-13-09969

JO N. HOPPER,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	**44TH JUDICIAL DISTRICT**
	§	
LAURA S. WASSMER and	§	
STEPHEN B. HOPPER,	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CAUSES OF ACTION FOR BREACH OF CONTRACT AND SPECIFIC PERFORMANCE

Defendants Laura S. Wassmer and Stephen B. Hopper file this Reply to Plaintiff Jo N. Hopper's Response to Defendants' Motion for Partial Summary Judgment on Plaintiff's Causes of Action for Breach of Contract and Specific Performance ("Plaintiff's Response"). In support, they would show:

I. Summary.

Plaintiff contends that it made an offer to Defendants on August 6, 2013 that was accepted by Defendants on August 13, 2013. While Plaintiff did make an offer (initially on August 5, 2013 and not August 6, 2013), Plaintiff misconstrues Defendants' response as an "acceptance" when it was indeed a counteroffer. The uncontroverted summary judgment evidence clearly shows that on August 6, 2013, Defendants made a counteroffer to Plaintiff that required, as an express condition precedent to any potential agreement between the parties, the negotiation and execution of definitive written documentation setting forth the specific terms of such agreement. This never occurred, and accordingly no agreement was ever reached between the parties.

In attempt to blur and hide the fact that Plaintiff's breach of contract claim fails as a matter of law because the undisputed evidence shows that no contract was ever formed, Plaintiff asks the Court to believe—despite only *drafts* of a Rule 11 agreement (as it was referred to over a dozen times by Plaintiff's counsel) exchanged during the course of negotiations—that an enforceable

agreement was formed between Plaintiff and Defendants through their respective counsel. Even if, for the sake of argument, such an agreement was formed, Plaintiff would have the Court completely disregard the requirements of Rule 11 with respect to this particular alleged agreement, although Plaintiff has herself utilized Rule 11 for a number of other agreements in this lawsuit on more than one occasion.

The evidence—when viewed in its entirety even in the light most favorable to Plaintiff—and the law clearly shows that no agreement was reached between Plaintiff and Defendants, and (in the alternative) even if an agreement had been reached, it would be unenforceable by Plaintiff for failure to meet the requirements of Rule 11.

II. Even In The Light Most Favorable To Plaintiff, The Summary Judgment Evidence Shows That Defendants Expressly Made A Counteroffer That Any Potential Agreement Subject To The Preparation of Definitive Documentation, Which Was Never Finalized or Executed.

The undisputed evidence shows that ***no*** agreement was ever reached. Plaintiff asks the Court to focus—in a vacuum—on two non-consecutive emails from August 6 and August 13, 2013, and to disregard several additional email correspondences in between those two emails as well as, most importantly, Mr. McNeill's (Defendants' counsel) initial counteroffer to Mr. Jennings (Plaintiff's counsel) requiring that any potential agreement is "subject to preparation of the appropriate documentation." Plaintiff would like to cherry pick which correspondence the Court should evaluate, and which it should disregard. When *all* the undisputed evidence is considered, however, it is clear that an enforceable agreement was never entered into by Defendants or formed between the parties. To the contrary, the evidence reflects the negotiation of a *proposed* written agreement—as required by Defendants' counteroffer as a condition precedent to entering into any actual agreement—that, as the undisputed evidence shows, never came to fruition. The summary judgment evidence before this Court shows that, even if Plaintiff was willing to make an offer to Defendants without a definitive written agreement, pursuant to their express counteroffer Defendants were not willing to accept any such offer without such a definitive written agreement. A response that does not mirror the terms of the offer is both a rejection of the original offer and a counteroffer. *See, e.g., United Concrete Pipeline Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 363-364 (Tex. 1968).

On January 25, 2013, Mr. Jennings emailed a draft Rule 11 agreement to Mr. McNeill. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000285-000289. Since the independent administrator did not assign the wine and golf club collections to the parties in undivided interests until July 31, 2013, these negotiations did not recommence until August 2013.

On August 5, 2013, Mr. Jennings emailed to Mr. McNeill a letter offering that the parties divide the assets as proposed in Mr. Jennings' January 25, 2013 letter, and inquiring whether Defendants wanted group "A" or "B" of each of the wine and golf club collections as they had previously been allocated by Plaintiff. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000232-234. This email reflects Plaintiff's original offer to Defendants, not the email from August 6, 2013 as alleged by Plaintiff.

