2015 IL App (1st) 133846-U

No. 1-13-3846

Fourth Division
Order filed March 26, 2015
Modified upon denial of rehearing June 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANSONIA PROPERTIES, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CH 08855
	)	
NEVENKA VASILJ and ESTATE OF PERO	)	Honorable
VASILJ, Deceased,	)	Mary Lane Mikva,
	)	Judge, presiding.
Defendants-Appellants.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of specific performance of a real estate contract was not against the manifest weight of the evidence given the course of conduct of the parties. Modifications to real estate contract pursuant to attorney modification clause were not a counteroffer and conduct of the parties indicated a waiver of the three day contractual acceptance period, thus, the contract was valid. Defendants' termination of the contract was not done in good faith or by the terms of the contract under the attorney modification clause. Disqualification of defendants'

trial attorney prior to trial did not work substantial hardship or prejudice, as defendants had notice their trial attorney was a necessary witness.[1]

¶ 2 Ansonia Properties LLC, (plaintiff) (buyer) brought this action against Nevenka Vasilj (Nevenka) and Estate of Pero Vasilj, deceased, (defendants) (sellers) seeking specific performance of a contract entered into between the parties for the sale of real estate. After a three day bench trial the court found in favor of plaintiff.

¶ 3 We first address defendants' motion to strike plaintiff-appellee's brief, which we ordered taken with the case. Illinois Supreme Court Rule 341(i) (eff. Feb. 6, 2013) provides that "the brief for the appellee and other parties shall conform to the foregoing requirements, except that items (2), (3), (4) (5), (6) and (9) of paragraph (h) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory. When a party violates this rule, a court may, in its discretion, strike or disregard those portions of a brief not in compliance with supreme court rules. *Hubert v. Consolidated Medical Laboratories*, 306 Ill. App. 3d 1118, 1120 (1999) citing R. 341 (e)(6). Ill. S. Ct. R. 341(1) (eff. Feb. 6, 2013). Here, we agree with defendants that plaintiff's brief includes an inappropriate preliminary statement. However, this court will not strike a portion of a party's brief unless it includes "such flagrant improprieties that it hinders our review of the issues." *John Crane Inc. v. Admiral Insurance Co.,* 391 Ill. App. 3d 693, 698 (2009) (citing *Lock 26 Constructors v. Industrial Comm'n,* 243 Ill. App. 3d 882, 886 (1993)). We find that the factual improprieties in the case do not significantly hinder our review. Thus, we will not strike plaintiff-appellee's brief, but we will disregard the preliminary statement in its entirety and any inappropriate or unsupported statements in its brief. *Id*. Defendants' motion is hereby denied. We now turn to the merits of this appeal.

[1] Defendants-Appellants' Petition for Rehearing was denied. However, we have chosen to modify the Rule 23 Order to clarify the court's analysis.

¶ 4 BACKGROUND

¶ 5 The following facts were borne out by testimony and evidence presented at trial. On March 15, 2013, plaintiff made a written cash offer to defendants to purchase real estate at 6945-51 N. Ashland Avenue, Chicago, Il. for $2,850,000. Through the course of this transaction, Jago Vasilj, (Jago) the son of Nevenka, acted as defendants' agent in the sale. The offer expired by its terms on March 18, 2013. On March 22, 2013, defendants accepted plaintiff's offer by executing a Purchase and Sale Contract (contract).

¶ 6 The contract contained an attorney modification provision that provides in sum that within six (6) business days after the acceptance date, the parties' respective attorneys may propose written modifications to the contract on matters other than the proposed price, broker's compensation and the date. If within the attorney approval period, the parties do not reach agreement regarding the proposed modification, then, at any time after the approval period, either party may terminate the contract. Any proposed modifications set forth in writing and accepted by the other party become terms of the contract, as if originally set forth in the contract.

¶ 7 The contract also contained the following requirement: "Upon Buyer's acceptance of this contract, Buyer shall deposit with [the] title company in joint interest-bearing account ("Escrow"), initial earnest money in the amount of $25,000.00 in the form of [a] check ("Initial Earnest Money")."

¶ 8 The last day of the attorney modification period was April 1. On March 26, 2013, counsel for plaintiff, Mark Vaughan, (Vaughan) sent to defendants' counsel Arnold Landis (Landis), a proposed rider to the contract, suggesting modifications to the contract.

The proposed rider contained the following provisions:

"Par R-6:

Paragraph 10 of the Contract is revised to provide that Seller shall operate the Property in the normal course, including without limitation... (vi) informing Buyer of any notices received by Seller from any governmental authority and if material, Buyer has the option to terminate the Contract.

Par. R-7:

...Buyer shall have until _____, 2013 (the "Inspection Period") to inspect the Property and determine, in its sole and absolute discretion, whether the Property meets with its approval...

Seller agrees to remove all monetary liens affecting the Property.

Par. R-9:

"....Seller shall provide the title insurance commitment and ALTA Plat of Survey in a form acceptable to Buyer on or before ten (10) days after the date hereof.

Par. R-11:

(iii) Seller hereby represents and warrants...which representations and warranties and all other representations and warranties in the Contract shall survive the Closing for one (1) year, the following:

(b) There are no leases in force and effect which are binding on Seller or the Property, except for the leases (the "Leases") set forth in the rent roll attached hereto, which Seller represents and warrants to be true and correct, and no defaults exist under the Leases..."

¶ 9 Also contained in the e-mail, were proposed strict joint order escrow instructions for the deposit of earnest money with the title company generally used by Vaughan. As explained

by Vaughan at trial, it is customary in large commercial transactions to close with the company that provides the title commitment, and the seller generally places the order for the title commitment. If the sellers [defendants] here elected to use a different title company the buyer [plaintiff] would need wire instructions for depositing earnest money in an escrow account with an alternative title company.

¶ 10 On March 27, 2013, Landis sent an e-mail to Vaughan with the following comments concerning some of the terms in the rider.

