COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP650 **Cir. Ct. No. 2007CV779**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LARRY WAGNER,

PLAINTIFF-APPELLANT,

V.

FOREMOST BUILDINGS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Reversed and remanded.*

Before Dykman, P.J., Vergeront and Higginbotham, J.J.

¶1 VERGERONT, J. The issue on this appeal is whether Foremost Buildings, Inc., is entitled to summary judgment on its accord and satisfaction defense to Larry Wagner's breach of contract claim. The circuit court granted summary judgment, concluding that, as a matter of law, Wagner's retention of Foremost's check for ten and one-half months was unreasonable without regard to whether and when during that time period Wagner communicated to Foremost that

he did not accept Foremost's offer. We agree with Wagner that whether and when he communicated his rejection to Foremost is relevant to whether there was an accord and satisfaction. We also agree that there are material factual disputes on this issue that preclude summary judgment. Accordingly, we reverse and remand to the circuit court for further proceedings.

BACKGROUND

¶2 Wagner entered into a contract with Foremost Buildings, Inc. for the construction of a cattle cover consisting of four buildings, and he paid Foremost a $25,000 deposit. Eventually Wagner decided to cancel the contract, which the contract terms allowed upon written notice. The contract required that, in the event of cancellation, Wagner pay the costs incurred by Foremost in preparing to perform and in performing the contract. In March 2006, or shortly before, Wagner notified Scott Herkert, the Foremost sales employee who had worked with him on the project, that he wished to cancel the project, and he requested that Foremost return his deposit. On March 6, 2006, Herkert notified Foremost's president, Steve Reifenberg, by facsimile that Wagner needed to cancel the order and that he should let Wagner know what his "cancellation charges" would be.

¶3 On March 28, 2006, Reifenberg sent Wagner a letter itemizing "the expenses incurred so far," which showed a total of $18,454.80. The letter stated that these expenses had been deducted from the deposit and the balance was being returned to him with the enclosed check. The check was for $6,545.20, and on the back was a handwritten notation stating, "In full and final settlement of deposit less cancellation charges for jobs 1692, 1693, 1694, & 1695."

¶4 According to Wagner's submissions, the check was for much less than he had expected. He had received four drawings, one for each of the

proposed buildings, and believed each would cost no more than several hundred dollars. Because he had not returned the drawings with his approval, he understood from the contract that the project would not proceed further. After he received the check, he talked to Herkert and said he disputed the amount of the check because he believed he was entitled to more. Wagner testified that this occurred shortly after he received the letter and estimated that it was probably within weeks, rather than within days or months.

¶5 The parties agree that there was a conversation between Reifenberg and Wagner in which Wagner expressed his objection to the check amount. However, the submissions conflict on when this occurred. According to Reifenberg's affidavit, "Foremost did not hear from Wagner directly" regarding his dissatisfaction with the check amount until September or October 2006, when Wagner called him and demanded the return of $22,500 of his $25,000 deposit. Reifenberg refused.

¶6 According to Wagner's deposition testimony, he could not remember whether he made the phone call to Reifenberg within days or within a month of receiving the refund check, but he could remember that it was within a year. In his affidavit Wagner averred that he called Reifenberg to object to the amount "shortly after receiving the check."

¶7 It is undisputed that on or about February 12, 2007, Wagner's attorney returned the check to Reifenberg accompanied by a letter explaining Wagner's disagreement with the amount.

¶8 Wagner subsequently filed this lawsuit, claiming that Foremost breached the contract by improperly charging Wagner for work that was either never done or never approved by Wagner as required by the parties' contract.

Foremost raised accord and satisfaction as a defense and moved for summary judgment on this ground. The circuit court granted summary judgment to Foremost and denied Wagner's motion for reconsideration. The court concluded that, regardless of when Wagner contacted Reifenberg to object, retaining the check for ten and one-half months was unreasonable as a matter of law.

DISCUSSION

¶9 On appeal, Wagner argues that the circuit court failed to consider other relevant facts besides the length of time he held the check, including the fact that he objected to the amount. If all the relevant circumstances are considered, according to Wagner, there are factual disputes that prevent summary judgment.[1] Foremost responds that retaining the check for ten and one-half months was unreasonable as a matter of law. Foremost also asserts that, whenever Wagner's phone call to Reifenberg occurred, it was not an unambiguous rejection of Foremost's offer.

