COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP765 **Cir. Ct. No. 2003CV177**

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

CHARLES A. GHIDORZI, GHIDORZI & ASSOCIATES, INC., AND STEWART CENTER, LLC,

PLAINTIFFS-APPELLANTS,

V.

STEVEN J. PERGANDE D/B/A PERGANDE AND COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: CONRAD A. RICHARDS, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 DYKMAN, J. Charles Ghidorzi, Ghidorzi & Associates and Stewart Center, LLC (collectively Ghidorzi) appeal from a judgment dismissing a complaint against Steven Pergande d/b/a Pergande and Company (Pergande) for

recovery of back rent on a commercial property. The circuit court found that Ghidorzi's retention of a check for $4,881.45 from Pergande constituted an accord and satisfaction. Ghidorzi contends that he did not enter into an accord and satisfaction because the back of Pergande's check provided specific terms prescribing the time and manner of acceptance that Ghidorzi did not fulfill. We disagree because we conclude that retention of the check was an accord and satisfaction.

¶2 Alternatively, Ghidorzi argues there was no accord and satisfaction because Ghidorzi rejected the offer by mailing Pergande periodic billing statements after receiving Pergande's check. Again, we disagree. Applying ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 273 N.W.2d 214 (1979), we conclude that Ghidorzi's asserted efforts to reject Pergande's offer were ineffectual because retention of the check for an unreasonable time was sufficient to establish an accord and satisfaction. We therefore affirm.

Background

¶3 The parties do not dispute the relevant facts. Ghidorzi is in the business of leasing office space to commercial tenants. In October 1995, Ghidorzi and Pergande entered into a five-year commercial lease for an office suite at the Stewart Center, a building owned by Ghidorzi in Wausau. The lease included an option to extend for an additional two years following the end of the five-year period. In late 2000, Pergande exercised his option to extend the lease.

¶4 In early 2001, Pergande contacted Ghidorzi to discuss the possibility of terminating the lease before the end of the two-year period. In July 2001, Pergande informed Ghidorzi, by letter, that he wished to terminate the lease at the end of August 2001.

¶5 Pergande paid the August 2001 rent and moved out of his office suite that month. Pergande made no additional rent payments for the remainder of 2001. Ghidorzi sent Pergande periodic "open statements" requesting payment of rent for the months following August 2001. Throughout the remainder of the lease period, Ghidorzi was unable to secure another tenant to mitigate his damages, but temporarily used the vacated space for storage between December 2001, and January 2002.

¶6 In January 2002, Pergande sent a letter to Ghidorzi and included a check in an amount equal to the unpaid rent for the months of September, October, November, and December 2001. The letter stated: "Enclosed is my check of $4,881.45 in total satisfaction of the balance of the Lease for my Suite … at 2600 Stewart Avenue dated October 6, 1995." The back of the check contained the following note: "Endorsement and negotiation of this check releases Pergande & Company, CPAs from the balance of the Lease, 10/6/95, from Charles Ghidorzi and/or Stewart Properties."

¶7 Ghidorzi received the check but did not endorse or cash it. He did not return it or otherwise expressly reject Pergande's offer to settle the account. However, Ghidorzi continued to send "open statements" requesting payment of rent for the period of September 2001 to the statement date. These statements did not account for the amount of Pergande's settlement check. Ghidorzi mailed several such statements at regular intervals from February 2002 to February 2003.

¶8 In February 2003, Ghidorzi sued Pergande for unpaid rent from September 2001 to November 2002. (R-1). Relying on ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 273 N.W.2d 214 (1979), the trial court determined that holding Pergande's check for an unreasonable period of time constituted an

accord and satisfaction agreement, and therefore Ghidorzi was entitled only to the amount of the check. The court also denied Ghidorzi's request for attorney fees and costs. Ghidorzi appeals.

