IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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	*	
Plaintiff,	*	
	*	
v.	*	CIVIL ACTION FILE
	*	NO. 2012CV223874
PATIENCE AJUZIE,	*	
	*	
Defendant.	*	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AND MOTION FOR ATTORNEY'S FEES[1] AND PLAINTIFF'S REQUEST FOR HEARING

I. SUMMARY

Georgia law is crystal-clear on this point: **"To constitute a contract, the offer must be accepted unequivocally and without variance of any sort."** *McReynolds v. Krebs*, 290 Ga. 850, 853, 725 S.E.2d 584, 588 (2012) reconsideration denied (Apr. 11, 2012) (emphasis added); *Frickey v. Jones*, 280 Ga. 573, 574, 630 S.E.2d 374, 376 (2006). If an insurer's response to an offer of settlement does not satisfy both conditions—i.e., it does not accept the plaintiff's offer "unequivocally" and "without variance of any sort"—the response constitutes a counteroffer, not an acceptance. *Torres v. Elkin*, 317 Ga. App. 135, 141, 730 S.E.2d 518, 523 (2012) (reversing trial court), reconsideration denied (July 26, 2012), cert. denied (Jan. 7, 2013).

[1] The title of Defendant's motion indicates that Defendant is seeking attorney's fees. However, Defendant makes no actual argument that fees are appropriate, and does not refer to attorney's fees except in the title. Therefore, this Response does not address fees in detail. In short, however, because Defendant's motion lacks merit, no fees should be awarded to Defendant. If Defendant's reference to "Attorney's Fees" in the title was not inadvertent, Plaintiff requests an opportunity to address any future argument Defendant makes on this issue.

State Farm's letter of July 30, 2012 satisfied neither condition. *See* State Farm's 07/30/12 letter (Ex. 1). First, the letter did not constitute an "unequivocal" acceptance because **State Farm labeled it an "offer,"** not an acceptance. Second, the letter did not accept "without variance of any sort" because in requiring Plaintiff to assume responsibility for a wider range of liabilities than Plaintiff had offered to assume, **the letter imposed new substantive conditions.** Because State Farm's 07/30/12 letter was neither "unequivocal" nor "without variance of any sort," it constituted a counteroffer.

Making a counteroffer "terminate[s] the power of acceptance." *Lamb v. Decatur Fed. Sav. & Loan Ass'n*, 201 Ga. App. 583, 585-86, 411 S.E.2d 527, 529-30 (1991). In other words, when a party makes a counteroffer, the counteroffer "act[s] to reject immediately and nullify the original offer." *Id.* A party cannot make a counteroffer, and then if the counteroffer is not accepted, "unilaterally breathe life into the then non-existing original offer" and accept it. *Id*. Because State Farm's 07/30/12 letter constituted a counteroffer, it "reject[ed]" and "nullif[ied]" Plaintiff's original offer, terminating State Farm's power of acceptance. Subsequent communications from State Farm could not accept Plaintiff's offer because "there was no offer left for [Defendant] to accept." *Costello Indus., Inc. v. Eagle Grooving, Inc.*, 308 Ga. App. 254, 257, 707 S.E.2d 168, 170 (2011).

Because neither State Farm's 07/30/12 letter nor any other communication accepted Plaintiff's offer of settlement, there is no contract of settlement. Plaintiff's provision of Butler, Wooten & Fryhofer LLP's tax identification number to Defendant does not change this analysis. The Court should deny Defendant's motion.

II. FACTS

On July 10, 2012, Plaintiff made a time-limited demand for Defendant's policy limits of $25,000. *See* 07/10/12 offer (Ex. 2).[2] In addition to specifying the amount of payment, Plaintiff's offer specified the way liens would be handled—Plaintiff wrote, " will bear responsibility for all valid and enforceable medical liens and will indemnify State Farm as specified [in the enclosed release]." *Id.* at 3. Plaintiff enclosed a release that set forth additional details regarding the handling of liens, and Plaintiff expressly made that release a part of the offer by writing that the enclosures included "a limited release, which will execute in return for State Farm tendering the policy limits as specified in this letter." *Id.* at 1.

On July 25, 2012, State Farm requested contact information for Bruce Guillory, a witness who had signed an affidavit stating that Defendant was at fault for causing the collision. Plaintiff had already provided the affidavit as an additional enclosure to the 07/10/12 offer, and on the same day as State Farm's request, Plaintiff provided Mr. Guillory's address and telephone number. 07/25/12 letter (Ex. 3).