¶10 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). A material fact is one that

[1] Wagner also argues that the doctrine of accord and satisfaction does not apply because there was no dispute when Foremost sent the check to Wagner. Foremost responds that it is undisputed that Wagner demanded the return of the deposit and, through Herkert, communicated to Foremost that he anticipated that only $1,300 would be withheld from his deposit. Wagner does not explain in his reply brief why, in these circumstances, Foremost's tender of a check "in full settlement of deposit less cancellation charges for jobs 1692, 1693, 1694, and 1695" was not an offer to settle a disputed claim. We take this failure to reply as a concession that Foremost is correct. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

would influence the outcome of the controversy. ***Marine Bank v. Taz's Trucking, Inc.***, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90 (citation omitted). In examining the evidence, we view it in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. ***Metropolitan Ventures, LLC v. GEA Assoc.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶11 An accord and satisfaction is an agreement to discharge an existing disputed claim and constitutes a complete defense to an action by a creditor to enforce a previously existing claim. ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979) (citing 13 Sarah Howard Jenkins, CORBIN ON CONTRACTS § 70.1 at 301 (rev. ed. 2003)).[2] Because a settlement agreement is a contract, a valid settlement agreement requires an offer and an acceptance of the offer. ***American Nat'l Prop. and Cas. Co. v. Nersesian***, 2004 WI App 215, ¶16, 277 Wis. 2d 430, 689 N.W.2d 922 (citation omitted). In determining whether an offer has been accepted, the question is not the actual intent of the offeree, but the manifested intent. ***Hoffman***, 86 Wis. 2d at 454. Manifestation of intent may be by deeds as well as words. ***Id.***

¶12 Because manifestation of intent to accept an offer may be by deeds as well as words, an acceptance may occur without an explicit statement of acceptance by the offeree. For example, generally, if the amount due is in dispute and the debtor sends a check for less than the amount claimed and clearly expresses that it is intended as a settlement in full, the creditor's cashing of the

[2] We cite to the most recent edition of CORBIN ON CONTRACTS rather than to the edition cited by the court in ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979).

check constitutes an acceptance of the offer, and thus, an accord and satisfaction. ***Chicago & N.W. Transp. Co. v. Thoreson Food Prod., Inc.***, 71 Wis. 2d 143, 146-47, 238 N.W.2d 69 (1976).

¶13 When a creditor retains a check that states it is intended as payment in full and does not cash it, there may or may not be an accord and satisfaction, depending on the length of time the check is held and the other circumstances in the particular case. *See* ***Hoffman,*** 86 Wis. 2d at 456. The Wisconsin cases addressing the retention of a check without cashing it do not have the same factual circumstances as this case, but they provide the starting point for our analysis.

¶14 In ***Frank v. Frost***, 170 Wis. 353, 174 N.W. 911 (1919), the creditor objected to the amount of the check within a few days of receipt and three months later offered to return the check. After that offer was refused, the creditor filed the action. ***Id.*** at 354-55. The court held there was no accord and satisfaction, noting that, had the check been cashed and the money retained by the creditor, there would have been an accord and satisfaction. ***Id.***

¶15 In ***Hanz Trucking, Inc. v. Harris Brothers Co.***, 29 Wis. 2d 254, 138 N.W.2d 238 (1965), the creditor did not object to the amount of the check but filed suit six weeks later, continuing to hold the check throughout the court proceedings. The court viewed the critical time period to be the length of time the creditor had the check before filing suit, reasoning that once suit was filed, it was clear the creditor "had not accepted the check on the terms under which it was presented." ***Id.*** at 264.

¶16 In ***Hoffman*** the court held there was an accord and satisfaction where the creditor and debtor had been negotiating a resolution of the disputed claim, the debtor sent the creditor a credit memorandum that cleared the creditor's

account plus a check in full settlement, the creditor retained the check without cashing it, and the creditor did not communicate with the debtor for seven months, at which time the debtor contacted the creditor after realizing the check had not been cashed. ***Hoffman***, 86 Wis. 2d at 452-53. At that time the creditor stated he was rejecting the offer. ***Id.***

¶17 In reaching the conclusion that there was an accord and satisfaction, the ***Hoffman*** court considered the fact that the creditor "retained not only the check but also retained the credit memorandum and accepted without objection the fruits of that credit memorandum—the cancellation of his existing indebtedness." ***Id.*** at 457. The court viewed "such silence and acquiescence [to be] a manifestation of assent under the rationale of Restatement 2d, Contracts, sec. 72(2)." ***Id.*** This subsection, since renumbered to § 69(2), provides: "An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable…." 1 RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1981). The court also viewed RESTATEMENT (SECOND) OF CONTRACTS § 72(1) to be applicable because of the "continuous process of negotiations" between the creditor and the debtor. ***Hoffman***, 86 Wis. 2d at 457. That subsection, since renumbered to § 69(1), provides:

> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> ….
>
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

1 RESTATEMENT (SECOND) OF CONTRACTS § 69(1) (1981).

¶18 In the more recent ***Nersesian*** case, we held there was not an accord and satisfaction where the creditor, after agreeing on a settlement amount and receiving two checks and a release to sign, notified the insurance company approximately one month later that his medical condition had changed and the settlement was "on hold" while he waited to learn more. ***Nersesian***, 277 Wis. 2d 430, ¶¶2-7. Seven months later the creditor wrote a letter "formally withdrawing … acceptance" of the settlement offer and returned the uncashed checks. ***Id.***, ¶10. We reasoned that the communication within one month that the settlement was "on hold" and the failure to return the release or cash the checks put the debtor on notice that the creditor was not willing to accept the offer. ***Id.***, ¶22. We also noted that the debtor could have requested the return of the checks and release or stopped payment on the checks, and by not doing so, it "acquiesced to the [creditor's] retention of all of the settlement paperwork," including the checks. ***Id.*** We concluded that, because of the creditor's notice to the debtor and the creditor's acquiescence, there was no acceptance of the offer. ***Id.***

