STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1165

Gary H. Newman,
Appellant,

vs.

Tim Marcus, et al.,
Respondents.

Filed September 16, 2008
Affirmed
Johnson, Judge

Kandiyohi County District Court
File No. 34-CV-06-343

John E. Mack, Mack & Daby, P.A., 26 Main Street, P.O. Box 302, New London, MN 56273 (for appellant)

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Considered and decided by Johnson, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Gary Newman claimed that Tim and Sheri Marcus owed him approximately $45,000 for consulting services that Newman had provided to the Marcuses' dairy farm. Sheri Marcus gave Newman a check in the amount of $15,000 with a notation in the

bottom, left-hand corner that said, "Final Payment Settlement." Newman cashed the check. Newman later sought to collect the balance of the debt that he claimed was owed. The district court found that the parties had entered into an accord and satisfaction. The district court then entered judgment in favor of the Marcuses. We conclude that the district court's finding of an accord and satisfaction is supported by the evidence and consistent with the applicable caselaw and, therefore, affirm.

FACTS

Tim and Sheri Marcus operate a dairy farm in Kandiyohi County. From February 1996 through March 2003, Newman, a veterinarian, performed services related to the nutritional health of the Marcuses' dairy herd. At the beginning of the business relationship, Newman and Tim Marcus entered into an oral agreement providing that Newman's fees would be based on a standard formula using three variables: herd size, quantity of milk produced, and the price of milk. The fee originally was calculated to be $483 per month, but the monthly amount increased to approximately $950 by June 1996.

Starting in September 1996, Tim Marcus began falling behind on his monthly payments. Tim Marcus and Newman later modified the payment arrangement by agreeing that Tim Marcus would pay Newman $500 per month. The Marcuses began making monthly payments in that amount in March 1997. One of the issues at trial was whether the two men agreed that Newman's fees would be capped at $500 per month. Newman testified that he allowed Tim Marcus to "defer part of the payment until [Tim Marcus] could afford" to pay the balance. The Marcuses, on the other hand, testified that $500 per month was to be the entire monthly obligation.

During the seven years in which Newman provided services, the Marcuses failed to make monthly payments on several occasions. But Newman did not actively pursue payment until August 2003, when he sent a letter to Tim and Sheri Marcus, demanding payment of approximately $45,000.

On or about July 1, 2004, in response to Newman's demand, Sheri Marcus sent Newman a check in the amount of $15,000. In the memo area on the front of the check, Sheri Marcus wrote, "Final Payment Settlement." Sheri Marcus mailed the check to Newman along with a four-page letter in which she thanked Newman for his work and recounted the mixed results obtained by the Marcuses' dairy operation. With respect to the amount of money owed, the letter states, "It is hard to put a dollar amount on stuff that you did so we are trying to be fair also." Newman cashed the check. Later, however, Newman told Tim Marcus that the "check didn't mean anything" and attempted to recover the balance of the debt that he claimed was owed. In September 2004, Sheri Marcus sent Newman another check, this time in the amount of $500. Sheri Marcus testified that she did so because Newman was intimidating and demanding.

In June 2006, Newman commenced this action against the Marcuses, alleging that they owed approximately $122,000, with interest. In January 2007, the district court granted the Marcuses partial summary judgment on Newman's claim for interest on the past-due debt and on Newman's claim against Sheri Marcus. In March 2007, the case proceeded to a bench trial against Tim Marcus. Newman sought a judgment of approximately $91,000. In a five-page order and memorandum, the district court found

that the July 1, 2004, check was an accord and satisfaction that bars Newman's claim. Accordingly, the district court entered judgment for the Marcuses. Newman appeals.

D E C I S I O N

Newman argues that the words "Final Payment Settlement" on the check from the Marcuses are insufficient to establish an accord and satisfaction.

> [T]he question of accord and satisfaction is one of fact to be determined by the jury or the court sitting in its stead. The findings of the court are entitled to the same weight as the verdict of a jury, and they will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence."