On July 30, 2012, State Farm responded by letter to Plaintiff's offer. (Ex. 1). As noted above, State Farm expressly labeled its 07/30/12 letter an "offer." This 07/30/12 letter differed from Plaintiff's 07/10/12 offer in substantive ways, including its handling of liens and other potential debts. For instance, whereas Plaintiff's offer had specified that Plaintiff would assume responsibility only for "*valid and enforceable medical* liens," State Farm's 07/30/12 letter stated that Plaintiff would assume responsibility for "*any* liens, assignments, or statutory rights of recovery." The substance of State Farm's 07/30/12 letter is pasted below.

[2] The exhibit includes Plaintiff's demand letter and all accompanying enclosures.

Dear Mr. Butler:

We received your July 10, 2012 time limit demand for your client, We have concluded the evaluation of your client's claim resulting from this loss. Based on the documentation provided, State Farm® is willing to settle your client's claim for $25,000.00. An attorney from Waldon, Castilla, Hiestand & Prout will be handling the settlement documents and payment..

This settlement is inclusive of all damages, known and unknown, and any liens, assignments or statutory rights of recovery.

Please contact us once you have had an opportunity to review this offer.

Sincerely,

Id. (highlights added).

The next two days included several phone calls and letters. On July 31, 2012, Defense counsel Rakhi McNeill called the Plaintiff's counsel Jeb Butler. Over the phone, Ms. McNeill expressed concerns about the release that was part of Plaintiff's offer, and Mr. Butler requested that Ms. McNeill put those concerns in writing. Butler Affidavit (Ex. 4). During this call, Ms. McNeill and Mr. Butler did not discuss whether State Farm's 07/30/12 letter constituted a counteroffer or an acceptance, and at no point did Mr. Butler assent to Defendant's current position that the 07/30/12 letter constituted an acceptance. *Id.* In the same call, Ms. McNeill asked Mr. Butler to provide Butler, Wooten & Fryhofer's tax identification number, which Mr. Butler agreed to provide. *Id.* Shortly thereafter, Mr. Butler sent an email confirming the conversation. 07/31/12 email (Ex. 5). Defendant responded to the email with a letter stating (erroneously) that "[y]our office confirmed that on July 30, 2012 State Farm accepted your July 10, 2012 policy limits demand" and offering for the first time to use the release that Plaintiff had enclosed in the original demand. 07/31/12 letter (Ex. 6). On the next day, August 1, 2013, Plaintiff responded to that letter as follows:

> This responds to your letter of July 31, 2012.
>
> I am compelled to correct a misstatement in your letter. Your letter states that "[y]our office [i.e., the office of Butler, Wooten & Fryhofer LLP] confirmed that on July 30, 2012 State Farm accepted your July 10, 2012 policy limits demand in exchange for a limited liability release."
>
> That statement is incorrect. Although this office did *receive* State Farm's letter of July 30, 2012, and did confirm *receipt* of the letter, this office did not—and does not—agree or "confirm[]" that State Farm's letter *constituted an acceptance* of the above-referenced policy limits demand. To the contrary, the express terms of State Farm's letter indicate that it is an "offer," not an acceptance.
>
> If anything in this letter is unclear, please let me know in writing.

08/01/12 letter (Ex. 7) (highlights added).

On August 2, 2013, Defendant sent Plaintiff a check in the amount of $25,000. 08/02/12 letter (Ex. 8). The next day, Plaintiff returned the check to Defendant with a letter noting that no settlement had been reached, that State Farm's letter of 07/30/12 constituted a counteroffer, and that such a counteroffer terminated the power of acceptance. 08/03/13 letter (Ex. 9).

III. ARGUMENT

In order to constitute an "acceptance," an insurer's response to a plaintiff's demand must meet two conditions. First, it must accept the plaintiff's offer "unequivocally," and second, it must accept the offer "without variance of any sort." *McReynolds*, 290 Ga. at 853, 725 S.E.2d at 588. This is clear law—both the Georgia Supreme Court and the Court of Appeals have so stated. *Id.*; *Frickey*, 280 Ga. at 574, 630 S.E.2d at 376; *Torres*, 317 Ga. App. at 141, 730 S.E.2d at 523. Even the cases cited by Defendant recite these two conditions for acceptance. *Turner v. Williamson*, 321 Ga. App. 209, 212, 738 S.E.2d 712, 715 (2013) ("To constitute a contract, the offer must be accepted unequivocally and without variance of any sort.").

