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## New Jersey Court of Errors and Appeals

NEW JERSEY TERRA COTTA  
COMPANY, a corporation,  
Plaintiff-Appellee,

vs.

GOODMAN WAREHOUSE CORPORA-  
TION, a corporation,  
Defendant-Appellant.

### BRIEF OF DEFENDANT-APPELLANT.

#### Facts.

This is an appeal from the judgment of the Hudson County Circuit Court in favor of the plaintiff for the sum of \$947.95 in an action upon a contract for the manufacture and sale of architectural terra cotta.

The plaintiff-appellee is a manufacturer of terra cotta used in building construction, and on the 4th day of August, 1922, the plaintiff and defendant entered into a written contract, whereby the plaintiff agreed to provide all the materials and perform all the work of furnishing and delivering at the building site, all the architectural terra cotta required in the construction and completion of an 8 story warehouse of the defendant, in strict accordance with the plans and specifications prepared by Moores and Dunford, Inc., Architects, referred to in the said contract. The defendant agreed to pay

the plaintiff the sum of \$6875.00 for the terra cotta, payable 85% on Architect's certificate, showing the amount delivered in the preceeding month and the balance within 60 days after the completion of the contract (p. 2). The specifications, which were a part of the contract, provided that,

"All terra cotta must be true to shape and profile strictly as to detail, and no warped or damaged terra cotta will be accepted. All terra cotta furnished must be guaranteed against any checking for a period of one year after being installed. All terra cotta must be of ivory white glazed with a mat finish and of a grade equal to that manufactured by the Northwestern Terra Cotta Company of Chicago" (p. 11).

The plaintiff started to deliver terra cotta to the building site of the defendant in the month of December, 1922, and within a few weeks the major portion of the terra cotta, about 1630 pieces out of 1700 had been delivered (p. 63). Before it had been actually used, the defendant's Architect and representatives on the job, found the terra cotta delivered to be spotted and chipped, and the Architect notified the plaintiff that the same was unsatisfactory and would be rejected.

A controversy thereupon arose between the plaintiff and the defendant and frequent conferences were had on the subject. On February 19th, 1923, the plaintiff wrote a letter to the defendant as follows (p. 130):

"Goodman Warehouse Corp.,  
Longacre Eng. & Constr. Co., Agents.  
Re: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

In accordance with agreement made over the telephone today with your Mr. Nathan Goodman, Attorney, and Mr. Eilinberger, of

the Longacre Engineering & Construction Company, we will agree to deduct, as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc., in the sum of \$1250. from the amount of our above mentioned contract.

You agree to forward to us at once a payment of 85% of the amount of the balance of the contract, as per enclosed statement, \$4781.25, and we will immediately on receipt of this payment deliver to your above mentioned building the balance of the work now stored at our plant.

We further agree to replace at your request and deliver at the building site, as soon as possible, ten pieces of terra cotta as may be designated by you, and which you may want to be replaced.

The above mentioned balance of 15%, or \$843.75 shall be paid us ten days after above mentioned replacements have been furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922, or otherwise by you for damages, delays or any other cause, and all previous agreements whether written or verbal hereby stand cancelled.

Yours very truly,

THE NEW JERSEY TERRA COTTA Co.,

E. V. Eskesen,

President."

EVE/FT

On the 8th day of March, 1923, the defendant sent a letter to the plaintiff as follows (p. 133) :

"The New Jersey Terra Cotta Company,  
149 Broadway,  
New York City.

Gentlemen:—

We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars (\$1250) from the contract price

in consideration of our waiving any claims for defective material, delays, etc.

We understand that the Architect is preparing a certificate showing the amount due you on your contract after deducting the sum of One thousand two hundred and fifty dollars (\$1250) herein mentioned, and the retainer of fifteen per cent. (15%). Upon receipt of this certificate, we will present to Mr. Harry Eilenberger, of the Longacre Engineering & Construction Company, an order upon the American Bond and Mortgage Company for payment of the same. *After delivery by you of the balance of the terra cotta, now ready for shipment, he will be authorized to present the same to you.*

We will advise you as soon as this order is presented to Mr. Eilenberger, so that you can immediately make shipment of the balance of the terra cotta.

