COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3531

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

DIDION, INC.,

PLAINTIFF-RESPONDENT,

V.

ERVIN PROHASKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

SNYDER, P.J. Ervin Prohaska appeals from a summary judgment in favor of Didion, Inc., requiring him to pay $4895.56 in damages and attorney's fees for a breach of contract. Prohaska argues that the trial court erred when (1) it determined as a matter of law that the parties had entered into a contract, and (2) it awarded actual attorney's fees. Because we conclude that the trial court's determination that Didion had carried its burden to show the existence of a

contract and that Prohaska is estopped from denying said agreement in this instance by § 402.201, STATS., we affirm. We also affirm the award of attorney's fees and damages pursuant to § 127.17(5), STATS.

The statement of facts is brief and for the most part uncontested. In May 1995, an agent of Didion had two conversations with Prohaska, a farmer, to discuss the purchase of corn and soybeans. According to Didion, a price was agreed upon. Prohaska concedes that he "discussed the sale of produce on two occasions over the telephone" with Didion, but argues that no contract was entered into. Although Didion sent Prohaska contract forms to sign and return, Prohaska did not sign or return them. Prohaska claims that because he believed there was no oral agreement, he was under no obligation to do anything more when he received the written contracts.

Prohaska argues that any agreement between the parties is unenforceable because it was not in writing. He argues that his failure to sign Didion's "Purchase Confirmation and Contract" forms affords him relief, as a matter of law, from the trial court's grant of summary judgment. We conclude that this case is governed by the provisions of § 402.201, STATS. That section permits a court to find the existence of an enforceable contract when an agreement is made between merchants, a writing in confirmation of the contract is received by the producer, and the producer does not object in writing to its contents. *See* ***id.*** We therefore conclude that Prohaska breached the contract and affirm the judgment.

We review decisions on summary judgment de novo, applying the same methodology as the trial court. *See* ***Armstrong v. Milwaukee Mut. Ins. Co.***, 191 Wis.2d 562, 568, 530 N.W.2d 12, 15 (Ct. App. 1995), *aff'd*, 202 Wis.2d 258,

549 N.W.2d 723 (1996). That methodology, set forth in § 802.08(2), STATS., has been recited often and we need not repeat it here. *See* ***Armstrong,*** 191 Wis.2d at 568, 530 N.W.2d at 15. Whether Didion had an enforceable contract requires an interpretation of § 402.201, STATS., and as such presents a question of law subject to de novo review. *See* ***Hake v. Zimmerlee,*** 178 Wis.2d 417, 421, 504 N.W.2d 411, 412 (Ct. App. 1993).

Section 402.201, STATS., provides in relevant part:

> **Formal requirements; statute of frauds. (1)** Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the party's authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.
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> **(2)** Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of sub. (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

Didion argues that it is permitted to rely on the confirmatory contracts it sent to Prohaska and that Prohaska's failure to respond within ten days was evidence of his acquiescence to the terms of the contract.[1] Prohaska responds that "Didion's

[1] The confirmatory memoranda that Didion sent contained the following language:

> Seller understands the above is an accurate statement of the terms of this contract. Didion, Inc. reserves the right to correct any clerical error within 10 days of date of this contract. Failure of seller to object in writing to Didion, Inc. of the contents of this Purchase Confirmation within 10 days of receipt constitutes acceptance by seller of all conditions herein and

(continued)

mailing of proposed contracts to [him], asking him to sign and return, did not create a contract if one did not exist prior to that point in time." We begin by construing the statute.

In the ordinary course of dealing, a contract between a buyer and a seller is not enforceable if the value of the goods is $500 or more unless the contract has been reduced to writing and has been signed by the party against whom enforcement is sought. *See* ***Cargill, Inc. v. Gaard,*** 84 Wis.2d 138, 140, 267 N.W.2d 22, 23 (1978). However, the statute of frauds provides an exception if the contracting parties are both merchants. *See* § 402.201(2), STATS. In such a case, the party seeking to enforce the contract must have sent a written confirmation of their agreement within a reasonable time. *See* ***Cargill,*** 84 Wis.2d at 140-41, 267 N.W.2d at 23. Such a writing then binds the other party unless he or she objects within ten days after receiving the written confirmation. *See* ***id.*** at 141, 267 N.W.2d at 23.

