

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2742

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FARMERS STATE BANK,

PLAINTIFF-RESPONDENT,

v.

WILLIAM P. SKEMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
JOHN A. DAMON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. William Skemp appeals from a summary judgment in favor of Farmers State Bank for \$13,277. He argues that the judgment should have been granted for no more than \$4,000 because the rule of accord and satisfaction discharged the original debt or, in the alternative, because he and the

bank had modified the guarantee contract between them. We reject these claims and affirm.

¶2 Skemp guaranteed a loan made by Ricky Booher from Farmers State Bank. When Booher failed to make payments, Farmers State Bank informed Skemp that he was personally liable for the balance. After negotiations, Farmers State Bank wrote to Skemp in March 1996, stating that it would accept Skemp's offer to pay \$4,000 in settlement of the claim. Skemp never made payment. Farmers State Bank brought an action to recover on the loan in February 1998. The trial court granted summary judgment in favor of the bank awarding it a total of \$13,227.

¶3 Summary judgment must be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (1997-98).¹ The trial court first looks to the complaint to determine whether it states a cause of action and, if so, whether the answer states a defense. *See Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If the complaint states a cause of action and the answer states a defense, the trial court looks to the moving party's affidavits to see if the evidentiary facts alleged state a *prima facie* claim for relief. *See id.* If they do, the trial court turns to the affidavits in opposition to the motion to see whether they raise material factual issues. *See id.* If no material factual issues are raised, the legal issues presented should be decided by summary judgment. *See Grams v. Boss*, 97 Wis. 2d 332, 337, 294 N.W.2d 473 (1980). On appeal, we follow the

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

same methodology as the trial court. *See Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶ 6, 235 Wis. 2d 103, 612 N.W.2d 332.

¶4 Skemp conceded that he guaranteed the loan, but contended that: (1) he had reached an “accord” with regard to his obligation to pay in the sum of \$4,000; (2) that the accord did not specify when payments would be made; and (3) that he was ready, willing and able to make payment. Skemp supported his claim with a letter to him from Farmers State Bank that stated that it would “accept your offer” to “settle for \$4,000 as payment in full.”

¶5 An accord and satisfaction bars an action to enforce a claim only where the promised performance occurs. *See Erickson v. Gundersen*, 183 Wis. 2d 106, 116, 515 N.W.2d 293 (Ct. App. 1994) (“[F]or the rule of accord and satisfaction to apply so as to bar an action to enforce a claim, there must have been a ‘dispute’ between the parties which is resolved by a payment in satisfaction of the obligation.”). It is undisputed that Skemp never paid. Because an accord was reached but there was no satisfaction, the trial court properly concluded as a matter of law that the rule of accord and satisfaction did not prohibit enforcement of the original note.

¶6 Skemp argues that he and the bank modified the original contract when he offered to pay \$4,000 and the bank replied by letter, “Farmers State Bank will accept your offer.” We agree with the trial court that Skemp’s offer and the bank’s response do not bar enforcement of the original note. The agreement contemplated a future act, that Skemp would pay \$4,000. The bank stated that it “will accept” \$4,000 as payment in full. Because Skemp did not pay, the bank had nothing to accept.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

