No. 13-110094-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GLASSMAN CORPORATION,
Plaintiff-Appellant

v.

CHAMPION BLDRS, LLC,
Defendant-Appellee

BRIEF OF APPELLANT GLASSMAN CORPORATION

Appeal from the District Court of Shawnee County, Kansas,
Honorable Franklin R. Theis, Judge
District Court Case No. 12-C-141

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NATURE OF THE CASE

Plaintiff filed suit against Defendant for breach of contract and quantum meruit. Prior to answering, Defendant filed a *Motion to Dismiss* pursuant to K.S.A. 60-212(b)(6). The District Court treated Defendant's *Motion* as one for summary judgment, as it was presented with facts beyond the pleadings. The District Court dismissed the suit, ruling that Plaintiff's claims were barred by the doctrine of accord and satisfaction. This appeal followed.

STATEMENT OF THE ISSUE

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS.

STATEMENT OF THE FACTS

On November 24, 2009, Defendant entered into a prime contract with Manhattan-Ogden Unified School District #383, for the renovation of and addition to the Ogden Elementary School. (R.O.A. Vol. I, p. 9). On November 24, 2009, Plaintiff entered into a subcontract with Defendant in furtherance of its prime contract with U.S.D. #383. (R.O.A. Vol. I, p. 9). The subcontract price was $858,700.00. (R.O.A. Vol. I, p. 10). Change Order #1 increased the subcontract price by $3,693.00. (R.O.A. Vol. I, p. 18). Change Order #2 increased the subcontract price by $4,681.60. (R.O.A. Vol. I, p. 19). A dispute arose over Change Order #3 and Plaintiff maintained that at most, change order #3 should operate to reduce the contract price by $3,101.51. (R.O.A. Vol. I, p. 29). Plaintiff performed additional work for Defendant, at its request, at a cost of $9,969.50. (R.O.A. Vol. I, p. 21). Plaintiff provided valuable labor, services, and materials that were necessary for Defendant to perform and complete its obligations under the prime contract with U.S.D. #383. (R.O.A. Vol. I, p. 28, ¶ 2; p. 29 ¶ 5). Plaintiff fully performed its

obligations under the contract. (R.O.A. Vol. I, p. 28, ¶ 2). Plaintiff claimed a total owed of $873,942.59. (R.O.A. Vol. I, p. 29).

Defendant paid Plaintiff a total of $799,444.00, but disputed the remaining amount due. (R.O.A. Vol. I, p. 6). On May 10, 2011, Defendant issued two checks to Plaintiff in the amounts of $16,616.04 and $38,304.05, respectively. (R.O.A. Vol. I, p. 29, ¶ 7). Defendant placed restrictive endorsements on these checks in an attempt to create an accord and satisfaction. (R.O.A. Vol. I, p. 29, ¶ 8). Plaintiff removed the restrictive endorsements and notified Defendant of its intent to do so. (R.O.A. Vol. I, p. 30, ¶ 10; p. 50). The checks were honored by Defendant's financial institution after Defendant had been notified that its restrictive endorsement was removed from the checks and that they would be presented for payment. (R.O.A. Vol. I, p. 30, ¶ 11; p. 50). Plaintiff claims a balance due, after application of the two partial payments, of $19,578.50, plus interest. (R.O.A. Vol. I, p. 6).

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS.

STANDARD OF REVIEW

When a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. *Rector v. Tatham*, 287 Kan. 230, 232-33, 196 P.3d 364, 366-67 (2008). The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. *Id.* If so, the dismissal by the district court must be reversed. *Id.* Judicial skepticism must be exercised when the motion is made before the completion of discovery. *Id.*

When a motion to dismiss under K.S.A. 60–212(b)(6) contests the legal sufficiency of a claim, the question must be decided from the well-pleaded facts of a plaintiff's petition. *Dye v. WMC, Inc.*, 38 Kan. App. 2d 655, 661, 172 P.3d 49, 54 (2007). A petition should not be dismissed for failure to state a claim unless, after reviewing the petition in the light most favorable to plaintiff and with every doubt resolved in plaintiff's favor, that, under plaintiff's pleadings, the plaintiff can prove no set of facts, either under plaintiff's theory or under any other possible theory, in support of plaintiff's claim which would entitle plaintiff to relief. *Id.* The granting of such motions has not been favored by our courts. *Id.*

