COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2358

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

KRAMER BUSINESS SERVICE, INC.
D/B/A KRAMER PRINTING,

PLAINTIFF-APPELLANT,

V.

HYPERION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Kramer Business Service, Inc., appeals an order dismissing its small claims action against Hyperion, Inc. Kramer claims that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

trial court erred in dismissing the action because Hyperion did not prove its counterclaim in an amount sufficient to offset Kramer's claim, and because the court failed to properly apply the law of accord and satisfaction. We disagree and affirm.

BACKGROUND

¶2 Kramer sued Hyperion for the balance due on an open account for printed items Kramer had supplied to Hyperion. Hyperion counterclaimed for the amount it claimed Kramer owed it under a prior equipment-sharing agreement between the parties. The matter was tried to the court.[2] Hyperion conceded the validity and amount of Kramer's claim, and Kramer stipulated that if Hyperion's counterclaim was valid, the amount would offset its claim entirely. Thus, the issue to be tried was the validity of Hyperion's claim for payments due under the parties' prior verbal agreement to share the use and costs of a certain piece of proofing equipment, called a "matchprint" machine.

¶3 The matchprint machine was purchased by Hyperion in 1995 and placed on its premises. Kramer, which occupied adjacent premises, paid Hyperion $3,000 toward the purchase of the machine for "access" to it. Kramer also agreed to pay for "matchprint materials" that Hyperion purchased and Kramer consumed when using the machine. The equipment sharing arrangement began amicably,

[2] Kramer began the litigation with a suit in small claims court for its balance due. Hyperion counterclaimed in an amount exceeding the small claims jurisdictional limit of $5,000, and the case was assigned to a circuit court judge to proceed under "regular" civil procedure. Kramer moved to dismiss the counterclaim because it exceeded the small claims limit and related to other than the transactions at issue in Kramer's complaint. *See* WIS. STAT. § 799.02(2). The circuit court dismissed the counterclaim and reassigned the case to small claims court. Hyperion then refiled its counterclaim, reduced in amount to allow for adjudication under Chapter 799. The case was first heard by a court commissioner, and then tried de novo to the court. *See* WIS. STAT. § 799.207.

with the parties working out time-sharing on the machine based on their respective job deadlines and priorities. Kramer personnel testified that over time, however, conflicts arose, and Kramer could not use the machine when it needed to do so in order to meet pressing customer orders. About seven months after the machine was acquired, Kramer purchased its own equipment to meet its needs and discontinued using the shared matchprint machine.

¶4 In May of 1996, Hyperion sent Kramer an invoice for matchprint materials in the amount of $3,707.37. Kramer responded that the invoice was "in dispute based on the quantity," and it tendered a check for $844.76, which represented the cost of materials Kramer's records indicated that it had used. Kramer stated in its cover letter forwarding the payment, "[t]o keep our bills current, we'll pay the amount of the bill that is not in dispute." Hyperion continued to bill Kramer for the remaining balance on the invoice for matchprint materials, as well as for other amounts Hyperion claimed it was owed for other products or services it provided to Kramer.

¶5 Some two years later, in March 1998, Kramer sent Hyperion a letter "in hopes of clearing up" its account. The letter recites that a check for $330 was enclosed, which "pays our account in full." The letter goes on to explain that, although Hyperion's statements "show several invoices still outstanding," Kramer was claiming various offsets and reductions which would negate any amounts owed beyond the $330 tendered. Specifically, Kramer noted its May 1996 payment of $844.76 for matchprint material, and claimed that the balance of $2,862.61 from that invoice was "to be credited." In addition, Kramer noted that it had discontinued using the matchprint machine after seven months, and it asserted that the machine had a three-year life. Kramer thus claimed it was entitled to a

credit of an additional $2,416.69 against other amounts it owed Hyperion.[3] Although Hyperion disputed at trial that it had received the letter setting forth Kramer's claims and tendering the $330, it did not dispute that it had received and cashed the check.

¶6 Following the testimony and written "closing arguments" of the parties, the trial court dismissed the action. The court noted that the parties had agreed that "the claims and cross claims are equal in worth," and it concluded that Kramer had not established an accord and satisfaction because "the amount tendered must be reasonable in comparison to the alleged debt." The trial court also denied Kramer's motion for reconsideration, stating that it "did not find nor allow that [Kramer] could unilaterally break the machine purchase agreement between the parties nor could it determine whether [Kramer's] interpretation of the set-offs were correct." Kramer appeals the orders dismissing the action and denying reconsideration.

