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BACKGROUND

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Court of Appeals of Nebraska.

CAMPOS CONSTRUCTION CO., Appellant,
v.
CREIGHTON SAINT JOSEPH REGIONAL
HEALTH CARE SYSTEM, L.L.C., third-party
Plaintiff, Appellee, and Leo A. Daly Company, third-
party Defendant, Appellee.

No. A-98-789.

Dec. 7, 1999.

Appeal from the District Court for Douglas County,
Lawrence J. Corrigan, Judge, No. A-98-789.

Eric W. Kruger and James D. Carson, of Rickerson
& Kruger, for appellant.

Steven E. Archelpohl, for appellee Creighton Saint
Joseph Regional Health Care System.

[IRWIN](#), Chief Judge, and [SIEVERS](#) and
CARLSON, Judges.

[SIEVERS](#).

*1 Campos Construction Co. (Campos) appeals the district court's order granting summary judgment to Creighton Saint Joseph Regional Health Care System, L.L.C. (Creighton), and Leo A. Daly Company (Daly). Campos brought this breach of contract action after Creighton decided not to proceed with a construction project. Campos alleged that it had been awarded the contract for the project and that a binding contract was created by Creighton's oral and written acceptance of Campos' bid proposal through Creighton's agent Daly, the architectural firm hired by Creighton to administer the project, together with the course of conduct of the parties which occurred thereafter. The district court disagreed.

On July 5, 1994, Creighton hired Daly to design a new entryway to serve outpatient services at the Saint Joseph Center for Mental Health (St. Joseph). In addition to designing the project, Daly agreed to prepare the contract documents, observe construction, and administer the contract. On February 6, 1995, with Creighton's authority, Daly invited Campos to submit a bid for the project. On February 27, Campos submitted a bid in compliance with the particulars outlined in the invitation. Creighton then informed Campos, via a telephone call from Daly, that Campos was the low bidder and was being awarded the contract.

On March 7, 1995, Daly sent a letter to Campos which designated the subject as "Agreement" and which enclosed three copies of the American Institute of Architects (AIA) owner/contractor agreement. The letter directed Campos to sign and return all three copies along with other documentation. The letter then stated that a signed copy of the owner/contractor agreement would be forwarded to Campos "as evidence of the Owner's final acceptance of your Proposal." The letter concluded with the following language: "The date representing your first day of Work and the date of Substantial Completion will be provided to you in a Notice to Proceed accompanying the fully executed Agreement." Campos signed and returned the owner/contractor agreement as directed. The requested documentation was also forwarded either with the owner/contractor agreement or subsequent thereto.

Between March 7 and June 1, 1995, Campos entered into various contracts with subcontractors and suppliers and communicated extensively with Daly concerning project progression, plan clarification, and material substitutions. By the time Creighton informed Campos that the project would not be going forward, Campos had submitted 8 substitution applications, 15 requests for interpretation, and 40 shop drawings. Daly responded to 7 of the substitution applications, 14 of the requests for interpretation, and 35 of the submitted shop drawings.

According to the contract documents, Campos was to complete the project 160 days after receiving a signed copy of the owner/contractor agreement and a formal notice to proceed. Campos' proposal provided that its bid would be kept open for 30 days. The contract documents indicate that the notice to proceed would be issued shortly after the contract was

executed. Completing the project before winter was important, because winter weather would typically result in increased costs.

*2 Creighton never forwarded a signed copy of the owner/contractor agreement or a formal notice to proceed to Campos. However, Daly did instruct Campos in a letter to "proceed with this work as it fits your schedule" in response to one of the several substitution applications submitted to Daly and Creighton by Campos.

On March 23, 1995, Campos granted Creighton's request that Campos "hold your bid" open for an additional 15 days beyond the 30 days as set forth in the Campos proposal. On April 7, Creighton requested an additional 30 day extension, to which Campos agreed. We digress briefly from the facts to point out that Creighton alleges that these extensions show it had not yet accepted Campos' bid and that it therefore reserved the right to accept or deny the bid. Campos responds by stating that the bid extensions were only an agreement to stick to the proposal price in light of the delays caused by Creighton's failure to provide a formal notice to proceed. During each extension, Daly assured Campos that the project would go forward and that the problem was only an administrative difficulty as a result of Creighton's parent company being changed.

On May 31, 1995, Creighton advised Daly that the project would not proceed. Daly informed Campos the following morning that funding for the project had been withdrawn and that all work on the project should stop. Upon Creighton's motion for summary judgment, the district court found that there was no contract.

