FILED
NOV 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITY OF DAVENPORT, a Municipal Corporation,

Plaintiff-Appellant,

vs.

A. M. BENNETT,

Defendant-Appellee.

Filed November 30, 1983

3-298
2-69564

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Plaintiff city appeals from the district court's order sustaining defendant's special appearance in this breach of contract action. AFFIRMED.

James L. Abshier, Davenport Corporation Counsel, for plaintiff-appellant.

Edward B. Harris of Nagle, Blair & Harris, Davenport, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

DONIELSON, J.

Plaintiff city appeals from the district court's order sustaining defendant's special appearance in this breach of contract action. Plaintiff alleges the court erred in holding: 1) that the parties' transactions did not lead to the existence of a binding contract, and 2) that, in any event, there were insufficient minimum contacts between defendant, a North Carolina resident, and Iowa so as to constitutionally justify the court's assumption of jurisdiction over the former. We affirm.

Plaintiff city filed its petition on August 24, 1982. The city advertised for bids for a used snorkel fire truck, located in Davenport, to be sold "as is, where is." Defendant submitted the high bid on the fire truck. A copy of the letter which constituted the bid was attached to the petition; in it, defendant offered to pay $42,559 for the truck, and included this statement: "Price is good and will be paid upon inspection of the Snorkel . . . ." The city council passed a resolution authorizing sale of the fire truck to defendant for the amount bid. This resolution did not refer to the "inspection" statement in defendant's bid.

The city alleged that the advertising for bids, the bid, and the acceptance of the bid created a contract which was breached when defendant refused to pay the bid price and take delivery and that it subsequently sold the fire truck to the second-highest bidder for $22,200, and therefore prayed for damages of $20,359. Defendant, a North Carolina resident, filed a special appearance, alleging that no contract was ever actually formed between the parties, so the provision in the long arm statute, Iowa Code § 617.3, for jurisdiction over foreign corporations when they have entered into a contract "to be performed in whole or in part by either party in Iowa" would not apply.

The court granted the special appearance, holding that the city's advertisement for bids was not an offer, so a contract did not exist until the defendant's bid (treated as an offer) was accepted. The court treated the advertisement for bids

as an invitation to bid. The court then assumed, arguendo, that the advertisement for bids was indeed an offer; under this analysis, however, the bid itself, which did not unconditionally meet the terms of the offer because it was conditioned "upon inspection," was not a sufficient acceptance to create a contract. From this, the court concluded that there was no contract. The essence of the city's issue on appeal is that the court failed to consider the possibility that the bid was indeed an offer and that the council's acceptance of the bid (albeit without mention of the "upon inspection" clause) constituted an acceptance. The court also buttressed the grant of the special appearance with a holding that the defendant had insufficient contacts with the state to constitutionally allow the Iowa court to take jurisdiction. Plaintiff brought this appeal.

When a defendant challenges the court's jurisdiction over his person by special appearance, "plaintiff has the burden to sustain the requisite jurisdiction, but when he establishes a prima facie case the defendant has the burden of producing evidence to rebut that showing." State ex rel. Miller v. Internal Energy Management Corp., 324 N.W.2d 707, 710 (Iowa 1982). In this case, jurisdiction over defendant is asserted to lie by virtue of the Iowa long-arm statute, Iowa Code § 617.3, which reads in relevant part as follows:

> If a nonresident person makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa, . . . such acts shall be deemed to be doing business in Iowa by such person for the purpose of service of process or original notice on such person under this section . . . .

Since plaintiff's action here is based on contract, plaintiff has the burden of proving the existence of a contract. See 17A C.J.S. Contracts § 579 (1963).

We agree with the district court that no binding contract came into existence in this case. One of the prerequisites to a binding contract is that "the parties must manifest a mutual, unequivocal assent to the terms of the contract." McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969). The requisite mutuality is lacking in this case. In response to plaintiff's invitation to bid, defendant offered

to purchase the truck for $42,559 but stated in addition that that price would only be paid "upon inspection" of the truck and its accompanying equipment. Plaintiff's acceptance of that offer, in the form of a motion by the city council, made no reference to the inspection condition; in fact, plaintiff has made no showing that it even considered that condition as part of the "agreement." Since plaintiff did not manifest a "mutual, unequivocal assent" to that condition, no binding contract came into existence. As a result, personal jurisdiction over defendant could not be obtained under the long-arm statute. Defendant's special appearance was properly sustained.

Because of this holding, it is unnecessary to consider the district court's alternative rationale; i.e. defendant did not have sufficient minimum contacts with the State of Iowa to allow a constitutional assumption of personal jurisdiction over him. The district court's order is affirmed.

AFFIRMED.