Yours very truly,

GOODMAN WAREHOUSE CORPORATION,  
Per Nathan L. Goodman,  
Sect."

After these letters were sent, and about March 15th, 1923 (p. 25, ll. 25 to 29) the plaintiff delivered the balance of the terra cotta that it had at its plant, namely about 70 pieces and thereafter received a check in payment therefore, in the manner indicated and set out in the defendant's letter of March 8th.

In December, 1923, the plaintiff shipped the 10 replacement pieces of terra cotta to the defendant and within 10 days thereafter, demanded of the defendant payment of the balance due which amounted to the sum of \$843.75. This the defendant refused to pay on the ground that the terra cotta which had been put in the building, had become warped and chipped in violation of the war-

ranty contained in the contract of August 4th, 1922, and on the further ground that delivery of the 10 pieces of terra cotta had been so long delayed, that they were now worthless to the defendant (p. 95, ll. 1-24).

The plaintiff thereupon commenced this suit for the balance due, basing its complaint on the two letters, namely; the plaintiff's letter of February 19th, and the defendant's letter of March 8th, 1923, alleging that these two letters constituted a new contract which rescinded and abrogated the contract of August 4th, 1922.

The defendant answered and counterclaimed, alleging that these two letters did not constitute a new contract, but that they were some evidence of a modification of certain terms in the original contract, and the defendant thereupon counterclaimed against the plaintiff for damages that it had sustained, by reason of the breach of warranty contained in the contract of August 4th, and also set up as a defense, that the plaintiff had breached the so called supplemental contract, based on the two letters, before mentioned, in not making delivery within a reasonable time.

The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of \$947.95. The defendant appeals on the ground that the court erred in holding the letters of February 19th, and March 8th, 1923 constituted a new contract abrogating the original contract of August 4th, 1922.

### **Statement.**

All the grounds of appeal with the exception of the 14th, are based on the same question of law, and involve the same error alleged to have been made by the trial judge in his charge to the jury,

and in the exclusion of certain testimony offered by the defendant, which errors will be argued by the defendant as one point. The nature of the error alleged is as follows:

Refusal by the trial Judge to permit the introduction of any evidence regarding the contract of August 4th, or evidence of the defendant's damages, by reason of violations of the said contract, on the part of the plaintiff. Objections were made and exceptions taken on such refusals of testimony in the following instances:—"P. 32, l. 8, l. 32; p. 33, l. 1, l. 17." (P. 90, l. 30; p. 91, l. 15.)

Throughout the case, and in particular in the above mentioned exceptions, the trial court held that the letters of February 19th and March 8th, constituted a new contract, abrogating the contract of August 4th, especially as to the clause containing the warranty against future defects and, therefore, that no evidence could be received which would show the existence of and the terms of the said contract of August 4th, and of the breach of any part or portion thereof, and that the case would be submitted only on the question of a breach of the new contract, which the Court found consisted of the letters of February 19th and March 8th (p. 119).

The Court further ruled that no evidence on the counterclaim was admissable, since said counterclaim was based on the contract of August 4th. Specific objections were made by the defendant to the refusal of the Court to allow such testimony, and exceptions noted thereon, which objections and exceptions will be found in the State of the Case on the following pages: "P. 90, ll. 9-19 and 30; p. 91, ll. 1-12; p. 71, l. 26; p. 75, l. 21; p. 75, l. 33; p. 76, l. 1."

The Court adhered to the same ruling in the charge to the Jury which will be found on p. 116

of the State of the Case, and the particular portion excepted to on p. 119, l. 18 to p. 120, l. 3.

It is the defendant's contention that in all these instances the Court erred because

1. The contract of August 4th, 1922 was still in existence.

2. The plaintiff's letter of February 19th was merely an offer.

3. The defendant's letter of March 8th was not an acceptance of such offer, but was in fact and in law, a rejection thereof and only constituted a counter-offer and that unless evidence other than the letter of February 19th was introduced, there was no evidence of an acceptance of the counter-offer of the defendant, as contained in its letter of March 8th, and, therefore, no evidence of any contract abrogating the contract of August 4th, 1922.

