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DISTRICT IV

April 18, 2013

To:

Hon. Juan B. Colas
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2012AP1453 Associated Insurance Agency, Inc. v. Gary R. Probst
(L.C. # 2009CV851)

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Gary Probst appeals a \$30,000 judgment in favor of Associated Insurance Agency. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

Probst and Associated entered into a settlement agreement requiring Probst to pay Associated the total sum of \$12,500, in monthly installments of \$500 after an initial payment of \$2,500, until paid in full. The agreement stated that, if any of the payments were not timely

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

made, Associated had the option to reopen the case and obtain a \$30,000 judgment from Probst, less any payments already made under the settlement agreement. Probst was untimely in making at least two payments under the settlement agreement, and Associated initiated this action for an additional money judgment against Probst. Both parties moved for summary judgment, and the circuit court entered judgment in favor of Associated.

Probst argues that the circuit court erred by granting summary judgment to Associated. He contends that the dispute between the parties was settled by accord and satisfaction when Associated accepted Probst's continued monthly payments following Probst's late payments under the original settlement agreement. He argues that he offered the final monthly payments remaining under the original settlement agreement as payment in full, and that Associated accepted the payments as satisfaction of the entire amount in dispute. He also argues that Associated waived its right to pursue the increased judgment amount by accepting Probst's late payments. We disagree.

An accord and satisfaction is an agreement to discharge a disputed claim. *Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.*, 116 Wis. 2d 95, 112, 341 N.W.2d 655 (1984). When, as here, the underlying facts are undisputed, the existence of a contract is a question of law that we review de novo. *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). Whether Associated waived its right to reopen the settlement agreement by accepting Probst's payments is also a question of law, which we review de novo. See *Davies v. J.D. Wilson Co.*, 1 Wis. 2d 443, 468, 85 N.W.2d 459 (1957).

An accord and satisfaction is established when: (1) the amount of a claim is in dispute; and (2) the creditor accepts payment from the debtor that was offered as full payment for the

claim. See *Flambeau Prods.*, 116 Wis. 2d at 101. The debtor must make an offer of payment sufficient for the creditor to understand that the payment is offered in full satisfaction of the claim. *Hoffman v. Ralston Purina Co.*, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979). In other words, “the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt.” *Flambeau Prods.*, 116 Wis. 2d at 111. There is no required “magic language”; “[t]he test, after all, is one of reason.” *Myron Soik & Sons, Inc. v. Stokely USA, Inc.*, 175 Wis. 2d 456, 466, 498 N.W.2d 897 (Ct. App. 1993).

Here, Probst argues that Associated’s acceptance of Probst’s final payments under the original settlement agreement established an accord and satisfaction, discharging Probst’s debt to Associated. Probst contends that the amount of the claim was in dispute once Associated moved to reopen the settlement agreement on September 6, 2011. At that point, according to Probst, there was a dispute as to whether Probst was liable for the remaining payments under the \$12,500 settlement agreement, or the remaining balance of a total \$30,000 judgment, as sought by Associated. Probst points out that he subsequently submitted his final monthly payments to Associated as required under the settlement agreement, and argues that Associated had reasonable notice that Probst offered those payments in full satisfaction of the disputed claim. He contends that there would have been no reason for him to continue to make the required payments under the original settlement agreement’s payment schedule if he was not offering payment as full settlement of the disputed claim. Thus, he contends, Associated’s acceptance of those payments resulted in an accord and satisfaction. Alternatively, Probst argues that Associated’s repeated acceptance of late payments waived its right to enforce the payment schedule in the settlement agreement. We are not persuaded.

There are two problems with Probst's accord and satisfaction argument. First, Probst does not deal with the fact that the \$12,500 he paid to Associated was never in dispute. That is, whether or not Associated had been successful in its action to recover the additional \$17,500 it sought based on Probst's late payments, Probst still would have been obligated to pay the \$12,500 he agreed to pay under the settlement agreement. Thus, the \$12,500 Probst paid to Associated was not a disputed claim as required for an accord and satisfaction. Second, Probst does not point to anything indicating that he provided notice to Associated that he intended his remaining payments under the settlement agreement as full satisfaction for Associated's claim for an additional \$17,500. We do not agree with Probst that it would have been reasonable for Associated to understand that Probst's payments were offered in full satisfaction of Associated's claim for an additional judgment. As we have explained, Probst was liable for the full \$12,500 in any event, regardless of the outcome of Associated's action for an additional money judgment based on Probst's late payments. Thus, Probst's final payments of the undisputed amount he owed under the settlement agreement, without any indication that those payments were intended as full satisfaction of the additional, disputed amount Associated was seeking, did not establish an accord and satisfaction.

Moreover, we are not persuaded that Associated waived its right to enforce the deadlines in the settlement agreement. As the circuit court explained:

Probst argues that Associated had waived its right to reopen the judgment by not acting sooner to enforce the agreement and by accepting the late payments. There are circumstances in which a pattern of indulging late payments may waive a requirement for timely payment. Those circumstances are not present here. The motion to re-open was filed ... on September 6, after the expiration of the grace period for the August 1, 2011 payment and before the August payment had been made. Even according to Probst there was not a pattern of late payment and acceptance of late payments;

he states that the July and August, 2011 payments were his only late payments. On these facts it cannot be said that Associated waived its right to enforce the strict deadlines to which Probst had agreed.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals