

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2009AP2299

Cir. Ct. No. 2007CV2640

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CENTRAL SUPPLY, INC.,

PLAINTIFF-RESPONDENT,

v.

ROOSEVELT CAPITAL, LLC d/b/a PROMOTIONS UNLIMITED,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EMILY S. MUELLER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Kessler, J.

¶1 PER CURIAM. Roosevelt Capital, LLC, appeals from a judgment in favor of Central Supply, Inc., for the unpaid sum Roosevelt agreed to pay under a contract for an open line of credit. Roosevelt argues that the contract is unenforceable because it is too indefinite and Central Supply's promise to provide

credit was illusory. We conclude that the evidence supports the trial court's finding that the parties had reached an enforceable agreement and that Roosevelt did not avail itself of the available open line of credit. We affirm the judgment.

¶2 Central Supply is a wholesale distributor of consumer products, including Kodak disposable cameras. In September 2006 it sold \$70,350 worth of disposable cameras to Promotions Unlimited Corporation (PUC) on credit. PUC failed financially and Central Supply went unpaid. In January 2007, Roosevelt purchased PUC's assets and was aware that PUC owed Central Supply \$70,350. Roosevelt sought to do business with Central Supply and requested that it be afforded an open line of credit. A February 1, 2007 letter from Central Supply to Roosevelt embodies the contract at issue here. The letter acknowledges Roosevelt's purchase of PUC assets and the request that Central Supply sell merchandise to Roosevelt on open credit terms of net thirty days. Central Supply agreed to sell to Roosevelt on "open terms," and "a workable line of credit" on the condition that Roosevelt pay PUC's debt in twelve monthly installments. The letter was "accepted and agreed" to by Roosevelt's vice-president.

¶3 Roosevelt made two monthly installments in February and March 2007. When Central Supply failed to make sales calls on Roosevelt or make known the available products, Roosevelt determined that Central Supply had no interest in doing business with Roosevelt and it ceased making payments. Central Supply commenced this action to recover the balance due of \$58,625 under the letter contract. Roosevelt answered denying that a contract was formed or was enforceable, and it counterclaimed for the payments it made as unjust enrichment to Central Supply.

¶4 The dispute was tried to the court. The trial court found that Roosevelt had drafted the language used in the contract and asked Central Supply to put it on its letterhead. It was Roosevelt that first used the phrase “workable line of credit,” the phrase that Roosevelt claimed was so indefinite as to render the contract unenforceable. The court found that the parties understood the phrase to mean a line of credit similar to that afforded to PUC. It concluded that the contract was not void for indefiniteness and it obligated Central Supply to extend a line of credit for purchases and Roosevelt to make the monthly payments on the PUC debt. Addressing Roosevelt’s claim that Central Supply failed to fulfill its obligation under the contract because it never made sales calls on Roosevelt, the court found that Central Supply’s manner of business with PUC had been only a sales calls basis. Although Central Supply did not make any sales calls to Roosevelt, Roosevelt had never contacted Central Supply to inquire about specials or other merchandise for sale. The court found that Roosevelt made an internal decision that it did not need products from Central Supply and it simply chose to stop making payments under the contract. The court found that Central Supply never denied open credit to Roosevelt. Judgment was entered for the unpaid balance under the contract.

¶5 “Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties’ basic commitments and obligations.” *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996) (emphasis omitted). However, indefiniteness may be cured by the parties’ subsequent conduct and by their own practical interpretation. *Id.* at 179. When the finder of fact “can determine the parties’ intentions, ‘indefiniteness disappears as a reason for refusing enforcement.’” *Id.*

at 180 (quoting Arthur L. Corbin, 1 CORBIN ON CONTRACTS § 4.1, at 544 (Joseph M. Perillo, revised ed. 1993)). The question becomes whether there is sufficient evidence to ascertain the intent of the parties looking at both the wording of the contract as well as the surrounding circumstances. *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶24, 291 Wis. 2d 393, 717 N.W.2d 58. The definiteness of a contract may be a question of fact to be decided by the trier of fact or a question of law to be decided by the court. *Management Computer Servs.*, 206 Wis. 2d at 178. Here, questions of fact were presented.

