COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3327

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

LOSS PREVENTION SYSTEMS,

PLAINTIFF-RESPONDENT,

V.

ALPHA OMEGA SECURITY, INC.,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

MILWAUKEE LISBON LIMITED PARTNERSHIP,
D/B/A LONDON SQUARE APARTMENTS,

DEFENDANT-THIRD-PARTY PLAINTIFF,

PAULA WASHOW,

DEFENDANT,

A AN J ELECTRIC,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Alpha Omega Security, Inc. (Alpha) appeals from a grant of summary judgment to Loss Prevention Systems (LPS) on its claim that an "account stated" existed between the parties, and that Alpha thus owed LPS more than $26,000. The trial court concluded, in granting summary judgment, that under the doctrine of "account stated," there were no genuine material issues of fact and Alpha was thus liable for the $26,000 bill. Alpha argues that all of the elements necessary to comprise an "account stated" are not present in the September 24, 1995 letter upon which the court based its decision that an "account stated" existed. Alpha further argues that the letter was not admissible and, therefore, should not have been considered as the basis for an "account stated," and that if the letter is held as a proper basis for an "account stated," this was not an appropriate case for summary judgment because the letter can be impeached due to a mistake made by Alpha when it accepted the terms of the letter. We affirm.

I. BACKGROUND.

London Square Apartments contracted with Alpha to install video security equipment. Alpha subcontracted with LPS to install cameras and monitoring equipment and to connect wiring. Alpha also subcontracted with A An J Electric (A An J) to lay the cable, erect mounting poles, and perform all electrical work. LPS completed its work and was paid.

Alpha later hired LPS to perform additional work to repair the faulty work that A An J had performed earlier. LPS and Alpha agreed that Alpha would pay the hourly rate of $40 and pay the cost of materials to LPS for the job to repair A An J's work. After LPS finished the additional work, it invoiced Alpha for the work in July 1996 and August 1996. Alpha did not dispute the charges in the invoices it received from LPS. However, Alpha did not pay LPS for the additional repair work it performed. When the bill remained outstanding, LPS continued to send invoices reflecting its work and the amount due. On September 18, 1996, LPS and Alpha met. Alpha claimed that the meeting was one of "information gathering" to discuss Alpha's concerns regarding the invoices. After the meeting, when payment was not received, LPS informed Alpha that it planned to file a lien against Alpha for its debt. In response, on September 24, 1996, Alpha, through its attorney, sent a letter to LPS's attorney:

> Dear Mr. Mayhew:
>
> I represent Alpha Omega Security in regard to agreements with your client, Loss Prevention. In response to your letter to Alpha Omega Security dated September 20, 1996 and consistent with our telephone conversation today, following is a statement of my client's position in regard to payment for work performed at … London Square.
>
> ….
>
> London Square
>
> As your client is aware, repair work at this site is not completed and payment has not been received by Alpha Omega Security. Consequently, the notice of intent to file a lien by your client is premature. Please note, Loss Prevention was paid for the installation work it completed at the site.
>
> Loss Prevention was aware from the outset of this job that an insurance claim to cover the cost of the repairs was pending and would likely delay payment indefinitely. Under these circumstances, it is difficult to understand why your client would contemplate filing a lien at this juncture. Such action exhibits a reckless approach to business relationships.

> Alpha Omega Security does not disagree with the amount claimed to be owed to your client for the repair work, $26,219.23, but disputes the interest charged, $47.12. An interest charge was not part of the agreement. As stated earlier, Alpha Omega Security will pay your client for its work when this job is completed and payment is received from the owner.
>
> ….
>
> Very truly yours,
> Susan M. Drewitz
> Attorney at Law

LPS claimed at the motion hearing, and the trial court agreed, that this letter formed the basis for an "account stated," requiring Alpha to pay LPS the sum of $26,219.23. Alpha appeals.

II. DISCUSSION.

First, Alpha argues that the September 24, 1996 letter was not admissible and, thus, was improperly used as the basis for an "account stated." "In reviewing evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have admitted it into evidence, but rather, whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982) (internal quotation omitted). If a reasonable basis exists for the trial court's determination, it will be upheld. ***Id.***

Alpha argues that the letter was inadmissible under § 904.08, STATS., which reads:

> **Compromise and offers to compromise**. Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration

> in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Alpha thus contends that the letter was an approach at compromise and should be viewed as "settlement discussion." Alpha quotes language from ***Production Credit Association of Green Bay v. Rosner***, 78 Wis.2d 543, 255 N.W.2d 79 (1977), to further support its argument: "[A] letter sent by [appellants] to [respondents] containing an offer or suggestion of compromise settlement as between the two [parties], was not admissible into evidence. Such mere offer, not accepted by the parties, was inadmissible under the provisions of sec. 904.08, Stats." ***Id.*** at 551, 255 N.W.2d at 82. In ***Production Credit***, however, the letter found inadmissible included an offer not agreed to by the parties, *see* ***id.***, whereas the letter in the present case included an admission of debt and an agreement as to the underlying amount; only the interest charge was in dispute. Thus, ***Production Credit*** does not control, and the letter here was not inadmissible under § 904.08, STATS. The trial court properly exercised its discretion in admitting the letter into evidence.

Alpha next contends that summary judgment was inappropriate because a genuine issue of material fact existed because the element of "debt" in an "account stated" had not been met. Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. ***Id.*** That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

If all of the elements are met for an "account stated," then no material issue of fact remains and summary judgment must be granted. *See* § 802.08(2), STATS. "An account stated is 'an agreement between debtor and creditor that the items of the transaction between them are correctly stated in a statement rendered, that the balance shown is [owing] by the one party to the other, and that the one promises to pay that balance to the other.'" ***Onalaska Electrical Heating, Inc. v. Schaller***, 94 Wis.2d 493, 499, 288 N.W.2d 829, 832 (1980) (quoting ***Lepp v. Tamer***, 1 Wis.2d 193, 199, 83 N.W.2d 664, 667 (1957)).

