COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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

No. 97-0225

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

MIKE GRUENBERGER, D/B/A MIKE THE PLUMBER,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY ZIOLKOWSKI AND JOYCE ZIOLKOWSKI,

DEFENDANTS-
THIRD PARTY PLAINTIFFS-
APPELLANTS,

V.

FRANKENMUTH MUTUAL INSURANCE CO.,

THIRD PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

BROWN, J. Timothy and Joyce Ziolkowski appeal from the trial court's judgment awarding Mike Gruenberger, d/b/a Mike the Plumber, damages under quantum meruit for plumbing work he performed on their house. The Ziolkowskis argue that because they wrote "accord and satisfaction" on a check that Gruenberger then cashed, they had a valid contract of accord and satisfaction with Gruenberger, discharging his contract claims against them. The Ziolkowskis also argue that because there was no agreed-upon price for Gruenberger's services, there was no contract and the trial court erred when it awarded damages under quantum meruit. Furthermore, the Ziolkowskis allege that the court should have enforced their settlement agreement with Frankenmuth Mutual Insurance Co., Gruenberger's insurer, for their negligence claim against Gruenberger. The trial court did not accept the Ziolkowskis' contract of accord and satisfaction argument and refused to enforce the Ziolkowskis' settlement agreement with Frankenmuth.

We affirm, holding that there was no valid contract of accord and satisfaction between the parties and that the trial court was within its powers to fashion a remedy under quantum meruit. Also, because the settlement agreement affected the Ziolkowskis' negligence claim against Gruenberger and was not made in court or reduced to writing and signed by Frankenmuth, we affirm the trial court's refusal to enforce the agreement.

In 1994, the Ziolkowskis hired Gruenberger to do plumbing work on their new home. The parties did not agree upon a price for Gruenberger's services.

After finishing part of the plumbing work, Gruenberger submitted a bill to the Ziolkowskis, which they paid in full. After receiving payment,

Gruenberger executed a lien waiver, thereby waiving his lien rights for the work already performed. Later, after completing additional work, Gruenberger submitted another invoice to the Ziolkowskis, asking them for an advance over and above the amount of the second invoice. The Ziolkowskis paid Gruenberger the advance. However, on the back of the check the Ziolkowskis printed the words "accord and satisfaction for goods and services provided." Gruenberger believed that this phrase reflected the Ziolkowskis' satisfaction with his work and he cashed the check. Afterwards, Gruenberger executed a second lien waiver, thereby waiving his lien rights for the work he completed since the first lien waiver.

In November 1994, Gruenberger submitted a final invoice for $2520.42 to the Ziolkowskis for the balance due for the plumbing work. The Ziolkowskis refused to pay this bill, claiming that the previous check Gruenberger accepted and cashed represented a valid contract of accord and satisfaction between the parties which capped the price for Gruenberger's services. But Gruenberger responded that he did not agree to enter into any contract capping the cost of his services and demanded the Ziolkowskis pay the balance due. The Ziolkowskis than submitted a check for $600, insisting it was payment in full. Gruenberger returned this check.

Gruenberger filed suit to recover the outstanding balance for his plumbing services and the fixtures and materials he provided, plus interest. The Ziolkowskis counterclaimed for negligence because of problems with the plumbing work. Although the Ziolkowskis negotiated a settlement agreement for their negligence claim with Frankenmuth, the insurance company ultimately decided not to settle. The Ziolkowskis then filed a motion with the court to

enforce the settlement agreement and moved to make Frankenmuth a party to the lawsuit.

The trial court held that the check having "accord and satisfaction" written on the back did not represent a valid contract of accord and satisfaction between the parties. The court awarded Gruenberger damages of $2702.42 based on quantum meruit. The court refused to enforce the settlement agreement between the Ziolkowskis and Frankenmuth. Also, the court awarded $500 in damages to the Ziolkowskis for their negligence claim. The Ziolkowskis appeal.

