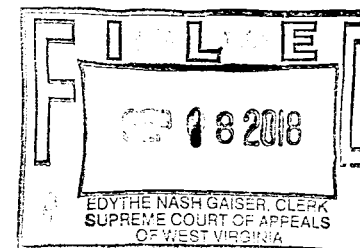


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IN THE SUPREME COURT OF WEST VIRGINIA

DOCKET NO. 18-0383



**ALEX LYON & SON,
Sales Managers & Associates, Inc.,**

Petitioner/Defendant below

vs.

JAMES R. LEACH,

Respondent/Plaintiff below.

**Appeal from Final Order of the Circuit
Court of Wood County
Civil Action No. 17-C-110
The Honorable Jason Wharton**

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Statement of facts¹

On May 21, 2016, Respondent James R. Leach (“Respondent”) attended an auction for the sale of real estate in Vienna, West Virginia. The real estate was located on 17th Street in Vienna, off Grand Central Avenue facing/fronting the Ohio River. The Petitioner, Alex Lyon & Son, Sales Managers and Auctioneers, Inc. (“Petitioner”) had organized and advertised this auction.² The auction was advertised as an “absolute sale,” meaning that the real estate would be sold to the highest bidder and the owner of the real estate could not withdraw the property once the minimum bid was offered. (Lyon Dep., p. 13, App No. 80). This absolute sale was advertised to begin at 1:00 p.m.

Petitioner advertised both the sale of the real estate as well as the legal terms of the absolute auction for the real estate prior to the sale. (Lyon Dep., pp. 12-13, App No. 80-81). Petitioner testified that the legal terms and conditions that govern the auction, set forth in the advertisements, are to protect both the seller and the bidder. (Lyon Dep., p. 15, App No. 81). Every advertisement for the sale provided the same terms, that the auction was an “absolute” sale, with the minimum opening bid to be \$200,000 and a 10% deposit in the form of cash or guaranteed funds was required in order to bid. (Lyon Dep., pp. 13-14, App No. 81; Various advertising and terms of sale items published by Petitioner for the auction, App No. 85-89). The terms and conditions of the sale further required bidders to produce a “Bank Letter of Guarantee”

¹As Petitioner failed to set forth the statement of facts in its Brief, Respondent will do so.

²The Petitioner is a New York corporation owned and operated by Alex “Jack” Lyon and Mr. Lyon conducts the auctions. (Lyon Dep., p. 4, App. No. 79).

from a financial institution indicating their ability to pay the balance of the proceeds on the real estate if the bidder was successful at auction. *Id.*

Each bidder was to receive a Bidder's Registration Agreement and the bidder was bound by his/her signature to the terms of the sale. *Id.* The terms were set forth in the advertising material, on the bidder registration card and on the Petitioner's website, www.lyonauction.com. (*Id.*)³ The terms and conditions of sale, found on the website, were the same as on the advertising material, with the added caveat that the individual auction material would control each auction, except "[s]tatements made day of sale supersede printed material." (Terms & Conditions, App. No. 91). In addition, Petitioner's auction registrar, Mary Pike, testified that she, along with other employees, are responsible to ensure that all bidders are qualified under the terms and conditions of the auction. (Pike Dep., 4, App No. 93). She and the other employees issued the Bidder Registration Agreements and qualified any bidders. (*Id.*). The bidder's information is written on a bidding card, and the bidder gets one-half of the card and the Petitioner keeps the other half with the bidder information on it. (Pike Dep., pp. 4-5, App No. 93-94).

Prior to the auction, Respondent obtained the appropriate letter of credit from Williamstown Bank as well as a cashier's check in the amount of \$20,000.00 as the required 10% deposit, in order to qualify as a bidder to the absolute auction. (Letter of Credit dated May 19, 2016 from Williamstown Bank, App No. 97; Check stub for \$20,000.00 and receipt from Alex Lyon & Son to Jim Leach, App No. 98-99). The receipt from Petitioner specifically noted that

³The Petitioner also offered live online bidding, under the same terms and conditions. (Bid Online, App. No. 90). In order to bid, the bidder had to wire the required 10% deposit prior to the start of the auction, as well as provide a bank letter of credit. (*Id.*)

the \$20,000.00 was the deposit to bid on the real estate. (*Id.*).

On the day of the auction, Respondent arrived at the auction at approximately 9:00 a.m. (Leach Dep., p. 10, App. No. 101). Rather than immediately registering to bid on the real estate with Ms. Pike, Respondent waited until just prior to the opening bid on the real estate to qualify to bid on the real estate, to see if anyone else would register to bid on it. (Leach Dep., p. 14, App No. 102). While he waited, he checked in with Ms. Pike several times to ask if anyone else had qualified or registered to bid on the property. (*Id.*). Ms. Pike told him every time that no one had submitted the required bid qualification documents. (*Id.*, p. 16, App No. 102). At approximately 12:50 p.m., Respondent again checked with Ms. Pike and was told again that there were no other bidders, qualified or otherwise. (*Id.*, pp. 14-17, App. No. 102-103). Respondent then presented his letter of credit and cashier's check to Ms. Pike, and successfully qualified to bid on the property. (*Id.*).

The bidding began at 1:00 p.m, conducted by Alex "Jack" Lyon. (*Id.*, p. 20, App. No. 103). When the sale of the real estate was announced, there were no statements that would alter the terms and conditions set forth in the advertisements. Indeed, the only oral statements made prior to the sale were made by the real estate agent from Petropolis Realty, the real estate agent for the property, and those were simply pertinent facts relating to the property itself and the minimum bid amount of \$200,000.00. (Lyon Dep., p. 11, App. No. 80). Mr. Lyon testified that he did not recall that he made any statements at all prior to the auction, including any statement that would alter the written terms and conditions of the sale. (*Id.*). However, contrary to every term and condition set forth in every document provided by Petitioner, Mr. Lyon testified that bidding requirements could be waived if you has special permission from the company. (Lyon

Dep., pp. 14-15, App. No. 81). However, this information is not provided to other bidders who must qualify according to the terms and conditions of the auctions, nor is it made part of the terms and conditions. (*Id.*).