1. Par. R-6. The phrase "... and if material, Buyer has the option to terminate the Contract" is over broad and vague.
2. 2. Add a date in Par R-7.
3. Par. R-7. The last sentence is not acceptable.
4. Par. R-9. The phrase "in a form acceptable to Buyer" is not acceptable. And, change "date hereof" to "expiration of the inspection period."
5. R-11. Change "One (1) year to 120 days in subparagraph (iii)."

¶ 11 Vaughan testified that between March 27, 2013 and March 29, 2013, he called Landis' office on multiple occasions, leaving numerous messages to discuss the comments in Landis' e-mail. Vaughan further testified that the attorneys were not able to speak prior to April 1, 2013.

¶ 12 Jago testified that on March 30, 2013, he received a call from a friend who knew of someone interested in the subject property. This friend wanted to show the property at issue to a new prospective purchaser. Jago testified that he called the on-site janitor and arranged to have the janitor show the property to the prospective purchaser, who Jago referred to as someone he thought might make a "potential offer" on the property. Nevenka testified that

she signed a contract with that party for the subject real estate for a price of $3, 350,000 on April 1, 2013. Landis testified that on April 1, 2013, he did work on this new contract on behalf of defendants.

¶ 13 On Monday April 1, 2013, still within the attorney modification period, Landis and Vaughan had their first telephone conference to discuss the comments raised by Landis in his March 27, 2013 e-mail. In a letter dated April 1, 2013, but not sent until April 2, 2013, Landis e-mailed Vaughan written termination of the contract pursuant to paragraph 14 because defendants did not agree with plaintiff's modifications. That same day Vaughan sent a letter to Landis stating that the termination was improper. On April 2, 2013, plaintiff's filed a lawsuit seeking specific performance. On April 4, 2013, Landis sent a letter to Vaughan setting forth additional reasons why the contract was not valid.

¶ 14 Prior to trial plaintiff filed a motion to disqualify Landis because he was a necessary witness. On November 14, 2013, the trial court granted that motion stating:

> "[I]t has certainly been my understanding from April (2013) on that you were not going to be trial counsel...I just thought that was understood, and I certainly thought you understood it, and to the extent there could be any prejudice to your client, you know, you would have taken action long ago to mitigate that, that prejudice."

¶ 15 On November 20, 2013, the three-day bench trial ensued resulting in the trial court's order of specific performance of the contract. In ruling, the court stated that "[defendants] accepted a late offer and that the time period for acceptance was for [plaintiff's] benefit, which the [plaintiff] waived when it proceeded to perform under the Sales Contract during the Attorney Modification Period." The trial court also held that "[defendants] were

responsible for [plaintiff's] inability to deposit earnest money, and therefore, the failure to do so did not constitute a breach or render the contract void."

¶ 16 The trial court further held that once the offer was accepted, a contract formed, and parties' negotiations, including sending the rider, did not constitute counteroffers, but rather occurred while the parties were still bound by the obligations of the sale contract, including the duty of good faith. The court reasoned that:

> "The argument today that, as it was articulated today that accepting the late offer -- by the seller's accepting the late offer, they were actually making a counteroffer. And I read the case that the defendants cited to me, which makes clear that -- that it is a counter offer in the sense that the person who put the time requirement in is not bound to accept it. They're free to accept it or reject it, but they are also free -- and it's quite clear to me from all of the evidence in this case that this is exactly what happened -- that since the time requirement was for the benefit, they're free to waive it. Everything demonstrates that they waived it and they moved forward. Specifically, by exercising the attorney review provision under the Rider, but everything in that makes clear that the assumption there, and the acceptance that the buyers were working under were that they had a contract along the lines that the contract that had been signed."

¶ 17 In finding that the defendants did not terminate the sale contract in good faith, the trial court held:

> "[T]here was a contract in place, and it was not properly terminated under the attorney review provision because there was never a determination made or a

negotiation made under the terms of that, and in good faith and fair dealing to determine that the parties could not reach an agreement."

It is from this order that defendants appeal. For the reasons following, we affirm.

¶ 18 ANALYSIS

¶ 19 The standard of review for a bench trial is whether the trial court's judgment is against the manifest weight of the evidence. *Al A. Martinez, v. River Park Place, LLC,* 2012 IL App (1st) 111478, ¶ 14 (citing *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or if the finding appears to be arbitrary, unreasonable, or not based on the evidence. *Id.* " '[A] reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact.' " *Martinez*, 2012 IL App (1st) 111478, ¶ 14 (citing *Emigrant Mortgage Co. v. Chicago Financial Services, Inc.*, 386 Ill. App. 3d 21, 26 (2007)) (quoting *In re Application of the County Treasurer,* 131 Ill. 2d 541, 549 (1989)). A trial court's judgment following a bench trial will be upheld if there is any evidence supporting it. *Nokomis Quarry Company, v. Dietl*, 333 Ill. App. 3d 480, 484 (2002) (citing *Hendricks v. Riverway Harbor Services St. Louis, Inc*., 314 Ill. App. 3d 800, 807 (2000)).

¶ 20 In this case, the dispositive issues are: (1) whether the parties entered into a valid contract such that specific performance was a proper remedy; (2) whether defendants late acceptance was a counteroffer; (3) whether plaintiff waived the late acceptance; (4) whether plaintiff was ready, willing and able to perform under the contract; (5) whether defendants terminated the contract by its terms under the attorney modification period; (6) whether defendants

terminated the contract in good faith; and (7) whether the trial court properly disqualified defendants' attorney from acting as trial counsel as he was a necessary witness at trial.

