STATE OF MICHIGAN

COURT OF APPEALS

STEVEN W. LOOMIS, Plaintiff-Appellant,	UNPUBLISHED March 21, 2013
v	No. 305819 Kent Circuit Court
MARK A. STAYTON and KIMBERLY A. STAYTON, Defendants-Appellees.	LC No. 11-002892-AV

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the circuit court affirming a ruling of the district court, which had granted defendants' motion for summary disposition. We affirm.

On July 13, 2010, plaintiff filed a complaint in district court alleging that, in November 2001, defendants[1] purchased a house in Grand Rapids for $90,0000 and subsequently hired him to remodel it. Plaintiff stated in the complaint that "Defendants hired Plaintiff to remodel their house . . . upon their promise to pay him upon completion of his work or upon its sale." Plaintiff alleged that he billed defendants $10,000 for his work, that defendants sold the house in 2007 for $137,000, and that they made payments totaling $3,000 and refused to pay any additional amount. Plaintiff requested a judgment of $7,000, plus interest.

On January 12, 2011, defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (10),[2] arguing that plaintiff's claims were barred because of the statute of limitations, because plaintiff was an unlicensed contractor, and because plaintiff "accepted a final payment accompanied by correspondence clearly indicating it constituted a final payment on a debt." With regard to the statute-of-limitations argument, defendants attached the transcript of a deposition during which plaintiff admitted that he completed his work on the house in June 2002. Defendants argued that, according to case law, the six-year limitations period began accruing at that time.

[1] Defendants are plaintiff's daughter and son-in-law.

[2] It is not clear why defendants did not cite MCR 2.116(C)(7).

In response to defendants' motion, plaintiff filed an affidavit stating, in part, the following:

> 3. Before [defendants] purchased their home . . . they and I verbally agreed that I would remodel their house at the rate of $10 per hour.
>
> 4. We further agreed that payment would be due upon completion of my work or, if they were not able to pay at that time, upon the sale of the home.
>
> 5. [Defendants] did not have the money to pay me upon completion of my work, and so it was due upon the sale of their home.
>
> * * *
>
> 7. I did not accept the payment of $1,275 made by [defendants] on February 22, 20010 [sic], as payment in full for my work.

Plaintiff argued that because the bill was not due until the sale of the home in June 2007, his lawsuit was not filed outside of the six-year limitations period for breach-of-contract actions. He further argued that a person doing home improvements for another on an hourly-fee or daily-fee basis is not required to be licensed. Finally, he argued that defendants' accord-and-satisfaction defense was untenable because they did not assert it in their answer to the complaint and because the note accompanying the alleged final payment "did not clearly and explicitly express that acceptance of the payment by Plaintiff would constitute a full settlement of Plaintiff's disputed claim."[3]

The district court dismissed the lawsuit, ruling that (1) defendants should be allowed to amend their pleadings to assert the accord-and-satisfaction defense, (2) plaintiff's claims were barred by the statute of limitations and by the accord-and-satisfaction doctrine, and (3) a question of fact remained regarding the licensing issue. The court stated the following at the summary-disposition hearing:

> First of all, I'm going to allow the defendant [sic] to assertive [sic] affirmative defense, nunc pro tunc, now for then. And I'm going to grant . . . the

[3] The note stated:

> Enclosed with this letter is the final check. This completes the amount we feel that we agreed to pay you. In our minds this issue is now closed and we will not be discussing this matter any further.
>
> However, after much pray [sic] and consideration, we will be maintaining a separation between you and our family. This is not up for discussion. We ask that you respect our wishes[;] if you cannot, then we will file necessary paperwork to make this official.

> Defendant's Motion for Summary Disposition on the basis of the Statute of Limitations. I think that the claim accrued to [plaintiff] in 2002 and I think it's when the last nail is pounded.
>
> And, furthermore, I'm going to find on the basis of Accord and Satisfaction, I think the letter is clear that this was intended to be a final payment. The letter was intended as a final satisfaction [of a] disputed claim between [the parties]. The letter, although[] it did not use the magic words of Accord and Satisfaction, its [sic] says, enclosed with this letter is the final check. This completes the amount we feel we agreed to pay you. In our minds the issue is now closed and we will not be discussing the matter any further.
>
> On the issue of . . . residential home builders, I think there's a factual issue as to whether this was done on an hourly basis which would take it out of the residential . . . home builder's statute or whether this was done on a fixed fee.

Plaintiff appealed to the circuit court, which stated the following in its written order:

> Appellant's arguments are respectfully without merit. The law in Michigan is well settled that for purposes of a construction contract, the six-year statute of limitations accrues at the time the work on the contract is completed. *Buckley v Small*, 52 Mich App 454[; 217 NW2d 422] (1974)[;] *Employers Mut Cas Co v Petroleum Equipment Inc*, 190 Mich App 57[; 475 NW2d 418] (1991). This Court finds no error in the District Court's ruling that Appellant should have filed his Complaint within six years of completing his work rather than six years of when the debt was due.
>
> Additionally, the Court is satisfied that the District Court did not abuse its discretion in allowing Appellees to amend their Affirmative Defenses. Leave to amend should be freely granted when justice so requires. MCR 2.118(A)(2). While Appellees did not include the defense of accord and satisfaction in their original pleadings, the lack of action was not the result of bad faith or undue delay and the amendment did not prejudice the Appellant's ability to respond to the issue.
>
> Finally, this Court finds no error in the District Court's ruling that Appellant's claim is barred based on the defense of accord and satisfaction. The ruling was well supported by the evidence of record in the case.

