COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP463 **Cir. Ct. No. 2004SC679**

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

BASIC METALS, INC.,

PLAINTIFF-RESPONDENT,

V.

MAHZEL METALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Reversed.*

¶1 NETTESHEIM, J.[1] Mahzel Metals[2] (Mahzel) appeals from a small claims judgment awarding Basic Metals, Inc. (Basic) money damages under the parties' contract. Mahzel argues that the trial court erroneously rejected its affirmative defense of accord and satisfaction. We agree and reverse the judgment.[3]

BACKGROUND

¶2 Although the parties draw sharply different conclusions from the evidence, the material facts of this case are not in dispute. Basic is in the business of cutting metal product, which it then sells to its customers. As a byproduct of this operation, Basic accumulates scrap metal, including aluminum, which it sells to metal scrap dealers such as Mahzel. The scrap metal is sold at the then prevailing market price, which fluctuates on nearly a daily basis. Because the amount of scrap produced by Basic's operation is irregular, Basic cannot predict the amount of scrap it will have on hand at a given time. Therefore, when a scrap dealer places an order for a particular amount of scrap metal, Basic will not always be able to deliver the amount requested.

¶3 Mahzel is a scrap metal dealer that had been purchasing Basic's scrap metal for over eleven years. On October 16, 2003, Mahzel submitted

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The caption of this case does not identify the business capacity of Mahzel Metals. However, the testimony at the trial established that Mahzel Metals is a corporation.

[3] Therefore, we need not address Mahzel's further argument that the trial court erred when it considered the parties' prior course of dealing when assessing Basic's obligations under the parties' agreement.

purchase order A 14050 to Basic for three truckloads of approximately 100,000 pounds of scrap aluminum at the then market price of sixty-two cents per pound for bare scrap and fifty-four cents per pound for painted scrap. Under the heading "Arrival Date" in the purchase order, Mahzel entered "prompt." Pursuant to this purchase order, Basic delivered one truckload of scrap aluminum to Mahzel on October 23, 2003, and a second truckload a week later. This depleted Basic's then supply of scrap aluminum and Basic did not deliver a third truckload.[4]

¶4 Nothing further transpired between the parties until January 19, 2004, when Mahzel issued purchase order A 14116 to Basic for scrap aluminum. This order called for one truckload of approximately 30,000 pounds of scrap aluminum at the then prevailing rates of sixty-five cents per pound for bare scrap and fifty-eight cents per pound for painted scrap. However, Basic did not ship any material to Mahzel under this order.

¶5 That brings us to the events that precipitated the current dispute. On February 27, 2004, Mahzel issued purchase order A-14163 to Basic for one truckload of approximately 26,000 pounds of scrap aluminum at the then rates of seventy-four cents per pound for bare scrap and sixty-five cents per pound for painted scrap. That same day, Basic shipped a total of 20,945 pounds of scrap aluminum and billed Mahzel $15,094.48 by invoice number 331138. The invoice quoted the rates recited in Mahzel's February 27 purchase order and also recited the same shipping date. However, the invoice referenced purchase order A 014116, which was Mahzel's January 19, 2004 purchase order.

[4] Although the parties' briefs do not state that Basic was paid for these shipments, we assume such payment since Basic makes no complaint otherwise.

¶6 The invoice directed Mahzel to remit its payment to "Basic Metals, Inc., Bin #269, Milwaukee, WI 53288." The bin number address was the location of Basic's bank, which was authorized to process and cash Basic's checks without Basic's direct involvement.

¶7 Upon receiving the invoice, Mahzel recalculated its debt to Basic. This recalculation was based on Mahzel's contention that Basic's February 27, 2004 delivery represented the third truckload still outstanding under Mahzel's October 2003 purchase order. This permitted Mahzel to calculate its debt to Basic under the lower prices for scrap aluminum in effect at that earlier time, resulting in a balance due to Basic of $12,626.06. Mahzel executed a check to Basic in that amount and wrote on the back of the check "In Full Payment of Invoice #331138." Mahzel then mailed the check to the bin number address as directed by the Basic invoice.[5] In due course, Basic's bank cashed the check without Basic's direct involvement and credited Basic's account. Basic then applied the amount of Mahzel's check against the amount billed in its February 27, 2004 invoice and followed with this action to collect the balance.

¶8 Consistent with its calculation, Mahzel defended on the grounds that Basic's February 2004 shipment represented the third truckload still due under Mahzel's October 2003 purchase order. Therefore, Mahzel argued that its obligation to Basic should be computed on the basis of the lower rates for scrap aluminum in effect at that time. Mahzel also defended on the grounds of accord and satisfaction based on the acceptance and cashing of its check by Basic's bank.

[5] Mahzel's mailing also included a spreadsheet showing its calculations.

¶9 Basic responded that the parties' course of past dealings established that it had complied with the October 16, 2003 purchase order by delivering the two truckloads of scrap aluminum, which depleted the amount of scrap that it then had in stock. Therefore, according to Basic, its February 27, 2004 invoice was a billing for its shipment to Mahzel on that same date in compliance with Mahzel's purchase order of the same day. Basic also contended that the reference on the invoice to purchase order "A 14116" was a clerical error.

¶10 The trial court rejected both of Mahzel's defenses. Mahzel appeals.

DISCUSSION

Introduction

¶11 Mahzel's first argument is that the trial court erred by considering the evidence of the parties' past course of dealing when determining that Basic had fulfilled its obligation to Mahzel under the October 16, 2003 purchase order. However, we need not address this argument since we agree with Mahzel's further argument that Basic's action is barred under the law of accord and satisfaction. We move directly to that issue.