When matters outside the pleadings are presented in support of a motion to dismiss, the district court shall treat the motion as one for summary judgment. *Ronald v. Odette Family Ltd. P'ship v. AGCO Fin., LLC*, 35 Kan. App. 2d 1, 5, 129 P.3d 95, 99 (2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. *Id.* On appeal, an appellate court must apply the same rules and where reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Id.*

ARGUMENT

The parties did not create an accord and satisfaction on the debt in question. In *Amino Bros. Co. v. Twin Caney Watershed (Joint) Dist. No. 34 of Chautauqua,*

Montgomery & Elk Counties, 206 Kan. 68, 72-73, 476 P.2d 228 (1970), the Kansas Supreme Court explained that "an accord is a contract between creditor and debtor for the settlement of the claim by some performance other than that which is due. Satisfaction takes place when the accord is performed." Therefore to have accord and satisfaction, there must have been

> an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed.

Id. An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. *Id.*

No such agreement existed here and there was not a meeting of the minds. When Plaintiff was presented with Defendant's offer in final settlement of the debt, it was expressly rejected by the Plaintiff. Plaintiff, recognizing the attempt to create an accord and satisfaction, notified Defendant that it was not in agreement with the compromised amount. Accord and satisfaction was meant to be an alternative means of dispute resolution and was not designed to be used as a way to trick creditors into accepting less than full payment. In this case, when Plaintiff received the two drafts that contained restrictive endorsements, it immediately communicated to Defendant that it did not consider the payments to be in final settlement of the amounts owed.

The restrictive endorsements printed on the drafts were not magic. The words had no effect after they had been eliminated. Had that language remained on the drafts, it would have served as evidence to third parties that Plaintiff and Defendant had reached a

settlement of their disputes. However, eliminating the language from the drafts, with notice, returned the parties to their initial positions. In effect, Plaintiff's removal of the restrictive endorsement, accompanied by notice to the Defendant of the removal and of Plaintiff's intention to deposit the checks for payment, giving Defendant the option of dishonoring the checks, constituted a counter-offer which was accepted by Defendant when it opted not to dishonor them or take any further action.

A factually similar case is *Lighthouse for the Blind v. Miller*, 149 Kan. 165, 86 P.2d 508 (1939), in which the creditor and debtor made a contract for the purchase of broom corn, but the product delivered by debtor was not of the quality ordered. *Id.* at 509. The creditor requested a refund of his purchase price and in response received a check for $100.00 from the debtor. *Id.* The creditor retained the check and wrote the debtor saying, "of course, this amount is far too small to be any adjustment on the loss we have on the last carload of broom corn we purchased from your firm." *Id.* The creditor filed suit and obtained judgment for $648.53. *Id.*

In holding for the creditor in *Miller*, the court stated that the creditor's retention of the check, when it had promptly notified the debtor that it still insisted upon payment of the balance claimed, did not establish assent to the acceptance of the sum tendered as a full settlement. *Id.* In the present case, Defendant issued the two checks on May 10, 2011. On May 13, 2011, the Plaintiff notified Defendant in writing that it still claimed a balance due and did not accept the payment in full settlement of the debt. The Plaintiff notified Defendant of its intent to eliminate the restrictive endorsements and present the checks for payment, communicating that it still insisted upon payment of the balance.

Defendant did not object to the Plaintiff's proposed course of action nor did it respond in any way.

Defendant relies on K.S.A. 84-3-311, a provision of the Uniform Commercial Code, in support of its claims. However, K.S.A. 84-3-311(b) requires the person against whom the claim is asserted to prove that the instrument negotiated contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. This placed the burden of proof on Defendant. In considering Defendant's motion, the District Court was required to resolve any doubts in favor of the Plaintiff. As such, the Plaintiff's theory of the case should have been accepted. In holding for Defendant, the District Court agreed that as long as an instrument bore a "conspicuous statement" at one time in its existence, an accord and satisfaction was created, as though the words printed on the instrument held special power once they were removed.

