COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1627 **Cir. Ct. No. 02-CV-92**

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

H.T. HACKNEY COMPANY,

PLAINTIFF-RESPONDENT,

V.

NATIONAL PETROLEUM, INC. AND YOGI BHARDWAJ,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

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

¶1 PER CURIAM. National Petroleum, Inc., and Yogi Bhardwaj appeal from a money judgment in favor H.T. Hackney Company for goods and services delivered to gas stations affiliated with National. National argues that it was not a party to the sales agreement with Hackney and that Hackney failed to meet its burden of proving that National actually received or was invoiced for the

unpaid goods and services. We conclude that the circuit court's findings that National was a party to the agreement and that a change in business name did not negate the agreement are not clearly erroneous. We affirm the judgment but deny Hackney's motion for an award of costs and attorney's fees for a frivolous appeal.

¶2 Hackney is a wholesale grocery distributor. It agreed to supply merchandise to more than thirty-five gas stations in Wisconsin, Illinois, Indiana, and Michigan. National agreed to be billed and payments were made by the electronic transfer of funds from National's bank account. Bhardwaj, as the sole owner of National, personally guaranteed the obligation to pay. The written sales agreement was executed on February 2, 2001. The agreement made reference to a list of stores operated by NP Retail, LLC. National supplied Hackney with the list; more than half the stations were designated as Petro Marts.

¶3 In December 2001, Hackney was informed that its services were terminated. Hackney indicated that it was owed $830,508.46 for November and December deliveries. When National failed to make payment, Hackney commenced this action. National and Bhardwaj failed to timely file an answer to the complaint and a default judgment was entered on liability.[1] An evidentiary hearing was held on the issue of damages. Judgment was entered in favor of Hackney for $1,095,884.95, representing the amount due on the account, interest, and collection costs.

[1] The circuit court denied a motion to extend the time for filing an answer concluding that National and Bhardwaj had not made a sufficient showing of excusable neglect. That ruling is not challenged on appeal.

¶4 National and Bhardwaj challenge the sufficiency of the evidence to support the damages award. We will not set aside the circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).[2] National does not dispute the amount due but argues that it is not responsible for the debt. It first claims that National was not a party to the agreement with Hackney because Bhardwaj's signature on the agreement did not include a designation that he was signing on behalf of National.[3] This is nothing more than an attempt to litigate the liability portion of the case. National defaulted with respect to filing an answer and the allegations of the complaint are deemed admitted. *See* ***Martin v. Griffin***, 117 Wis. 2d 438, 444, 344 N.W.2d 206 (Ct. App. 1984); WIS. STAT. § 802.02(4). Thus, National admitted the allegation in the complaint that it was a party to the written agreement and agreed to pay for goods and services delivered.

¶5 Even if National's obligation under the agreement is subject to question,[4] the evidence supports the circuit court's finding that National agreed to pay for the goods and services, and that Bhardwaj guaranteed that obligation. The agreement included the proviso that goods would be shipped to the "store list" and billed to National. In an owner's information section of the agreement, Bhardwaj was designated as the president, CEO, and 100% owner of National. Bhardwaj's guaranty acknowledged the extension of credit to "National Petroleum INC/NP

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] Bhardwaj claims that he has no personal liability if National is not a party to the agreement.

[4] We do not address National's contention that a default judgment on liability cannot stand if evidence at the damages hearing controverts the liability allegations of the complaint.

Retail LLC/Petro Mart LLC."[5] Bhardwaj's individual guaranty and separate signature for that purpose would be superfluous if his signature under the "working agreement" portion of the agreement was not on behalf of National. A corporation can be contractually bound even where the corporate name is not used in the contract. ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 855, 470 N.W.2d 888 (1991).

¶6 National's second claim is that the goods and services were delivered after a change in ownership; therefore, Petro Mart, LLC, and not National, received the goods, was invoiced for the deliveries, and is responsible for payment.[6] National characterizes Petro Mart, LLC as a legally unrelated corporation.