ANALYSIS

¶7 Kramer claims the trial court erred in both its factual findings and in its legal conclusions. We will uphold the former unless clearly erroneous, WIS. STAT. § 805.17(2), but we decide de novo questions of law, such as whether certain facts produce an "accord and satisfaction" of a debt. *See* ***Zubek v. Edlund***, 228 Wis. 2d 783, 788, 598 N.W.2d 273 (Ct. App. 1999).

[3] Kramer calculated the credit as follows: It divided the $3,000 it had paid for use of the machine by thirty-six months, and multiplied the result ($83.33) by seven. It then deducted the $583.31 it believed it owed for usage from the $3,000 it had paid, and claimed a credit for the remainder ($2,416.69) against other amounts it owed Hyperion.

¶8 We conclude that the trial court did not clearly err in finding that Hyperion had established a counterclaim sufficient to offset Kramer's undisputed $5,000 claim for goods and services. The following interchanges between counsel and the court are instructive:

> [HYPERION'S COUNSEL][at the beginning of the trial]: …If you decide that the Kramer setoff was improper, I think those—our entire posture on this, Judge, and counsel, if you would, maybe we can narrow this down. I think the bills were roughly equivalent between each other, say, for the setoff issue.
>
> [KRAMER'S COUNSEL]: Well, they are now because [Hyperion] amended its claim to limit itself to the small claims jurisdiction, so, yes, the equivalent.
>
> THE COURT: So we're talking $5,000 each way?
>
> [HYPERION'S COUNSEL]: Right.
>
> THE COURT: All right.
>
> [KRAMER'S COUNSEL]: (Moves head in affirmative manner.)
>
> ….
>
> THE COURT [following close of Hyperion's case]: Do we have something in the counterclaim amount? Is there an agreement—agreed amount on your counterclaim?
>
> [HYPERION'S COUNSEL]: The discussion I've had with this counsel are: These amounts are basically the offset against one another. That's because of the small claims limitation, they're both $5,000.

> [KRAMER'S COUNSEL]: Yes. I believe that if this case is proven it exceeds the small claims.

¶9 Thus, we agree with Hyperion that a precise accounting of its claim against Kramer was obviated by the foregoing stipulation of the parties. Kramer never asserted that, even if its reductions and offsets were improper, it did not owe Hyperion at least $5,000, and we read the interchanges quoted above as a stipulation to the contrary. It was understood that what was at issue was the propriety of Kramer's asserted reductions and offsets to Hyperion's invoices. Two reductions or offsets were the principal focus of the testimony and exhibits at the trial: (1) Kramer's $2,800 reduction on an invoice for matchprint materials, based on its claim that it had used much less of the materials; and (2) Kramer's claim for a $2,400 credit against other amounts it owed Hyperion, which was based on its terminating use of the matchprint machine after seven months.

¶10 We are satisfied that the trial court did not clearly err in finding that Kramer improperly claimed both of these reductions, and thus concluding that Kramer owed Hyperion at least $5,000, offsetting the Kramer claim in its entirety. Each of the parties provided testimony regarding how it had arrived at the amount of matchprint materials Kramer had consumed during its use of the machine. The court implicitly accepted the Hyperion figures, as it was entitled to do. A trial court's factual finding will not be disturbed on appeal unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* WIS. STAT. § 805.17(2). When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). It is for the trier of fact, and not this court to assess witness credibility. ***Rohl v. State***, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974).

¶11 We also do not fault the trial court's disallowance of Kramer's claimed credit for discontinuing its use of the matchprint machine. The record supports a finding that Kramer's decision to discontinue use of the machine was a business decision occasioned by Kramer's increased need for greater and more timely access to equipment of this type, and by its opportunity to acquire its own machine on advantageous terms.[4] By contrast, there was little evidence in the record from which the trial court might conclude that Hyperion had breached the informal agreement regarding Kramer's access to the matchprint machine, or that the agreement allowed Kramer to unilaterally terminate usage and claim a refund of over eighty percent of its initial payment for access.

¶12 In short, we accept the trial court's assessment of the posture of the case before it, given the parties' stipulation, and its factual finding that Hyperion had a valid, offsetting claim to Kramer's claim. The trial court did not clearly err in rejecting Kramer's assertions that it was overbilled for materials and that it was further entitled to a credit on early termination of the access agreement. We next consider whether the court properly rejected Kramer's assertion of accord and satisfaction with respect to the amounts claimed due by Hyperion.

¶13 Both parties point to the supreme court's discussion in ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis. 2d 95, 341 N.W.2d 655 (1984) as a definitive statement of the law in Wisconsin regarding accord and satisfaction. They disagree, however, as to the proper result in this case under the ***Flambeau*** analysis. The supreme court noted that under long-standing Wisconsin

[4] Kramer's president testified that the supplier of the new machine "had the higher quality proof and they were willing to work with us because we were in a growth mode at that point, so that they cut us a screaming deal on it."

law "payment in full settlement of a claim which is disputed as to amount discharges the entire claim." ***Id***. at 113. Kramer asserts that that is precisely what occurred in this case, and that Hyperion's acceptance of its partial payment discharged the remainder of Hyperion's claim, which was "disputed as to amount."

