COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1167

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

KOHLER COMPANY,

PLAINTIFF-APPELLANT,

V.

DONALD S. PECK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

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

PER CURIAM. Kohler Company appeals from a judgment which only awards a small portion of the sum Kohler claims Donald S. Peck owes it under a personal guaranty. The issues on appeal involve contract interpretation and entitlement to equitable remedies. We affirm the trial court's interpretation of

the guaranty, its refusal to grant equitable relief or disregard corporate entities, and the amount of costs and attorney's fees awarded.

In 1988, Kohler entered into a distributorship relationship with Peel Engines, Ltd. (PEL), a business operated by Peck in Ontario, Canada. Peck also operated Peel Engine Service Co., Ltd. (PESCO). Kohler shipped different products to the separate addresses of both PEL and PESCO. Two billing accounts were maintained. When payments on the accounts slowed, Kohler sought a personal guaranty from Peck. The guaranty which Peck signed in February 1990 unconditionally guaranteed the full payment of the "indebtedness of whatsoever nature upon or for which the debtor is or may hereafter become obligated to Kohler." PEL was identified on the guaranty as the "debtor."

PESCO filed for bankruptcy in the summer of 1993. PEL's bankruptcy filing came in September 1993. The debts to Kohler were eventually discharged. Kohler commenced this action to recover from Peck, based on his guaranty, the outstanding account balances for both PESCO and PEL—a sum estimated to be $229,370.62.

Trial was to the court. The trial court found that Peck had guaranteed only the debts of PEL. Judgment was entered for $539.64 for products shipped and billed to PEL and $853.00 for collection costs and attorney's fees under the guaranty. Kohler's causes of action based on a disregard of the corporate form and reformation of the guaranty were dismissed.

The first issue to be resolved is what did Peck guarantee. The interpretation and construction of a contract are questions of law that we review without deference to the trial court. *See* ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 454-55, 485 N.W.2d 426, 432 (Ct. App. 1992). When interpreting a contract,

we must ascertain the parties' intentions as expressed by the contractual language. *See* ***id.*** at 455, 485 N.W.2d at 432. Unambiguous contractual language must be enforced as it is written. *See* ***State v. Windom***, 169 Wis.2d 341, 348, 485 N.W.2d 832, 835 (Ct. App. 1992).

Kohler does not argue that there was ambiguity in the identification of the entity whose debts Peck guaranteed. Indeed there is none. If there was ambiguity, the guaranty would be construed against Kohler, the party which drafted the provision. *See* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis.2d 600, 609, 288 N.W.2d 852, 856 (1980). That would be particularly true here where Kohler was aware that two corporate entities existed. "'Where one party chooses the terms of a contract, he [or she] is likely to provide more carefully for the protection of his [or her] own interest than for those of the other party.'" ***Capital Invs., Inc. v. Whitehall Packing Co., Inc.***, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979) (quoted source omitted). Kohler did not list PESCO as a debtor and there is no basis to suggest that the debts of PESCO were guaranteed.

Having determined that Peck only guaranteed the debts of PEL, we turn to Kohler's claim that all products were actually purchased by PEL. Kohler argues that all amounts were appropriately billed to PEL because the billing to PESCO was only done as a matter of convenience to PEL and PEL was the only authorized distributor. Regardless of whether Kohler sought to recover on the theory of an account stated, *see* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 566, 538 N.W.2d 849, 854 (Ct. App. 1995) (an open account arrangement to deliver products on demand is a classic account stated scenario), or a mutual and open account, *see* ***Lepp v. Tamer***, 1 Wis.2d 193, 197, 83 N.W.2d 664, 666 (1957) ("[a] mutual account arises where there are mutual dealings, and the account is allowed to run with a view of an ultimate adjustment by a settlement and payment

of the balance"), the determination of the amount due from a purchaser is a question of fact. The trial court's factual findings will not be overturned unless they are clearly erroneous. *See* § 805.17(2), STATS.

