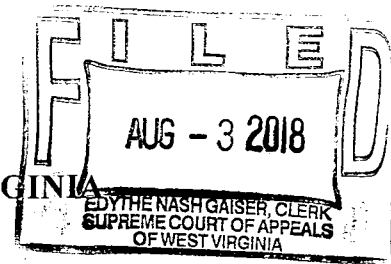


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 18-0383

ALEX LYON & SON,
Sales Managers & Auctioneers, Inc.,
Petitioner,

Appeal from a final order
of the Circuit Court of Wood
County (17-C-110)

v.

JAMES R. LEACH,
Respondent.

**BRIEF
ON BEHALF OF PETITIONER,
ALEX LYON & SON,
Sales Managers & Auctioneers, Inc.**

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Sales Managers & Auctioneers, Inc.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	1
ASSIGNMENT OF ERROR	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	2
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	3
STANDARD OF REVIEW.....	3
ARGUMENT.....	3
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

CASES:

<i>Syl. Pt. 1 Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E. 2d 755 (1994).....	3
<i>Pitchfork Ranch Co. v. Bar TL</i> , 615 P. 2d 541 (Wyo. 1980).....	4
<i>Pyles V. Goller</i> , 674 A.2d 35 (1996).....	4
<i>Pitchfork Ranch v. Bar TL, supra</i>	4
<i>Dry Creek Cattle Co. v. Harriet Bros, Ltd Partnership</i> , 903 P. 2d 399 (1995).....	4
<i>Milwaukee Stove & Furnace Supply Co. v. Apex Heating & Cooling, Inc.</i> , 416 N.W. 2d 4, 142, Wis. 2d 151 (1987).....	4
<i>Chevalier v. Town of Sonford</i> , 475 A.2d 1148, 3a UCC Rep. Serv. 468 (1984).....	4
<i>Pyles v. Goller</i> , 109 Md. App. 71, 674 A.2d 35 (1996).....	4
<i>Express Auction Services, Inc. v. Conley</i> , 732 A.2d 1012, 127 Md. App. 447 (1999).....	4
<i>Citizens Telecommunications Co. of W. Va. v. Sheridan</i> , 799 S.E. 2d 144 (2017).....	6
<i>Cook v. Heck's, Inc.</i> 176 W. Va. 368o, 342 S.E. 2d 453 (1986).....	6
<i>Crain v. Lightner</i> , 178 W.Va. 765, 364 S.E. 2d 778 (1978).....	7
<i>Payne's Hardware Building Supply, Inc. v. Apple Valley Trading Company of West Virginia</i> , 200 W.Va. 685, 490 S.E. 2d 772 (1997).....	7

STATUTE:

West Virginia Code § 19-2C-1(a).....	4
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ASSIGNMENT OF ERROR

The Circuit Court of Wood County, West Virginia, erred when it granted the Respondent's motion for summary judgment and denied the motion of summary judgment filed by the Petitioner.

STATEMENT OF THE CASE

On the 17th day of March, 2017, the Respondent, **JAMES R. LEACH**, filed a complaint against the Petitioner, **Alex Lyon & Son, Sales Managers & Auctioneers, Inc.** ("**Alex Lyon & Son**"), alleging various claims against the Petitioner arising out of an auction for the sale of real estate in Wood County, West Virginia [App. 1-17]. The Petitioner timely filed an answer, denying the allegations entered in the complaint [App. 28-33]. After discovery was conducted, each party filed motions for summary judgment [App. 55-126; 134-425]. The Circuit Court of Wood County granted the Respondent's motion for summary judgment and denied the Petitioner's motion for summary judgment [Ap. ii]. It is from the Court's ruling that the Petitioner files its appeal.

The facts of this case are generally not in dispute and are set forth in the memoranda of law filed with the pleadings for the respective motions for summary judgment referred to above.

