COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2810

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

TRADITIONAL DESIGN WORKS, LTD.,

PLAINTIFF-APPELLANT,

V.

JOHN MCGOURTHY, JR., AND CELEEN MCGOURTHY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

BRENDAN L. SULLIVAN,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Traditional Design Works, Ltd. (TDW) appeals from an order dismissing its action against John McGourthy, Jr. and Celeen McGourthy. Because we conclude that the McGourthys' last payment to TDW constituted an accord and satisfaction under their contract for the construction of their home, we affirm the trial court's order.

The following facts are undisputed. In August 1992, TDW and the McGourthys entered into a contract to construct a home. The contract price was $248,500. Paragraph 13 of the contract provided as follows:

> The Owner shall not be entitled to occupancy of the premises until the aforesaid agreement sum, adjusted as to additions, deductions, and any other extras ordered by Owner during the time of this agreement have been paid in full. If Owner shall occupy the home prior to its completion and before final payments of monies due Contractor under this agreement, Contractor may, at his option, construe such occupancy as acceptance of all the work performed by Contractor to such date, and the amount of the entire agreement shall become immediately payable less the amount of Contractor's costs to complete said work relieving Contractor of further responsibility to complete said work.

During the course of the construction, the McGourthys requested and received extras, i.e., work above and beyond the terms of the parties' contract. In July 1993, the McGourthys moved into the house. Also that month, John McGourthy and Steve Frohman, TDW's president, met to discuss the amounts outstanding for the construction. While McGourthy and Frohman disagree as to what transpired during that meeting, it is undisputed that McGourthy tendered a check for $22,000 to Frohman with the notation "payment of construction extras." McGourthy contended that this payment constituted an amount which Frohman agreed to accept in payment of the balance due for the

project. Frohman contended that an additional $33,183 was due and owing for extras on the project and that the check represented what McGourthy could afford to pay at that time. TDW deposited the check and on August 3, 1993, Frohman, on behalf of TDW, issued a waiver of lien to the McGourthys.[1] On August 6, 1993, Frohman executed a Contractor's Affidavit and Release under oath.[2]

TDW sued the McGourthys in March 1995 to recover payment for $52,902 in extras and interest and attorney's fees under the parties' contract.

The parties filed cross-motions for summary judgment. TDW sought partial summary judgment as to the McGourthys' liability for extras. The McGourthys opposed the motion and argued that they paid $259,500 to construct their house, including extras, and that TDW's acceptance of the McGourthys' $22,000 payment in July 1993 constituted an accord and satisfaction. The McGourthys sought dismissal of TDW's complaint on issue preclusion grounds because liability for extras under the contract had been litigated in a separate

[1] The waiver of lien stated: "For value received, we hereby waive all rights and claims for lien on land and on buildings about to be erected, being erected, erected, altered or repaired and to the appurtenances thereunto, for John McGourthy, owner, by Traditional Design Works, contractor, for [names illegible], same being situated in [description of property] for all labor performed and for all materials furnished for the erection, construction, alteration or repair of said building and appurtenances …."

[2] The Contractor's Affidavit and Release identified TDW as the general contractor on the project and stated that improvements were fully completed on or about July 1, 1993. The affidavit further stated that "the contract price due said contractor under the construction contract, in the sum of _____, has been paid in full," that all subcontractors had been paid with the exception of two subcontractors identified on the affidavit, and that TDW "hereby releases and waives any and all rights to file a mechanics' or materialmen's lien against said property." The affidavit stated that it was made for the purpose of inducing the title insurance company to insure title to the McGourthys' property without exception to possible construction lien claims.

Milwaukee county action brought by TDW (and Frohman) against a former associate of TDW, Brendan Sullivan.[3]

The trial court decided the motions on the parties' written submissions. The court concluded that the Milwaukee litigation, which determined that there was no liability for extras, resolved the substantive issues regarding liability for extras between TDW and the McGourthys. Therefore, there was no basis for the TDW/McGourthy suit. TDW appeals.

We may sustain the trial court's decision for reasons not relied upon by the trial court. *See* ***Bence v. Spinato***, 196 Wis.2d 398, 417, 538 N.W.2d 614, 620 (Ct. App. 1995). We conclude that the presence of an accord and satisfaction defeats TDW's claim against the McGourthys.

An appeal from a grant of summary judgment raises an issue of law which we review de novo. *See* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See* ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994). On summary judgment motion, we look at the affidavits and draw inferences from the facts contained therein, viewed in the light most favorable to the nonmoving party. *See* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.,*** 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979). If these facts are subject to conflicting interpretations or reasonable

[3] Sullivan, who is related to the McGourthys by marriage, was employed by TDW at the time the McGourthys' house was under construction. The business relationship between Frohman and Sullivan broke down in December 1993 and was litigated in Milwaukee county thereafter.

persons might differ as to their significance, summary judgment is improper. *See* ***id.***

Accord and satisfaction is an agreement to discharge a disputed claim. *See* ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis.2d 95, 112, 341 N.W.2d 655, 664 (1984). Such an agreement will be implied from TDW's acceptance of the check only if, as here, the amount due was unliquidated and disputed. *See* ***Karp v. Coolview, Inc.,*** 25 Wis.2d 299, 303, 130 N.W.2d 790, 793 (1964).[4] 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, 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.*** at 681-82, 291 N.W.2d at 638.

Assent to or acceptance of an accord and satisfaction can be manifested by word or action. *See* ***Hoffman v. Ralston Purina Co.,*** 86 Wis.2d 445, 454, 273 N.W.2d 214, 217 (1979). "[I]f a check offered by the debtor as full payment for a disputed claim is cashed by the creditor, the creditor is deemed to have accepted the debtor's conditional offer of full payment notwithstanding any reservations by the creditor." ***Flambeau,*** 116 Wis.2d at 101, 341 N.W.2d at 658.

Here, the undisputed facts establish that the parties entered into a contract for the construction of the McGourthys' home. The contract provided

[4] A claim is liquidated if the amount due can be determined by mere mathematical computation. *See* ***Clark v. Aetna Fin. Corp.,*** 115 Wis.2d 581, 589, 340 N.W.2d 747, 751 (Ct. App. 1983). Here, the parties were in dispute regarding the extras provided.

that upon occupancy by the McGourthys, all amounts due would become immediately payable. The McGourthys took occupancy in July 1993, thereby triggering this provision of the contract. At the time McGourthy met with Frohman contemporaneously with the occupancy date, the parties were in dispute regarding extras and Frohman accepted a $22,000 check with the notation "payment of construction extras." TDW deposited the check and on August 3, 1993, Frohman, on behalf of TDW, issued a lien waiver to the McGourthys. Three days later, Frohman executed a Contractor's Affidavit and Release. It was not until March 1995 that TDW sued the McGourthys to recover payment for extras. These undisputed facts support a conclusion of accord and satisfaction.

TDW argues that it provided the lien waiver and contractor's affidavit to facilitate the McGourthys' ability to obtain title insurance. However, the documents on their face do not reserve any rights to TDW, and we conclude that this contention does not defeat our legal conclusion regarding accord and satisfaction.

While we acknowledge that a party may waive construction lien rights without extinguishing a contract claim, *see* § 779.05(1), STATS., we nevertheless conclude that under the circumstances of this case, acceptance by TDW of the McGourthys' $22,000 check constituted an accord and satisfaction relating to the parties' contract and the extras.

In light of our holding, we need not reach the other issues raised on appeal. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Order affirmed.

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