ASSIGNMENTS OF ERROR

Campos alleges the district court erred in sustaining Creighton's motion for summary judgment because it incorrectly ruled, without analysis, (1) that no enforceable contract was created when Creighton notified Campos that Campos was being awarded the contract, (2) that there remained no material issues of fact regarding the formation of the contract, (3) that Creighton was not stopped from asserting that a signed AIA contract for construction was a necessary prerequisite to the formation of a contract or that a contract was not otherwise formed, and (4) that there remained no material issues of fact with respect to whether Creighton was stopped from denying the formation of a contract because of its previous course of conduct.

STANDARD OF REVIEW

When reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists. [Ratigan v. K.D.L., Inc., 253 Neb. 640, 573 N.W.2d 739 \(1998\).](#)

ANALYSIS

In this case, Creighton alleges that no contract was ever formed between the parties because it had not formally accepted Campos' bid as required by the contract documents, and as contemplated by the parties. We first look to the contract documents to determine whether the district court properly granted Creighton summary judgment based on Creighton's assertion that it never accepted Campos' proposal as required by the contract documents.

*3 The contract documents relating to the construction project in this case are extensive and complicated. For example, article 1 of the owner/contractor agreement defines the "Contract Documents" as consisting of "this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement." The question for decision is whether these documents, together with the affidavits and depositions submitted in this case, when viewed in a light most favorable to Campos, support the district court's conclusion that there was no genuine issue of material fact as to whether Creighton accepted Campos' bid, thereby creating a contract between the parties. We first look to the contract documents.

These contract documents, as well as the bidding documents, clearly define what steps Campos must take in order to make an offer in the form of a proposal to do the work contemplated by the project. However, these same documents fail to expressly define what Creighton must do in order to accept that proposal once it is properly offered by Campos. Creighton argues that to accept Campos' offer, it must sign and deliver a copy of the owner/contractor agreement to Campos. We can find no signature requirement in the contract documents. In fact, the "Supplementary General Conditions" form which modifies the contract documents specifically deletes

the signature requirement. To illustrate, the "General Conditions of the Contract for Construction" form, which is included in the contract documents, states in paragraph 1.2.1 that "[t]he Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement." However, the signature requirement found in paragraph 1.2.1 is not part of the contract documents, because paragraph 1.2.1 is expressly deleted by the "Supplementary General Conditions" form. We find only one other instance of significance where the owner's signature is required, and that is for purposes of determining when the "Contract Time" commences for purposes of calculating when the project is to be completed. Our reading of the contract documents shows that there is no express requirement that Creighton sign the contract documents in order to accept Campos' bid or proposal.

We also note that all "Bidding Documents such as the Advertisement or Invitation for Bids and the Bid Proposal" are expressly excluded from the contract documents. Therefore, Campos' proposal is not even a part of the contract documents that Creighton relies on as being the "contract" which it claims can only be "accepted" when Creighton signs and delivers a copy to Campos. In fact, since Campos' bid is expressly "not included" in the contract documents, there is no term within the contract documents that defines price or time. Price and time are found in Campos' proposal, i.e., a "lump sum Base Proposal" of \$858,500 to be completed in 160 calendar days. The fact that Creighton never actually signed or delivered the contract documents to Campos is not determinative of the issue of whether Campos and Creighton entered into a binding contract for construction of this project. Thus, viewing the evidence most favorably to Campos, we find the absence of Creighton's signature is not, by itself, fatal to Campos' claim that a contract had been formed.

*4 The contract documents expressly state that the "intent" of the contract documents is to "include all items necessary for the proper execution and completion of the Work by the Contractor." While the contract documents may memorialize the agreement between the parties, their defined intent is to "include all items necessary for the proper execution and completion of the Work by the Contractor." In light of the fact that the signature requirements and the proposal (which outlines the price and time elements of the contract) are expressly excluded from those forms which comprise the contract documents, we conclude for purposes of the motion for summary judgment and this appeal that the contract documents themselves are just as

Creighton's agent Daly described them to be in the March 7, 1995, letter to Campos: only "evidence of the Owner's final acceptance of your Proposal."

Since the contract documents fail to expressly define a specific method by which Creighton would accept Campos' offer, we turn to basic principles of contract law. A contract may be written or oral and can be shown by circumstantial evidence. [*Tilt Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 \(1998\)](#). To create a contract, there must be both an offer and an acceptance and there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. [*Tilt Up Concrete*, supra; *Hoelt v. Five Points Bank*, 248 Neb. 772, 539 N.W. 2d 637 \(1995\)](#). Mutual assent to a contract is determined by the objective manifestations of intent by the parties, not by their subjective statements of intent. [*Tilt Up Concrete*, supra](#). See [*Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 \(1993\)](#). Thus, Creighton's evidence that it did not intend to, nor did it, enter into a contract with Campos is clearly not determinative, particularly on a motion for summary judgment.