In response to Mr. Jennings' email, on August 6, 2013 Mr. McNeill emailed Mr. Jennings with a *counteroffer* when he stated that "my clients are agreeable to dividing the wine and golf club collections per your proposal, *subject to preparation of the appropriate documentation* (which I anticipate should be very simple)." *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000231. That evidence indisputably shows that any potential agreement between the parties was subject to the negotiation and execution of a definitive agreement. This email reflects Defendants' counteroffer to Plaintiff, on which all further negotiations were based.

Later that same day, Mr. Jennings responded to Mr. McNeill by email, and stated "Please select and we will draw up an agreement accordingly." In other words, Mr. Jennings accepted Mr. McNeill's counteroffer term that any agreement between the parties would only be reflected in a definitive written agreement. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000192-000193.

On August 8, 2013, Mr. Jennings sent an additional email to Mr. McNeill, and stated "Respectfully we suggest that your clients take a coin out of their pocket and flip it, pick heads or tails, and one way or another get to either 'A' or 'B' and communicate that back, <u>at once</u>. … You just wrote us a day or two ago and indicated that an agreement on all this could be very short." *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition

Production 000190-000191. This evidence confirms that both parties still contemplated a definitive written agreement as required by the terms of Mr. McNeill's counteroffer.

On August 13, 2013, Mr. McNeill replied to Mr. Jennings' *August 8th email* (which referenced the preparation of an agreement per Defendants' prior requirement, and not Mr. Jennings' August 6th email as Plaintiff incorrectly alleges): "My clients have selected group A for each of the wine and the golf clubs. Please advise how you would like to proceed…", *i.e.*, who should prepare the initial draft of the definitive written documentation required by Mr. McNeill's counteroffer. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000189.

Mr. Jennings responded later that same day by emailing a revised draft of his original January 2013 Rule 11 agreement to Mr. McNeill. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000184-000188. After additional negotiations between the parties, as evidenced by Mr. Jennings' cover email, on August 20, 2013, Mr. Jennings emailed a further revised draft Rule 11 agreement to Mr. McNeill. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 000177-000181. It is clear that there was never a meeting of the minds between the parties on all salient points of an agreement, or acceptance by Defendants pursuant to the requirements of their counteroffer, as evidenced by the multiple drafts of the proposed written agreement being exchanged by the parties as late as August 20, 2013.

As evidenced by Mr. Jennings' email of August 23, 2013, no agreement, Rule 11 or otherwise, was ever signed by the parties. *See* Exhibit A to Appendix A to Defendants' Motion for Summary Judgment, Children's Partition Production 167. Plaintiff has proffered no evidence to the contrary. This evidence proves, beyond any doubt, that Defendants' condition precedent to accepting any offer—that definitive documentation be finalized and executed—never occurred. Accordingly the express terms of Defendants' counteroffer were never met, and Plaintiff's cause of action for breach of contract must fail.

II. In the Alternative, Plaintiff's Failure To Comply With Rule 11 Is Dispositive Of Defendants' Motion.

Rule 11 provides, in relevant part, that "no agreement between attorneys … touching any pending suit will be enforced unless it be in writing, signed and filed with the papers as part of the

record…." This rule has existed since 1840 under the laws of the Republic of Texas, and has contained the present signature and filing requirement since 1877. *Kennedy v. Hyde*, 682 S.W.2d 525, 526 (Tex. 1984). The purpose of Rule 11 is to "ensure[] that such agreements [between attorneys] do not themselves become sources of controversy, impeding resolution of suits." *Id.* at 530.

Despite knowing what a valid Rule 11 agreement is,[1] Plaintiff's Response completely disregards the requirements of Rule 11 in attempting to defeat summary judgment. Plaintiff's Response argues, *without any legal citation or support*, that the parties were not required to sign and file a Rule 11 agreement with the court to have an enforceable contract. To support this proposition, Plaintiff states in her response that "*[p]arties in litigation* often reach enforceable agreements without entering into or filing a Rule 11 Agreement, *e.g.*, a settlement agreement." Plaintiff's Response p. 10 (emphasis added). Plaintiff is correct that *the parties to a lawsuit* often enter into enforceable settlement agreements. *See, e.g.,* Texas Civil Practices & Remedies Code § 154.071(a) ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."). However, that is not the case presented here, where Plaintiff seeks to enforce an alleged agreement that was allegedly reached *by the parties' respective attorneys*. This present case is exactly the type of situation that Rule 11 governs.

Plaintiff alleges that an agreement was formed pursuant to two non-consecutive emails between the parties' counsel on August 6 and August 13, 2013 in connection with the pending probate proceeding. Even if one were to disregard the evidence discussed *supra* regarding how such emails failed to comply with the express requirements of Defendants' counteroffer, these email exchanges failed to meet the requirements of Rule 11 and thus cannot be enforced. *See Padilla v. LaFrance,* 907 S.W.2d 454, 460 (Tex. 1995) ("A settlement agreement must comply with Rule 11 to be enforceable.").