¶7 The relevant facts are as follows. A letter to Hackney on National stationary, signed by Bhardwaj, and dated October 11, 2001, asks Hackney to "[p]lease change all accounts that are under NP Retail, LLC to Petro Mart, LLC effective immediately." On October 18, 2001, Hackney received a fax transmission requesting that all billings for the stations previously operated by NP Retail be sent to Petro Mart, LLC at a given address. The address was the same as that utilized by National. It is undisputed that Hackney continued deliveries as before and made electronic draws on the same bank account.

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[5] We recognize that National attempted to show at the hearing that the "Petro Mart LLC" designation in the guaranty was added after Bhardwaj signed the document because Petro Mart, LLC did not come into existence until October 2001. The circuit court was not persuaded that the designation was a substantial alteration of the document since Bhardwaj was unable to produce a copy that did not include the designation.

[6] Hackney's representative admitted that all the unpaid invoices were addressed to Petro Mart, LLC.

¶8 The circuit court found that the change in name to Petro Mart, LLC was "ministerial" and did not result in any substantive change to the agreement with Hackney. This finding is not clearly erroneous. Hackney employees testified that name changes were common in the gas station industry and may often reflect marketing strategy rather than changes in legal ownership. They further explained that goods and services would not be delivered to a new owner without sufficient proof of credit worthiness and guarantees of payment. Hackney did not consider the name change to alter its original agreement with National. Indeed, payments were still taken from the same bank account (when sufficient funds existed). In response to Hackney's demand for payment, National unconditionally acknowledged the existence of the debt and offered a payment plan.[7]

¶9 The fuzzy line between National and Petro Mart, LLC also supports the finding that the name change did not alter National's obligation under the agreement with Hackney. The circuit court noted Bhardwaj's use of LLCs and the sale of business interests without bulk transfer affidavits. A Petro Mart, LLC partner testified that he acquired his interest in the business without payment of any money. The principal partner in Petro Mart, LLC was Bhardwaj's wife. Petro Mart, LLC operated out of the same office as National. Affidavits filed earlier in the action on behalf of National characterized Petro Mart, LLC as an "affiliate" of

[7] Hackney argues that National's acknowledgement permits recovery on an account-stated theory. *See* ***Lepp v. Tamer***, 1 Wis. 2d 193, 199, 83 N.W.2d 664 (1957) ("If one party holds an account against the other, and a statement of the same is made showing the amount due on a particular day, and the statement is admitted by the other party to be correct, and there is a promise, either actual or implied, to pay the same, it amounts to an account stated between the parties."). Although Hackney did not plead an account stated in its complaint, the circuit court recognized National's admission of the debt. This could be construed as a sua sponte amendment of the pleadings to conform to the evidence, a matter within the circuit court's discretion. *See* ***Schultz v. Trascher***, 2002 WI App 4, ¶14, 249 Wis. 2d 722, 640 N.W.2d 130; WIS. STAT. § 802.09(2). We need not address this theory as additionally supporting the judgment.

National. Finally, Petro Mart, LLC leased gas stations and convenience stores from Petrol Properties, LLC, of which Bhardwaj was the managing member. The lease agreement gave access to the property to the landlord or National Petroleum, Inc., as needed. In light of the interrelationship of the entities, we sustain the circuit court's finding that had National and Bhardwaj intended to be released from the agreement with Hackney, a clearer statement that an actual ownership change had occurred would have been put forth.

¶10 Having concluded that the circuit court's findings are not clearly erroneous, National and Bhardwaj are obligated to Hackney for the unpaid invoices. Hackney requests that we declare this appeal frivolous and award it costs and attorney's fees under WIS. STAT. RULE 809.25(3). We need not address the issue. The parties' agreement provides for the recovery of collection costs and payment of an attorney fee of a percentage of the amount due. The agreement controls. Hackney has already been compensated for attorney's fees.

By the Court.—Judgment affirmed.

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