The letter from Alpha's attorney, stating that "Alpha Omega does not disagree with the amount claimed to be owed to your client for the repair work, $26,219.23,"is a clear admission of debt. Alpha claims that because the "letter did not affirmatively state that Alpha Omega would either review, consider, approve or specifically pay the LPS London Square repair bill in the amount of $26,219.23," it did not admit to a debt. We find this argument unpersuasive. The letter is clear on its face with regard to the amount owed, and the letter need not say more to satisfy the element of "debt." Further, the other elements to establish an "account stated" are also met. The amount stated in the letter was agreed upon and Alpha promised to pay the debt when it stated, "Alpha Omega Security will pay your client for its work …."

Alpha's next claim that a material issue of fact existed rests on its contention that the September 24, 1996 letter "is not an unconditional promise to pay LPS'[s] London Square repair bill." Alpha argues that because it had an understanding with LPS that A An J's insurer would ultimately pay the repair bill,

its promise to pay in the letter was not unconditional and, thus, the "account stated," if it existed, was between Alpha/LPS and A An J, not between Alpha and LPS. Alpha further argues that this is a material factual issue rendering the case inappropriate for summary judgment. In its decision, however, the trial court stated:

> There is no dispute concerning the terms of the agreement between the parties, and there is no dispute that the letter was written.
>
> ….
>
> There is an amount of $26,219.23 saying Alpha Omega Security does not disagree with the amount claimed to be owed to [LPS] for the repair work … $26,219.23, but disputes the interest charged of $47.12 and says interest wasn't part of the agreement but does not dispute the underlying amount.
>
> The only condition there is on the receipt of funds saying "We're waiting to get the money from A An J's insurer.["]
>
> ….
>
> The language of the letter is unambiguous. The only question is the timeliness that might be affected given the expectation of insurance.
>
> *Whether or not there is insurance does not undercut the account stated, [it] is really irrelevant to the account stated*[,] *and [it] does not negate a post-agreement and acknowledgement of the amount owed.*

(Emphasis added.) We agree. The fact that Alpha was expecting A An J's insurer to pay LPS's repair bill and LPS was aware of this fact does not transform Alpha's promise to pay into a conditional promise to pay upon receipt of the insurance money. Thus, we conclude there was no genuine issue of material fact.

Alpha's last argument is that if the letter is held as a proper basis for an "account stated," it can be impeached by virtue of mistake. "Accounts stated may be impeached for mistake, and may be opened for error arising therefrom."

Lepp v. Tamer, 1 Wis.2d 193, 200, 83 N.W.2d 664, 668 (1957). Alpha contends it made a mistake in accepting the billing by LPS without objection and that this type of mistake is sufficient to impeach an "account stated." Specifically, Alpha claims it accepted the billing under the assumption that the work performed by LPS was done properly.

This, however, is not the type of mistake that case law supports for impeachment. Mistakes that form the basis for impeachment in an "account stated" have taken the form of errors in statements, numerical or clerical errors. *See* ***id.***; *see also* ***Preston v. LaBelle View Corp.***, 192 Wis. 168, 173, 212 N.W. 286, 288 (1927); ***Wussow v. Badger State Bank of Milw.***, 204 Wis. 467, 472-73, 234 N.W. 720, 722 (1931). An "account stated" specifically requires fraud or mistake to overcome a presumption of correctness of the claim. ***Preston***, 192 Wis. at 173, 212 N.W. at 288. To impeach a formal written instrument on the grounds of mistake, "the proof must be clear and convincing beyond reasonable controversy." ***Steffen v. Supreme Assembly of the Defenders***, 130 Wis. 485, 485, 110 N.W. 401, 401 (1907).

The trial court addressed this issue:

> Defense argues there was a mistake … but I agree that there is no factual underpinning for that allegation.
>
> But also, even if the Court were to accept that, I agree that it would callow [sic] the doctrine. *There would be no doctrine of account stated if it could be negated by a mistake of this nature*.
>
> ….
>
> The mistake, I think, should be in the area of, "We had three different bills, and we've added them up, and there was a thousand dollar mistake." That is what mistake would cover; not "Well we made a mistake in agreeing to this amount and now we have all these questions,"

> especially when you have the facts here that are undisputed ….

(Emphasis added.) Given the case law and facts in the record, we adopt the trial court's reasoning and conclude there was no mistake sufficient to overcome the "account stated." Thus, the judgment of the trial court is affirmed.

LPS has filed a motion for costs under § 809.25(3), STATS.[1] LPS claims that Alpha has presented facts and legal arguments that are unsupported or contradicted by the record.

> A claim is not frivolous merely because there is a failure of proof. Nor is a claim frivolous merely because it was later shown to be incorrect, or because it lost on the merits. However, a claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed.

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[1] Section 809.25(3)(a), (c), STATS., provides:

> **(3)** FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section.
>
> ….
>
> (c) In order to find an appeal or cross-appeal to be frivolous … the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party … knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Stern v. Thompson & Cotes, Ltd., 185 Wis.2d 220, 243-44, 517 N.W.2d 658, 667 (1994) (citations and footnote omitted). After a review of the record, we conclude the facts of this case do not support a finding of frivolousness. There is no indication that the appeal was filed in bad faith, solely for the purpose of harassing LPS or injuring LPS maliciously. Further, it has not been established that there is "no set of facts which could satisfy the elements of the claim," as mandated by Wisconsin law. Therefore, the motion for costs is denied.

By the Court.—Judgment affirmed.

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