The evidence established Kohler's practice of invoicing PEL and PESCO orders separately by a "sold to" designation on the invoices. The cost of products sold to PESCO was evidenced by the invoices with a PESCO designation on them. Although Kohler "re-invoiced" amounts from PESCO to PEL, whether a credible reason for doing so existed was for the trial court to determine. The trial court rejected Kohler's reason for invoicing amounts from PESCO to PEL. We must defer to the trial court's credibility determination. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). We sustain the trial court's finding that the amounts invoiced to PESCO were not PEL's purchases.

Kohler advances several equitable theories to have the guaranty applied so as to hold Peck liable for the debts of both PEL and PESCO. The main thrust of its argument is that the corporate fiction separating PEL and PESCO can be disregarded based on the alter ego doctrine. *See* ***Olen v. Phelps***, 200 Wis.2d 155, 162-63, 546 N.W.2d 176, 180-81 (Ct. App. 1996).

Equitable relief is dependent on two maxims of equity: equity aids the vigilant, not those who sleep on their rights; and one who seeks equity must have clean hands. *See* ***Kenosha County v. Town of Paris,*** 148 Wis.2d 175, 188, 434 N.W.2d 801, 807 (Ct. App. 1988). Here, Kohler cannot claim that it was mislead by the fact that PEL was merely a corporate shell. Kohler was aware that two separate corporate bodies existed and it played along with the separate roles of each corporation. This is demonstrated not only by the separate invoicing of

purchases but also by a corporate promissory note on which the reference to PEL as the debtor was thrice stricken and replaced with PESCO. Despite the awareness of the two entities, when it drafted the guaranty Kohler did not require Peck to guarantee the debts of PESCO. Also, credit was extended to PESCO even after Kohler was aware that PEL was a nonasset corporation and that Kohler was unable to obtain a new guaranty from Peck to guarantee the debts of PESCO. Kohler does not have the clean hands required to obtain equitable relief.

We summarily reject Kohler's request that the issue of corporate disregard be remanded to the trial court for full consideration based on Wisconsin law. Kohler reads the trial court's decision to state that it would not apply Wisconsin law with regard to corporate disregard because PEL and PESCO were corporations created in Canada. We do not read the trial court's acknowledgment that the law of the place of incorporation applies to determine if a valid corporation was formed to be inconsistent with its initial ruling that Wisconsin law applies to all issues arising out of the guaranty. Even if error occurred, it makes no difference. As a matter of law, Kohler is not entitled to the equitable relief it seeks under the doctrine of corporate disregard.

The final issue concerns the award of costs and attorney's fees. The guaranty requires Peck to "reimburse Kohler, on demand, for all expenses, including attorney's fees, incurred by Kohler in the enforcement or attempted enforcement of any of Kohler's right hereunder." Kohler sought costs and attorney's fees in the amount of $52,142.16. The trial court concluded that because only $539.64 was owed by PEL, and consequently by Peck, and that a small claims action would have sufficed to recover that sum, $853.00 was a reasonable amount for costs and attorney's fees.

The award of attorney's fees is committed to the trial court's sound discretion. *See* ***Stan's Lumber***, 196 Wis.2d at 572, 538 N.W.2d at 856. "The trial court properly exercises its discretion when it applies the appropriate legal standard to the facts of record and, using a logical reasoning process, draws a conclusion that a reasonable judge could reach." ***Id.***

Kohler argues that there is no limitation based on the success of its claims or amount recovered in the requirement that Peck reimburse it for all costs and attorney's fees associated with the attempted enforcement of the guaranty. However, the costs and fees must be related to Kohler's right of enforcement. Here, Kohler sought enforcement beyond what its right was. It is reasonable that Peck should not be forced to pay fees incurred on claims that were not within Kohler's right under the guaranty. To allow such recovery would encourage meritless claims to stretch contractual rights and punish those who defend against them.

Moreover, reasonableness is a matter within the trial court's discretion. The reasonableness of attorney's fees is one of those rare questions of law to which we give weight to the trial court's determination. *See* ***Siegel v. Leer, Inc.***, 156 Wis.2d 621, 630, 457 N.W.2d 533, 537 (Ct. App. 1990). It is logical that because Kohler's right of recovery was minimal, the costs and fees be likewise minimal.

By the Court.—Judgment affirmed.

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