However, the use of the word "conspicuous" in the statute in reference to the statement on the instrument indicates that the statement must exist on the instrument and be visible at the time of negotiation. The Uniform Commercial Code Comment recognizes that the canceled check would be used to prove that there was a conspicuous statement, as well as the fact that the claiming obtained payment of the check. *Uniform Commercial Code* § 3-311 cmt. 4 (1991). A statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it." *Id.* In this case, no reasonable person could have noticed the statement after its removal by Plaintiff. If a creditor negotiates an instrument with a "conspicuous statement", it provides notice to the debtor and the public that the accord has been formed. If the

instrument has no "conspicuous statements" on it when negotiated, it provides no evidence of compromise and should be treated as any other instrument.

Subsections a and b of K.S.A. 84-3-311 must be read together, as requiring the Defendant to prove, among other things, that Plaintiff obtained payment of an instrument that contained a "conspicuous statement". Defendant cannot meet its burden because Plaintiff obtained payment of instruments that had no "conspicuous statements". The "conspicuous statement" must be present on the instrument at the only time relevant, the time of negotiation. An instrument that has not been negotiated by the creditor has no legal effect as an accord and satisfaction. The point at which the instrument becomes effective as an accord and satisfaction is the point when the creditor accepts it by negotiating it. If the "conspicuous statement" does not exist on the instrument at that relevant time, it cannot be effective against the creditor. Negotiation of a check with no restrictive endorsement has no consequence other than as a partial payment.

The restrictive notations on the drafts by the Defendants were nothing more than an offer to make an accord. The statute was intended to create an informal method of dispute resolution. There was no dispute resolution in this case as both parties were aware that the balance due was still considered to be outstanding by Plaintiff, with the two checks considered partial payments. As in any other contract, the offer needed to be accepted by the Plaintiff to constitute a contract. Had the Plaintiff presented the instruments for payment without removing the endorsements, the accord would have been formed and the satisfaction achieved. However, Plaintiff informed the Defendant in advance that it found the restrictive endorsements unacceptable. When Plaintiff removed the endorsements and deposited the drafts, giving prior notice to the Defendant it was

now in a position to resolve the remaining financial issues, Plaintiff clearly rejected Defendant's offer of settlement and Defendant, at worst, acquiesced in that position.

In re Al Muehlberger Concrete Const., Inc., 319 B.R. 663, 666 (Bankr. D. Kan. 2005), is relied on by the Defendant for the proposition that a creditor cannot simply cross out the restrictive endorsement on an instrument to avoid accord and satisfaction. The case is distinguishable from the present case for two reasons. First, Plaintiff totally removed the restrictive endorsements from the instruments, rather than just crossing them out. More importantly, Plaintiff communicated to Defendant its intent to remove the restrictive endorsements from the instruments before negotiating them. Negotiation of the instruments could not have served to give Defendant notice of agreement to the accord because Defendant had already been informed to the contrary.

The notification gave Defendant the opportunity to act if it did not wish the instruments to be negotiated without the proposed restrictive endorsements. There was clear notice to the Defendant that Plaintiff did not agree to compromise the debt. At that point, Defendant knew there had been no meeting of the minds and no accord as to the payment of the debt and that Plaintiff was still claiming the remainder of the balance was owed. In response, Defendant did nothing. Defendant knew Plaintiff had rejected its offer of settlement and intended to apply the payments to the balance owed. Defendant's failure to act should prevent it from benefiting from its claimed accord and satisfaction.

Defendant also relied upon *Amino Bros.*, 206 Kan. 68, 73 (1970), in which the creditor made no attempt to remove the restrictive endorsement before negotiating the payment. Instead, the creditor cashed the check and filed suit months later. *Id.* at 230. The Court explained that an accord and satisfaction is the result of an agreement between

the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. *Id.* at 231. "If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor." *Id.* at 232. Here, both parties were aware that they had no agreement for compromise of the disputed amount owed. Plaintiff communicated its position on the offer, in writing, prior to cashing the check submitted by Defendant, and removed the restrictive endorsement on the check.

Defendant claims that the alteration of the instrument was fraudulent. However, when Defendant was given notice of Plaintiff's intent to remove the endorsements and took no action to protest or to prevent Plaintiff from pursuing its stated course of action, it waived any claim that the alteration was done fraudulently. Defendant acquiesced in the alteration when it was notified of Plaintiff's plan to eliminate the restrictive endorsement and allowed the draft to be paid by its financial institution. K.S.A. 84-3-407(b) provides that a fraudulent alteration discharges the party except when that party assents to the alteration or is precluded from asserting the alteration. (Emphasis added). The alteration in question was not done fraudulently, but was done with advance notice to Defendant. Defendant had the opportunity to object to the alteration or respond to the Plaintiff's letter and failed to do so, therefore cannot now claim fraud.

