COURT OF APPEALS DECISION DATED AND RELEASED

September 7, 1995

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.

NOTICE

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

No. 95-1327-FT

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

LUBCKE LANDSCAPING, INC.,

Plaintiff-Appellant,

v.

GARY J. DIVALL,
DIVALL DEVELOPMENT CORPORATION,
TIMOTHY CONNERY and
CONNERY BUILDING CORPORATION,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Lubcke Landscaping, Inc. appeals from a judgment dismissing its claim against Gary Divall, Divall Development Corporation, Timothy Connery, and Connery Building Corporation. Lubcke

sued on a note executed by the respondents. Because the undisputed facts show that Lubcke cannot recover on the note, we affirm.[1]

Divall and Connery were general partners in Ashbury Meadows Associates, Lubcke's debtor. In order to obtain waivers on liens Lubcke held on Ashbury's property, the respondents executed a note agreeing to pay an amount equal to Ashbury's debt to Lubcke.

Several months later, in exchange for an agreement not to pursue collection on Lubcke's debts, Lubcke assigned M & I Bank "all of its rights, title and interest in" the note. In November 1993, with that assignment still in effect, Lubcke nevertheless commenced this action, alleging that the respondents had defaulted on the note. Meanwhile, Ashbury had filed a petition in bankruptcy. In March 1994, Lubcke filed a claim against Ashbury in bankruptcy court. The bankruptcy plan proposed full payment of the note to M & I to satisfy Lubcke's claim, without interest after the bankruptcy petition was filed. Lubcke voted in favor of the plan, the bankruptcy court confirmed it, and Ashbury's escrow account issued a joint check to Lubcke and M & I. The check, which Lubcke endorsed, stated that it was "in full settlement and satisfaction of all claims of Lubcke Landscape under Chapter 11 Plan confirmed 5/24/94." The bank retained the proceeds and gave Lubcke the note. Lubcke continued this action, seeking $1,441 in interest on the note after the bankruptcy petition was filed, and attorney's fees expended by Lubcke in collecting on the note.

We decide motions for summary judgment in the same manner as the trial court and without deference to its decision. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Summary judgment is appropriate if, as here, the material facts are not in dispute and admit of only one reasonable inference. ***Wagner v. Dissing***, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987).

Lubcke describes the note as a guarantee of Ashbury's debt to Lubcke, and we accept that characterization. Discharge of the guaranteed debt

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

automatically discharges the obligation of the guarantors. RESTATEMENT OF SECURITY § 115(1) (1941).

Respondents' obligation on the note was therefore discharged when Ashbury's debt was discharged through accord and satisfaction. To obtain a discharge through accord and satisfaction, the debtor must convey information that would cause a reasonable creditor to understand that the tendered performance is offered as full satisfaction of the claim. ***Hoffman v. Ralston Purina Co.***, 86 Wis.2d 445, 453, 273 N.W.2d 214, 217 (1979). The creditor must then manifest an intent to accept the performance as full satisfaction. ***Id***. at 454, 273 N.W.2d at 217. Here, Lubcke approved the bankruptcy plan for payment of Ashbury's debt. The check for that payment expressly stated that it fully satisfied Lubcke's claim. Lubcke then endorsed the check manifesting its intent to accept it as full satisfaction. At that point, Ashbury's debt was discharged and the respondents were no longer obligated on the note.

Lubcke cannot claim attorney's fees in collecting on the note. The note provided that the respondents would pay all costs of collection, including reasonable attorney's fees. However, Lubcke lost its right to pursue recovery under this provision when it assigned all its rights in the note to M & I. By the time it received the note back, the debt was fully satisfied.

By the Court.—Judgment affirmed.

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