The facts asserted by Didion were that one of its agents had two telephone conversations concerning the purchase of produce from Prohaska. Didion submitted an affidavit by the agent which stated that she had entered into an oral contract with Prohaska. Didion also attached the contract proposals, copies of which were sent to Prohaska, as further evidence that there was an oral agreement. Prohaska does not dispute the fact that the parties had several conversations, nor does he argue that he did not receive the contract proposals submitted by Didion. Prohaska's sole argument is that the two conversations did not result in an oral agreement with Didion, and his failure to sign and return

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acknowledgment of a binding contract between seller and Didion, Inc.

Didion's purchase confirmation and contract was further evidence in support of his position that there was no oral agreement.

Findings of fact by a trial court will be sustained unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 144, 267 N.W.2d at 25. Even if more than one reasonable inference can be drawn from the evidence, we are constrained to support the findings made by the trial court. *See* ***id.*** The trial court found the following facts were undisputed: that Prohaska was a merchant within the meaning of ch. 201, STATS.; that the transaction was memorialized as confirmed by Didion's invoice no. 13561, dated December 27, 1995; and that Prohaska admitted he received a purchase confirmation and contract from Didion which evidenced on its face a transaction between the parties. The trial court also noted that Prohaska agreed that the subject of his discussion with Didion was the sale of corn and soybeans in an amount in excess of $500. Based on these findings of fact, the court concluded that the summary judgment motion brought by Didion should be granted. We agree.

Prohaska argues that all of the above evidence fails to "establish as a matter of law that the parties came to an agreement." This argument, however, misconstrues the purpose and effect of an action brought under § 402.201(2), STATS. The essential question is not whether the party seeking damages proved a meeting of the minds during the parties' conversations; if that were the case, the "proof" offered by contesting parties would be nothing more than a credibility contest. Rather, a merchant seeking to enforce an oral agreement must produce evidence which supports its position that an oral agreement was indeed reached.

In this case, Didion submitted evidence that following the undisputed conversation between it and Prohaska regarding the purchase of specific amounts of corn and soybeans, it furnished Prohaska with a purchase confirmation and contract. Didion also submitted copies of an invoice and its contract log, which included two contracts recorded by its agent. This evidence was in addition to the purchase confirmation and contract sent to Prohaska. Based on all of this evidence and the provisions of § 402.201, STATS. Prohaska's failure to object in writing to the contract now acts to bind him to the terms of the written contract.

Prohaska also argues that Didion should not be entitled to attorney's fees pursuant to ch. 127, STATS. Review of the record in this case shows that Didion made a motion for an award of attorney's fees under § 127.17(5), STATS., on October 17, 1996, prior to the court's decision on its motion for summary judgment. Under § 127.17(5), "[a]ny person who is injured as a result of a violation of this chapter, or any rules promulgated … under this chapter, may bring an action against the violator and may recover twice the amount of that person's proven damages, together with costs, including all reasonable attorney fees." According to Didion, Prohaska violated § 127.12(1), STATS., which prohibits a producer who has agreed to sell grain "[to] refuse to sell or deliver grain … in accordance with the terms of the contract."

At the motion hearing, evidence was presented as to Didion's damages and its attorney's fees. Prohaska cross-examined the witness. The court then made a finding that damages equaled $1420 and that reasonable attorney's fees were $2055.56. Although the general rule is that a trial court's findings of fact will not be disturbed unless clearly erroneous, an exception to this rule exists with regard to a court's determination of the value of legal services. *See* ***Three &***

One Co. v. Geilfuss, 178 Wis.2d 400, 415, 504 N.W.2d 393, 399 (Ct. App. 1993). However, Prohaska does not raise an issue as to the amount of the fees awarded. Rather, Prohaska contends that the trial court erred in even considering an award of attorney's fees in this instance. Our independent review of the record convinces us that the trial court properly considered the evidence on which it based its award of double damages and attorney's fees, and its decision will not be disturbed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.