Mr. Lyon further testified that some long time customers have “permanent bid numbers” which allows them to bid at an auction without having to qualify. (*Id.*). Green paddles are issued to these customers, and Petitioner must initial the bid card to have the requirements waived. (*Id.*). Mr. Lyon must initial the bid card at every auction. (Lyon Dep., p. 31, App. No. 361). Ms. Pike testified that she must see the initialed card if she does not personally know the long time customer prior to each auction. (Pike Dep. pp. 7-8, App. No. 94). Although Mr. Lyon testified that Kurt Lerch, the other bidder in this auction, had this special permission to waive the bid requirements, Ms. Pike testified that she did not know if Mr. Lerch was one of those customers and did not see his permanent card. (Pike Dep., pp. 8-9, App. No. 94-95). In addition, Mr. Lerch, contrary to Mr. Lyon’s testimony regarding the requirements for a permanent bid card, testified that “I just sign up – you know, if I have something I’m interested in at a particular auction, then I usually just sign up then and get a new bidder card rather than having a permanent number.” (Lerch Dep., p. 9, App. No. 373).

Furthermore, Petitioner could not produce any documentation, including a permanent bidder card, that Mr. Lerch was, in essence, pre-qualified to bid at the auction. (Pike Dep., pp. 8-9, App. No. 94-95; Defendant Alex Lyon & Son’s Answers to Plaintiff’s First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 14, Request No. 1 and 5, App. No. 107-111; Defendant, Alex Lyon & Son’s Supplemental Response to Request for Production of Documents, (August 29, 2017), App. No. 385-386; Defendant, Alex Lyon & Son’s

Supplemental Response to Request for Production of Documents (Nov. 13, 2017), App No. 387-397). Nor could Petitioner produce Mr. Lerch's bidder card from the day of the auction. (*Id.*). In fact, no documents beyond the advertising material were ever produced by Petitioner. (*Id.*). Mr. Lyon testified that "i[]f you don't have a bidder card you can not bid." (Lyon Dep., p. 17, App. No. 82). And, he specifically testified that other bidders are not "allowed" to know about "preferred" or "privileged" bidders who would be exempt from the published terms and conditions of the real estate sale; that it was an "in-house" policy. (*Id.*, p 15, App. No. 81).

Mr. Lerch not only did not have a green permanent bidder card, he did not have a bidder card for the day of the auction, he did not have a bidder card signed by Lyon, he did not speak with Lyon prior to the auction to get his bid card initialed by Lyon, nor did he register with Ms. Pike. (Lerch Dep., pp. 16-17, App. No. 376-377). In fact, Mr. Lyon was not even aware if Mr. Lerch had a permanent bidder card, which is required to bid without pre-qualifying in an auction. (Lyon Dep., p. 31, App. No. 361).

Therefore, Respondent, when the real estate auction started, did not know of any waiver regarding the bidding requirements for the real estate and did not expect there to be any other bidders on the real estate. Before Respondent could offer an opening bid of \$200,000.00, another bidder, Kurt Lerch, started the bidding at the minimum bid. (Leach Dep., pp. 21-22, App. No. 104). Respondent, surprised by the bid by Mr. Lerch because he had been told by Ms. Pike just before the auction began that there were no other qualified bidders, engaged in competitive bidding with Mr. Lerch and, after approximately 30 seconds of bidding, Respondent secured the high bid at \$265,000. (*Id.*, pp. 22-23, App. No. 104).

After the bidding concluded, Respondent asked Rick Coulson, the property owner, why

Mr. Lerch had been permitted to bid when he had not qualified to bid prior to the auction. (*Id.*, p. 23, App. No. 104). Mr. Coulson had no answer. (*Id.*). Respondent also confirmed again with Ms. Pike that no other bidder had qualified to bid prior to the auction. (*Id.*, p. 25, App. No. 105). The Petitioner confirmed that no one else had provided the required deposit on the day of the auction, including Mr. Lerch. (Lyon Dep., p. 16, App. No. 81). As the Petitioner admitted, because of the unqualified bidder, Respondent was forced to buy the property at \$265,000.00, as well as pay additional fees to the Petitioner for the sale.

Q. If Kurt Lerch was not qualified to bid on the property, meaning Mr. Leach was the only bidder, what would the selling price have been?

A. The price would have been \$200,000.

(Lyon Depo., p. 34, App. No. 83) (emphasis added).

Respondent did, after the auction was concluded, approach Mr. Lyon and protest the unauthorized bidder, putting his protest in writing. (See Letter to Alex Lyon Auctions from James R. Leach dated May 21, 2016, App. No. 113-116). Although Mr. Lyon indicated he would look into it and get back to Respondent, he never responded to Respondent's complaint or disqualified the bids of Mr. Lerch.

SUMMARY OF ARGUMENT

Respondent alleges that he entered into a contract with the Petitioner and that the Petitioner breached that contract by allowing an unqualified person to bid at the auction, thus driving up the price of the real estate and causing Respondent to buy the real estate at a much higher price than he would have had to otherwise. There is no dispute that this auction was advertised as an "absolute" sale. Petitioner also does not dispute the written terms of sale found in the advertisements and that no oral statement was made to modify those terms.

The terms, as noted on the advertisements, required a "Cash or Company Check" in the amount representing 10% deposit of the minimum opening bid of \$200,000.00 and a "Bank Letter of Guarantee" to qualify to bid on the property. There is also no dispute that a term of the auction was a minimum bid of \$200,000.00 to start the auction, and the owner of the property, Rick Coulson, was bound by the terms of the "absolute" auction to accept any bid once the auction opened with the \$200,000.00 bid, and he could not withdraw the real estate from the auction after the first bid. As such, this was an auction "without reserve," creating a contract between Petitioner and Respondent. Furthermore, as there was no modification of the terms of the auction as set forth in the advertisements, the Petitioner was bound by the terms as set forth therein.

Furthermore, the testimony as to how an alleged "permanent qualified bidder" would be permitted to bid at an auction is so inconsistent as to be unbelievable. For instance, Mr. Lyon testified that a permanent qualified bidder would have "permanent bid numbers," issued to these customers on green paddles, and Lyon must initial the bid card to have the requirements waived which allows them to bid at an auction without having to qualify. On the other hand, Mr. Lerch testified that he just got a new bid card at each auction and did not have a permanent number. Ms. Pike testified that she is responsible to ensure that all bidders are qualified under the terms and conditions of the auction and she must see the initialed card if she does not personally know the long time customer prior to each auction. However, both Ms. Pike and Mr. Lyon agreed that neither ever saw Mr. Lerch's green bidder card on that day. Of course, that is because Mr. Lerch admitted that he did not have one. Thus, Mr. Lerch was not a qualified bidder and, in allowing him to bid on the property, the Petitioner breached the contract with Respondent.

Finally, although Respondent denies that he engaged in any improper behavior during the auction, this evidence is irrelevant and no more than a red herring. The conduct between Respondent and a third party, in this instance Kurt Lerch, is not relevant to the issue of the contract between Respondent and Petitioner. Thus, the Order granting summary judgment to Respondent and denying summary judgment to Petitioner should be affirmed. (App. No. 448-463).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary in this matter as the issues are ones of first impression and should be set for a Rule 20 hearing.