Bloomer v. Bloomer, 289 Minn. 481, 484, 185 N.W.2d 520, 522 (1971); *see also Webb Bus. Promotions, Inc. v. American Elecs. & Entm't Corp.*, 617 N.W.2d 67, 73 (Minn. 2000).

"An accord is a contract in which a debtor offers a sum of money, or some other stated performance, in exchange for which a creditor promises to accept the performance in lieu of the original debt." *Webb Bus. Promotions, Inc.*, 617 N.W.2d at 72 (citing *Don Kral Inc. v. Lindstrom*, 286 Minn. 37, 39, 173 N.W.2d 921, 923 (1970), and Restatement (Second) of Contracts § 281 (1981)). "The satisfaction is the performance of the accord, generally the acceptance of money, which operates to discharge the debtor's duty as agreed to in the accord." *Webb Bus. Promotions, Inc.*, 617 N.W.2d at 72 (citing *Don Kral Inc.*, 286 Minn. at 39, 173 N.W.2d at 923). Thus, an enforceable accord and satisfaction exists upon proof that

> (1) the party, in good faith, tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or

> an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument.

Webb Bus. Promotions, Inc., 617 N.W.2d at 73 (citing Minn. Stat. § 336.3-311(a)-(b)).

Newman focuses his argument on the second element, which he contends is not satisfied by the words "Final Payment Settlement" on the front of the check because the words are not clear in their intent and are not in a conspicuous location. The district court made a finding that the notation "Final Payment Settlement" in the memo area of the check "was clearly visible and legible." The district court further found, "The statement referred specifically to a settlement between the parties regarding the disputed fee for services." The district court thus concluded, "An Accord and Satisfaction was created at the time Plaintiff cashed the check." This finding is supported by the evidence. When asked at trial to explain her purpose in writing those words on the check, Sheri Marcus testified that she intended to enter into a settlement with Newman when she sent him the $15,000 check. Thus, the district court did not err in finding that an accord and satisfaction was created when Newman cashed the check containing the words "Final Payment Settlement."

In addition, Newman's argument is inconsistent with the applicable caselaw. The words "final payment" and "payment in full" have been held to create an effective accord and satisfaction, even when appearing on the front of a check. In *Winter Wolff & Co. v. Co-op Lead & Chem. Co.*, 261 Minn. 199, 111 N.W.2d 461 (1961), the words "Payment in full to date" appeared on both the front and the back of the check, and an

accompanying transmittal letter called the check a "settlement." *Id.* at 201-02, 111 N.W.2d at 463. The supreme court stated, "With full knowledge of the facts, plaintiff accepted this check and should now be precluded from seeking recovery of more." *Id.* at 209, 111 N.W.2d at 468. Similarly, in *Beck Elec. Constr. Co. v. National Contracting Co.*, 143 Minn. 190, 173 N.W. 413 (1919), a check read, "Pay to William Hart, or order, in payment of contract in full for painting Alexandria hotel $484.37 four hundred eighty four dollars thirty seven cents. If not correct, return, without alteration, stating differences." *Id.* at 192, 173 N.W. at 413. The supreme court deemed that language, which apparently was on the front of the check, to be effective for an accord and satisfaction. *Id.* at 192-93, 173 N.W.2d at 413-14. Likewise, in *T.B.M. Props. v. Arcon Corp.*, 346 N.W.2d 202 (Minn. App. 1984), *review denied* (Minn. Oct. 31, 1984), a check with a notation stating "Final Payment for Rent Owed [landlord] Now or Forever," which was sent to a landlord by a former tenant, was held to be effective for an accord and satisfaction. *Id.* at 203. Each of these three cases was decided before Minnesota's adoption of the U.C.C. in 1992 but is consistent with section 336.3-311. *Webb Bus. Promotions, Inc.*, 617 N.W.2d at 73 & n.4.