¶ 21 We begin our analysis by noting that Illinois courts have long held that where the parties have fairly and understandingly entered into a valid contract for the sale of real property, specific performance of the contract is a matter of right and equity will enforce it, absent circumstances of oppression and fraud. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 477 (2004) (citing *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971, 981 (1985)). Contracts to devise or convey real estate are enforced by specific performance on the ground that the law cannot "do perfect justice." *Schwinder*, 348 Ill. App. 3d at 477 (quoting *Giannini*, 136 Ill. App. 3d at 981). Generally, a party will be entitled to specific performance of a contract for conveyance of real estate only upon establishing either that the party has performed according to the terms of the contract or that the party was ready, willing and able to perform but was prevented, and thus excused from doing so by the acts or conduct of the other party. *Schwinder*, 348 Ill. App. 3d at 477 (citing *Omni Partners v. Down*, 246 Ill. App. 3d 57, 63 (1993)).

¶ 22 Specific performance is a matter of sound judicial discretion controlled by established principles of equity exercised upon a consideration of all the facts and circumstances of a particular case. *Schwinder*, 348 Ill. App. 3d at 477 (citing *Omni Partners*, 246 Ill. App. 3d at 62)). In this regard, the trial court should balance the equities between the parties. *Schwinder*, 348 Ill. App. 3d at 477 (citing *Hild v. Avland Development Co.*, 46 Ill. App. 3d 173, 179 (1977)). Accordingly, a court using its equitable powers may refuse to grant specific performance where the remedy would cause a peculiar hardship or inequitable result. *Schwinder*, 348 Ill. App. 3d at 477 (citing *Geist v. Lehman*, 19 Ill. App. 3d 557, 561 (1974)).

A court's decision to grant such relief will not be disturbed absent an abuse of discretion. *Schwinder*, 348 Ill. App. 3d at 477 (citing *Omni Partners*, 246 Ill. App. 3d at 62).

¶ 23 To state a cause of action for specific performance, the plaintiff must allege and prove the following elements: (1) the existence of a valid, binding and enforceable contract; (2) the compliance by plaintiff with the terms of his contract or the fact that he is ready, willing and able to perform his part of the contract; and (3) the failure or refusal by the defendant to perform his part of the contract. *McCormack Road Associates L.P.II, v. Taub*, 276 Ill. App. 3d 780, 783 (1995) (citing *Dixon v. City of Monticello*, 223 Ill. App. 3d 549, 561 (1991)). Before granting specific performance, a trial court must determine that the terms of the subject contract are clear, definite and unequivocal. *McCormack*, 276 Ill. App. 3d at 783 (citing *Pionke v. Beitz*, 211 Ill. App. 3d 656, 661 (1991)). "[W]here a party seeks specific performance of a contract the law requires a greater deal of specificity than is demanded for other purposes. Where the court would be left to order further negotiations and where the parties have yet to reach agreement on essential terms, specific performance is not available. Specific performance requires as a prerequisite a clear and precise understanding of the terms of the contract." *Poinke*, 201 Ill. App. 3d at 661 (quoting *Nerone v. Boehler*, 34 Ill. App. 3d 888, 891 (1976)). Where extrinsic facts and circumstances are controverted, questions involving the understanding and intent of the parties are factual determinations to be resolved by the trier of fact. *Poinke*, 211 Ill. App. 3d at 661 (citing *Nerone*, 34 Ill. App. 3d at 891).

¶ 24 Defendants first argue that there was no enforceable contract because the contract dated March 15, 2013, had an expiration date of March 18, 2013. Defendants point out that they did not sign the offer until March 22, 2013, thereby forming a counteroffer. Since plaintiff never signed the counteroffer there was no enforceable contract. Defendants rely on

Hernandez v. Afni, Inc. 428 F. Supp. 2d 776, 781 (2006) for the proposition that a contract was never formed. An offer may require that acceptance be made within a specified time, and "if no acceptance is made within that time, the power of acceptance necessarily expires." *Hernadez,* 428 F. Supp. 2d at 781 (quoting 1 WILLISTON ON CONTRACTS §5:5 (4th ed. 2006); see also 6A CORBIN, CONTRACTS § 273, P. 588 (1962) ("If the time for acceptance of an ordinary offer is expressly limited by the offeror, acceptance must take place within that time or not [at] all; time is of the essence."). An attempt to accept an offer past the deadline set by the offeror is a counteroffer, which the original offeror is free to decline or accept. *Hernandez,* 428 F. Supp. 2d at 781.

¶ 25 Plaintiff responds that this argument has been previously considered and rejected by this court. Specifically, plaintiff argues that it waived the acceptance deadline, made for its benefit, which under Illinois law, does not make the contract null and void. In support of this proposition, plaintiff cites *Lempera v. Karner,* 79 Ill. App. 3d 221, 223 (1979). In *Lempera,* the plaintiffs signed a real estate purchase agreement. *Id.* at 222. The agreement required that the defendants accept the contract within 5 days. *Id*. The defendants signed and returned the contract one day after the deadline. *Id*. The plaintiff proceeded to closing. *Id*. The defendants backed out of the deal and the plaintiffs filed for specific performance. *Id*. at 223. The defendants filed a motion to dismiss claiming that the contract was null and void because the defendants had not accepted the contract until after the acceptance period. *Id*. The trial court found that the conduct of the parties indicated a waiver of the acceptance period and granted specific performance. *Id*. On appeal, the appellate court agreed and found that the contract was valid. *Id*. at 224. See *Compton v. Weber,* 296 Ill. 412, 417 (1921); see *Kitsos v. Terry's Chrysler-Plymouth, Inc*., 70 Ill. App. 3d 728, 731 (1979) (parties to a contract may waive

delays in performance by conduct which indicates an intention to regard the contract as still in force and effect); see also *Botti v. Avenue Bank and Trust Co. of Oak Park*, 103 Ill. App. 3d 1052, 1054 (1982) (it is settled that the parties to a contract may waive any provisions in the contract).