Analysis

¶9 "Ordinary contract principles apply in determining whether an agreement of 'accord and satisfaction' is reached." ***Hoffman***, 86 Wis. 2d at 453. The existence and interpretation of a contract are questions of law that we review de novo when the relevant facts are undisputed. ***Gustafson v. Physicians Ins. Co.***, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). Here, the issue is whether, on the undisputed facts, an accord and satisfaction agreement existed. Hence, our review is de novo.

¶10 "An 'accord and satisfaction' is an agreement to discharge an existing disputed claim; it constitutes a defense to an action to enforce the claim." ***Flambeau Products Corp. v. Honeywell Info. Sys. Inc.***, 116 Wis. 2d 95, 112, 341 N.W.2d 655 (1984). Like a contract, an accord and satisfaction requires an offer, acceptance, and consideration. ***Id.*** Acceptance may be demonstrated by the offeree's actions as well as his statements. ***Hoffman***, 86 Wis. 2d at 454. Consistent with this principle, Wisconsin courts have held that retention of a check offered as full settlement of an obligation constitutes acceptance of the offer and an accord and satisfaction.[1] *See* ***Hoffman***, 86 Wis. 2d at 458.

[1] Ghidorzi contends that retention of a check for an unreasonable period of time without more is not a sufficient basis for an accord and satisfaction agreement, and that additional evidence is necessary to prove the existence of such an agreement. We consider this argument at length in ¶¶16–20.

¶11 Whether a check is held for an unreasonable length of time depends on the circumstances of the case, and is a question of fact for the trial court. ***Hoffman***, 86 Wis. 2d at 456. Here, Ghidorzi retained the check from January 2002 until he filed suit in February 2003. The trial court found that this was an unreasonable length of time, and Ghidorzi does not challenge this finding. Instead, Ghidorzi contends that because the back of Pergande's check contained a specific manner of acceptance that he did not follow, the parties did not reach an accord and satisfaction agreement.

¶12 Pergande responds that we may not reach the merits of this argument because Ghidorzi failed to assert it at the trial court, thereby waiving his right to raise it on appeal. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). We conclude otherwise. Ghidorzi's argument that the check contained a specific manner of acceptance that precluded an accord and satisfaction is closely related to arguments made by Ghidorzi at trial. For example, Ghidorzi's attorney elicited testimony from an employee of Ghidorzi that the terms written on the back of the check were not acceptable to Ghidorzi. The attorney also elicited testimony from Pergande that he believed that "if [he] put wording like this on the back of the check … it was a legally binding document." Ghidorzi's trial court briefs also asserted that he did not accept the offer represented by the language on the back of the check. Because these statements are related to the argument being made on appeal, we do not deem the argument waived.

¶13 Ghidorzi contends that when an offer prescribes the matter and time of acceptance, its terms must be complied with to create a contract, citing ***Chase Lumber & Fuel Co., Inc. v. Chase***, 228 Wis. 2d 179, 596 N.W.2d 840 (Ct. App. 1999), and ***Nelson, Inc. v. Sewerage Comm. Of Milwaukee***, 72 Wis. 2d 400, 241 N.W.2d 390 (1976). The back of Pergande's check stated that "[e]ndorsement and

negotiation of this check releases Pergande … from the balance of the Lease." Because Ghidorzi neither endorsed nor negotiated the check, he argues that there could not have been an accord and satisfaction. We believe that such language on a check does not preclude the creation of an accord and satisfaction agreement.

¶14 Under ***Hoffman***, retention of a check for an unreasonable period of time is, for all practical purposes, endorsement and negotiation of the check. As ***Hoffman*** explains, "there is no distinction between the cashing of a check or the retaining of a check for an unreasonable length of time." ***Id.*** at 454, citing 6 Williston Contracts (rev. ed.), § 1854, at 5215-6. A leading treatise notes that a creditor's control over the check is the critical factor in ascertaining a creditor's assent to an accord and satisfaction: "The creditor's exercise of dominion over the debtor's funds even though not intended by the creditor as an acceptance is a sufficient manifestation of assent." CORBIN ON CONTRACTS, § 70.2(3), at 325. We therefore conclude that Ghidorzi's retention of the check for a period of thirteen months prior to the litigation had the effect of assenting to an accord and satisfaction under the terms offered by Pergande.