Taking the evidence most favorably to Campos and applying the foregoing principles of contract law, we find that summary judgment cannot be sustained in this case. Campos adduced evidence that Creighton accepted its proposal orally via a telephone conversation shortly after all the proposals were submitted. The affidavit of Pat Connell, viewed most favorably to Campos, lends considerable support to the position that Campos' bid was orally accepted. Connell was the chief operating officer for St. Joseph, and he received Campos' proposal. He stated that the St. Joseph board of directors had full authority to initiate construction of the project. Connell further stated in his affidavit:

5. On or about March, 1995, Johanna Anderson had received from the board of directors of St. Joseph Center for Mental Health authority and direction to proceed with the entry/stairtower project, noting that it was of the utmost importance that the project begin immediately so that it could be completed before the winter.

6. In early March, 1995, I participated in a conference call with Johanna Anderson and Leo Daly Company wherein Johanna Anderson instructed the Leo Daly Company to proceed with the project and to inform Campos Construction to begin work and that time was of the essence.

*5 The favorable inference from the affidavit is that Creighton accepted Campos' proposal and directed its

agent and architect, Daly, to begin work with Campos. There is abundant evidence that Campos and Daly undertook a number of preliminary matters necessary to the start of construction. For example, with Daly's assistance, Campos arranged and expended funds to secure "long lead" materials for the project to ensure timely completion. It is important to remember that the law is that a binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance as to all of the details of the proposed agreement-it may be imputed from conduct and surrounding circumstances. [Lindsay Ins. Agency v. Mead](#), 244 Neb. 645, 508 N.W.2d 820 (1993). Acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement. *Id.* Creighton retained Daly to not only design the entryway, but to "prepare contract documents and provide approximately 200 hours of Construction Observation/Contract Administration." Daly's duty to administer the contract and observe construction on behalf of Creighton lends support to Campos' position that Creighton accepted and began implementation of Campos' proposal through Creighton's agent Daly. In passing, we also note that the bill of exceptions contains two copies of the owner/contractor agreement in which the Creighton signature block is signed with a signature that appears to read "Johanna Anderson." However, the record does not establish the authenticity of this signature and in fact is silent on this point. However, Campos' allegation that Creighton orally accepted its proposal for the project is supported by evidence in the record, some of which we have already discussed. Additionally, we note that on two separate occasions, Daly, Creighton's agent and architect, wrote to Campos and stated, "Please proceed with the work." Taking a favorable view of these responses from Daly to a substitution application and a request for interpretation from Campos, it is impossible, on a motion for summary judgment, to conclude that there is not a genuine issue of material fact as to whether there was a contract between Campos and Creighton. We cannot lose sight of the fact that Campos introduced evidence that Daly informed Campos that Campos was the low bidder and was being awarded the contract, which was followed by the March 7, 1995, letter directing Campos to sign the owner/contractor agreement. That letter also told Campos that a copy signed by Creighton would be forwarded "as evidence of the Owner's final acceptance of your Proposal." But the course of conduct, some of which we have detailed, would indicate that the contract was in fact formed-particularly when viewing the evidence most favorably to Campos, as we are bound to do. While

we recognize that Creighton has a different view of these documents and events, cogently set forth in its brief, the focus in this appeal is properly on Campos' evidence and the favorable inferences to be drawn from that evidence.

*6 We find that there are genuine issues of material fact as to whether there was a contract between Creighton and Campos. The circumstantial evidence shows that the parties conducted themselves as if a binding contract was in place. Campos alleges Creighton accepted its bid both orally and in writing, and the evidence shows the parties conducted themselves as if there was a meeting of the minds that Campos would later be given the formality of a signed contract as well as a formal notice to proceed. Campos entered into agreements with subcontractors and communicated extensively with Daly concerning material substitutions and architect interpretations. Daly assured Campos that the project would proceed and that the delays were due to administrative problems associated with Creighton's change of parent company. While we do not find that a contract did in fact exist, we readily conclude from the contract documents, the proposal, and the course of conduct that there are genuine issues of material fact for trial. Because we find that summary judgment was improperly granted, we need not address Campos' remaining assignments of error. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

1999 WL 1111596, 1999 WL 1111596 (Neb.App.)

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