ARGUMENT

1. Standard of Review

“A circuit court's entry of summary judgment is reviewed de novo.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Therefore, in order to determine if summary judgment was appropriate in this matter, the Court must look at the standard for summary judgment. The provisions of West Virginia Rules of Civil Procedure 56(c) provide the standard for Summary Judgment and states in its pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

This Court has consistently held that “[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case

that it has the burden to prove.” *Wilson v. Polino Enterprises, Inc.*, 2018 WL 2277812192, citing *Painter*, 192 W.Va. at 190, 451 S.E.2d at 756. Summary judgment is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Larew v. Monongahela Power Co.*, 487 S.E.2d 348, 351, 199 W.Va. 690, 694 (1997) citing *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995); *Painter v. Peavy*, 192 W.Va. 189, 192 n. 5, 451 S.E.2d 755, 758, n. 5 (1994); *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 22, 207 S.E.2d 191, 194 (1974).

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,” if in essence there is no real dispute as to salient facts or if only a question of law is involved. *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 22, 207 S.E.2d 191, 194 (1974). * * * When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion. *Hanks v. Beckley Newspapers Corp.*, 153 W.Va. 834, 172 S.E.2d 816 (1970).

Painter, 192 W.Va. at fn 5, 451 S.E.2d at fn 5.

The West Virginia Supreme Court of Appeals has defined, on many occasions, “genuine issue” and “material fact:”

Roughly stated, a “genuine issue” for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

Daniel v. United Nat. Bank, 505 S.E.2d 711, 714 , 202 W.Va. 648, 651 (1998). *See also*, *Tolliver v. Kroger Co.*, 498 S.E.2d 702, 201 W.Va. 509 (1997); *Banfi v. American Hosp. for Rehabilitation*, 207 W.Va. 135, 529 S.E.2d 600 (2000). In determining whether summary judgment should be granted, inferences to be drawn from the facts of the case must be viewed in a light most favorable to the non-moving party. *Pritt v. Republican Nat. Committee*, 210 W.Va. 446, 453, 557 S.E.2d 853, 860 (2001). “In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as ‘[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]’” *Id.* citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986).

The non-moving party must come forward with facts sufficient to defeat summary judgment, and not simply blanket allegations:

[i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co., 206 W.Va. 458, 466, 525 S.E.2d 649, 657 (1999). The evidence submitted by the non moving party must be more than a mere scintilla of evidence and cannot be conjectural or problematic. *Williams v. Precision Coil, Inc.*, 194 W.Va. at 59, 459 S.E.2d at 336. The nonmoving party must come forward with specific facts, not simply inferences or speculation, that demonstrates a genuine, material fact in

controversy. *Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 254, 685 S.E.2d 219,227 (2009).

Finally,

A nonmoving party need not come forward with evidence in a form that would be admissible at trial in order to avoid summary judgment. However, to withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party.

Wilson v. Daily Gazette Co., 214 W.Va. 208, 213, 588 S.E.2d 197, 202 (2003), *citing Williams*, 194 W.Va. at 60-61, 459 S.E.2d at 337-338 (citations omitted).

2. It is the province of the Court to determine what constitutes a contract and to interpret a written contract that is unambiguous.

The elements of a contract are of long standing and enduring precedence. “A contract is an offer and acceptance supported by consideration. See Syl. pt. 1, *First National Bank v. Marietta Mfg. Co.*, 151 W.Va. 636, 153 S.E.2d 172 (1967).” *Warden v. Bank of Mingo, et al.*, 176 W.Va. 60, 62, 341 S.E.2d 679, 680 (1985). See also *McCormick v. Hamilton Business Systems, Inc.*, 332 S.E.2d 234 (W. Va. 1985) (“The elements of a contract are an offer and an acceptance supported by consideration.”).

The issue in this matter is whether the advertisement by Petitioner and the conduct by Petitioner and Respondent constitutes a contract under our relevant cases and to interpret the terms of that contract, and this is a question of law for the Court to determine. “[T]he determination of what constitutes a contract under our relevant cases is a question of law.” *HN Corp. v. Cyprus Kanawha Corp.*, 195 W.Va. 289, 293-294, 465 S.E.2d 391, 395-396 (W.Va. 1995) (per curiam). The different roles of the Court and a jury relating to a contractual dispute are well established in West Virginia:

Further, the Brewers contend that resolution of the ambiguity presents a jury question. “‘It is the province of the Court, and not of the jury, to interpret a written contract.’ Syl. Pt. 1, *Stephens v. Bartlett*, 118 W.Va. 421, 191 S.E. 550 (1937).” Syl. Pt. 1, *Orteza v. Monongalia County General Hospital*, 173 W.Va. 461, 318 S.E.2d 40 (1984). Moreover, this Court stated in *Williams v. Precision Coil, Inc.*, 194 W.Va. at 62, n. 18, 459 S.E.2d at 339 n. 18, that: While the determination of what constitutes a contract under our relevant cases is a question of law, the determination of whether particular circumstances fit within the legal definition of a contract under our cases is a question of fact. Subject to one exception, the determination of factual issues is solely within the province of the jury. Of course, that exception is Rule 56 dealing with summary judgments.

Brewer v. Hospital Management Associates, Inc., et al, 202, W. Va. 163, 166, 503 S.E.2d 17, 20 (W. Va. 1998). See also *HN Corp.*, , 195 W.Va. at 294, 465 S.E.2d at 396, citing *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 62, n. 18, 459 S.E.2d 339, n. 18, rehearing denied, (1995) (in accord).

The court also interprets a written contract. “It is a settled principle, long recognized in this State that ‘[i]t is the province of the Court, and not of the jury, to interpret a written contract.’ Syl. Pt. 1, *Stephens v. Bartlett*, 118 W.Va. 421, 191 S.E. 550 (1937).” *HN Corp.*, 195 W.Va. at 293-294, 465 S.E.2d at 395-396, citing Syl. pt. 1, *Orteza v. Monongalia County General Hospital*, 173 W.Va. 461, 318 S.E.2d 40 (1984). Thus, the Court has the responsibility of applying the terms and conditions of the agreements as written unless the agreement is ambiguous. *Orteza* at Syl. Pt. 2. “‘A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” *Brewer*, 202 W. Va. at 165, 503 S.E.2d at 16, citing *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). See also Syl. pt. 1, *Bennett v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981). W.

Va. Code § 46–1–304 provides: “Every contract or duty within this chapter imposes an obligation of good faith in its performance and enforcement.”