Defendant should not be permitted to benefit from its failure to assert its rights. Defendant had ample opportunity to communicate with Plaintiff about the offer of compromise or to inform Plaintiff that it did not wish to make partial payment if the accord was not accepted or simply stop payment on the checks. Instead, Defendant did

nothing and should now be prevented from asserting the rights it failed to assert before suit was filed. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. *Bowen v. Westerhaus*, 224 Kan. 42, 46, 578 P.2d 1102 (1978). "It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . ." *Id.* By failing to respond in any way, and allowing its bank to honor the checks without the restrictive endorsements, Defendant consented to the alteration and presentment of the checks to its financial institution. Defendant acquiesced in the course of action taken by Plaintiff and as a result is now estopped from claiming that Plaintiff's actions have some other significance.

In addition to its breach of contract claim, Plaintiff asserted a claim in equity against Defendant for quantum meruit. Quantum meruit is an equitable doctrine. *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 259 Kan. 166, 176, 910 P.2d 839, 846 (1996). The Defendant's *Motion to Dismiss* did not address the quantum meruit claim and the District Court made no ruling on this claim. Therefore, the District Court's dismissal of Plaintiff's suit was improper as it did not address all of Plaintiff's claims. Plaintiff provided labor, services and materials on a project and was not paid. Defendant benefitted from the labor, services and materials provided by Plaintiff and has been unjustly enriched. The District Court had power in equity to make the Plaintiff whole, a power that is not affected by the legal doctrine of accord and satisfaction. In general, equitable remedies are not available if there is an adequate remedy at law, such that a remedy at law must be unavailable before equitable relief is allowed. *Nelson v. Nelson*,

288 Kan. 570, 597, 205 P.3d 715, 734 (2009). Here, if the District Court's ruling is affirmed, the Plaintiff should be allowed to prove its case for equitable relief.

CONCLUSION

The concept of accord and satisfaction exists to provide a simple way for parties to compromise their disputes. It is not meant to be used as a way to unilaterally compel a creditor to compromise the amount it is owed. The Defendant knew that there was a dispute over the amount it owed to Plaintiff. It knew that there was no meeting of the minds as to a compromise of the amount owed. It submitted two checks, with unacceptable restrictive endorsements to Plaintiff, in an attempt to force Plaintiff into accepting less than what it was owed. When Plaintiff responded unequivocally that it did not agree to the compromise, it rejected the drafts with the restrictive endorsements. Plaintiff notified Defendant that it intended to accept the checks without the restrictive endorsements as partial payment of the amount owed. No accord and satisfaction took place and Defendant is indebted to Plaintiff both on the contract and in equity. The District Court's dismissal of Plaintiff's case should be reversed.

RESPECTFULLY SUBMITTED.

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CERTIFICATE OF SERVICE

I, John T. Bird, Hays, Kansas, do hereby certify that on this 14th day of November, 2013, I mailed two (2) true and correct copies of the above and foregoing *Brief of Appellant* by depositing the same in the U.S. Mail, postage prepaid and properly addressed to:

ANTHONY S. BARRY
Barry Law Offices, L.L.C.
5340 Southwest 17th St.
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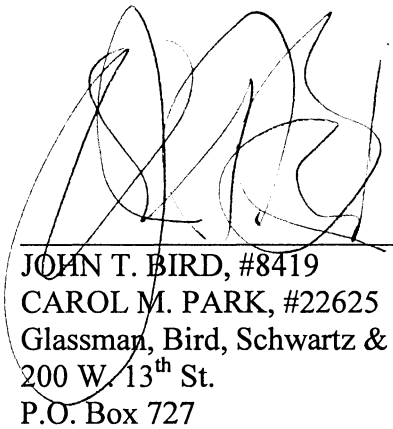
Topeka, Kansas 66604

and the original and sixteen (16) copies were mailed to:

CLERK OF THE APPELLATE COURTS
Kansas Judicial Center
374 Kansas Judicial Center
301 S.W. 10th Ave.
Topeka, Kansas 66612-1507

on the same date.



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