4. That, therefore, the defendant was entitled to prove any damage that resulted to it by reason of the plaintiff's failure to perform the contract of August 4th.

5. That in the event the court did find that the letter of March 8th constituted a counter-offer, then the defendant had the right to introduced evidence rebutting or contradicting any evidence that the plaintiff might produce to show an acceptance thereof.

6. And that the question of whether or not a new contract arose by reason of the subsequent conduct of the parties was a disputed question of fact to be submitted to the jury and not one of law to be decided by the court.

## ARGUMENT.

### POINT I.

**The Trial Court erred in finding as a matter of law, that the contract of August 4th was rescinded by a supplemental contract consisting of two letters dated February 19th and March 8th, and consequently erred in so charging the jury, in refusing testimony offered to prove damage sustained by the defendant under the contract of August 4th, and in refusing testimony of the defendant showing that its subsequent conduct did not result in a contract rescinding or abrogating the contract of August 4th.**

It is an elementary rule of law that in order to have a meeting of the minds which is essential to the formation of a contract, that the acceptance of the offer must be substantially as made. There must be no variance between the acceptance and the offer. It is the defendant's contention that this rule of law is directly applicable to the facts of this case.

In the plaintiff's letter of February 19th, 1923, the terms of the offer are set forth in four distinct, independent and separate paragraphs, which may be summarized as follows:

1. The plaintiff was to allow a reduction of one thousand two hundred and fifty (\$1,250.00) Dollars from the contract price in settlement of claims for defects.

2. The defendant was to forward at once a check for four thousand seven hundred and eighty-one (\$4,781.00) Dollars, and immediately upon receipt of this sum, the plaintiff was to deliver the balance of the terra cotta stored at the plant.

3. Plaintiff was to replace ten (10) pieces of terra cotta to be designated by the defendant, AS SOON AS POSSIBLE after designation.

4. Defendant was to pay eight hundred forty-three dollars and seventy-five cents (\$843.75) ten days after delivery of the ten (10) pieces, and to make no further claim under previous contracts, and to consider them cancelled.

The defendant's letter of March 8th, 1923, is in two paragraphs, which may be summarized as follows:

1. Accepts the offer of reduction of one thousand two hundred and fifty (\$1,250.00) Dollars in practically the same language used in paragraph one of the plaintiff's letter.

2. Defendant's letter changes the mode and time of payment from that mentioned in paragraph two of the plaintiff's letter, by reversing the order of payment and suggesting payment in an entirely different manner.

If the defendant had merely answered the plaintiff's letter by saying "We accept your offer," or "We accept the terms outlined in your letter," that could be considered an unconditional and unqualified acceptance of the plaintiff's offer, and it would not be necessary in order to make it unconditional, to answer each paragraph.

But in this case it will be noted that the defendant's letter specifically changes the manner and mode of payment, and offers in lieu thereof a

different manner and mode of payment, completely reversing the order outlined in the plaintiff's letter.

We submit that said letter, therefore, is a rejection, not only of the particular paragraph involved, but is a complete rejection of the plaintiff's entire offer, and the defendant's letter of March 8th, 1923 becomes a counter-offer, which the plaintiff has the right to either accept or reject, but if accepted the terms of the original offer could no longer be considered in connection therewith.

This rule that an acceptance must be unconditional and unqualified is an elementary principal of the law of contracts, so elementary in fact, that there are not many cases in this State involving this question, but this rule can be found without one dissenting opinion in such leading authorities as Corpus Juris, Cyc. and Ruling Case Law, and in many cases in other States in this Country cited by these authorities. In volume 6 Ruling Case Law p. 608 we find the rule stated as follows:

"In order that there may be a meeting of the minds which is essential to the formation of a contract, the acceptance of the offer must be substantially as made. There must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. The acceptance must likewise be unequivocal and unconditional. If to the acceptance of a proposal a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be made or requested, there is a rejection of the offer."