¶ 26 In the case at bar we note that the trial court reasoned that:

> "The argument today that, as it was articulated today that accepting the late offer -- by the seller's accepting the late offer, they were actually making a counteroffer. And I read the case that the defendants cited to me, which makes clear that -- that it is a counter offer in the sense that the person who put the time requirement in is not bound to accept it. They're free to accept it or reject it, but they are also free -- and it's quite clear to me from all of the evidence in this case that this is exactly what happened -- that since the time requirement was for the [buyers] benefit, they're free to waive it. Everything demonstrates that they waived it and they moved forward. Specifically, by exercising the attorney review provision under the Rider, *** and the acceptance that the buyers were working under [is] that they had a contract along the lines [of] the contract that had been signed."

¶ 27 We find the contract was formed when plaintiff's offer was accepted on March 22, 2013, and therefore the rider was not a counteroffer, but a request for modifications under the terms of the contract. See *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 981 (1997) (a counteroffer rejects an offer only when made before a contract is formed).

¶ 28 Defendants also argue that the contract was null and void because it had not been accepted until after the acceptance period had passed. Plaintiff, on the other hand, contends that the parties waived the acceptance period by engaging in a course of conduct which

indicated their desire and intent to be bound by the contract. We agree with plaintiff's contention.

¶ 29 Plaintiff maintains that it was plaintiff's choice to remain in the contract notwithstanding defendants' late acceptance. Parties to a contract have the power to waive provisions placed in the contract for their benefit and such a waiver may be established by conduct indicating that strict compliance with the contractual provisions will not be required. *Whalen v. K-Mart Corporation*, 166 Ill. App. 3d 339, 344 (1988) (citing *Harrington v. Kay* 136 Ill. App. 3d 561, 563-64 (1985)). This principle applies even where the contract provides that the agreement shall be "null and void" if certain conditions are not met. *Botti*, 103 Ill. App. 3d 1054 (citing *Lempera*, 79 Ill. App. 3d at 222). An implied waiver of a legal right may arise when conduct of the person against whom waiver is asserted is inconsistent with any other intention than to waive it. *Whalen*, 166 Ill. App. 3d at 344 (citing *Harrington*, 136 Ill. App. 3d at 564).

¶ 30 We note that parties to a contract may waive delays in performance by conduct which indicates an intention to regard the contract as still in force and effect. *Kitsos*, 70 Ill. App. 3d at 732 (citing *Peterson Steels, Inc. v. Seidmon*, 188 F. 2d 193, 195 (1951)). Waiver is either an express or implied voluntary and intentional relinquishment of a known and existing right. *Whalen*, 166 Ill. App. 3d at 344 (citing *National Tea Co. v. Commerce and Industry Insurance Co*. 119 Ill. App. 3d 195, 204-05 (1983)). The determination as to what facts are sufficient to constitute waiver is a question of law. *Whalen*, 166 Ill. App. 3d at 344. An analysis of whether there was in fact a waiver of a contractual provision focuses on the intent of the non-breaching party. *Whalen*, 166 Ill. App. 3d at 344. If he has intentionally relinquished a known right, either expressly or by conduct inconsistent with intent to enforce

that right, he has waived it and may not thereafter seek judicial enforcement. *Whalen*, 166 Ill. App. 3d at 344 (citing *Saverslak v. Davis-Cleaver Produce Co*., 606 F. 2d 208, 213 (1979)).

¶ 31 A party to a contract has a right to waive its strict compliance and where time is stated to be of the essence of a contract to convey land, if the parties treat the time clause as waived or suspended, one of them cannot suddenly insist upon a forfeiture, but must then, in order to avail himself of it, give reasonable, definite and specific notice of this changed intention. *Compton v. Weber*, 296 Ill. 412, 418 (1921) (citing *Eaton v. Schneider*, 185 Ill. 508, 512 (1900)).

¶ 32 Here, the conduct of both parties in this case indicates a waiver of the three day acceptance period. Plaintiff exhibited an intention and desire to waive the three day acceptance period when its attorney sent an email containing a rider with modifications, in accordance with the terms of the agreement, and a request for instructions for the deposit of earnest money on March 26, 2013. This occurred after defendants had signed the agreement and must be construed as indicating an intention to carry out the contract. Defendants exhibited their intention to waive the three day acceptance period when they signed the contract on March 22, 2013. Despite the fact that their acceptance occurred four days after the contractual acceptance period had passed, we cannot but place great weight on their acceptance after the period. Further, we place great weight on the fact that defendants' attorney sent an answer to plaintiff's attorney's rider on March 27, 2013.

¶ 33 We therefore conclude that the trial court did not err when it determined that plaintiff waived its right under the contract. In light of the above, we find that regardless of the fact that there was no written agreement to extend the performance date and that time may have been of the essence in the contract, the parties waived the acceptance date. Having found a

waiver of the acceptance date, we look to the legal relationship which then resulted from the parties, and we observe that in Illinois the laws provide that when a specified date for performance has been waived by the parties to a contract, the date is extended for a reasonable time. *Kitsos*, 70 Ill. App. 3d at 732 (citing *Moline Malleable Iron Co. v. McDonald*, 38 Ill. App. 589, 591 (1890)). In the case at bar, the expiration date was March 18, 2013, and defendants signed on March 22, 2013. We find this a reasonable time in which defendants accepted the offer, and that plaintiff waived the acceptance date, thus, the parties had a valid contract.

¶ 34 We now turn to defendants' contention that plaintiff did not sign the "counteroffer," but sent a rider, which defendants maintain, is a rejection of their "counteroffer." Defendants contend that there was no enforceable contract because the contract dated March 15, 2013, had an expiration date of March 18, 2013. Defendants point out that they did not sign the offer until March 22, 2013, thereby forming a counteroffer and that since plaintiff never signed the counteroffer there was no enforceable contract.