SUMMARY OF ARGUMENT

It is the position of the Petitioner that the brochure advertising the sale of the real estate in Wood County, West Virginia, created by the Petitioner, **ALEX LYON & SON**: (1) did not create an offer to prospective bidders for the purchase of real estate; (2) constituted an advertisement for an auction with reserve, and (3) did not limit the discretion the auctioneer as to

who could bid on the property. The Circuit Court's findings in this regard were in error and the Petitioner respectfully demands a reversal of the Court's ruling in favor of the Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument pursuant to Rule 20 of the Rules of Appellate Procedure on the grounds that the case involves issues of first impression and issues of fundamental public importance.

STANDARD OF REVIEW

The Court reviews the entry of a summary judgment under a de novo standard of review. Syl. *Pt. 1 Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994).

ARGUMENT

On May 21, 2016, the Petitioner conducted an auction of a parcel of real estate (3.373 acres) in Vienna, Wood County, West Virginia. Prior to the sale, an advertisement was disseminated to the public [App. 00016]. The advertisement, prepare by the Petitioner, stated in pertinent part:

**Absolute Sale, Minimum Opening Bid
\$200K (10% Deposit Required to Bid)**

This is a case of first impression in the State of West Virginia. Auctions are governed by a specific set of rules under contract law. An auction is a form of sale. In an auction, property is publically put up for sale. An auction has a seller and a varying number of prospective buyers. Thus an auction can be defined as "the public sale of a property to the highest bidder.

See *Pitchfork Ranch Co. v. Bar TL*, 615 P. 2d 541 (Wyo. 1980). West Virginia Code § 19-2C-1(a) defines an auctioneer as a person who sells goods or real estate at a public auction for another on commission or for other compensation. There are generally two methods of selling property at an auction; with reserve or without reserve. *Pyles V. Goller*, 674 A.2d 35 (1996). In an auction held with reserve, the owner reserves the right not to sell the property. Here, an auctioneer's bringing a piece of property up for bid is an invitation to make a contract, not an offer to contract. Before the highest bid is accepted, a seller can withdraw the property from the auction. The auctioneer can withdraw property from the auction sale before the dropping of the gavel. Additionally, if the bidding is too low, an auctioneer need not sell the property. An auction with reserve includes all auctions where the advertisements and preliminary information representations do not specifically announce the sale to be without reserve, (emphasis added). See *Pitchfork Ranch v. Bar TL*, *supra*; *Dry Creek Cattle Co. v. Harriet Bros, Ltd Partnership*, 903 P. 2d 399 (1995); *Milwaukee Stove & Furnace Supply Co. v. Apex Heating & Cooling, Inc.*, 416 N.W. 2d 4, 142, Wis. 2d 151 (1987). *Chevalier v. Town of Sonford*, 475 A.2d 1148, 3a UCC Rep. Serv. 468 (1984); *Pyles v. Goller*, 109 Md. App. 71, 674 A.2d 35 (1996); *Express Auction Services, Inc. v. Conley*, 732 A.2d 1012, 127 Md. App. 447 (1999). It is clear from the advertisement for this auction that this was for an auction with reserve.

The rules regarding auctions are further confirmed by the Reinstatement of Contracts.

§28. Auctions, Reinstatement of Contracts 2d

At an auction, unless a contrary intention is manifested:

- (a) the auctioneer invites offers from successive bidders which he may accept or reject;
- (b) when goods are put up without reserve, the auctioneer makes an offer to sell at any price bid by the highest bidder, and after the auctioneer calls for bids the goods

cannot be withdrawn unless no bid is made within a reasonable time;

- (c) whether or not the auction is without reserve, a bidder may withdraw his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

§26. Preliminary Negotiations, Reinstatement of Contracts 2d

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

§29. To Whom an Offer is Addressed, Reinstatement of Contracts 2d

- (1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.
- (2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise of renders a specified performance.