The contract, in the form of the advertisement for the auction, at issue herein is unambiguous and clear on its terms and the facts in this case are not in dispute. It has been established beyond doubt that Petitioner advertised this auction in written form. It has been further established beyond doubt the terms and conditions of the auction as set forth in the advertisement. Further, it has been established beyond doubt that Petitioner qualified to bid in the auction. Therefore, there is no factual issue concerning the contract itself and summary judgment was appropriate.

3. Petitioner was bound by the terms and conditions of the auction as advertised as there was no effective modification of those terms and conditions.

As the legal precedent makes clear, the type of auction is irrelevant regarding the enforcement of the terms advertised. The auctioneer does not have the discretion to change the advertised terms at will and permit anyone to bid, and thereby contradicting the stated terms in the advertisement. There is no dispute that the 10% deposit, the bank letter of credit and the minimum bid were all terms and conditions of the auction that could not be modified absent notice to all qualified bidders.

A public auction is specifically defined in W.Va. Code §19-2c-1(e) as “any public sale of real or personal property when offers or bids are made by prospective purchasers and the property sold to the highest bidder.” Although Respondent could find no cases on point specifically addressing this issue with regard to auctions in West Virginia, West Virginia precedent regarding modifications of a contract require notice of any modification to the other party. Although a

contract may be modified by the offeror (auctioneer), the offeror must give the offeree (qualified bidder) reasonable notice of any change in order for the modification to be effective and there must be additional consideration for the modification.” *Citizens Telecommunications Company of West Virginia v. Sheridan*, 239 W.Va. 67, 73, 799 S.E.2d 144, 150 (2017).

Most commonly, this Court has examined the interpretation and modification of unilateral contracts in the context of employee handbooks or manuals. We have held:

A promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes acceptance and sufficient consideration to make the employer's promise binding and enforceable.

Syl. Pt. 5, *Cook*, 176 W.Va. 368, 342 S.E.2d 453. We find the contract and modification at issue in the present case analogous to an employee handbook in that Frontier agreed to provide Internet service pursuant to its Terms and Conditions, which would be accepted by Respondents by continuing to subscribe to the service while under no obligation to do so. Additionally, Frontier, like many employers, reserved the right to make unilateral modifications to the Terms and Conditions upon notice of the changes.

Id. Thus, without notice to the other bidders, there is no effective modification and the auctioneer did not have discretion to let a person bid who had not adhered to the written terms. In addition, there is no dispute that there was no additional consideration for any attempted modification.

Thus, the contract between Plaintiff and the Defendant stood as written, which required The Defendant to only allow bidders that met the requirements in the contract to bid. Even had there been proper notification of the modification of the contract, there would have been a lack of consideration. Consideration has been defined as “some right, interest, profit, or benefit accruing

to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another.” *Citizens Telecommunications Company of West Virginia*, 799 S.E.2d at 152 (citations omitted). However, the Court went on to hold: “not only must such modification or alterations be by mutual agreement but must be based upon a valid consideration, and the original consideration ... cannot be used as consideration for any agreement of modification or alteration in connection therewith.” *Id.* There was no additional consideration offered to Respondent for any modification of the contract, making any modification void.

Other jurisdictions are instructive in dealing specifically with auctions and agree there must be notice to the other bidders of any modifications. Auction terms and conditions can be set by advertising material by the seller and these terms and conditions are binding unless there is an effective modification by the auctioneer. *Pyles v. Goller*, 109 Md. App. 71, 85, 674 A.2d 35, 42 (1996) citing Restatement (Second) § 28(2) (emphasis added) (App. No. 293-302); 7 Am.Jur.2d §§ 14 & 17; *cf. Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520, 45 S.Ct. 181, 181-82, 69 L.Ed. 417 (1925) (holding that conditions of a sale set in an advertisement were binding); *Sullivan v. Mosner*, 266 Md. 479, 491, 295 A.2d 482 (1972) (stating that a written agreement may be modified by a subsequent oral modification). *See also Love v. Basque Cartel*, 873 F.Supp. 563, 569 (U.S. Dist. Ct. Wyo. 1995). Indeed, Petitioner’s own materials agree that the terms of the advertisement can only be modified by an oral statement at the auction.

Once the terms are set by the seller, “[a] buyer may rely upon the announced terms and conditions of an auction and the buyer is likewise bound thereby. Implicit in this statement is its reciprocal—that if the buyer is entitled to rely on the terms of the auction, then the seller is also bound by the terms which he has set.” *Id.*, 873 F.Supp. at 570, citing 7A C.J.S. Auction &

Auctioneers § 9b (1980) (emphasis added). *See also Kivett v. Owyhee County*, 58 Idaho 372, 74 P.2d 87, 92 (1937) (“Printed conditions under which a sale proceeds are binding on both buyer and seller, and cannot be varied, although they may be explained by verbal statements of the auctioneer made at the time of the sale.”); *Accord, Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541, 553 (Wy. 1980).

As the court in *Love* discussed, some jurisdictions do not allow parol modifications that conflict with the printed terms and conditions of the auction advertisement. *Love*, 873 F.Supp. at 571. The court, citing 7A C.J.S. Auction & Auctioneers § 9b (1980), noted that “[t]he general rule seems to be that the printed conditions of an auction may not be modified by the auctioneer at the time of the auction.” *Id.*

Generally, printed conditions under which an auction sale proceeds are binding on both buyer and seller, and cannot be varied by verbal statements of the auctioneer made at the time of sale, although they may be so explained. Thus, an auctioneer may, at the time of the sale, explain the meaning of advertisements published before the sale.

Id. at 570-571, citing 7A C.J.S. Auction & Auctioneers § 9b (1980). *See also* 7 Am.Jur.2d Auctions and Auctioneers § 15 (1980).

Other jurisdictions allow modification of the terms with notification to the bidders of the auction. “Still other courts have held that declarations of the auctioneer subsequent to and at variance with the advertised procedures cannot change the printed terms of such advertisements unless the purchaser has knowledge of the modification.” *Love*, 873 F.Supp. at 571, citing 7 Am.Jur.2d Auctions and Auctioneers § 15 (1980) (emphasis added). The Maryland Appellate Court in *Pyles* held that “[t]he terms in the advertisement are binding unless effectively modified

prior to the start of the auction.” *Pyles*, 109 Md. App. at 85, 674 A.2d at 42. The Restatement (Second) dictates that:

Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up.

Restatement (Second) § 28(2). “[B]ids at an auction embody terms made known by advertisement, posting, or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up for sale.” *Washburn v. Thomas*, 37 P.3d 465, 467 (Co. App. 2001), citing Restatement (Second) of Contracts, § 28(2); and *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376, 379 (6th Cir.1991).

