

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 97-1280-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICK DEMAURO,

PLAINTIFF-APPELLANT,

V.

PETER R. SZUKIS AND PATRICIA A. SZUKIS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waushara County:
LEWIS MURACH, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM.¹ Patrick DeMauro appeals from a judgment dismissing his complaint to foreclose upon a mortgage against Peter R. Szukis and

¹ This is an expedited appeal under RULE 809.17, STATS.

Patricia A. Szukis.² DeMauro claims the trial court erred in concluding the parties orally entered into an accord and satisfaction settling Szukis's obligation to DeMauro prior to the commencement of the trial court action. We agree and reverse the judgment.

This case is a foreclosure action by DeMauro against Szukis. After trial, the circuit court held that the mortgage had been released by an agreement to transfer other property, and therefore this case was barred by accord and satisfaction. The agreement arose from other litigation involving F&M Bank, which also held a mortgage on property owned by Szukis, including some of the same property on which DeMauro held a mortgage. The bank filed a foreclosure suit against Szukis which also named DeMauro as a junior lienholder. DeMauro filed an answer which raised an issue with the priority of the bank's mortgage.

The trial court in the present case found that DeMauro's attorney had "discussions" with counsel for the bank in October 1993. However, the court did not find that those discussions led to a firm agreement. The court found that in late October or November 1993, DeMauro and Peter Szukis met with two representatives of the bank and reached an agreement to resolve the case. As part of that agreement, DeMauro agreed to accept certain pieces of equipment in exchange for withdrawing his answer in the bank's foreclosure action and releasing his mortgage on the Szukis property.

On appeal, DeMauro refers to the agreement as the "alleged" agreement, and at one point he argues that the existence of anything rising to the

² The appellant advises us that Peter Szukis has died, but that the title to the property in question was held by Peter and Patricia Szukis as joint tenants, leaving Patricia as the sole owner. Therefore, we will refer to the respondents' arguments as being made by Patricia Szukis.

level of an agreement is “speculative at best.” However, factual findings of the trial court “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Section 805.17(2), STATS. DeMauro does not argue that the finding, as to the specifics of the agreement, was clearly erroneous in light of the trial record. We accept the finding for purposes of this appeal.

DeMauro argues primarily that the agreement does not meet the elements of an accord and satisfaction. An “accord and satisfaction” is an agreement to discharge an existing disputed claim, and it establishes a defense to an action to enforce a claim. *Butler v. Kocisko*, 166 Wis.2d 212, 215, 479 N.W.2d 208, 210 (Ct. App. 1991). It requires a bona fide dispute regarding total amount owing, an offer, an acceptance and consideration. *Id.* Whether an accord and satisfaction has occurred is a question of law reviewed by this court de novo. *See Cooke & Franke, S.C. v. Meilman*, 136 Wis.2d 434, 440, 402 N.W.2d 361, 364 (Ct. App. 1987).

DeMauro argues that there was never a bona fide dispute between himself and Szukis as to the debt owed, because Szukis always agreed that he had not repaid his \$25,000 loan. The trial court’s decision does not expressly identify a dispute between DeMauro and Szukis. In her brief on appeal, Szukis argues that the “dispute here regarded what security interest the bank and DeMauro had in the property.” However, that is a description of the dispute between DeMauro and the bank, not DeMauro and Szukis. We are unable to identify a disputed claim that existed between DeMauro and Szukis at the time of the negotiation. Therefore, we conclude that the oral agreement did not meet the elements of accord and satisfaction, and the judgment which was based on that theory must be reversed.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