Neither condition is met here, as is explained more fully below. Because State Farm's 07/30/12 letter was neither an "unequivocal" acceptance nor an acceptance "without variance of any sort," it constituted a counteroffer. Because State Farm's 07/30/12 letter constituted a counteroffer, no subsequent communication from State Farm could "accept" the original offer that the counteroffer rejected. *Lamb*, 201 Ga. App. at 585, 411 S.E.2d at 529. Defendant's argument regarding Plaintiff's counsel's tax identification number does not change that analysis.

A. State Farm's 07/30/12 letter was not "unequivocal."

If an insurer's response to an offer is anything less than "unequivocal," then it is not an acceptance. *McReynolds*, 290 Ga. at 853, 725 S.E.2d at 588. To be unequivocal, a communication must be "[u]nambiguous; clear; free from uncertainty." Black's Law Dictionary (9th ed. 2009).

Here, State Farm's 07/30/12 letter expressly stated that it constituted an "offer." Nowhere did the letter indicate that it constituted an acceptance. Therefore, it was far from "unambiguous," "clear," or "free from doubt" that the letter constituted an acceptance, as Defendant now contends. Because the letter did not accept unequivocally, it constituted a counteroffer, not an acceptance, under Georgia law.

The Court's analysis could stop here. On this basis alone, Defendant's motion should be denied.

B. State Farm's 07/30/12 letter was not "without variance of any sort."

If a response to an offer "veri[es]"from the offer, then the response constitutes a counteroffer. *McReynolds*, 290 Ga. at 853, 725 S.E.2d at 588. Here, State Farm's 07/30/12 offer varied from Plaintiff's 07/10/12 offer in significant ways. For instance, in Plaintiff's offer, Plaintiff agreed to assume responsibility for "all *valid and enforceable medical* liens." 07/10/12

offer at 3 (Ex. 2) (emphasis added). That italicized limitation is important, and Plaintiff's decision to make it a part of his offer was deliberate. Plaintiff **did not offer** to assume responsibility for invalid or unenforceable liens, assignments, or statutory rights of recovery (whether they were filed in the wrong amount, were billed at the wrong rate, were not properly perfected pursuant to O.C.G.A. § 44-14-471, or were unenforceable for some other reason). The reason is that if Plaintiff had agreed to bear responsibility for "any" liens, without regard to their enforceability, could have become contractually obligated to pay nonmeritorious liens or other claims asserted against State Farm that State Farm would have little incentive to defend (since Plaintiff was obligated to pay them). In contrast to Plaintiff's offer, State Farm's 07/30/12 letter unilaterally announced that would be responsible for "**any** liens, assignments, or statutory rights of recovery." 07/30/12 letter (emphasis added). Because State Farm's announcement varied from Plaintiff's offer, State Farm's letter constituted a counteroffer.

State Farm's 07/30/12 letter also varied from Plaintiff's 07/10/12 offer in other ways. Plaintiff's offer expressly incorporated a release that "appl[ied] to all unknown and known injuries and damages resulting from said accident, casualty or event, as well as those now disclosed, *except to the extent other insurance coverage is available which covers such claims*." 07/10/12 offer (emphasis added). In other words, it was a limited release. State Farm's response announced that "[t]his settlement is inclusive of *all* damages, known and unknown." 07/30/12 letter (emphasis added). In other words, it demanded a full release. The distinction between a limited release and a full one is important, and this "variance" between the offer and response is another reason that State Farm's letter constituted a counteroffer. *See McReynolds*, 290 Ga. at 853, 725 S.E.2d at 588.

The Georgia Supreme Court has established that a letter like the 07/30/12 letter constitutes a counteroffer. In *McReynolds v. Krebs*, the plaintiff made a time-limited demand for settlement, and the insurer timely responded via letter that it "agree[d] to settle this matter for the $25,000 per person limit." 290 Ga. at 853, 725 S.E.2d at 588. In the same letter, the insurance adjuster requested that the plaintiff's counsel "call me in order to discuss how the lien(s) . . . will be resolved as part of this settlement." *Id.* The Supreme Court held that because the adjuster's letter requested a call to discuss resolving liens "as part of this settlement," the adjuster's letter contained an additional settlement term and constituted a counteroffer. *Id.* at 854. Here, State Farm has deviated even further from original offer than the insurer in *McReynolds* did. Whereas in *McReynolds*, the insurer merely sought to discuss how liens would be resolved, here, State Farm unilaterally announced that the settlement "is inclusive of . . . any liens, assignments or statutory rights of recovery." 07/30/12 letter. Because a *request* to discuss resolving liens "as a part of this settlement" constituted a counteroffer, State Farm's *unilateral announcement* that "[t]his settlement is inclusive of . . . any liens, assignments or statutory rights of recovery" must also constitute a counteroffer.