Thus, depending on the jurisdiction, an auctioneer may modify the advertised terms of the auction, but the modifications “must be announced by the auctioneer in the form of a public statement so that all the bidders know of, or should have known of, the changes in the auction.” *Pyles*, 109 Md. App. at 85, 674 A.2d at 42, citing Restatement (Second) § 28(2); 7 Am.Jur.2d § 14. “A public announcement requirement helps ensure that all bidders ‘stand on equal footing’ with respect to the auction.” *Pyles*, 109 Md. App. at 86, 674 A.2d at 43, citing 7 Am.Jur.2d § 19, at 374.

In the case at bar, Petitioner first admitted that the legal terms and conditions that govern the auction, set forth in the advertisements, are to protect both the seller and the bidder. There is no question that the advertisement for the auction required both a 10% deposit and a bank letter of credit in order to qualify as a bidder for the real estate. Petitioner further admitted that there was no announcement made prior to the auction that modified the published terms of the auction.

In fact, the only statements made prior to the auction were made by an employee of Petropolis and Associates, the real estate broker. And, even assuming, *arguendo*, that Mr. Lerch was a preferred bidder, Mr. Lyon testified that he would not announce to other bidders that preferred bidders are exempt from the terms and conditions of the advertised sale, which modified the written terms. Indeed, he testified that other bidders would not “be allowed” to know of the modification of the terms of the advertisement.

Thus, the contract between Respondent and the Defendant stood as written, which required The Defendant to only allow bidders that met the requirements in the contract to bid. Even had there been proper notification of the modification of the contract, there would have been a lack of consideration. Consideration has been defined as “some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another.” *Citizens Telecommunications Company of West Virginia*, 799 S.E.2d at 152 (citations omitted). However, the Court went on to hold: “not only must such modification or alterations be by mutual agreement but must be based upon a valid consideration, and the original consideration ... cannot be used as consideration for any agreement of modification or alteration in connection therewith.” *Id.* There was no additional consideration offered to Respondent for any modification of the contract, making any modification void.

Without any effective modification of the terms of the advertisement, as Respondent was the only bidder to provide both the deposit and the bank letter of credit, he was the only qualified bidder. Petitioner argues that, because Mr. Lerch was considered a “permanent bidder,” he did not have to adhere to the terms of the advertisement in this auction. However, Petitioner was bound by the written terms of his advertisement, without discretion to waive them at will.

Therefore, as Petitioner admitted, there was no effective modification of the written terms of the advertisement, Mr. Lerch could not have been a qualified bidder, and Petitioner breached the contract with Respondent by allowing Lerch to bid.

4. **Although the auction was “absolute” or “without reserve,” and, therefore, a contract was formed on Respondent’s first bid, regardless, even if the auction was one “with reserve,” a contract was formed when Respondent’s final bid was accepted by Petitioner.**

Petitioner erroneously argues that an auctioneer is not bound by the terms and conditions of his advertised auctions, because the auction was “with reserve.” In fact, by its very terms, advertised as an “absolute” sale, the auction was “without reserve.” An auction can be either “with reserve” or “without reserve,” and the type of auction is established by the terms of the auction, as set forth by the seller. And, it is a long held principle that the auctioneer advertising and putting the property up for sale is a proper party to any claim regarding the auction:

We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue upon a contract with him; *Denton v. Great Northern Railway Company*, 5 E. & B. 860. Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.

Pitchfork, 615 P.2d at 551, citing the English case, *Warlow v. Harrison* (1859) 1 E. & E. 309 (emphasis added) (App. No. 276-292). Although the particular suit involved a claim that the auction be without reserve, it is clear from the holding that the auctioneer is a proper party for breach of any term or condition set forth in the advertising materials.

In this instance, contrary to Petitioner's assertion, the auction meets the definition of an auction "without reserve." However, whether this auction could be considered either with or without reserve, a contract was certainly formed when Respondent was the high bidder and Petitioner accepted his offer. In order to understand the difference in each type of auction, it is necessary to understand the elements of each type. The Maryland Court of Appeals in *Pyles* set forth definitions from the National Auctioneers Association Glossary of Terms:

Absolute Auction

An auction where the property is sold to the highest qualified bidder with no limiting conditions or amount. The seller may not bid personally or through an agent. Also known as an auction without reserve.

Auction With Reserve

An auction in which the seller or his agent reserves the right to accept or decline any and all bids. A minimum acceptable price may or may not be disclosed and the seller reserves the right to accept or deny any bid within a specified time.

Auction Without Reserve

See Absolute Auction.

Pyles, 109 Md. App. at fn 2, 674 A.2d at fn 2). If the advertisement for the auction does not specify, the auction is presumed to be "with reserve." *Id.* at 81, 40 citing 1 Corbin § 4.14; 7 Am.Jur.2d § 17. However, the terms "Absolute Auction" and "Without Reserve" are defined the same and are interchangeable. As the advertisement in this matter specifically advertised the auction as an "absolute" auction, the auction, once the minimum bid was offered, was one without reserve. Petitioner's argument that the auction is with reserve, apparently because the advertisement did not specifically state "without reserve," is both disingenuous and misleading. There is no dispute the advertisement stated the auction was an "absolute sale," which term is synonymous with the term "without reserve."

To further define the differences between the two types, in a “with reserve” auction, “[t]he contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer.” *Dry Creek Cattle Co. v. Harriet Bros. Ltd. Partnership*, 908 P.2d 399, 402 (Wyo. 1995) (emphasis in the original), citing *Pitchfork*, 615 P.2d at 548 (App. No. 303-309). “[I]n an auction with reserves . . . the contract is formulated by the offer of the bidder and the acceptance of the seller.” *Pitchfork*, 615 P.2d at 548 (App No. 276-292). “Once a bid has been accepted, the parties occupy the same relation toward each other as exists between promisor and promisee in an executory contract of sale conventionally made.” *Id.*

By contrast, in an “absolute” or “without reserve” auction, “the contract is consummated with each bid, subject only to a higher bid being received.” *Id.* “A ‘no reserves’ auction is significantly different than the auction with reserves above described. As has been noted, in auctions *with reserve*, the bidder is deemed to be the party making the offer, while the auctioneer (as agent for the seller), is the offeree with authority to either accept the bid or reject it.” *Id.* In a without reserve auction, the bidder is the offeree and the seller the offeror and each bid creates a contract, until there is a higher bid. *Id.* Thus, as Respondent was the high bidder, a contract was formed between the parties, and it is irrelevant when it was formed, either at Respondent’s first bid or his last, when he became the highest bidder.