¶ 35 Defendants rely on *Olympic Restaurant Corporation v. Bank of Wheaton et al.*, 251 Ill. App. 3d 594, 599 (1993) for the proposition that the proposed rider constitutes a rejection of the contract and a counteroffer. In *Olympic*, a buyer and a seller entered into a contract for the sale of real estate. 251 Ill. App. 3d at 595. The buyer was required to deposit earnest money under the contract but did not. *Id.* The sellers then contracted with another party for the sale of the same real estate. *Id*. at 596. The original buyer's attorney and seller's attorney sent the other proposed modifications to the contract. *Id*. The modifications were unacceptable to the parties. *Id*. at 597. The trial court found that the proposed modifications were both counteroffers. *Id*. at 601. On appeal the appellate court agreed and also found that

the failure to pay earnest money bolstered the claim that the proposed modifications were a counteroffer. *Id.* at 602.

¶ 36 The instant case is factually distinguishable. Initially, we note that the language in the attorney review clause in *Olympic* differs from the clause in this case. In *Olympic*, the clause provided, in relevant part, "[t]he parties agree that their respective attorneys may review and make modifications *** within ten (10) business days after the date of the Contract acceptance. *If the parties do not agree* and written notice thereof is given to the other party *** then this Contract will become null and void ***." (*Emphasis added*.) *Id.* at 596. The review clause in the instant case provides, in relevant part, "[w]ithin 6 business days after the Acceptance Date ("Attorney Approval Period"), the Parties' respective attorneys may propose written modifications to this Contract ("Proposed Modifications"). *** If, within the Attorney Approval Period, *the Parties cannot reach agreement regarding the proposed modifications*, *** either Party may terminate this Contract by written notice to the other Party." (*Emphasis added*.) The *Olympic* court, noting the lack of clarity in the review clause there, suggests that what the parties may not "agree" to — the contract or the modifications — could inform the result in a case. *Id.* at 601-02. The court found, however, that the distinction did not change the result there because neither party accepted the other's modifications. *Id.* at 597; 601-602. Here, unlike in *Olympic*, the clause clearly provides that what the parties may not agree to are proposed modifications to the contract.

¶ 37 Additionally, in *Olympic* the seller's attorney specifically stated that "[p]ursuant to paragraph 14 of said contract, please be advised that I do not approve said contract." *Id.* at 596. In our case, unlike in *Olympic*, there was no express disapproval of the contract, only proposed modifications. See also *Hubble*, 291 Ill. App. 3d at 982-983 (distinguishing the

language used by the attorney in proceeding under the attorney review clause in that case from the language used by the seller's attorney in *Olympic* and comparing *Groshek v. Frainey*, 274 Ill. App. 3d 566, 568 (1995) (where attorney unambiguously wrote within the disapproval period, "I hereby withhold my approval of said contract.")).

¶ 38 Further, in *Olympic*, the court found that the buyer's failure to pay or tender any earnest money bolstered the claim that the November 7 letters were counteroffers. *Id.* at 602. Here, we agree with the trial court that plaintiff's inability to pay the required earnest money was due to defendants' conduct and did not demonstrate a lack of willingness to perform. Indeed, included in the proposed modifications was a request for instructions for deposit of the earnest money. A request to which no response was given.

¶ 39 Finally, the court in *Olympic* noted that the only affirmative act by the buyer that would indicate that he considered the original contract valid was his recordation of the contract. *Id.* Unlike the buyer in *Olympic*, in the case at bar, on the same day that plaintiff's attorney received defendants' attorney's emailed termination, he responded that the termination was improper. Additionally, on April 2, 2013, plaintiff filed a lawsuit seeking specific performance of the contract.

¶ 40 Even absent these factual distinctions, we would not equate the proposed modifications to the contract in this case with a counteroffer. We agree with the reasoning in *Hubble* that the attorney review clause constituted a condition subsequent. See also *Patel*, 374 Ill. App. 3d at 381 (holding that attorney review clause that provided that "[i]f within ten (10) business days after the date of [a]cceptance[,] written agreement on proposed modifications(s) cannot be reached by the parties, this [c]ontract shall be null and void," constituted a condition subsequent within the offer, and not a counteroffer). Moreover, "an offer that states that it is

'subject' to the approval of the attorneys of both parties creates a contract the moment it is accepted." *Hubble*, 291 Ill. App. 3d at 980 (quoting 1 J. Perillo, Corbin on Contracts § 3.7 at 336 (rev. ed. 1993)). "It is well established that a counteroffer rejects an offer only when made before a contract is formed." *Patel*, 374 Ill. App. 3d at 383 (quoting *Hubble*, 291 Ill. App. 3d at 980). Here, the contract had been accepted and the proposed modifications were no more than that — proposed modifications. We elect to follow the reasoning in *Patel* — to the extent that the *Olympic* court's contract analysis frustrates use and implementation of an attorney review clause, we decline to follow it. *Id.* at 383.

¶ 41 The trial court reasoned that the rider was not a counteroffer but a proposal for modification. The trial court further reasoned that, at a minimum defendants, to adhere to the contract in good faith, "ha[ve] to go back to the buyer who proposed the Rider and say, '[t]ake it all away or this contract is over,' and give the buyer a chance to do that." We agree.

¶ 42 Defendants next contention is that the contract was terminated by its terms under the attorney modification provision. In general, an attorney review clause does not render a contract illusory or unenforceable. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc*., 388 Ill. App. 3d 81, 95 (2002) (citing *Patel v. McGrath*, 374 Ill. App. 3d 378, 381 (2007)). Rather, such a provision operates as a condition subsequent within the offer. *Suburban*, 388 Ill. App. 3d at 95 (citing *Patel*, 374 Ill. App. 3d at 381). The attorney review clause does not permit the parties to cancel the contract arbitrarily. *Suburban*, 388 Ill. App. 3d at 95. Also, the attorney review clause must be exercised in good faith (*Olympic*, 251 Ill. App. 3d at 594) and any potential changes suggested by counsel are limited by the terms of the provision. *Suburban*, 388 Ill. App. 3d at 95.