¶15 Neither ***Chase Lumber*** nor ***Nelson*** is of much assistance to Ghidorzi. ***Chase Lumber*** concerns the law of real estate transactions and not contract law generally. ***Chase Lumber***, 228 Wis. 2d at 195 ("[A]n option to purchase real estate binds the seller only if the buyer unconditionally accepts it."). ***Nelson*** more squarely stands for the general principle on which Ghidorzi relies: "[W]here an offer prescribes the time and manner of acceptance, its terms must be complied with in order to create a contract." ***Nelson***, 72 Wis. 2d at 419. But ***Nelson*** offers no guidance on how to resolve the apparent conflict that occurs when this general principal stated in ***Nelson*** conflicts with a creditor's apparent assent to an accord and satisfaction by retaining a check. In Ghidorzi's case, at

least where the offered terms pertained to the cashing of the check, ***Hoffman***'s rule that retention of a check is the same as cashing it controls. [2]

¶16 Ghidorzi next contends that under ***Hoffman***, retention of a check for an unreasonable period of time alone does not manifest assent to an accord and satisfaction agreement. Ghidorzi argues that a creditor's retention of the check must be accompanied by silence or inaction by the creditor. Because he sent Pergande periodic billing statements requesting payment of the full amount after Pergande's offer to settle, Ghidorzi asserts that he was not silent and therefore did not assent to an accord and satisfaction agreement.

¶17 ***Hoffman***'s facts are not inconsistent with Ghidorzi's view. There, Hoffman sued Ralston Purina, Waldschmidt & Sons, Inc., and Heritage Mutual Insurance over some feed he purchased. Purina mailed Hoffman a $3,000 check with a statement that the check was offered to settle the account in full. Hoffman testified that he did not receive the check (a statement disputed at trial and disbelieved by the trial court), but did receive subsequent statements from Purina showing his account balance had been reduced to zero. After several months, the check remained uncashed, and Purina heard nothing from Hoffman regarding the check or the account statements received later. The supreme court upheld the trial court's conclusion that, by his conduct, Hoffman assented to an accord and satisfaction agreement with Purina.

[2] We venture no opinion as to the outcome of a case in which the check or a document mailed with the check contained terms prescribing a manner and time of acceptance other than or in addition to those pertaining to the cashing of the check.

¶18 The court explains that Hoffman's silence provided a rationale for its conclusion:

> The Restatement 2d, *Contracts*, furnishes still another rationale for our determination that Hoffman accepted Ralston Purina's contract of "accord and satisfaction." Sec. 72(1) provides:
>
> (1) When an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:
>
> ....
>
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
>
> Under this rationale, where Hoffman and Purina had been in a continuous process of negotiations, the silence of Hoffman in respect to the offer, even if no check and credit memorandum had accompanied the offer, could be construed as an acceptance of the offer.

Hoffman, 86 Wis 2d at 457. However, the court held that Hoffman's silence was a secondary basis for its holding—"*still another* rationale for our determination." (Emphasis added.)

¶19 The primary—and sufficient—basis of ***Hoffman***'s conclusion was the plaintiff's retention of the check for an unreasonable period of time. ***Hoffman***'s first paragraph states this unambiguous holding: "We conclude that under these circumstances, where David Hoffman retained the check and credit memorandum for an unreasonable length of time with the knowledge that both instruments were offered in full settlement of the disputed claim, such retention *in itself* constituted an acceptance of the settlement offer." ***Hoffman***, 86 Wis. 2d at 448-49 (emphasis added). ***Hoffman*** established a bright-line rule that when a creditor retains a check offered as a full payment of a debt for an unreasonable

period of time, the creditor assents to an accord and satisfaction agreement.[3] Because it is undisputed that Ghidorzi retained Pergande's check for an unreasonable period of time, we conclude that he entered into an accord and satisfaction agreement with Pergande, satisfying Pergande's debt to him in full.