The same rule may be found in 9 Cyc. 267, 13 Corpus Juris 281 and followed in this State in the case of *Runyon vs. Wilkinson Gaddis & Company*, 57 N. J. L. 420. The language of the Court in its charge to the jury (p. 119, l. 18, to p. 120, l. 3) as follows:

“Now, Gentlemen, it is the peculiar province of the court to construe and interpret contracts, and whether you may agree with the court’s interpretation of the letters in this case or not, you are obliged to take them with respect to the interpretation and construction which the court will now give you, and the court holds that these two letters, that is the letter of February 19th, 1923, written by the plaintiff to the defendant and also addressed to the Longacre Construction Company as agent, taken in conjunction with the defendant’s letter of March 8th and the subsequent conduct of these parties with respect to the delivery of the balance of the tile except the ten pieces and the payment of the four thousand and odd dollars, made a complete new contract between these parties, and that therefore there can be no claim for defective material growing out of any original contract or for any asserted warranty arising out of the original contract, and so insofar as the counterclaim is urged in this case on behalf of this defendant, it is narrowed down to the question of whether or not there was a breach of the so-called new contract between the parties as evidenced by these letters and conduct to which I have already alluded.”

From this it is apparent that even the trial court was not sure that the defendant’s theory was not the correct one, for in this charge it told the jury that the two letters plus the subsequent conduct of the parties constituted the contract. If the letter of March 8th was an unqualified acceptance of the offer

contained in the letter of February 19th, then there was no necessity of going to the subsequent conduct of the parties and if, as a matter of law, this letter of March 8th did not constitute an acceptance, the subsequent conduct of the parties could not supply that deficiency, unless the court found that the defendant's letter of March 8th was a counter-offer, and that the subsequent conduct of both parties amounted to an acceptance of this counter-offer. If the court had followed this theory, then it should have permitted in evidence testimony of both the plaintiff and the defendant on the subject of acceptance of the counter-offer. This right the court specifically denied to the defendant as set out in the objections and exceptions heretofore mentioned. (P. 90, ll. 9-15; p. 91, l. 10, l. 20.)

But even under this theory, the error of the court is again apparent because if the case was then to be tried under such theory there was a disputed question of fact as to the matter of acceptance, and it became a question of fact for the jury to determine, and not for the court to decide as a matter of law.

Assuming that the court found that the defendant's letter of March 8th constituted a counter-offer and that the subsequent conduct of the parties constituted an acceptance thereof, the defendant still contends that the court erred in charging the jury that the new contract abrogated that portion of August 4th, 1922, which contained the provision in which the plaintiff warranted the terra cotta for a period of one year as set forth in the warranty previously stated.

It might be argued by the plaintiff that the first paragraph of the letter of March 8th, if taken as a counter-offer, waives any claims for defective material and so forth, that the defendant might have against this plaintiff, but it can readily be seen that

this clause does not pertain to defects that would arise under the warranty clause, but only pertains to those defects that were found at the time of rejection in December, 1922, and which were the basis of the conferences which finally resulted in the deduction of \$1250.00 from the contract price. No better proof of this need be found than by reference to the plaintiff's letter of February 19th, for it will be noted that the language used by the plaintiff in the first paragraph of its letter is almost similar to the language used by the defendant in the first paragraph of the defendant's letter. The plaintiff did not consider that paragraph and the language used therein sufficient to cover future defects and sufficient to be considered as an abrogation of the contract of August 4th, because it specifically, in paragraph four of its letter, indicates its thought on the subject, by expressly abrogating the contract of August 4th and barring the defendant from all future claims, which paragraph is not part of the defendant's counter-offer and which appears nowhere in the case, as being a part of the subsequent conduct of the parties hereto.