¶ 43 Defendants argue that on or about March 26, 2013, plaintiff sent a rider comprised of 22 proposed contract modifications. Defendants point out that the attorney modification period expired on April 1, 2013, and at that time the terms of the proposed modifications were not agreed upon by the parties. Defendants maintain that they terminated the contract after the expiration of the attorney modification period on April 2, 2013. Defendants further contend that Landis sent written notice of termination of the contract on April 2, 2013. Defendants argue that even if Landis had agreed in principal to some of the proposed modifications, the rider was not valid unless and until it was agreed to and signed by the parties. Defendants maintain that since this never occurred there was no valid contract between the parties.

¶ 44 Plaintiff contends that the language of the contract at issue here makes it clear that the attorney modification period did not negate the existence of the valid contract. Plaintiff further contends that the attorney modification period provided that the parties' respective attorneys may propose written modifications to the contract and that if the parties cannot reach an agreement on the proposed modifications, they may terminate the contract. Consequently, when plaintiff proposed modifications in the form of a rider and they were under negotiation, plaintiff believed there was a valid contract.

¶ 45 The contract at issue is a standard real estate sales agreement. The contract contained an attorney modification clause, which became the focus of this dispute between the parties. That clause provided:

> 'Within six (6) business days after the acceptance date("Attorney Approval Period") the Parties' respective attorneys may propose written modifications to this Contract ("Proposed Modifications") on matters other than the Purchase Price, broker's compensation and date. Any proposed modifications that are set forth in writing and

> accepted by the other Party shall become terms of this Contract as if originally set forth in this Contract. If, within the Attorney Approval Period, the Parties cannot reach agreement regarding the proposed modifications, then, at any time after the Attorney Approval Period, either Party may terminate this Contract by written notice to the other Party. In that event, this Contract shall be null and void and the Earnest Money shall be returned to Buyer. In the absence of delivery of proposed modifications prior to the expiration of the Attorney Approval Period, this provision shall be deemed waived by all parties and this Contract shall be in full force and effect."

¶ 46 In the case at bar the trial court stated as follows: "Once a contract is formed, putting out proposals for changes, absent something specific in the contract that says otherwise, is not a rejection. It's not a new contract. It's a proposal for changes." Here, contrary to *Groshek* and similar cases, we hold that, pursuant to the reasoning in *Hubble*, 291 Ill. App. 3d at 980-81, a contract was formed. Defendants accepted plaintiff's offer. Upon that acceptance a contract was formed. "The attorney approval clause did not render the offer, acceptance, or the consideration supporting the contract formation in this case illusory, instead it constituted a condition subsequent within the offer, allowing the parties to do one of three things: (1) approve, (2) disapprove, or (3) make modifications to the contract." *Patel*, 374 Ill. App. 3d at 381.

¶ 47 Plaintiff's rider requested modifications to the parties' contract pursuant to the terms of the contract, *i.e.* the attorney modification clause. "Simply because a communication discusses the possibility of modification does not necessarily mean that the communication is

a demand for modification." *Hubble*, 291 Ill. App. 3d at 980. This idea is reflected in the Restatement (Second) of Contracts which states:

> "A mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counter-offer. Such responses to an offer may be too tentative or indefinite to be offers of any kind; or they may deal with new matters rather than a substitution for the original offer; or their language may manifest an intention to keep the original offer under consideration." Restatement (Second) of Contracts §39, Comment *b*, at 106-07 (1981). See *Hubble*, 291 Ill. App. 3d at 980 (stating approval of Comment *b*).

¶ 48 Here, the trial court found that despite the proposed modifications, "the contractual responsibilities that were entered into between these two parties remained in place." We agree. When the instrument is construed in light of all its provisions and with a view to the intent gathered from the extrinsic evidence, we cannot agree with defendants that the limits in the attorney modification provision were intended by the parties to negate the contract. In our view, the parties agreed to a valid and binding contract with the right to make proposals for modifications pursuant to the attorney modification clause. See *Hubble*, 291 Ill. App. 3d at 979 (attorney review clause constitutes condition subsequent within offer).

¶ 49 Defendants next argue that plaintiff should not have been granted specific performance because they were not ready, willing and able to perform. A party seeking specific performance of a contract must show he has himself been ready, willing and able to perform the contract on his part, and he is not entitled to a decree of specific performance if the circumstances or a course of conduct clearly show he abandoned the contract. *Wolford v.*

James E. Kolls Investment Company, 61 Ill. App. 3d 405, 409 (1978) (citing *Jones v. Dove*, 382 Ill. 445, 452-53 (1943)).

¶ 50 In support, defendants maintain that plaintiff never deposited earnest money which was a condition precedent to the formation of the contract. Defendants point out that the contract required that: "Upon Buyer's acceptance of this contract, Buyer shall deposit with [the] title company in joint interest-bearing account ("Escrow"), initial earnest money in the amount of $25,000.00 in the form of [a] check ("Initial Earnest Money")." Defendants contend that plaintiff was required by the terms of the contract to sign and deposit the earnest money in a title company joint order escrow account. Defendants further contend that since the deposit was never made, the offer was illusory, and thus, no contract was formed.

¶ 51 Plaintiff responds that it was always ready, willing and able to perform and that defendants abandoned the contract. Plaintiff contends that its attorney, Landis, sent a second e-mail to defendants' attorney, Vaughan, and also placed numerous calls to Vaughan, to receive the instructions for the deposit of the escrow money. Defendants never responded to these requests. As evidence of defendants' inattentiveness, plaintiff maintains that they never received instructions for the deposit of the escrow funds. Also, as evidence of defendants' abandonment of this contract, plaintiff argues that during the attorney modification period, defendants executed a second contract with a new buyer and subsequently terminated the contract between plaintiff and defendants. Plaintiff states that it immediately contacted defendants and indicated that it wanted to pursue the contract and that the termination was improper. Thus, plaintiff maintains that it was always ready, willing and able to perform and defendants' mere speculation that it was not ready is unfounded and is not a basis to reverse the trial court's decree of specific performance.