¶6 The trial court found that the parties shared an understanding that a “workable line of credit” meant credit enjoyed by PUC.

In reviewing findings made by a trial court in a trial to the court, “[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact” because the trial court has a superior opportunity “to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (footnote omitted). It is for the trial court, not the appellate court, to resolve conflicts in the testimony, *see Fuller v. Riedel*, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990), and we review the evidence in the light most favorable to the findings made by the trial court, *see Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, 10, 253 Wis. 2d 588, 644 N.W.2d 269. When more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). We must search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not. *Becker v. Zoschke*, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

Tang v. C.A.R.S. Protection Plus, Inc., 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169.

¶7 The trial court's finding of a common understanding of the phrase is supported by the evidence. Central Supply's representative testified that there had been discussion about the number of units Roosevelt was interested in purchasing and that it was comparable to the amount PUC had first ordered. Roosevelt's representative understood that it would be allowed to buy whatever it needed for its programs on open credit. Since Roosevelt was essentially stepping into PUC's shoes, the past practice was relevant in determining the provision of open credit. Roosevelt had contacted all PUC vendors to establish a relationship and continue business as PUC had done. Roosevelt proposed the contract language suggesting that the phrase "workable line of credit" was sufficient for its purposes.

¶8 It was not necessary for the parties to pin down a limit on Roosevelt's line of credit for the contract to be enforceable. *See Management Computer Servs.*, 206 Wis. 2d at 181 ("Parties often agree to a contract provision that is ambiguous and thereby gamble on a favorable interpretation should a dispute arise, rather than take the time to work out all their possible disagreements, especially since such disagreements may never have any consequence."). Neither of Roosevelt's two representatives at trial had a specific dollar amount of credit in mind when contracting with Central Supply. Additionally the term "net 30" reflected that the parties would operate on a month-to-month basis and the arrangement would be flexible.

¶9 The phrase "workable line of credit" only gives rise to a question of "interpretation of the parties' intent, not one of mutual assent or indefiniteness." *See id.* at 182. Because there was a mutual understanding of the open credit to be provided to Roosevelt, the contract was not indefinite in its making and not rendered unenforceable.

¶10 Roosevelt argues that the contract fails for lack of consideration because Central Supply's performance under the contract is illusory. It points out that Central Supply never offered products to Roosevelt for purchase and Central Supply intended to apply some unknown credit limit. "A contract is illusory when the contract is 'conditional on some fact or event that is wholly under the promisor's control and his [or her] bringing it about is left wholly to his [or her] own will and discretion.'" *Metropolitan Ventures*, 291 Wis. 2d 393, ¶33 (citations omitted). When only illusory promises are made, the party not constrained in any way has not given consideration and, therefore, no contract exists. *Devine v. Notter*, 2008 WI App 87, ¶4, 312 Wis. 2d 521, 753 N.W.2d 557.

¶11 The decision of whether or not Roosevelt actually purchased any product and availed itself of the open line of credit was not Central Supply's alone. True, Central Supply did not pursue Roosevelt for orders as it had previously done with PUC. The contract did not require any specific sales method. The trial court found Roosevelt had not attempted to make purchases so there was no refusal by Central Supply to fulfill its obligation to give credit. The obligation to allow open credit was not conditioned on events solely within the control of one party and therefore was not illusory.

¶12 The fact that Central Supply would impose a credit limit not previously communicated to Roosevelt also does not render its obligation to perform under the contract illusory. Central Supply had the obligation to supply open credit at a minimum to the extent previously granted to PUC. It did not have a right to deny credit to that extent. It remains that both sides of the contract had obligations but that Central Supply was not called upon to perform. Roosevelt could not simply disavow the contract.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