[1] For example, on January 27, 2015, Mr. Jennings reduced an agreement with Mr. McNeill regarding this lawsuit to writing, obtained Mr. McNeill's signature, and filed the signed letter with the Court under Rule 11. Plaintiff's current counsel, Loewinsohn Flegle Deary, L.L.P., did the same on December 10, 2015.

Here, Plaintiff's Response "comprises little more than each attorney's 'spin' on the … correspondence and what was said between them regarding it. The elimination of such bickering is the goal of current Rule 11." *Roeglin v. Daves*, 83 S.W.3d 326, 331-32 (Tex.App.—Austin 2002. ***Even if, despite the evidence discussed supra regarding the requirements of Defendants' counteroffer that were never satisfied, we assume for the sake of discussion that a binding agreement was in fact formed between the parties, Plaintiff's Response does not provide any evidence (or otherwise create a fact issue) that the alleged agreement that was allegedly formed between the parties' respective counsel by way of email correspondence on August 6 and August 13, 2013 was ever signed or filed with the court—defects in violation of Rule 11 that are fatal to Plaintiff's Response and mandate summary judgment for Defendant.***

Indeed, this present case presents exactly the type of situation where Rule 11 mandates that no enforceable agreement has been reached. For example, the Supreme Court of Texas has favorably cited to *Foster v. Gossett*, 17 S.W.2d 469 (Tex.Civ.App.—Texarkana 1929, writ dism'd), where the appellate court held that evidence of a settlement agreement was properly excluded because while the compromise offer was made by attorneys representing parties to the suit and accepted by attorneys representing the other parties to the suit, the settlement agreement was nevertheless unenforceable because it was not evidenced as required by Rule 47 (now Rule 11). *Kennedy*, 682 S.W.2d at 528. As Defendants' uncontroverted summary judgment evidence shows, no Rule 11 agreement was never signed by the parties or filed with the court. Accordingly, Defendants are entitled to summary judgment.

The fact that Plaintiff must resort to the affidavit testimony of her former counsel in this lawsuit, Mr. James A. Jennings, merely confirms that the August 6 and August 13, 2013 emails do not by themselves establish a binding, enforceable agreement between the parties. Otherwise, Mr. Jennings' affidavit testimony regarding the purpose and meaning of his correspondences with Mr. McNeill, as well as his intentions, beliefs and understandings regarding such correspondence, would be unnecessary. Even if Mr. Jennings' affidavit testimony does validly evidence Plaintiff's intent to make an offer, there is no summary judgment evidence that Defendants ever accepted or intended to accept that offer, as their counteroffer term of appropriate written documentation as discussed *supra* was never met.

III. Defendants Object To Certain Alleged "Facts" In Plaintiff's Response.

Defendants object to several of Plaintiff's alleged "facts" in Plaintiff's Response.

1. In paragraph 6 of Plaintiff's Response, Plaintiff attaches as evidence testimony from Defendant Wassmer's deposition and the corresponding deposition exhibit relating to negotiations held in 2011. No connection between such testimony and the relevant communications in 2013 is provided by Plaintiff, and none is warranted. Defendants, therefore, object to this testimony as irrelevant.

2. In paragraph 6 of Plaintiff's Responses, Plaintiff's statements and Mr. Jennings' affidavit testimony on which such statements are based contain inadmissible and unsubstantiated factual conclusions as opposed to actual facts, and are not proper summary judgment evidence. *See, e.g., Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013). Defendants also object to this testimony.

3. In paragraph 8 of Plaintiff's Response, Plaintiff states that Mr. McNeill accepted the offer made in the August 6th email, and that the August 6th email and the August 13th email collectively constituted an agreement. Defendants object to this so-called "fact" because it is not a fact, but rather a legal conclusion and argument that, among other deficiencies, completely disregards the several significant intervening emails. *See, e.g., Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

4. In paragraph 10 of Plaintiff's Response, Plaintiff states that Mr. McNeill signed an affidavit "confirming that defense was untrue." Defendants object to this statement because not only is it untrue, but Plaintiff's alleged factual support for that point does not support it.

IV. Prayer

For these reasons, Defendants ask this Court to enter an order granting Defendants summary judgment on Plaintiff's causes of action for breach of contract and specific performance. Defendants further request all other relief to which they may be entitled.

Dated: February 23, 2016

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record in this matter by e-service on this the 23th day of February 2016.

/s/ Christopher M. McNeill
CHRISTOPHER M. MCNEILL