Accord and Satisfaction

¶12 Mahzel relied on the law of accord and satisfaction based on the acceptance and cashing of its check by Basic's bank. As noted, the check carried the language "In Full Payment of Invoice #331138" on the reverse side. Basic's response is that it cannot be bound by the law of accord and satisfaction since it never personally received Mahzel's check and therefore it was not directly aware of the "full payment" language on the reverse side. The trial court agreed, holding that Mahzel was not entitled to invoke accord and satisfaction because:

> plaintiff was not aware that there was a dispute and was not aware that [the payment] was sent as full accord and satisfaction. It was sent to a bank lock box and credited to the account from the M & I Bank lock box. As a result, there was no knowing acceptance of partial payment as full accord and satisfaction.

Mahzel's response is that the bank was acting as Basic's agent and therefore Basic is bound by the actions of the bank. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 45, 526 N.W.2d 264 (Ct. App. 1994).

¶13 Unfortunately, neither the parties' appellate briefs nor the trial court's decision addresses WIS. STAT. § 403.311 of the Uniform Commercial Code (UCC), which directly governs this case. This statute, entitled "Accord and satisfaction by use of instrument," speaks to an accord and satisfaction in a commercial transaction setting and sets out the elements for an accord and satisfaction.[6] We recite the relevant portions of § 403.311:

> **(1)** Subsections (2) to (4) apply if a person against whom a claim is asserted proves that all of the following conditions have been met:
>
> (a) That person in good faith tendered an instrument to the claimant as full satisfaction of the claim.
>
> (b) The amount of the claim was unliquidated or subject to a bona fide dispute.
>
> (c) The claimant obtained payment of the instrument.
>
> **(2)** Unless sub. (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> **(3)** Subject to sub. (4), a claim is not discharged under sub. (2) if any of the following applies:

[6] It also appears that the parties did not alert the trial court to this statute.

> (a) The claimant, if an organization, proves that all of the following conditions have been met:
>
> 1. Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office or place.
>
> 2. The instrument or accompanying communication was not received by that designated person, office or place.
>
> (b) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with par. (a) 1.

¶14 The undisputed evidence in this case reveals that all the elements of an accord and satisfaction as set out in WIS. STAT. § 403.311(1) and (2) are satisfied. First, Mahzel in good faith tendered payment to Basic as full satisfaction of Basic's claim.[7] Second, the parties were engaged in a bona fide dispute. Mahzel contended that it was entitled to the third truckload of scrap aluminum as recited in its October 16, 2003 purchase order and that Basic's February 27, 2004 delivery and invoice of the same date pertained to that purchase order. On the other hand, Basic contended that its two deliveries in October 2003 fulfilled its obligation under Mahzel's October purchase order since those deliveries depleted all of its scrap aluminum then in stock.[8] Third, the evidence shows that Basic

[7] Although the parties traded accusations of bad faith and fraud against each other during their testimony, the trial court made no such finding, and we agree that the evidence fails to show such conduct.

[8] The trial court's adoption of Basic's interpretation of the parties' agreement does not mean that the dispute between the parties was not genuine.

obtained payment of Mahzel's check. And, fourth, the check clearly indicated that the payment was tendered in full payment of Basic's invoice.

¶15 The trial court, however, held that Basic was not bound by an accord and satisfaction because Basic did not have direct knowledge that Mahzel's check was tendered as such. Basic makes a similar argument on appeal. We reject this argument for two reasons. First, neither the trial court's decision nor Basic's brief cites to any law which holds that the law of agency does not apply to an accord and satisfaction.

¶16 Second, and more importantly, WIS. STAT. § 403.311(3) of the UCC addresses this concern by offering a claimant such as Basic two methods by which it can avoid an accord and satisfaction where it uses an agent to process its debtors' payments. First, if the claimant is an organization,[9] it must show (1) that within a reasonable time before the tender, it sent a conspicuous statement to the debtor that communications concerning a disputed matter, including the instrument tendered in satisfaction of the debt, are to be sent to a designated person, office or place; and (2) that the instrument or accompanying communication was not received by the claimant's designated person, office or place. Here there is no evidence showing that Basic utilized this procedure to avoid a potential accord and satisfaction.

¶17 Second, a claimant can overcome the defense of accord and satisfaction by showing that it tendered repayment of the amount to the debtor within ninety days after payment of the instrument. Again, Basic did not invoke

[9] Basic qualifies as an "organization" since it is a corporation. *See* WIS. STAT. § 401.201(28).

this procedure. Instead, it retained the money paid by Mahzel and applied it against the disputed debt.

¶18 *Corbin on Contracts* addresses this provision of the UCC in a setting where the claimant utilizes a third party such as a bank to process payments received from debtors. Corbin states that an accord and satisfaction will not lie under § 3-311 of the UCC (the equivalent of WIS. STAT. § 403.311) where the claimant is an organization that has arranged to have its checks processed by a remote facility, a third party, or through the use of a bank lock box. This is because "the organization will not obtain knowledge of the condition upon which the check is tendered." 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 70.2(3) at 326 (rev. ed. 2003). However, consistent with our analysis of § 403.311(3), Corbin observes that this avoidance of an accord and satisfaction defense is subject to the claimant "[sending] a conspicuous statement to its debtors directing that communications regarding disputed claims be sent to a designated person, office, or place …." JENKINS, *supra*. As we have noted, Basic did not invoke this procedure.

CONCLUSION

¶19 Here, Mahzel's check to Basic clearly stated that the payment was tendered in "full payment" of the amount in dispute. Basic, acting through its agent, processed and cashed the check and retained the money. Those events satisfied all the elements of an accord and satisfaction. Basic did not invoke any of the procedures under WIS. STAT. § 403.311(3) by which it could have avoided the accord and satisfaction. We reverse the judgment.

By the Court.—Judgment reversed.

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