

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1804
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-685

**IN COURT OF APPEALS
DISTRICT II**

LUIGE'S PIZZA FACTORY, LTD.,

PLAINTIFF-APPELLANT,

V.

DENIS PETRI, SR. AND CAROL PETRI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Luige's Pizza Factory, Ltd. appeals from a judgment dismissing its suit against Denis and Carol Petri to enforce the Petris' guaranty of Open Range Meats, Inc.'s debt to Luige's. The circuit court found that a contract of accord and satisfaction between Open Range and Luige's satisfied the debt guaranteed by the Petris. Because this finding is not clearly

erroneous, we affirm the judgment dismissing the complaint against the Petris to enforce their guaranty of the satisfied debt.

¶2 The Petris did business as D.C. Distributing and did business with Luige's. The Petris sold D.C. Distributing and its assets to Open Range. Open Range agreed to assume D.C. Distributing's debt to Luige's. As part of the transaction, the Petris guaranteed a \$24,000 promissory note given by Open Range to Luige's. After the transaction closed, Open Range became a distributor of Luige's.

¶3 The business relationship between Luige's and Open Range deteriorated, and representatives of Open Range, James Pope, and Luige's, Larry Drake, met to discuss how to resolve the difficulties. Luige's ultimately sued the Petris to enforce their guaranty of the \$24,000 note. In their answer to the complaint, the Petris alleged accord and satisfaction because Open Range had satisfied all debts owed to Luige's, thereby relieving the Petris of their guaranty on the \$24,000 note. The court found that Open Range and Luige's entered into a contract of accord and satisfaction which eliminated the debt guaranteed by the Petris. Luige's appeals.

¶4 "An accord and satisfaction is an agreement to discharge an existing disputed claim." *Cook & Franke, S.C. v. Meilman*, 136 Wis. 2d 434, 439, 402 N.W.2d 361 (Ct. App. 1987). As with any contract, accord and satisfaction requires an offer, acceptance and consideration. *Id.* Offer and acceptance exist when the parties mutually express assent, and consideration exists if the parties manifest an intent to be bound to the contract. *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 173, 588 N.W.2d 363 (Ct. App. 1998). Whether the parties assented and exchanged consideration are factual questions, not legal questions.

See *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 838, 520 N.W.2d 93 (Ct. App. 1994) (existence of consideration is a factual question); *Hoefl v. U.S. Fire Ins. Co.*, 153 Wis. 2d 135, 144, 450 N.W.2d 459 (Ct. App. 1989) (whether offer is accepted is question of fact).

¶5 We reject Luige’s argument that our standard of review is de novo because we must construe a contract of accord and satisfaction between Open Range and Luige’s. A contract cannot be construed until its existence is confirmed. See *NBZ*, 185 Wis. 2d at 838.¹ This matter was tried to the circuit court, and we review the court’s findings of fact regarding the existence of a contract of accord and satisfaction. We will uphold those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2001-02). We apply a de novo standard of review to the circuit court’s legal conclusion that the facts are sufficient to establish the existence of an accord and satisfaction contract. See *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991) (whether facts satisfy a particular legal standard presents a question of law which we decide de novo).

¶6 Open Range gave a \$24,000 note to Luigi’s. The question on appeal is whether Luigi’s and Open Range resolved the note obligation via accord and satisfaction. If the parties entered into a contract of accord and satisfaction, the Petris cannot be pursued on their guaranty. *Cont’l Bank & Trust Co. v. Akwa*, 58 Wis. 2d 376, 388, 206 N.W.2d 174 (1973) (“As a general rule the payment or

¹ Only when the facts are undisputed does the existence and interpretation of a contract become a question of law which we decide de novo. *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998).

other satisfaction or extinguishment of the debt or obligation of the principal discharges the guarantor.”).²

¶7 The court found that representatives of Open Range and Luige’s had several face-to-face meetings to resolve the difficulties in the relationship. Pope testified that he and Drake discussed the sale of Open Range to Luige’s and which aspects of Open Range’s business Luige’s wanted to purchase. The discussion about the financial terms focused on Open Range’s open invoices to Luige’s and the balance owed on the \$24,000 note. The parties agreed that no additional consideration would change hands and that the amount Open Range owed on invoices and the note would be satisfied if Luige’s took over Open Range’s business, including Open Range’s customer lists and equipment. During a November 10, 1999 conversation, Drake told Pope he would accept the deal. Pope then sent a November 16 letter confirming the deal. With the letter, Pope provided an Open Range customer list and a proposal for managing the delivery routes and other Open Range assets which would “conclude any balances due to Luige’s.”

¶8 Although Pope did not receive a response from Drake to the November 16 letter, Pope believed that the agreement was in place. Luige’s retained the customer lists and the Open Range equipment. Pope believed that the Open Range debt was cancelled, and he never received any more invoices from Luige’s for amounts due or requests for payment on the note.

² Neither party contends on appeal that the Petris remain obligated on their guaranty if Open Range’s debt to Luige’s was satisfied.

¶9 Drake testified that he met with Pope on November 10, but did not discuss purchasing any sales routes. He also denied having reached an agreement with Pope regarding the Open Range debt.

¶10 The circuit court found evidence of accord and satisfaction in the confirming letter of November 16, 1999, and the testimony of Pope that from November 1999 through Open Range's bankruptcy filing thirteen months later, Luige's did not demand payment for payment of the principal amount due on the note, even though previous payments had been made on interest only. The court found that Luige's accepted Open Range's business in satisfaction of the note. This arrangement eliminated the debt the Petris guaranteed, and therefore Luige's could not pursue the Petris on their guaranty.

¶11 The circuit court found Pope's testimony more credible than Drake's on the question of whether the parties agreed to satisfy Open Range's debt to Luige's. As the fact finder, the circuit court was entitled to weigh the credibility of the witnesses. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We conclude that the circuit court's findings are not clearly erroneous because they are supported by the record and reasonable inferences from the record. The court's findings of fact also satisfy the legal requirements of an accord and satisfaction contract: offer, acceptance and consideration.

¶12 Luige's argues that accord and satisfaction cannot be inferred from the parties' conduct. We disagree. Accord and satisfaction may be inferred if the parties' conduct is consistent with an agreement to resolve a claim. *See Hoffman v. Ralston Purina Co.*, 86 Wis. 2d 445, 454, 273 N.W.2d 214 (1979). Pope described the terms of the agreement to the circuit court, and Drake and Luige's performed

consistently with those terms. The court obviously rejected Drake's testimony that he never agreed to the proposed resolution of Open Range's debt. Luige's acted consistently with an agreed-upon resolution of Open Range's debt for a period of time which was more than sufficient and reasonable to deem Luige's to have assented to the resolution of the debt. *Cf. id.* at 455-57 (retention of settlement check for unreasonable amount of time constitutes consent to settlement).

By the Court.—Judgment affirmed.

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