The cases involving the two types of auctions are unanimous in holding that the distinguishing difference between them is whether the owner of the property has the right to withdraw the property for sale before the final bid and the gavel falls. “In every case, the distinction is whether the seller has the right to withdraw the property prior to the completion of the auction, regardless of the bidding.” *Pitchfork*, 615 P.2d at 541. In an auction “with reserve”

“the seller may at any time withdraw the article from sale, if he has not already accepted a bid.”

Id. at 548 (emphasis added). Furthermore, a contract is formed when the high bid is accepted:

A sale at auction, like every other sale, must have the assent, express or implied, of both seller and buyer. An announcement of an auction or the act of putting property up for sale at auction does not constitute an offer to sell capable of acceptance by the making of a bid. An advertisement of an auction is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made. Rather, an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is a mere invitation to those attending the sale to make offers by bids. The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer.

Pitchfork, 615 P.2d 541 at 548.

In the auction “without reserve,” “after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time.” *Id.*

(emphasis added).

Such sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

Md.Code, CL § 2-328, and the corresponding Uniform Commercial Code section, are consistent with accepted legal principles of an auction sale.

Pyles, 109 Md. App. at fn 6, 674 A.2d at fn 6.

One of the distinguishing features of an auction held “with reserve” is that the owner reserves the right not to sell the property, and can withdraw the property from the auction before the acceptance of the highest bid. 1 Corbin § 4.14, at 638; 7 Am.Jur.2d § 17.

Conversely, in an auction held “without reserve,” the opening of bids by the auctioneer constitutes a firm offer, as opposed to an invitation to make an offer. 7 Am.Jur.2d § 17. In this type of auction the seller promises to sell the goods to the

highest bidder. 1 Corbin § 4.14, at 642; 7 Am.Jur.2d § 17. The Restatement (Second) describes an auction “without reserve” as:

[W]hen 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....

Restatement (Second) § 28(1)(b), at 79-80 (1979).

Pyles, 109 Md. App. at 80, 674 A.2d at 40 (emphasis added).

Two methods to sell property at auction exist. When an auction is “without reserve” or “absolute,” a seller makes an offer to sell when the seller advertises the sale and it is up to the bidder to accept. The seller is the offeror and the bidder is the offeree. A contract is formed with each bid, and the seller may not withdraw the property once any legitimate bid has been submitted, but is absolutely committed to the sale once the bid has been entered.

Washburn, 37 P.3d at 467(emphasis added). Finally:

Apart from statute, it would seem that it is a strong inference of fact that the auctioneer merely invites offers, and that he might make himself the offeror by using language appropriate to the purpose, that is, by using language which, fairly interpreted, amounts to a promise on his part to sell to any person who shall make the highest bid. The announcement that he will sell without reserve, made in any form of words, would justify this interpretation. With reference to the sale of goods, it has been enacted that such an announcement binds the auctioneer, though the bidder may withdraw his offer at any time prior to the fall of the hammer.” (Emphasis supplied.)

Pitchfork, 615 P.2d 541 at 550, citing Williston on Contracts, Third Edition s 29, pp. 76-77, entitled, “Formation of Contract at Auction” (emphasis added). The court in *Pyles* defined an auction that had been advertised as an “absolute” auction to be without reserve. *Id.* 85, 42 The court in *Pitchfork*, 615 P.2d at 548, also found an auction that had been advertised as “absolute” to be one that was without reserve.

The distinction makes a difference in the timing of the formation of the contract between the auctioneer and the bidder, but, a contract is formed in both instances with the high bidder.

“In an auction held “with reserve,” an auctioneer's bringing a piece of property up for bid is an invitation to make a contract, and is not an offer to contract.” *Pyles*, 109 Md. App. at 81-82, 674 A.2d at 41-42, citing 7 Am.Jur.2d § 17; see *Ferrero Constr. v. Dennis Rourke Corp.*, 311 Md. 560, 578, 536 A.2d 1137 (1988) (stating that in contract law an invitation to submit an offer is not itself an offer). Instead, “the contract is formulated by the offer of the bidder and the acceptance of the seller . . .” and “the bidder is deemed to be the party making the offer, while the auctioneer (as agent for the seller), is the offeree with authority to either accept the bid or reject it.” *Dry Creek*, 908 P.2d at 402, citing *Pitchfork*, 615 P.2d at 548-549.

By contrast, “in an absolute auction, or an auction held without reserve, mutual contingent assent is achieved when an offer is made.” *Pitchfork*, 615 P.2d at 548-549.

In the no reserves type of sale, which is the kind of sale with which we are here concerned, the legal relationship as between the seller and bidder is reversed. In the no-reserves sale, the seller becomes the offeror and the bidder the offeree by reason of a collateral contract theory which will be discussed in detail, *infra*. This role-switching exercise results in a significant readjustment of rights and obligations between the parties. For example, in the no-reserves auction, the contract is consummated with each bid, subject only to a higher bid being received. This is so because the seller makes his offer to sell when he advertises the sale will be a no-reserves sale to the highest bidder. Once the first bid has been received, the only acceptance which forms a binding agreement is the one offered by the highest bidder. In this type of sale, the seller may not withdraw his property once any legitimate bid has been submitted, as he may do at any time before the hammer falls in the with-reserves auction. In the no-reserves situation, the seller is absolutely committed to the sale once a bid has been entered * * *.” *Pitchfork*, 615 P.2d at 548-49 (emphasis added, italics in original).

Id. However, identical to the issue in this case, the court in *Dry Creek* made clear that an auction with a minimum bid is an auction “with reserve,” but, once the minimum bid is reached, if it is then advertised as an “absolute” auction, it then becomes an auction without reserve and the contract is formed at the moment the bidder makes the first bid above the minimum.

In *Dry Creek*, the defendant was auctioning off a large ranch property in 11 separate parcels or as a whole.⁴ *Id.* at 400. The advertisement for the property provided:

Minimum Bid—Absolute Auction: On receiving the announced minimum bid for each offered ranch property, the auction will then move to an absolute sale with the parcels selling to the highest bidders as acknowledged by the auctioneer. The ranch will be offered in 11 separate ranch units as hereafter outlined and also in its entirety. Sellers will accept that bid or combination of bids that make up the highest sales price for the total offering. (Emphasis added.).

Id. Minimum bid was not reached on two parcels, but the minimum bid for the entire property was reached, and the property was sold to the highest bidder for the entire property. *Id.* at 401. Plaintiff, who had bid higher than the minimum on one parcel, filed suit to purchase that parcel under a contract allegedly formed by the auction. *Id.* Plaintiff argued that the advertisement was that the auction was an “absolute” auction:

In this instance, Dry Creek relies upon the advertisement announcing an “absolute auction.” That phrase cannot be taken out of the context of the paragraph quoted above, which announces an auction without reserve only after the condition precedent has been satisfied. That condition precedent was the receipt of the announced minimum bid for each offered parcel of the ranch.