¶ 52 In the case at bar, it is undisputed that plaintiff did not tender the earnest money. However, to be entitled to specific performance, a party need not have performed according to the terms of the contract if he can establish that he was ready, willing and able to perform but was prevented, and thus excused, for doing so by the acts of the other party. *Djomlija v. Urban*, 107 Ill. App. 3d 960, 966 (1982) (citing *Tantillo v. Janus,* 87 Ill. App. 3d 231, 234 (1980)). We find that plaintiff's failure to tender the escrow money was caused by defendants' actions and was therefore excusable. "Defendants' overall conduct by silence, accommodation or acquiescence lulled plaintiff into a false sense of security, and therefore, plaintiff should not be held in material breach of the contract." *Omni Partners*, 246 Ill. App. 3d 57, 65 (1993) (see also *Tanitillo*, 87 Ill. App. 3d at 237) (acceptance of delays coupled with absence of demand to perform resulted in waiver, and there was no material breach of contract).

¶ 53 Under these circumstances, we believe that plaintiff established that it was always ready, willing and able to perform the contract on its part but was prevented, and thus excused, from doing so by defendants' actions. See *Djomlija*, 107 Ill. App. 3d at 966 (Mere speculation by defendants that plaintiff was not ready, willing and able to perform is an insufficient basis upon which to deprive plaintiff of its right to specific performance).

¶ 54 We next turn to defendants' argument that they did not terminate the contract in bad faith because they had no duty to warn or negotiate the terms of the contract. Under Illinois law, "every contract implies good faith and fair dealing between the parties to it." *Greer Properties, Inc. v. LaSalle National Bank*, 847 F. 2d 457, 461 (1989) (citing *Martindell*, 15 Ill. 2d 286), and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of which does not, the latter construction should be adopted.

Martindell v. Lake Shore National Bank, 15 Ill. 2d 272, 286 (1979). The duty of good faith is weak in the formation stage of a contract, if indeed it can be said to exist at all. *First National Bank of Chicago v. Atlantic Tele-Network Company*, 946 F. 2d 516, 521 (1991). "Once a contractual relation is formed, however *** the duty of good faith performance enters the picture and requires bargaining in good faith over terms left open by the original contract; for that bargaining is a component of the anticipated performances." *Martindell*, 15 Ill. 2d at 286.

¶ 55 The implied obligation of good faith and fair dealing in the performance of contracts acts as a limit on the discretion possessed by the parties. In Illinois, "a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously." *Greer*, 874 F. 2d at 461 (quoting *Foster Enterprises, Inc. v. Germania Fed. Savings and Loan Ass'n*, 97 Ill. App. 3d 22, 30 (1981)). If discretion is exercised in bad faith, a breach of contract occurs and the court must grant relief to the aggrieved party. *Id*.

¶ 56 With this limitation on the discretion of the defendants in mind, the decision to terminate the contract must be analyzed to determine if it was in good faith. *Greer*, 874 F. 2d at 461. If the defendants terminated the contract to obtain a better price their action would have been in bad faith. *Id.* When the parties entered into a contract for a specific price for the property, defendants gave up their opportunity to shop around for a better price. *Id*. If the termination clause was used to recapture that opportunity the defendants would have acted in bad faith. *Id.*

¶ 57 Defendants maintain that since there was no contract between the parties there cannot be an issue of good faith, and as such, it is a "red herring." However, assuming *arguendo* there was a contract, defendants maintain that they did not act in bad faith. Defendants contend

that they did not terminate the contract because they had a better offer, but terminated the contract because they did not agree with plaintiff's rider. Further, defendants maintain that because the earnest money was never deposited, they doubted that plaintiff was serious about performing under the contract. Defendants argue that the trial court erred when it ruled that defendant had a legal duty to negotiate, in good faith, the rider's terms before termination. Defendants contend that because of the disagreement about the rider prior to termination, there was no contract, and thus, the termination is not evidence of bad faith. Additionally, defendants contend that a contract terminated by its terms is not evidence of bad faith.

¶ 58 Plaintiff responds that the trial court found a valid contract existed between the parties and argues that defendants did not negotiate or terminate the contract in good faith. Plaintiff contends that defendants never indicated that their late acceptance meant the contract was null and void or that the rider was objectionable in its entirety. As evidence, plaintiff points to defendants' attorney's email of March 27, 2013, which contained changes to some of the paragraphs in plaintiff's attorney's proposed rider. Additionally, plaintiff points out that Jago testified that defendants had no intention of proceeding under the contract and that they had accepted a higher offer. Further, Nevenko testified that she signed a contract for the sale of the subject property with a different buyer for an increased price on April 1, 2013. Plaintiff argues that this testimony is evidence of bad faith.

¶ 59 Plaintiff further maintains that after considering defendants manner of termination, without any attempts to resolve the issues contained in the rider that the parties were still discussing, the trial court properly ruled that; "because a contract existed, a duty of good faith governed the parties during the course of negotiating the proposed modifications." Plaintiff contends that defendants have not shown that the trial court's finding was so arbitrary and

unreasonable that it was against the manifest weight of the evidence. We agree. See *Greer*, 874 F. 2d at 461; see also *Foster Enterprises*, 97 Ill. App. 3d at 52 (If discretion is exercised in bad faith, a breach of contract occurs and the court must grant relief to the aggrieved party).

¶ 60 We now turn to defendants contention that plaintiff is not entitled to specific performance because the parties had not agreed to all of the terms of the contract. Where the court would be left to order further negotiations and where the parties have yet to reach agreement on essential terms, specific performance is not available. Specific performance requires as a prerequisite a clear and precise understanding of the terms of the contract." *Poinke*, 201 Ill. App. 3d at 661 (quoting *Nerone v. Boehler*, 34 Ill. App. 3d 888, 891 (1976)).