The conditions that State Farm unilaterally announced were not merely "precatory." "Language is properly characterized as precatory when its ordinary significance imports entreaty, recommendation, or expectation rather than any mandatory direction." *Torres*, 317 Ga. App. at 141, 730 S.E.2d at 523. In other words, while a *request* may be "precatory," a *statement* is mandatory. For instance, in a case cited by Defendant, an insurer's request that the plaintiff "please" sign a certain release was considered "precatory" rather than mandatory. *Turner*, 321 Ga. App. at 214, 738 S.E.2d at 716. In *Torres v. Elkin*, however, when an insurer responded to a plaintiff's offer of settlement by purporting to accept and writing, "I trust that your office will

satisfy any liens arising out of this matter," the Court of Appeals held that the insurer's statement was mandatory and that the insurer's letter constituted a counteroffer. *Torres*, 317 Ga. App. at 142, 730 S.E.2d at 524. Here, State Farm's 07/30/12 letter unilaterally announced that "[t]his settlement is inclusive of all damages, known and unknown, and any liens, assignments, or statutory rights of recovery." 07/30/12 letter (emphasis added). That is a statement, not a request. Therefore, the 07/3012 letter constituted a counteroffer. *Id.*

Defendant's reliance upon *Turner v. Williamson* is unavialing. 321 Ga. App. 209 (2013). That case is distinguishable for three reasons. First, the letter in *Turner* that the court deemed an "acceptance" did not expressly identify itself as an "offer," as does State Farm's 07/30/12 letter. (In fact, the undersigned has found no reported decision in which a Georgia court held that an insurer's letter labeled "offer" actually constituted an "acceptance.") Second, in *Turner*, the purported variations between the plaintiff's demand and the insurer's response arose from the release that the insurer sent to the plaintiff—which the court found significant because "the mere inclusion of *a release form* unacceptable to the plaintiff does not alter the fact that a meeting of the minds had occurred." *Id.* at 213 (emphasis added). Here, in contrast, the additional conditions that State Farm sought to impose are contained in State Farm's letter-response itself, not merely an enclosed release that could be construed as "precatory." Third, the court in *Turner* held that the insurer's request for the plaintiff to sign the release was "precatory" because the insurer merely *requested* that the plaintiff "please" sign it. *Id.* at 214. Here, instead of making such a request, State Farm *unilaterally announced* the additional terms of settlement. *See* 07/30/12 letter ("This settlement is inclusive of all damages, known and unknown . . ."). Such unilateral announcements are not precatory.[3]

[3] Most cases where an insurer's response to a demand was deemed an acceptance rather than a counteroffer are distinguishable for the same reasons as *Turner*. Although Defendant did not cite the following cases in her initial

C. State Farm's 07/30/12 letter terminated the power of acceptance.

State Farm's letter of 07/30/12 did not constitute an acceptance, and neither did any letter that followed. That is because pursuant to black-letter law, "[a] counter-offer operates to reject the offer and to terminate the power of acceptance." *Duval & Co. v. Malcom,* 233 Ga. 784, 787, 214 S.E.2d 356, 358 (1975). "An offer, when once rejected, loses its legal force and cannot be accepted thereafter so as to create a binding agreement unless it is renewed after the rejection by the original offerer. No revocation of the offer is, therefore, necessary to prevent its subsequent acceptance after it has once been rejected." *Lamb,* 201 Ga. App. at 585-86, 411 S.E.2d at 529-30. "After a counteroffer act[s] to reject immediately and nullify the original offer, any subsequent performance on the part of [the offeree] . . . could not unilaterally breathe life into the then non-existing original offer." *Id.*; *accord Johnson v. DeKalb Cnty.*, 314 Ga. App. 790, 793, 726 S.E.2d 102, 106 (2012). Because State Farm's 07/30/12 letter constituted a counteroffer, no subsequent communication could accept Plaintiff's 07/10/12 offer.