First, the Ziolkowskis contend that the trial court erred when it failed to find a valid contract of accord and satisfaction. The Ziolkowskis argue that because they wrote "accord and satisfaction" on a check subsequently cashed by Gruenberger that as a matter of law they have a valid contract of accord and satisfaction with Gruenberger shielding them from his contract claims. We disagree.

A contract of accord and satisfaction discharges a disputed claim and constitutes a defense against a creditor's claim that money paid did not satisfy a debt. *See* ***Van Sistine v. Tollard,*** 95 Wis.2d 678, 681-82, 291 N.W.2d 636, 638 (Ct. App. 1980). For a contract of accord and satisfaction to arise, the obligor must offer performance in satisfaction of a disputed claim, the creditor must understand that full satisfaction is intended, and the creditor must accept the offer. *See* ***id.*** However, the mere act of an obligor writing "accord and satisfaction for services provided" on the back of a check that is then cashed by the creditor does not, as a matter of law, establish a valid contract of accord and satisfaction. "Accord and satisfaction" is a term of legal art, with little or no meaning to those unfamiliar with the term. Instead, whether a valid contract of accord and

satisfaction exists is a factual question answered by the trier of fact. We will not overturn the trial court's factual finding that there was no valid contract of accord and satisfaction unless that finding is clearly erroneous.[1] *See* § 805.17(2), STATS.

The record contains sufficient evidence to support a finding that although Gruenberger cashed the check, there was no valid contract of accord and satisfaction. First, the language on the check—"for services provided"—is in the past tense. Standing alone, the phrase does not suggest that the Ziolkowskis intended this payment to cover the unfinished plumbing work. Also, Gruenberger testified that he did not understand and had never before seen the phrase "accord and satisfaction," and that he cashed the check because he thought it reflected the Ziolkowskis' satisfaction with the work he had already completed. Moreover, the record is unclear as to whether Gruenberger was aware of any dispute over the cost of his services until he completed the job and submitted a final invoice. The Ziolkowskis never attempted to explain to Gruenberger that the check was offered in full satisfaction; they simply gave Gruenberger the check and said nothing alerting him to their intent. Therefore, we uphold the trial court's finding that there was no contract of accord and satisfaction between the parties.

Second, the Ziolkowskis claim the trial court erred when it awarded damages to Gruenberger under quantum meruit. The Ziolkowskis argue that because there was no "meeting of the minds" between the parties over the price for Gruenberger's services, there was no contract and therefore the trial court should

[1] The trial court did not make a direct ruling on this issue. However, because the trial court ultimately awarded Gruenberger damages for services rendered, we deem the trial court to have implicitly found that no valid contract of accord and satisfaction existed.

not have applied the equitable remedy of quantum meruit.[2] The Ziolkowskis are wrong on the law, and therefore their argument must fail.

Quantum meruit, literally translated, means "as much as he deserves." *See* ***Ramsey v. Ellis,*** 168 Wis.2d 779, 784, 484 N.W.2d 331, 333 (1992). "Recovery in quantum meruit is allowed for services performed for another on the basis of a contract implied by law to pay the performer the reasonable value of the services." ***Id.*** It is of no consequence that there was no "meeting of the minds" over price, and therefore no express contract. To establish an implied contract, Gruenberger need only show that the Ziolkowskis requested the services and that Gruenberger expected reasonable compensation. *See* ***id.***

The record clearly indicates that there was an implied contract between the parties. The Ziolkowskis hired Gruenberger to do the plumbing for their new home and they intended to compensate him for his services. It is also undisputed that Gruenberger did in fact provide those services. Therefore, the court was well within its equitable powers to fashion a remedy under quantum meruit.