¶ 61 Defendants maintain that the proposed modifications were not agreed to by either of the parties. Defendants argue that the trial court would have to order the parties to conduct further negotiations as to the terms of the contract. We disagree. Here, the trial court found that, despite the proposed modifications "the contractual responsibilities that were entered into between these parties remained in place" and "the contract that needs to be specifically enforced is the contract that is in place, absent any attorney review provisions." The trial court found that "once you have a contract, you have a contract. And then if you put forward other terms, that doesn't negate the fact you have a contract." As to the rider, the trial court held that at a minimum, defendants had an obligation to go back to plaintiff and say, "[t]ake it all away or this contract is over." We agree and find that when defendants executed a Purchase and Sale Form, an enforceable contract existed. See *Cinman v. Reliance Federal Savings and Loan Association*, 155 Ill. App. 3d 417, 424 (1987) (There must be a description

of the property, the price, the terms and conditions of sale and the names and signatures of the parties to be charged).

¶ 62 We now turn to defendants' final argument that the trial court erred by disqualifying Landis as their trial attorney because his disqualification worked a substantial hardship on defendants. Defendants maintain that they were entitled to the attorney of their choice. Defendants point out that Landis had been representing them for years and had been involved in this litigation from the start. Defendants admit that the trial court intimated early in litigation that it might disqualify Landis, however, an order was never entered and in reliance on the fact he had not been disqualified, Landis remained the primary attorney in this litigation. Defendants contend that plaintiff's motion to disqualify Landis, just prior to trial, was brought as a tactical weapon to gain an advantage. Defendants maintain that the motion to disqualify Landis prejudiced defendants and should be reversed.

¶ 63 Plaintiff responds that it moved to disqualify Landis as defendants' trial counsel, as he was a necessary witness at trial and not as a tactical maneuver to gain an advantage. Plaintiff argues that defendants were aware early in the litigation that the trial court might disqualify Landis. Plaintiff notes that in granting the motion, the trial court disqualified Landis from acting as lead counsel at trial, but not from representing defendants throughout the course of the litigation leading up to trial. Plaintiff further notes that the trial court permitted Landis to act as co-counsel at trial.

¶ 64 A trial court's decision to grant a motion to disqualify an attorney will not be disturbed absent an abuse of discretion. *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 19 (citing *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997)). "An abuse of discretion occurs

where no reasonable person would agree with the position adopted by the trial court. *Stephenson*, 2011 IL App (2d) 101214, ¶ 20 (citing *Schwartz*, 177 Ill. 2d at 176).

¶ 65 The rule prohibiting a lawyer from acting as both advocate and witness in the same case reflects a number of important considerations. Permitting an advocate in a matter to testify as a witness in that matter may unfairly prejudice the case of his or her client or the opposing party and may erode public confidence in the administration of justice. *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corporation*, 218 Ill. App. 3d 383,396 (1991) (citing *Jones v. City of Chicago*, 610 F. Supp 350, 357 (1984)). All of the policy considerations raised by the attorney-witness prohibition should be applied in deciding a disqualification motion. *Weil*, 218 Ill. App. 3d at 396 (citing *United States v. Morris* 714 F. 2d 669, 671 (1983)).

¶ 66 When determining whether to grant or deny a motion to disqualify an attorney, a trial court must consider that "[a]ttorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party to representation by counsel of his or her choosing" *Stephenson*, 2011 IL App (2d) 101214, ¶ 19 (citing *Schwarz*, 177 Ill. 2d at 178). Therefore, a trial court should grant a motion to disqualify an attorney only when absolutely necessary. *Stephenson*, 2011 Il App (2d) 101214, ¶ 19 (citing *In re Estate of Klehm*, 363 Ill. App. 3d 373, 377 (2006)). In addition, the party seeking disqualification carries a heavy burden to prove that his motion for disqualification is not being brought as a tactical weapon to gain undue advantage in the litigation. *Stephenson*, 2011 IL App (2d) 101214, ¶ 19 (citing *SK Handtool Corp. v. Dresser Industries, Inc*., 246 Ill. App. 3d 979, 989 (1993). In an effort to discourage tactical gamesmanship, courts have determined that motions to disqualify should be made with reasonable promptness after a party discovers the

facts which [led] to the motion. *Klehm*, 363 Ill. App. 3d at 377 (citing *Kafka v. Truck Insurances Exchange*, 19 F. 3d 383, 386 (1994)).

¶ 67 Here, the trial court disqualified Landis from acting as lead counsel at trial on the grounds that Landis was a necessary witness, as he was the attorney who handled the real estate transaction at issue in this case. In so deciding, the trial court cited the "Attorney as Witness" of the Illinois Rules of Professional Conduct Rule 3.7 which states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless***disqualification of the lawyer would work substantial hardship on the client." Ill. R. P. C. 3.7 (eff. Jan. 1, 2010). The trial court determined that the "substantial hardship" exception did not apply here because defendants and Landis knew from the outset of the case that he would not be permitted to act as lead counsel. The trial court specifically reasoned that:

> "[I]t has certainly been my understanding from April [2013] on that you were not going to be trial counsel...I just thought it was understood, and I certainly thought you understood it, and to the extent there could be any prejudice to your client, you know, you would have taken action long ago to mitigate that, that prejudice."

In the case at bar, the record indicates that defendants and their counsel knew or should have known of a potential conflict and that counsel would be a necessary witness at trial from at least April of 2013. Thus, defendants were not prejudiced and neither did the disqualification work a substantial hardship on defendants. Therefore, we find that the trial court's decision was not against the manifest weight of the evidence.

¶ 68 CONCLUSION

¶ 69 The legal principles applicable to the facts recounted are firmly established. The granting of the equitable remedy of specific performance is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the facts and circumstances in the particular case. *Dromlija,* 107 Ill. App. 3d at 967 (citing *Faulkner v. Black*, 378 Ill. 112, 119 (1941)). We affirm the trial court's conclusion that plaintiff is entitled to specific performance and that it would be inequitable to deny it the benefit of its contract.

¶ 70 Affirmed.