The fact that Plaintiff's offer was time-limited does not change this well-established principle. Like any other offer, a time-limited offer may be nullified by counteroffer, rejection, or withdrawal. *Costello Indus.*, 308 Ga. App. at 257, 707 S.E.2d at 170 (counteroffer operated to reject a time-limited offer even if counteroffer was made "prior to the expiration of [the] original

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brief, *Newton v. Ragland* is distinguishable because (1) the insurer's response was not labeled "offer," (2) the purported variance stemmed from language in a proposed release sent by the insurer, and (3) the insurer's release form was precatory because the insurer merely requested that the plaintiff "please" use it. No. A13A1541, 2013 WL 6052695 (Ga. App. Nov. 18, 2013). *Sherman v. Dickey* is distinguishable because (1) the insurer's response was not labeled "offer," (2) the purported variance stemmed from language in a proposed release sent by the insurer, and (3) the insurer's release form was precatory because the insurer "repeatedly invited changes to the proposed release." 322 Ga. App. 228, 232 (2013). *Hansen v. Doan* is distinguishable because (1) the insurer's response was not labeled "offer," (2) the purported variance stemmed from language in a proposed release sent by the insurer, and (3) the insurer's release form was precatory because the insurer offered to "tailor [the release] to fit your needs." 320 Ga. App. 609, 610 (2013). Here, in contrast, (1) State Farm's response was labeled an "offer," (2) the variance stemmed from State Farm's responsive letter, not a precatory release form, and (3) State Farm's unilateral announcement regarding the terms of settlement was mandatory, not precatory. *See* 07/30/12 letter.

offer"). The fact that a time-limited offer has an additional means of nullification (i.e., expiration) does not mean that the usual means of nullification (e.g., counteroffer, rejection, or withdrawal) no longer apply. A counteroffer nullifies a time-limited offer just like it would nullify an offer that did not contain an express time limit—even if the expiration date has not yet arrived.

Here, Plaintiff's offer stated that "[a]t the end of [a] twenty-day period, this offer will stand withdrawn." 07/10/12 offer at 3. The offer did ***not*** state that it would remain open for twenty days regardless of what action State Farm took. Instead, the offer merely set a date by which it would expire if State Farm did nothing.[4] Like any other offer, it could be nullified by counteroffer, rejection, or withdrawal. *Id.* Therefore, after State Farm's 07/30/12 counteroffer, Plaintiff's offer was nullified and State Farm no longer had the power to accept it.

D. Mr. Butler's email containing his firm's tax identification number did not convert State Farm's counteroffer into an acceptance.

Mr. Butler's compliance with Ms. McNeill's request for his firm's tax identification number did not change the form, substance, or legal significance of State Farm's 07/30/12 letter. Mr. Butler provided the number because Ms. McNeill had asked for it, providing the number seemed like the courteous thing to do, and Mr. Butler failed to see any harm that could come from it. Defendant now argues that by providing that tax identification number, Plaintiff waived the right to recognize State Farm's 07/30/12 letter as a counteroffer. This argument lacks merit. "[B]ecause waiver is not favored under the law, the evidence relied upon to prove a waiver must be so clearly indicative of an intent to relinquish a then known particular right or benefit as to

[4] In this regard, Defendant's description of Plaintiff's offer is not strictly accurate. Defendant states that "[t]he demand . . . stated the demand would remain open for twenty (20) days from State Farm's receipt of the demand." Def.'s Br. at 2. Actually, Plaintiff's demand did not promise to *stay open* for any length of time, but only set a date by which it would *expire*. 07/10/12 offer (Ex. 2).

exclude any other reasonable explanation." *Vratsinas Const. Co. v. Triad Drywall, LLC*, 321 Ga. App. 451, 454, 739 S.E.2d 493, 496 (2013). Here, because Plaintiff sent letters on 08/01/12 and 08/03/12 expressly stating that State Farm's 07/30/12 letter constituted a counteroffer, and because Plaintiff returned the check that Defendant sent within a single day, Plaintiff's conduct has not been "prove[d]" to be "so clearly indicative of an intent to relinquish a then known particular right or benefit as to exclude any other reasonable explanation." (Ex. 7, 9). To the contrary, as Plaintiff's letters make clear, Plaintiff has consistently maintained that the 07/30/12 letter constituted a counteroffer. Therefore, waiver did not occur. The case that Defendant cites—*Arnold v. Neal*, 320 Ga. App. 289, 738 S.E.2d 707 (2013)—is simply inapposite.

IV. REQUEST FOR HEARING

Plaintiff requests a hearing on this motion.