¶20 Ghidorzi directs our attention to another case, ***Frank v. Frost***, 170 Wis. 353, 174 N.W. 911 (1919), in which the court concluded an accord and satisfaction was not reached. Ghidorzi contends that ***Hoffman*** distinguished ***Frank*** because the plaintiff in ***Frank*** was not silent. But this was only one of the bases on which ***Hoffman*** distinguished ***Frank***. In ***Frank***, the plaintiff not only expressed his objections to the offered check, but offered to return the check. The ***Hoffman*** court explained its basis for distinguishing ***Frank*** as follows: "***Frank*** was not a case of silence, and it is difficult to say that, under the circumstances, the check was retained, in a legal sense, when the effort to return it was rebuffed." ***Hoffman***, 86 Wis. 2d at 455. Thus, the ***Hoffman*** court questioned whether the plaintiff in ***Frank*** even retained the check after his attempt to return it was denied. Therefore, we conclude that this discussion of ***Frank*** in ***Hoffman*** does not conflict with the express holding of ***Hoffman*** that retention of a check for an unreasonable period of time in itself is sufficient for an accord and satisfaction agreement.

¶21 Finally, Ghidorzi contends that the trial court erred by denying him attorney fees under the terms of the parties' lease agreement. He asserts that he is

[3] Corbin offers two policy reasons for adopting this bright-line rule: "By holding that the creditor's conduct is operative as an acceptance … a court obtains a shortcut to complete justice, protecting the debtor against injury and preventing unnecessary litigation." CORBIN ON CONTRACTS, § 70.2(3), at 325.

entitled to attorney fees incurred at trial court and in this appeal under paragraph nineteen of the lease, which provides in part:

> 19. INDEMNITY
>
> Tenant shall indemnify and hold harmless Landlord against and from any and all claims arising from Tenant's use of the Premises or from the conduct of its business or from any activity, work, or other things done, permitted or suffered by the Tenant in or about the Premises, and shall further indemnify and hold harmless Landlord against and from any and all claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease, or arising from any act of negligence of the Tenant, or any officer, agent, employee, guest, or invitee of Tenant, and from all costs, attorney's fees, and liabilities incurred in or about the defense of any such claim or any action or proceeding brought thereon and in any case any action or proceeding be brought against Landlord by reason of such claim, Tenant upon notice from Landlord shall defend the same.

Ghidorzi asserts that he is entitled to attorney fees because his action against Pergande "ar[ose] from [Pergande's] breach or default in the performance" of the lease.

¶22 Pergande counters that paragraph twenty-one, entitled "DEFAULT BY TENANT," and not paragraph nineteen, applies. Pergande contends that a default by tenant describes this case, not indemnification, which applies to third-party claims, as indicated by the phrase in paragraph nineteen, "liabilities incurred in or about the defense of any such claim." Pergande notes that paragraph twenty-one provides for recovery of attorney fees "incurred by Landlord in obtaining possession of said Leased Premises," and not attorney fees in other types of proceedings against a defaulting tenant. Finally, Pergande argues that the contract is at least ambiguous as to whether Ghidorzi may recover attorney fees here, and we must therefore construe it against him as the contract's drafter, citing

Hunzinger Const. Co. v. Granite Resources Corp., 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995).

¶23 We agree that the contract is ambiguous as to whether Ghidorzi may recover attorney fees. Further, Ghidorzi's interpretation of the agreement is contrary to the American Rule that parties are responsible for their own attorney fees. To contract out of this well-established rule, an agreement's relevant terms must be unambiguous. ***Hunzinger,*** 196 Wis. 2d at 340. Because these terms are ambiguous, we construe the relevant provisions against Ghidorzi and deny his request for attorney fees.[4]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] We observe that even if the contract permitted recovery of attorney fees here, Ghidorzi would not be entitled to them because his claim did not "aris[e] from a breach or default" by Pergande. By February 2003, the date this action was brought, Pergande was no longer in default because Ghidorzi had accepted Pergande's offer of settlement by retaining his check for over a year.