Newman cites *Weed v. Commissioner of Revenue*, 550 N.W.2d 285 (Minn. 1996), in which the memo portion of a check stated, "separation." *Id.* at 286. The supreme court held that there was no accord and satisfaction because the check "did not contain any language stating that endorsement acknowledged full payment, satisfaction, or indicating that the check was offered in consideration of any waiver or agreement by Weed." *Id.* at 288-89 (interpreting Minn. Stat. § 336.3-311(b)). The *Weed* case,

however, is of no benefit to Newman because the word "separation" is not nearly as clear as the words "Final Payment Settlement." In addition, the supreme court did not base its conclusion on the fact that "separation" appeared in the memo area of the check but, rather, on the fact that the language used did not indicate that full payment was being tendered. *Id.* at 289.

Newman also contends that an accord and satisfaction does not exist because the words "Final Payment Settlement" were obliterated before the check was cashed. We note that, at trial, Newman claimed to be ignorant of both the notation and the obliteration. The district court simply made a finding that the memo portion of the check "is now defaced," without any additional findings as to how the check became defaced or, more importantly, who defaced it. At oral argument before this court, however, Newman's counsel stated that Newman is the only person who could have obliterated the notation. This court has the original check, and we see that someone attempted (unsuccessfully) to obliterate the words by repeated pen strokes in a metallic light-blue ink that matches the ink with which Newman endorsed the check.

If a creditor receives a check that was sent on the condition that it will be accepted as full payment, he or she either must decline the offer and return the check or accept it pursuant to the condition expressed on it. *T.B.M. Props.*, 346 N.W.2d at 203. "Erasing or scratching out the words" indicating full payment on a check without the other party's knowledge or consent "has no effect." *Id.* Thus, Newman's apparent attempt to eliminate the words "Final Payment Settlement" from the check does not preclude an accord and satisfaction.

At oral argument, Newman also argued, for the first time, that the first element of accord and satisfaction is not satisfied because Tim Marcus did not personally sign the check. But the check itself indicates that it was drawn on a joint account owned by Tim and Sheri Marcus. Furthermore, in light of Newman's earlier demand and Sheri Marcus's four-page letter to Newman, elementary principles of agency law support the conclusion that if the payment was not made jointly, then Sheri Marcus sent the check on behalf of Tim Marcus. *See Wojahn v. Faul*, 242 Minn. 33, 40, 64 N.W.2d 140, 145 (1954) (relying on evidence that husband and wife were joint tenants and that she left farm business matters to him and concluding that "under elementary principles of agency the acts of her husband were binding upon her").

Finally, Newman contends that the finding of an accord and satisfaction is inconsistent with the evidence that Sheri Marcus sent Newman a $500 check two months after sending him the $15,000 check. Newman argues that the second check proves that Tim and Sheri Marcus did not intend for the $15,000 check to be in full satisfaction of the claim. Sheri Marcus testified that she paid an additional $500 to Newman because he was bothering them and she felt intimidated. There was no other evidence about any communication between the Marcuses and Newman regarding the intended purpose or meaning of the second check. "Waiver is the intentional relinquishment of a known right," and a party seeking to prove waiver must establish the other party's intent. *Carlson v. Doran*, 252 Minn. 449, 456, 90 N.W.2d 323, 328 (1958). A court may infer the intention to relinquish or abandon the right from the party's conduct. *Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn. 1977). Here, the evidence shows no more than that

the Marcuses intended to pay Newman an additional $500. The evidence does not show that the Marcuses intended to waive the accord and satisfaction and assume the entire debt sought by Newman. Thus, the district court did not err by not inferring waiver from the Marcuses' conduct.

Newman briefed two additional arguments that we need not reach. First, Newman argued that the district court erred by granting summary judgment to Sheri Marcus on the ground that she did not enter into a contract. But Newman's counsel expressly abandoned that issue at oral argument. Second, Newman argued that the district court erred by holding that Newman could not recover interest on the past-due amounts. But Newman's counsel conceded at oral argument that the issue of interest would be moot if we were to uphold the finding of an accord and satisfaction. Furthermore, the argument concerning interest that Newman included in his brief differs from the argument he made in the district court and, therefore, was not preserved.

In sum, the district court's determination that the parties entered into an accord and satisfaction was not "manifestly and palpably contrary to the evidence," *Bloomer*, 289 Minn. at 484, 185 N.W.2d at 522, and is consistent with the applicable caselaw.

Affirmed.