* * *

Dry Creek contends the word “each” in the paragraph on which it relies simply meant that as each individual parcel received a minimum bid, the parcel moved into an absolute sale position, that is, the auction of the parcel became one without reserves. Since Dry Creek submitted the highest bid over the minimum on Parcel 5 prior to the time the auctioneer's hammer fell, Dry Creek insists Harriet Bros. was contractually obligated to sell Parcel 5 to Dry Creek.

Id. at 402. The court, after analyzing the word “each,” held:

We conclude the language in the advertisement which reads, “[o]n receiving the announced minimum bid for each offered ranch property, the auction will then move to an absolute sale with the parcels selling to the highest bidders as acknowledged by the auctioneer,” is grammatically apt to convey the proposition

⁴The sales brochure set for a minimum bid for each individual parcel as well as a minimum bid for the entire property. *Id.* at fn 1.

that a minimum bid must be received for all of the parcels before the auction would move to an absolute sale. The legal effect is that this auction was one with reserves until that condition was satisfied as to every one of the several parcels.

Id. at 403.

The bidding process was somewhat complicated and involved four different rounds of bidding. *Id.* Each round allowed the bidders to either submit a bid or increase a bid on the individual parcels, providing opportunity for all parcels to achieve the minimum bid before the last round, and then bid on the property in its entirety. *Id.* at 401. Therefore, the auction could not move to an absolute auction until the final round of bidding. “The sale was an auction with reserves, at least until the final round was reached.” *Id.* at 403. The minimum bid for the entire property was \$3,870,000 and the high bid was \$3,960,000. *Id.* Therefore, the entire property was sold to the highest bidder. *Id.* However, as every parcel did not obtain the minimum bid, the auction did not convert to an auction without reserves, or an absolute auction with regard to the individual parcels. *Id.* at 404.

The court held that, because the minimum bid was not reached with regard to the one parcel, there was no contract with Plaintiff. However, a contract was formed between the owner of the property and the high bidder for the entire ranch. “**The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer.**” *Id.* at 403 (emphasis in the original), citing *Pitchfork*, 615 P.2d at 547. See also *Love*, 873 F.Supp. at 567-568 and fn 2 (same circumstances concurring that where a minimum bid at an auction was reached, the auction became one “without reserve.”)

In the instant case, Petitioner admitted that the auction was an “absolute auction,” after the condition precedent, the minimum bid of \$200,000.00, was reached.

- Q. Now, on this advertisement it says, Absolute Sale, Minimum Opening Bid. What does the term absolute sale mean?
- A. It becomes – \$200,000 is the – the owner has the right to refuse or reject the bid. At \$200,000 he accepts the bid as the minimum bid of acceptance.
- Q. So once the minimum bidf has been reached or given then it's going to be sold?
- A. Whoever bids last owns the land.

(Lyon Dep., p. 13, App. No. 81). Even if the minimum bid requirement made it an auction with reserve, as long as the minimum bid was hit, it then became an auction without reserve, as every case cited by Petitioner defines an absolute auction as an auction without reserve. After that minimum bid was reached, the property owner was obligated to sell to the highest bidder. Thus, under the cases cited above, this was ultimately an auction “without reserve” and “the contract is consummated with each bid, subject only to a higher bid being received.” *Pitchfork*, 615 P.2d at 548–49. And, in fact, this auction opened at the minimum bid of \$200,000.

However, even if this could be considered an auction “with reserve,” there is no dispute that Respondent was the high bidder and that his bid was accepted by Petitioner. Therefore, the contract was formed when Respondent’s bid was accepted. *Dry Creek*, 908 P.2d at 404. So, in either scenario, a contract was formed between Respondent and Petitioner. Indeed, the materials announced that Petitioner would accept no bid under the minimum required bid of \$200,000.00 to start the bidding on the real estate and that was the opening bid.

5. There is legal precedent in West Virginia that would find this contract to be a unilateral contract.

Although this case involves an auction, which appears to have specific legal precedent in other jurisdictions, there is no legal precedent directly on point in West Virginia. However, there

is authority from our West Virginia Supreme Court that the conduct between Respondent and Petitioner constituted a unilateral contract and that Petitioner breached that contract.

There are different types of contracts, including “unilateral” contracts. A unilateral contract is one “‘where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise.’ *Cook v. Heck's Inc.*, 176 W.Va. 368, 373, 342 S.E.2d 453, 458 (1986).” *Citizens Telecommunications Company of West Virginia v. Sheridan*, 239 W.Va. 67, 73, 799 S.E.2d 144, 150 (2017). The party may accept the unilateral contract “‘by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror.’ *First Nat'l Bank v. Marietta Mfg. Co.*, 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967).” *Id.* See also *Warden v. Bank of Mingo, et al.*, 176 W.Va. 60, 62, 341 S.E.2d 679, 680 (1985).

In the instant matter, a clear, unambiguous unilateral written contract was formed. Petitioner made a promissory offer that only qualified bidders who met the terms and conditions of the sale would be able to bid on the real estate, “a definite and specific proposal presented by one party to another party.” Respondent accepted the terms by his conduct, providing the 10% deposit and the bank letter of credit in order to become a qualified bidder. Petitioner committed to Respondent to allow only qualified bidders to bid on the real estate and Respondent provided the deposit and letter of credit, thereby properly bidding on the real estate. Furthermore, although Petitioner may assert that the contract was modified by the existence of “permanent” or “privileged” bidders, there was no effective modification of the original contract and this assertion must fail.

A unilateral contract, and modification of that contract, was extensively discussed *Citizens*. In that matter, Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia, Frontier West Virginia, Inc. (hereinafter “Frontier”), offered internet services to customers through advertising. *Citizens*, 239 W.Va. at 69, 799 S.E.2d at 146. The terms and conditions for the internet service were available on Frontier’s website, and, by subscribing to the service, the customer agreed to such terms and conditions. *Id.* “Frontier presented its Terms and Conditions as a condition of providing Internet service to customers, and Frontier's customers accepted those Terms and Conditions by using and paying for that Internet service, forming a unilateral contract.” *Id.* at 73, 799 S.E.2d at 150.

