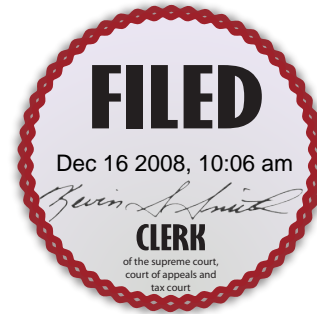


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

AMERITECH PUBLISHING, INC.,)
)
Appellant-Plaintiff,)
)
vs.)
)
COUNSELING CENTER FOR EFFECTIVE)
LIVING,)
)
Appellee-Defendant.)

No. 49A02-0809-CV-835

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0711-CC-50024

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Ameritech Publishing, Inc. (Ameritech Publishing) appeals from the grant of summary judgment in favor of appellee-defendant Counseling Center for Effective Living (Counseling Center). Specifically, Ameritech Publishing argues that the trial court should have granted summary judgment in its favor because the designated evidence established as a matter of law that Counseling Center failed to make payments that were due under a purported contract. Moreover, Ameritech Publishing argues that the designated evidence did not establish that it had waived its right to pursue the debt or that an accord and satisfaction of the amount due had occurred. Concluding that the trial court erred in granting summary judgment for Counseling Center because a genuine issue of material fact remains as to whether its account remains due and unpaid, we reverse and remand for trial.

FACTS

Sometime in February or March 2006, Counseling Center entered into an agreement with Ameritech Publishing for advertising services in the “yellow pages.” Appellant’s App. p. 13. Thereafter, Dr. Robert Ross, Counseling Center’s president, received a bill from Ameritech Publishing in the amount of \$10,671.42. Thereafter, Dr. Ross contacted Ameritech Publishing and explained that Counseling Center had already paid the balance. Ameritech Publishing subsequently sent Counseling Center a revised invoice showing a credit for the full balance previously stated on the account and stating that no payment was due.

Approximately two months later, Dr. Ross received a telephone call from a collection

agency, indicating that Counseling Center owed Ameritech Publishing \$11,169.30, which represented the original amount that had been billed plus late charges. In response, Dr. Ross informed the collection agency that Counseling Center did not owe any money and sent the agency the invoice showing that Counseling Center had no outstanding balance. Nonetheless, the credit agency continued sending Dr. Ross invoices for the amount that was allegedly owed.

On November 26, 2007, Ameritech Publishing filed a complaint against Counseling Center seeking \$11,169.30 plus interest at the rate of 18% per annum that was due under the purported contract. On March 28, 2008, Counseling Center filed a motion for summary judgment, claiming that Ameritech Publishing “waived any right it might have had to collect the alleged debt from [Counseling Center].” Appellant’s App. p. 23. In the alternative, Counseling Center alleged that the parties had already resolved their disputed claims, so Ameritech’s request for relief was barred under the doctrine of accord and satisfaction from collecting any additional amounts from Counseling Center. In support of the motion for summary judgment, Counseling Center submitted an affidavit executed by Dr. Ross, which provided in pertinent part that

3. In February or March of 2003, Counseling Center . . . entered into an agreement with AT & T for advertising services.
4. From March 2003 until June 2006, I paid AT & T for advertising services. I paid these fees in advance.
5. Sometime in early 2006, I received an invoice from AT & T in the amount of \$10,671.42. I contacted AT & T by telephone and explained that this invoice should not have been sent; that I owed no balance and had already paid for advertising services in advance.

6. Subsequently, AT & T sent me a revised invoice showing a credit for the full amount of the invoice, showing that that balance due was zero. (see Exhibit A).^[1]

7. Approximately 2 months later, I received a call from a collection agency stating that I owed AT & T \$11,169.30, which represented the previous invoice of \$10,671.42, plus late charges.

8. I informed the collection agency that I owed AT & T nothing and told them that my bill was paid in full.

9. I sent the collection agency the statement showing that my invoice was paid in full, but they refused to accept it and continued to send me an invoice stating that I owed more than \$11,000.

10. At no time has AT & T sent me a letter or informed me that the invoice indicating that my balance was paid in full was sent in error or inadvertently.

Id. at 28-29.

On April 18, 2008, Ameritech Publishing filed a motion for summary judgment, claiming that the trial court should enter judgment in its favor because the designated evidence established that Counseling Center failed to pay the amount owed under the agreement. In support of its motion for summary judgment, Ameritech Publishing submitted the affidavit of Mary Murphy, the company's credit and collections manager. In relevant part, Murphy's affidavit provided that:

8. The attached Exhibit B is a true and correct copy of a bill that was prepared from Ameritech Publishing Inc.'s old computer billing system. In the detail of the payments and adjustments, there is a note which states "transfer to AT&T YP Direct Bill." The debt owed Ameritech Publishing Inc. from defendant was then transferred to Ameritech Publishing Inc.'s new account number. No

¹ The invoice, dated June 7, 2006, shows that on May 10, 2006, Ameritech Publishing issued Counseling Center a credit in the amount of \$10,671.42 under account number 317R74219806, with a "zero" balance. Appellant's App. p. 27.

credit for the full amount of the bill was given to defendant as claimed in the affidavit of Dr. Robert [Ross]. This was the process for all Indiana accounts when Ameritech Publishing Inc. converted to its new computer billing system around May, 2006. Anytime you see a bill with the note “transfer to AT&T YP Direct Bill” there will be a new bill with a new account number carrying over the amount owed on the bill produced by the old computer system.