An advertisement of an auction is not an offer to sell, which becomes binding, even conditionally on the owner when bid is made, but it is a mere declaration of intention to hold an auction at which bids will be received. Am. Jur. 2d, Auctions and Auctioneers, § 14. Inasmuch as an auction is an open sale, the rule, with few exceptions [see definition of an auction without reserve, *supra.*], is that anyone is qualified to be a bidder. Am. Jur. 2d, *supra.*, 24.

Alex Lyon was hired by the real estate broker, Petroplus, to sell the real property of Rick Coulson. It is the fiduciary obligation of the auctioneer and the purpose of the auction to get the highest price for his client. The advertisement did not contain any language that the auction was without reserve. Therefore, it is clear that this was an auction with reserve, and therefore, the advertisement could not be considered an offer. It is merely an invitation for prospective

buyers to bid and the auctioneer had discretion to permit anyone he believed to be qualified to submit a bid. The language regarding a 10% deposit was simply a way to keep unknown, unqualified bidders from bidding. It was not a contractual term of the sale. Therefore, the Petitioner could allow anyone it believed to be qualified to bid on the property, including Mr. Lerch.

Because this case is in the context of an auction, the law relied upon by the Respondent and the Court, most notably this Court's decision in *Citizens Telecommunications Co. of W. Va. v. Sheridan*, 799 S.E. 2d 144 (2017), does not apply. Unlike the terms and conditions at issue in the *Citizens* case, which became binding on subscribers of the internet service offered by the telecom company, this case does not meet the criteria of a unilateral contract. As the *Citizens* case, *supra*, recognized, a unilateral contract is established where a party makes a promissory offer and the other accepts by performing an act rather than by making a return promise. In this Court's tradition, a unilateral contract of this type often refers to employment situations. See *Cook v. Heck's, Inc.* 176 W. Va. 368o, 342 S.E. 2d 453 (1986).

The facts in this case are clearly distinguishable. In the case at bar, the advertisement was for an auction with reserve. Therefore, the advertisement was only an invitation to bid on property, **not** an offer to sell property upon certain terms and conditions and, therefore, the act of bidding did not create a unilateral contract. The auctioneer, who has a duty to maximize the value of the property being sold for his client, had the discretion to allow bidders whom he deemed qualified. Because he had a long standing business relationship with Mr. Lyon and Mr. Lerch, himself, had \$100,000 worth of equipment in the auction, Mr. Lyon was confident in Lerch's ability to purchase the property from Lyon's client, the property owner, Rick Coulson. [Lyon Dep. pages 31-32; Lerch Dep. pages 17-18] Alex Lyon didn't have the same relationship

with Mr. Leach, who, like any other unknown bidder, had to demonstrate he could purchase the property if he was the successful bidder. Mr. Leach wrongly presumed that because Mr. Lerch didn't give a bank letter to the staff of Alex Lyon, he was somehow disqualified from bidding. Once the bidding got underway, and he saw Lerch was bidding, he didn't question the propriety of his being able to bid or ask for the sale to be stopped until that issue was resolved. Instead, he attempted to illegally manipulate the sale by offering Lerch \$5,000 not to bid. See *Crain v. Lightner*, 178 W.Va. 765, 364 S.E. 2d 778 (1978); *Payne's Hardware Building Supply, Inc. v. Apple Valley Trading Company of West Virginia*, 200 W.Va. 685, 490 S.E. 2d 772 (1997). Mr. Leach's actions clearly show that he accepted that Mr. Lerch was an appropriate bidder. He is angry because he thought he was going to get the property for \$200,000 instead of \$265,000. If he felt aggrieved, he could have walked away from the sale and sought relief before accepting the deed to the property.

CONCLUSION

The Petitioner respectfully demands that the order of the Circuit Court of Wood County, Wet Virginia, granting summary judgment to the Respondent be reversed and that summary judgment be granted to the Petitioner.

Dated this 2 day of August, 2018.



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