It is, therefore, evident that the courts attempt to strengthen its position by bringing in the conduct of the subsequent parties, was harmful error, regardless of any theory that might be advanced, for if such subsequent conduct is to be regarding in connection with the defendant's letter of March 8th, as an acceptance of the offer of the plaintiff's letter of February 19th, then the letter of March 8th, 1923, must be construed as a counter-offer, secondly, if said letter of March 8th, 1923 constituted a counter-offer, then the conduct of the defendant with respect to same is immaterial, as said counter-offer did not in any way abrogate the provisions of the contract of August 4th, 1922, dealing with the warranty against further defects,

and the defendant would therefore have been entitled to have proven its counterclaim and have that question submitted to the jury.

It might be argued by the plaintiff, that even though the defendant's letter of March 8th did amount to a rejection of the plaintiff's offer, as contained in its letter of March 8th did amount to a rejection of the plaintiff's offer, as contained in its letter of February 19th, nevertheless, the subsequent conduct of the parties was of such nature that notwithstanding such rejection, the defendant thereafter, by its subsequent conduct did accept the plaintiff's offer of February 19th, 1923.

This line of reasoning cannot prevail because it is the settled rule of this and all other jurisdictions, that an offer once rejected is thereafter eliminated from the transaction and cannot thereafter by any action or conduct of the party rejecting the same, be the subject of acceptance, because it would then require a new offer and a new acceptance to revive the terms that were originally rejected.

We refer the court to Lawyers Reports Annotated, 1915 D. P. 145 under note, and the cases and authorities therein cited; also to Volume 13, Corpus Juris, p. 296, Sec. 110. A summary of this rule of law is as follows:

“Lapse of Offer. By Rejection, Conditional or Varying Acceptance, or Counter-Offer. If an offer is rejected, either by an absolute refusal or by an acceptance conditionally or not identical with the terms of the offer, or by a counter proposal, the party making the original offer is relieved from liability on that offer, and the party who has rejected the offer cannot afterward, at his own option, convert the same offer into an agreement by a subsequent acceptance. For that purpose he must have the renewed consent of the person who made the offer.”

**POINT II.**

**The Court's charge as set out on page 133 of the State of the Case, lines 10 to 24, was harmful error.**

Throughout the trial of this case, the court confined the issue to proof of non-performance of the supplemental contract, which it found consisted of the two letters of February 19th and March 8th, and refused the defendant the right to proceed on its counterclaim, which arose out of the contract of August 4th. This original contract was for the delivery of approximately 1700 pieces of terra cotta (p. 63, l. 7), and that approximately 1630 of these pieces had been delivered prior to February 19th. Therefore, the entire amount of terra cotta to be delivered under the alleged supplemental contract was 70 pieces, 60 of which were then in the plant of the plaintiff and 10 which were to be remade and shipped at a later date.

Throughout the entire case, the court restricted the defendant to its defense of non-performance of this supplemental contract which dealt with only 70 pieces of terra cotta. Notwithstanding the strict ruling of the court that the sole question of performance was the performance of the supplemental contract, the court charged the jury that in determining whether or not the supplemental contract had been performed by the plaintiff, the jury should take into consideration the question as to whether the contract had been substantially performed, and in determining whether or not the supplemental contract had been substantially performed by the plaintiff, the jury was instructed to take into consideration the amount of pieces, in the

neighborhood of 1600 (p. 123, l. 10) that had been delivered under the original contract of August 4th, 1922. It is the defendant's contention that the court was in error, for the test as to whether or not the supplemental contract had been substantially performed was the amount of pieces to be delivered under the alleged supplemental contract and not the amount to be delivered under the original contract of August 4th, 1922.

The effect of such a statement upon the minds of the jury can be readily understood, for if this plaintiff had delivered approximately 1690 pieces out of 1700, its failure to deliver 10 of them within a reasonable time, would be greatly minimized and would seem insignificant. On the other hand if the plaintiff defaulted in the delivery of 10 out of 70 pieces instead of 10 out of 1700 as suggested by the court, it would more readily appeal to the jury as being a substantial *failure* of performance.

It is therefore respectfully submitted that such charge and the rejection of evidence above referred to was error harmful to the defendant and that the judgment should be reversed.

Respectfully submitted,

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Of Counsel.