9. According to the books and records of Ameritech Publishing Inc., Dr. Bob Ross of defendant was advised of the transfer of defendant’s old balance from its old billing account number to its new billing account number o[n] multiple occasions. According to the books and records of Ameritech Publishing Inc. in February 2007, Glenda Mumaugh of Ameritech Publishing Inc. explained again to Dr. Bob Ross how the charges were moved from one account number to another.

10. The bill charges for which plaintiff seeks to be paid from defendant were not forgiven. There is no indication in the books and records of plaintiff that such charges were forgiven.

11. Plaintiff did not reach a settlement agreement with defendant regarding the monies which plaintiff seeks to be paid from defendant and for which plaintiffs has filed this lawsuit. There is no indication in the books and records of plaintiff that any such settlement agreement was reached.

Id. at 55-56. Counseling Center did not respond to Ameritech Publishing’s motion for summary judgment. After considering the designated evidence submitted by both parties, the trial court granted Counseling Center’s motion for summary judgment. Ameritech Publishing now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When reviewing a trial court’s grant of summary judgment, we apply the same standard as that of the trial court. Summary judgment is appropriate if the pleadings and evidence submitted demonstrate that there are no genuine issues of material fact and that the

moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Jacobs v. Hilliard, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005). We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Wilson v. Royal Motor Sales, Inc., 812 N.E.2d 133, 135 (Ind. Ct. App. 2004). Although conflicting facts and inferences on some elements of a claim exists, summary judgment may be proper when there is no dispute or conflict regarding a fact that is dispositive of the action. Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 614 (Ind. Ct. App. 1991).

Because a trial court's grant of summary judgment comes to us clothed with a presumption of validity, the appellant must persuade us that error occurred. Id. If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439, 442 (Ind. Ct. App. 2004). Finally, we note that our standard of review is not altered by cross-motions for summary judgment. Hartford Acc. & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 291 (Ind. Ct. App. 1997).

II. Ameritech Publishing's Claims

Ameritech Publishing argues that the trial court erred in granting Counseling Center's motion for summary judgment and claims that the trial court should have granted judgment in its favor because the designated evidence established as a matter of law that Counseling Center owed the debt pursuant to the parties' contract. Put another way, Ameritech Publishing maintains that the designated evidence failed to show that it had waived any

alleged claim that it had against Counseling Center or that the alleged amount due under the contract was resolved as the result of an accord and satisfaction.

We initially observe that in Mominee v. King, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994), this court explained that “accord and satisfaction is a method of discharging a contract, or settling a cause of action by substituting for such contract or dispute an agreement for satisfaction.” An “accord” is an express contract by which the parties agree to settle a dispute, and a “satisfaction” is the parties’ performance of their contractual obligations. Reed v. Dillon, 566 N.E.2d 585, 590 (Ind. Ct. App. 1991). Accord and satisfaction is an affirmative defense, and the party asserting the defense bears the burden of proof. Fifth Third Bank v. Bentonville Farm Supply, Inc., 629 N.E.2d 1246, 1249 (Ind. Ct. App. 1994). The issue of whether the party making the defense has met its burden is ordinarily a question of fact but becomes a question of law if the requisite controlling facts are undisputed and clear. Mominee, 629 N.E.2d at 1282. As a contract, accord and satisfaction requires a meeting of the minds or evidence that the parties intended to agree to a particular remedy. Sedona Dev. Group, Inc. v. Merrillville Road, et al., 801 N.E.2d 1274, 1278-79 (Ind. Ct. App. 2004).

As discussed above, Counseling Center claims that there was an accord and satisfaction regarding the alleged outstanding debt that it purportedly owed to Ameritech Publishing. Dr. Ross included a bill in the affidavit that his company received from Ameritech Publishing, showing that the balance was reduced to “zero.” Appellant’s App. p. 28. Nonetheless, Murphy attested in her affidavit that because Ameritech Publishing

“switched” the company’s computer systems, the bill that Counseling Center claims was nullified indicates that the account balance was reduced only because the amount due and owing was transferred to another account. Thus, Murphy claimed that the balance remained due and unpaid. Id. at 54-56. Murphy’s affidavit also indicates that Dr. Ross was advised on several occasions that Counseling Center’s balance had been transferred from a previous account number to a new number, and a “billing itemization” that was submitted shows an outstanding balance of \$11,169.30 as of September 7, 2006, under account number 317-R74-2198-029. Ex. B. As a result, Ameritech Publishing contends that the charges it sought to collect from Counseling Center were not discharged, modified, or settled, and the account remained due and owing.

After examining the evidence that was designated to the trial court, we conclude that a genuine issue of material fact exists as to whether the alleged debt that Ameritech Publishing sought to collect from Counseling Center is due. Indeed, the designated evidence fails to establish as a matter of law that Ameritech Publishing discharged, settled, or even waived the account balance that Counseling Center allegedly owed. Mominee, 629 N.E.2d at 1282. And Counseling Center did not meet its burden of establishing that Ameritech Publishing agreed to a particular remedy regarding the balance that was allegedly due on the account as required by the doctrine of accord and satisfaction. Accordingly, we reverse the grant of summary judgment for Counseling Center and remand for trial.

Reversed and remanded.

NAJAM, J., and KIRSCH, J., concur.