This appeal followed. Plaintiff contends that, at a minimum, there was a question of fact concerning whether defendants established the defense of accord and satisfaction. We disagree.

We review de novo a grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as

a matter of law." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).[4]

In arguing the accord-and-satisfaction issue, both plaintiff and defendants rely on *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643; 482 NW2d 474 (1992),[5] which in turn relied on *Fuller v Integrated Metal Technology, Inc*, 154 Mich App 601; 397 NW2d 846 (1986). However, both of those cases, as well as the additional cases cited by the parties, apply the common law—not statutory law—regarding accord and satisfaction, and in *Hoerstman Gen Contracting Inc v Hahn*, 474 Mich 66, 75; 711 NW2d 340 (2006), the Michigan Supreme Court held that, in enacting MCL 440.3311 (dealing with accord and satisfaction) in 1993, the Legislature indicated its intent that that provision "covered the entire area of accord and satisfactions involving negotiable instruments." The *Hoerstman* Court stated that the Legislature "clearly intended that the statute would abrogate the common law on this subject." *Hoerstman*, 474 Mich at 75. Thus, MCL 440.3311 governs situations in which the payment tendered in satisfaction of a disputed debt is made by a negotiable instrument such as a check. *Hoerstman*, 474 Mich at 72, 75-76.[6]

In the present case, the "final payment" was made by check and, therefore, MCL 440.3311 governs. In pertinent part, that statute states:

> (1) If a person against whom a claim is asserted proves that (*i*) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (*ii*) the amount of the claim was unliquidated or subject to a bona fide dispute, and (*iii*) the claimant obtained payment of the instrument, the following subsections apply.

---

[4] While defendants also cited MCR 2.116(C)(8) in their summary-disposition motion, it is clearly MCR 2.116(C)(10) that applies to the accord-and-satisfaction issue, because the issue concerns documents outside the pleadings.

[5] Defendants do not cite *Nationwide* directly but heavily rely on the language from *Sparling Plastic Industries Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998). This language in *Sparling* was lifted directly from *Nationwide*.

[6] The *Hoerstman* Court did offer the following observation:

> We note that [our] conclusion does not eliminate common-law accord and satisfactions entirely. An accord and satisfaction can exist without the use of a negotiable instrument. For instance, the parties could use cash or goods to satisfy a debt rather than a check. MCL 440.3311 would not apply in those situations. [*Hoerstman*, 474 Mich at 75 n 9.]

> (2) Unless subsection (3) applies,[7] the claim is discharged if the person against whom the claim is asserted proves that 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.
>
> * * *
>
> (4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

The factual circumstances in *Hoerstman* were similar to those in the present case. The plaintiff had been hired to remodel the defendants' home, and the defendants disputed the amount that the plaintiff claimed was owed for some work. *Hoerstman*, 474 Mich at 67-68. After concluding that the tender made by the defendants to the plaintiff was made in "good faith," that there was a bona fide dispute regarding the amount owed, and that "the claimant . . . obtain[ed] payment of the instrument,"[8] the *Hoerstman* Court found that the language the defendants used in tendering their payment operated to discharge the debt under both MCL 440.3311(2) and (4). *Hoerstman*, 474 Mich at 76-80.

On the check the defendants in *Hoerstman* tendered, they wrote "final payment." *Id*. at 68, 79. The Court stated that "inclusion of 'final payment' on the check satisfied the requirements of MCL 440.3311(2)." *Hoerstman*, 474 Mich at 79. In a letter that accompanied their check, the *Hoerstman* defendants also stated, "If we send you a check for $5144.79 we will consider this account closed and will not expect discussion of the other . . . items. We will then expect the lein [sic] waiver to be sent. If this is not acceptable, we will have to resort to

---

[7] Subsection (3) is not relevant to this case.

[8] In the present case, there was no argument or evidence that (1) the tender was not made in good faith, (2) there was no bona fide dispute, or (3) there was no actual payment in accordance with the instrument. The parties' arguments related solely to whether the language that defendants used with their tender discharged the debt. We note that even under the common-law principles discussed in *Nationwide*, a defendant, in order to establish an accord-and-satisfaction defense, is required to show a "good faith dispute of" a claim. See *Nationwide*, 192 Mich App at 647. Thus, plaintiff could have attacked, in some fashion, the "good faith" and "dispute" elements below, even if he was focusing solely on common-law principles. However, he did not do so.

arbitration . . . ." *Id*. 68-69, 79. The Court found that this language, too, satisfied the requirements of MCL 440.3311(2). *Hoerstman*, 474 Mich at 79-80.

In the letter defendants sent with their check in the present case, they stated, "Enclosed with this letter is the *final check*. This completes the amount we feel that we agreed to pay you. In our minds *this issue is now closed* and *we will not be discussing this matter any further*." (Emphasis added.) As in *Hoerstman*, we find that defendants satisfied the requirements of MCL 440.3311(2). The letter "contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." *Id*. We also find that defendants satisfied the requirements of MCL 440.3311(4), because the letter accompanying the check informed plaintiff that the check was being tendered in full satisfaction of the claim. See, generally, *Hoerstman*, 474 Mich at 78. Even if plaintiff did not know the legal effect of cashing the check, "MCL 440.3311(4) contains no exception for a mistaken understanding of the law." *Hoerstman*, 474 Mich at 78.

Although our reasoning somewhat differs, we affirm the conclusion of the circuit court that defendants established their accord-and-satisfaction defense.[9] In light of our decision, we need not reach the issue concerning the statute of limitations.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan

[9] We note that plaintiff does not raise an issue on appeal concerning the amendment of defendants' pleadings.