Again, the essential facts underlying this case are undisputed. The Defendant and Respondent entered into a unilateral written contract regarding the sale of the real estate, where the terms and conditions were clear and unambiguous in the advertisements. “Absolute Sale, Minimum Opening Bid, \$200K (10% Deposit Required to Bid).” In addition, the Terms and Conditions required bidders to produce a current “Bank Letter of Guarantee.” *Id.* As in *Citizens*, “[s]uch advertisements clearly aim to entice customers to sign up for Internet service,” and similar to the promises of job security in employee handbooks, the advertisement herein enticed Plaintiff to bid on the real estate. That was the offer from Petitioner.

Respondent accepted the offer by taking the action necessary to become a qualified bidder at the auction. *Citizens* analyzes the situation in this manner: “Frontier presented its Terms and Conditions as a condition of providing Internet service to customers, and Frontier's customers accepted those Terms and Conditions by using and paying for that Internet service, forming a unilateral contract.” *Id.* To use this same analysis in the case presently before the Court, it

would be: Petitioner presented its terms and conditions of the auction (through its advertisement) of allowing someone to bid in the auction, and Petitioner's customers (Respondent) accepted those terms and conditions by getting the bank letter of credit, etc., forming a unilateral contract. Part of that unilateral contract was to only allow qualified bidders to bid. Petitioner breached that unilateral contract by allowing Lerch to bid up the price of this real estate. There has been no evidence presented that Lerch was a qualified bidder.

In this matter, a contract was formed between Respondent and Petitioner and there was no effective modification of the written contract.

A party breaches a contract when [he] fails to do something that [he] is obligated by the contract to do or does something which [he] has contracted not to do. A breach of contract is material if it deprives the other party of a substantial benefit that [he] reasonably expected to receive under the terms of a contract.

W. Va. P.J.I. §1111 Contracts, citing *Kesner v. Lancaster*, 180 W.Va. 607 378 S.E.2d 649 (1989); *Emerson Shoe Co. v. Neely*, 99 W.Va. 657 129 S.E. 718 (1925); *J.W. Ellison, Son & Co. v. Flat Top Grocery Co.*, 69 W.Va. 380 71 S.E. 391 (1911). When Respondent permitted an unqualified bidder to bid, it materially breached the contract, causing Respondent to pay an additional \$65,000.00 for the property, as well as additional fees, that he would not otherwise had to pay.

Q. If Kurt Lerch was not qualified to bid on the property, meaning Mr. Leach was the only bidder, what would the selling price have been?

A. The price would have been \$200,000.

(Lyon Depo., p. 34, App. No. 81). Because the written contract was clear and unambiguous, Respondent was entitled to have that written instrument enforced according to its plain and

unambiguous language and the lower court's grant of summary judgment to Respondent should be affirmed.

6. The alleged conduct of Respondent regarding bid restriction, although denied by Respondent, is nonetheless irrelevant to the issues in this matter.

Once again, Petitioner has failed to establish any relevance of the allegations against Respondent regarding "bid restriction" and the issues involved herein. Indeed, the cases cited by Petitioner are inapposite to its argument. *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987), and *Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia*, 200 W.Va. 685, 490 S.E.2d 772 (1997) both are appeals involving procedural issues in the granting or denying of a summary judgment motion. There is absolutely no support in either case for the argument Petitioner is attempting to make regarding whether Respondent's alleged conduct in the auction precludes summary judgment for him on the issue of breach of contract.

Notwithstanding the lack of legal precedent for the argument, the assertion that Respondent offered Mr. Lerch \$5,000.00, although vehemently denied by Respondent, is no more than a red herring, as the conduct between Respondent and a third party is not relevant to the contract between Respondent and Petitioner.⁵ Petitioner has failed to identify how this conduct would affect the contract between Respondent and Petitioner. The critical point is that the alleged conduct did not, in any way, affect the auction, as Mr. Lerch and Respondent both engaged in bidding. Therefore, it does not invalidate the contract between Respondent and

⁵Petitioner's brief only addresses this issue in one statement, with a string of citations following. Therefore, Respondent will only briefly address it as well, but refer this Court to Section 3 of the *Plaintiff's Reply to Defendant Alex Lyon & Son, Sales Managers & Auctioneer's Inc.'s Response, Contra, to the Motion for Summary Judgment and Response to Defendant Alex Lyon & Son, Sales Managers & Auctioneer's Inc.'s Motion for Summary Judgment*. (App. No. 348-352).

Petitioner. Furthermore, the only effect the alleged conduct would have, if it had been successful, would be to invalidate the contract of sale of the land between Respondent and Mr. Coulson.

Generally, any act of the auctioneer, or of the party selling, or of third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes competition and stifles or chills the sale, is contrary to public policy and vitiates the sale. Thus, a sale will be set aside where a person, desirous of purchasing, prevents others by his improper conduct from bidding against him; but a mere attempt of a purchaser to prevent another person from bidding will not render the sale invalid, if such attempt has not been successful.

Love at 571.7A C.J.S. Auction & Auctioneers § 14 (1980). Thus, regardless of whether Respondent engaged in this conduct, which, again, he denies, it is irrelevant to the issues in the case.

Finally, the subject of Respondent failing to object to Lerch's first bid is irrelevant to the issues in this matter. Respondent did not accept Mr. Lerch as a qualified bidder, but had no time to object during the bidding, as it lasted about 30 seconds. However, Respondent did, in fact, object to allowing Mr. Lerch to bid. After the bidding concluded, Respondent had a conversation with Rick Coulson, the owner of the property, objecting to Mr. Lerch's bids. He further objected in writing to Petitioner on the same day. If he had walked away from the bidding, he would have had no standing to object to the auction as he would not have been the high bidder. Thus, he bid on the property and reserved his rights under the contract formed by the advertising material and the auction.

CONCLUSION

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” West Virginia Rules of Civil Procedure 56(c). Petitioner has admitted every material fact necessary for summary judgment in Respondent’s favor, including that he failed to adhere the terms and conditions of the written advertisements, there was no modification of those terms and conditions to justify his failure, and that it was an “absolute” or “without reserve” auction. These facts provide the basis, under relevant law in any jurisdiction, to establish a contract was formed between Respondent and Petitioner and that Petitioner breached that contract, causing Respondent damages.

Petitioner further, and once again, failed to adequately address how any conduct between Respondent and a third party is relevant to the contract between Respondent and Petitioner. And, again, the cases cited in his brief fail to address, let alone support, any argument that the alleged conduct had any effect on the contract formed between Respondent and Petitioner. However, even if the conduct occurred, any bid restriction was unsuccessful, as both parties bid. There is no legal consequence for any alleged attempt. Therefore, the Order Granting Plaintiff’s Motion for Summary Judgment and deny Defendant’s Motion for Summary Judgment should be affirmed.


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