Third, the Ziolkowskis argue that even if there was an implied contract, Gruenberger waived his right to recover any money for his services under the contract when he executed a second lien waiver. Again, the Ziolkowskis are wrong on the law. The law is clear that a waiver of lien rights only waives

[2] The Ziolkowskis also claim that Gruenberger did not plead quantum meruit and therefore they did not have an opportunity to defend against this claim and were unfairly surprised. We reject this claim. Although the complaint does not mention quantum meruit by name, it does ask for the reasonable value of goods and services provided. Therefore, the Ziolkowskis had adequate notice of Gruenberger's claim and could not have been "unfairly surprised."

those rights afforded under ch. 779, STATS. "A waiver furnished is a waiver of lien rights only, and not of any contract rights ...." Section 779.05(1), STATS. Therefore, because Gruenberger did not waive his contract rights when he signed the lien waiver, he was free to pursue his contract claims against the Ziolkowskis.

Fourth, the Ziolkowskis argue that even if there was an implied contract and the trial court had the power to award Gruenberger damages under quantum meruit, it erred in calculating the amount of damages.

Damages in a quantum meruit claim are measured by the reasonble value of the plaintiff's services. *See* ***Ramsey,*** 168 Wis.2d at 785, 484 N.W.2d at 333-34. What consitutes a "reaonable value" for services provided is a factual question for the trial court. Our standard of review in this situation is fairly limited, and we will only reverse the trial court if our review of the record reveals that the amount of damages awarded was clearly erroneous. *See* § 805.17(2), STATS.

The Ziolkowskis allege that the record provides no support for the trial court's finding as to the value of Gruenberger's services. According to the Ziolkowskis, the trial court improperly substituted its own judgment as to the value of Gruenberger's work. Also, the Ziolkowskis argue that it was improper for the trial court to rely on Gruenberger's testimony as to the reasonable value of his services because those statements are self-serving and lack any credibility.

But the Ziolkowskis have oversimplified the trial court's analysis. The trial court did not blindly accept Gruenberger's testimony as to the value of the services he provided, nor did it simply pick a number at random when it determined the reasonable value of Gruenberger's services. Instead, the trial court factored in the cost of the materials and fixtures Gruenberger provided, the

number of hours Gruenberger and his apprentice worked, and evidence on the standard hourly rates normally charged for this type of work to calculate the amount of damages. The record reflects that both sides presented testimony as to the value of the fixtures, materials and Gruenberger's services, and the trial court based its calculations on this evidence. Because the trial court's determination is based upon facts in the record and is not clearly erroneous, we uphold its finding on the amount of damages.

Finally, the Ziolkowskis argue that they had a binding settlement agreement with Frankenmuth, Gruenberger's insurer, and the trial court erred when it dismissed their motion to have the trial court enforce the settlement. Also, the Ziolkowskis claim that because Frankenmuth was not yet a party to the lawsuit at the time of their settlement offer, § 807.05, STATS., does not apply. We disagree.

As a general rule, settlement agreements or stipulations affecting the course of an action in a court proceeding are not considered binding agreements. *See* § 807.05, STATS. However, § 807.05 creates a limited exception. For a settlement agreement or stipulation to be binding, there must be an agreement between the parties or their attorneys, and it must take place in court or during a special proceeding, or be reduced to writing and signed by the party to be bound or that party's attorney. *See* ***id.***

We see no consequence in the fact that at the time of the settlement offer Frankenmuth was not yet a party to the lawsuit. Frankenmuth represented Gruenberger on the negligence claim, and any settlement agreement would have resolved the Ziolkowskis' negligence claim against Gruenberger. Thus, any agreement would have clearly affected the course of an action in a court

proceeding, and § 807.05, STATS., is applicable. Moreover, the agreement between the Ziolkowskis and Frankenmuth does not fall within any of the exceptions listed in § 807.05. The settlement agreement was not approved by the court, nor was it reduced to writing and signed by Frankenmuth or its attorney. Therefore, the trial court did not err when it refused to consider the Ziolkowskis' motion to enforce the settlement agreement.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.