¶19 In ***Nersesian***, we rejected the argument that under ***Hoffman*** the retention of the settlement checks for seven months constituted an accord and satisfaction as a matter of law. ***Nersesian***, 277 Wis. 2d 430, ¶¶21-22. We explained that ***Hoffman*** did "not establish a bright-line rule that retaining a check for seven months is unreasonable and automatically results in a contract by accord and satisfaction." ***Id.***, ¶21. We referred to the ***Hoffman*** court's statement that whether a check is held for an unreasonable length of time depends upon the circumstances of the particular case. ***Id.*** The particular circumstances in ***Hoffman***, we stated, were not only that the creditor retained the check for seven months, but also that he maintained complete silence for that time period and acquiesced in the benefits of the credit memorandum. ***Id.***

¶20 From these cases we see that a key factor is the length of time the creditor holds the check before notifying the debtor that the creditor does not accept the check in settlement of the disputed claim. None of these cases suggest that the length of time the creditor held the check was determinative without regard to whether and when the creditor notified the debtor that the creditor did not accept the check as a settlement in full. Accordingly, we agree with Wagner that the circuit court erred in concluding that, regardless of when Wagner contacted Foremost to object, holding the check for ten and one-half months constituted an accord and satisfaction as a matter of law.

¶21 In examining the evidence on when Wagner notified Foremost of his objection to the check amount, we view the evidence most favorably to Wagner and draw all reasonable inferences in his favor. According to Wagner's affidavit, he called Reinfenberg to object "shortly after receiving the check." While neither this statement nor his deposition testimony is precise on when he called, they are sufficient to create a reasonable inference that he called within a month or two.[3]

¶22 Foremost contends that, when Wagner called Reifenberg, Wagner did not make an unambiguous rejection of the offer to settle for the check amount. Foremost relies on Wagner's deposition testimony that he told Reifenberg he wanted more of the deposit returned and he "thought the charges were quite high." However, Wagner also testified that the conversation ended with Reifenberg saying, "we'll see you in court," and Wagner's affidavit states that he "objected to the small amount of the refund." In addition, Reifenberg's own affidavit avers

[3] There may also be a reasonable inference from the evidence that, before Wagner called Reinfenberg, Herkert told Reinfenberg that Wagner objected to the amount of the check. However, the parties do not address this issue, and it is unnecessary for us to resolve it.

that in the phone conversation Wagner "demanded return of a total of $22,500 (rather than $6,545.20) of the $25,000 initial deposit." Assuming without deciding that some evidence reasonably supports Foremost's position on the ambiguity of Wagner's statements to Reifenberg, there is ample conflicting evidence that Wagner made it clear that he did not accept the offer to settle for the check amount.

¶23 Foremost contends the circuit court was correct in deciding that it did not matter if Wagner called Reifenberg "shortly after receiving the check," in April or May, 2006, because Wagner did not return the check until February 12, 2007. However, none of the cases Foremost brings to our attention find an accord and satisfaction because of the length of time the creditor continued to hold the check after notifying the debtor that the offer was rejected. Once Foremost was on notice that Wagner did not accept the settlement offer, it could have requested that Wagner return the check. There is no evidence that Foremost did so. By not doing so, it is reasonable to infer that Foremost acquiesced to Wagner's retention of the check. *See* ***Nersesian***, 277 Wis. 2d 430, ¶22.

¶24 We also disagree with Foremost and the circuit court that, because Wagner had the drawings, he retained a benefit for ten and one-half months analogous to the credit memorandum in ***Hoffman.*** In ***Hoffman*** the credit memorandum was offered by Purina as part of the settlement amount and benefited Hoffman because Purina cancelled Hoffman's indebtedness of $2,624.36 for other undisputed deliveries of the product. ***Hoffman***, 86 Wis. 2d at 451. In contrast, the drawings Foremost made of the proposed buildings were not offered as part of the settlement. Rather, Wagner already had the drawings and the dispute was over the fair payment for them and other work Foremost asserted it had done before the cancellation. In effect, Wagner had already paid for the drawings with

the deposit, and Foremost, in making its settlement offer, was retaining the amount it believed was fair for the drawings and other work it asserted it had done.

¶25 We conclude that Foremost is not entitled to summary judgment based on accord and satisfaction. In order to determine if there was an accord and satisfaction here, it is necessary to determine whether and when Wagner notified Foremost that he objected to the check amount. There is conflicting evidence, including conflicting reasonable inferences from the evidence, on when Wagner contacted Foremost. This is a material factual dispute. In addition, assuming Foremost is correct that some evidence shows Wagner's comments to Reifenberg were ambiguous, that creates a material factual dispute because other evidence and reasonable inferences show that Wagner clearly rejected the offer in his conversation with Reifenberg.

CONCLUSION

¶26 The circuit court erred in granting summary judgment in favor of Foremost on its defense of accord and satisfaction. Accordingly we reverse and remand for further proceedings.

By the Court.—Orders reversed and remanded.

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