¶14 Hyperion, on the other hand, points to the requirement in ***Flambeau*** that "when the amount of a debt is undisputed but *an offset is claimed arising directly out of the contract of sale of goods and not out of any collateral transaction*, the debt is a single claim which is disputed in amount." ***Id***. at 114 (emphasis added). In Hyperion's view, Kramer's debt arose out of transactions separate from each other and from the matchprint machine usage agreement. That is, Kramer did not dispute that it owed certain amounts for other supplies or services it received from Hyperion, the only significant dispute being over the amount billed for matchprint materials. And, according to Hyperion, Kramer's claim of an offset arising out of Kramer's termination of the matchprint usage agreement cannot be used to accomplish an accord and satisfaction regarding amounts owed to Hyperion that were otherwise not in dispute. We agree that the attempted offset from a "collateral transaction," together with other facts in the present case, defeat Kramer's accord and satisfaction defense to Hyperion's claim.

¶15 The record contains two letters from Kramer to Hyperion regarding the amounts at issue. The first, dated May 17, 1996, does not establish accord and satisfaction, although it did put Hyperion on notice that Kramer disputed the amount billed for matchprint materials. The tendered amount of $844.76, however, was not communicated to be a full settlement of the dispute. Rather, the letter indicates that the payment tendered was based on Kramer's own calculations of materials used, and states only that "[t]o keep our bills current, we'll pay the

amount of the bill that is not in dispute." The letter expressly contemplated further discussions between the parties regarding the disputed billing: "Please … call as soon as you have had a chance to look into this, as we are interested in how there could be such a discrepancy in what was billed as opposed to what our usage shows."

¶16 Kramer claims, however, that its March 4, 1998, letter tendering $330 and asserting that "[t]his check pays our account in full," resulted in a discharge of any remaining obligations to Hyperion when Hyperion cashed the check. We note first that Hyperion posits the trial court may have concluded that Kramer did not send, or at least, that Hyperion did not receive, the March 1998 letter. Hyperion points to testimony from one of its employees, to whom the letter should have been directed had it been received, that she had not seen the letter prior to the instant litigation, and to inconsistencies in the dates of the letter, the check and when it was cashed. We do not accept this purported finding. Not only did the trial court say nothing in its decision from which we might imply a finding that the letter had not been received by Hyperion, but the court's comment rejecting Kramer's accord and satisfaction argument on another basis implies a contrary finding.

¶17 Thus, our inquiry must be whether Kramer's letter is sufficient to trigger an accord and satisfaction, assuming for the purposes of our analysis that Hyperion received the letter along with the $330 check that Hyperion subsequently cashed. We conclude that it is not. First, we note that the check itself was not restrictively endorsed and bore no notation that it was tendered "in full settlement" of all outstanding disputed amounts. *See* ***Flambeau***, 116 Wis. 2d at 117 (noting that the lack of a notation on the check was a distinguishing fact in a prior case where discharge was not allowed). Furthermore, the wording of the

March 1998 Kramer letter was considerably less forceful in communicating the intent of the tender than was the case in ***Flambeau***. There, not only did the check bear the annotation "in full payment of liability to you for equipment," but the accompanying letter "stated that the 'check … [is] in full settlement of notes we owe to Honeywell in connection with purchase of our computer system.'" ***Id***. at 99. Kramer's letter by contrast, while asserting that the enclosed check "pays our account in full," proceeds to recite the outstanding invoices and the various credits claimed by Kramer against them, most notably the $2,416.69 credit for Kramer's termination of usage of the matchprint machine. The letter concludes with a statement that the check and explanation of claimed credits "*should* clear up our account with you" (emphasis added).

¶18 We conclude that the lack of a restrictive endorsement or annotation on the tendered check, the less than unequivocal language of the letter, and Kramer's attempt to apply offsets arising out of a collateral transaction, combine to deprive Kramer of the benefit of the holding in ***Flambeau***. *See* ***id.*** at 111 (noting that "the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt"); ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979) ("There must be expressions sufficient to make the creditor understand or to make it unreasonable for him not to understand that the performance is offered in full satisfaction of the claim." (citing 6 CORBIN, CONTRACTS § 1277. at 118)).

CONCLUSION

¶19 For the reasons discussed above, we affirm the appealed orders.

By the Court.—Orders affirmed.

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