

STATE OF MICHIGAN
COURT OF APPEALS

LARRY ZAHN,

Plaintiff-Counterdefendant-
Appellant,

v

ENGINEERING SOLID SOLUTIONS, INC., and
FREDERICK A. KARAM,

Defendants-Counterplaintiffs-
Appellees.

UNPUBLISHED

March 20, 2007

No. 266196

Oakland Circuit Court

LC No. 2003-053133-CK

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this “shareholder” action, plaintiff Larry Zahn appeals the trial court’s order granting defendants Engineering Solid Solutions, Inc. (ESS), and Karam a partial directed verdict. We affirm.

In September 2003, ESS, which was owned by Karam, terminated plaintiff’s employment. Thereafter, plaintiff, alleging that his termination was willfully unfair and oppressive to him and to ESS, filed a shareholder’s action under MCL 450.1489 against defendants.¹ Plaintiff asserted that, pursuant to an offer to purchase 10 percent of ESS’s stock in September 1999 and an offer in the fall of 2002 to purchase an additional 20 percent of ESS’s stock, both of which he accepted as part of his compensation package, he owned 30 percent of ESS’s stock, thereby making him a shareholder for purposes of MCL 450.1489. At the close of plaintiff’s case-in-chief, defendants moved for a directed verdict. The trial court granted it as to plaintiff’s claim that he owned 20 percent of ESS’s stock pursuant to the offer he received in the

¹ Plaintiff alleged numerous other causes of action in his complaint, but those were dismissed pursuant to a motion for summary disposition, and the dismissal of those claims is not challenged on appeal.

fall of 2002. According to the trial court, while plaintiff received offers to purchase an additional 20 percent of ESS's stock, there was "nothing more than that."²

On appeal, plaintiff argues that the trial court erred in granting a partial directed verdict to defendants because his testimony created a question of fact as to whether he owned more than 10 percent of ESS's stock. We review de novo a trial court's decision to grant a motion for a directed verdict. *Tobin v Providence Hosp*, 244 Mich App 626, 642-643; 624 NW2d 548 (2001). A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). To determine whether a question of fact existed, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party,³ grant that party every reasonable inference, and resolve any conflict in the evidence in that party's favor. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

Certain elements, which include offer, acceptance, and consideration, are necessary to make a contract. *Kirchhoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937); *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). An offer, a unilateral declaration of intent, is not a contract, *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992), nor is an option to contract, *Bowkus v Lange*, 196 Mich App 455, 460; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993). "An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein." *Id.*, citing *LeBaron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947). The acceptance of an option "must be in agreement with the terms proposed and the exact thing offered." *Bowkus, supra* at 460. A contract is made when the parties have executed or accepted the offer, not before. *Kamalath, supra* at 549. "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *In re Costs & Attorney Fees*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994), aff'd in part and remanded in part on other grounds 451 Mich 420 (1996).

According to plaintiff, he accepted the offer to purchase the additional 20 percent of ESS's stock when he agreed to work for ESS at a reduced salary. However, at trial, plaintiff testified that, in September 1999, when he agreed to work for ESS, he was told by Karam that he could purchase ten percent of ESS's stock and that he would receive an option to purchase additional ESS stock in the future. Viewing plaintiff's testimony in the light most favorable to plaintiff, the nonmoving party, *Thomas, supra* at 643-644, his testimony merely establishes that

² The jury rejected plaintiff's claim with respect to the remaining 10 percent of ESS's stock, finding that plaintiff never exercised the option to purchase.

³ While the parties acknowledge the principle that only evidence presented up to the time of the motion is to be considered, they nonetheless proceed to cite evidence submitted after the motion and included in defendants' presentation of their case. We properly limit ourselves to the evidence presented up to the time of the motion for directed verdict.

he received an option to purchase additional ESS stock in the future. This option alone does not establish that plaintiff owned 20 percent of ESS's stock because an option, in order to become a contract, must be accepted consistent with the proposed terms or agreed upon terms, and there was no such evidence. *Bowkus, supra* at 460.⁴

Plaintiff failed to present any testimony that he accepted the above option or any other offer to purchase the additional 20 percent of ESS's stock. Plaintiff never tendered cash or check to ESS for the purchase of the stock. Plaintiff presented no evidence that he and Karam agreed to a purchase price for the sale of any ESS stock, nor did he present any signed document in which he agreed to purchase ESS stock. In other words, plaintiff failed to present any evidence that he voluntarily undertook some unequivocal act to manifest an intent to be bound to purchase the additional 20 percent of ESS's stock. *In re Costs & Attorney Fees, supra* at 96-97. There is no evidence that plaintiff ever became a shareholder, acted as if he were a shareholder for purposes of his divorce, taxes, and other documentation, took on the responsibilities or duties of a shareholder, or was ever entitled to be deemed a shareholder. Because plaintiff failed to establish that he accepted any offer to purchase the additional 20 percent of ESS's stock, the trial court did not err in granting defendants a directed verdict on plaintiff's claim that, pursuant to an offer he received in the fall of 2002, he owned 20 percent of ESS's stock.

Plaintiff also argues that, even if the trial court did not err in granting defendants a partial directed verdict, he is entitled to a new trial because the trial court's order precluded the jury from considering his testimony that he owned more than ten percent of ESS's stock and, thereby, the trial court's order affected his substantial rights under MRE 103(a). Plaintiff's argument is without merit because MRE 103(a) does not apply to the present case. MRE 103(a) dictates when a trial court's error in either admitting or excluding evidence warrants reversal. See *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003); *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 469; 624 NW2d 427 (2000). Plaintiff is not arguing that the trial court erroneously admitted or excluded evidence, nor has plaintiff shown that the trial court committed any error. Accordingly, plaintiff's reliance on MRE 103(a) is misplaced. Plaintiff is not entitled to a new trial.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

⁴ If any contract was formed by plaintiff working at a reduced salary, it was simply one pursuant to which plaintiff would be given an opportunity to exercise the option to purchase stock; however, there was no evidence that he actually exercised the option. Plaintiff's appellate brief implicitly suggests that the reduced salary was agreed to in exchange for the future transfer of stock, with no additional payment for the stock or agreements being necessary, but this is wholly inconsistent with plaintiff's pleadings and the evidence at trial that reflected an opportunity or offer *to purchase stock by paying money out for the stock* at a later date *if* plaintiff chose to exercise the option and become a shareholder.