

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JIM HENCHES,)	No. 58282-8-I
)	
Appellant,)	
)	
SEBNEM ODEN,)	
)	
Plaintiff,)	
)	
v.)	
)	
BENJAMIN TAYLOR, as his separate)	UNPUBLISHED OPINION
estate; PAGLIALUNGA & HARRIS, LLP,)	
a Washington limited liability)	
partnership; JAMES HARRIS & JANE)	
DOE HARRIS; husband and wife and)	
their marital community;)	
)	
Respondents,)	
)	
MATT GEFREE; FIRESAFE FIRE)	FILED: April 30, 2007
SAFETY & EQUIPMENT COMPANY,)	
LLC; SAFECO PROPERTY &)	
CASUALTY INSURANCE COMPANY,)	
)	
Defendants.)	
)	

ELLINGTON, J. When both debtor and creditor are aware that a check is tendered in full settlement of a disputed debt, the creditor's negotiation of that check completes an accord and satisfaction of all amounts owed. Summary judgment for the debtor was proper here because the check was offered as payment in full to

settle the debtor's account and denominated as final payment. We affirm.

BACKGROUND

Jim Henches, a licensed massage therapist, treated Benjamin Taylor after he was injured in a car accident in August 2000. Taylor's last appointment with Henches was on November 18, 2000, by which time Henches had billed over \$7,000 to Taylor's account. Taylor's insurance company disputed Henches' bills as exorbitant, and eventually paid \$2,625.37 for 24 massage treatments.

Between November 2000 and February 2004, Henches billed Taylor for consultations with his other healthcare providers, time reserved to testify in his personal injury lawsuit, and correspondence related to billing disputes with Taylor's insurance representatives and lawyers. Henches also billed for the costs and time expended in filing a lien for payment of his bill. Henches later assigned his interest in that lien to Sebnem Oden.¹

In response to a bill for \$11,945.86, Taylor's lawyer James Harris sent Henches a letter in March 2004:

I have reviewed your billing statements and am having a difficult time understanding a number of charges you included. By my calculations, the amount owed to you is approximately \$5,243.45. I have enclosed a check for that amount as payment in full to settle Mr. Taylor's account with you.

¹ Oden did not appear below, nor did she file a notice of appeal or any briefs in this court. Henches contends that he has standing to argue on her behalf, since it would benefit him to ensure she collects on the lien. Henches argues that an accord and satisfaction with Henches would not embrace Oden's claim against Taylor since Taylor had actual or constructive notice that the lien had been assigned. We decline to rule on this argument. Oden has been a party to the case from its inception, but did not preserve the issue for appeal by filing a notice of appeal or appearing before this court. Whatever claims or interest she may have, they are not before us.

Clerk's Papers at 327. The letter was accompanied by a check for the stated amount, with the notation "final payment." Clerk's Papers at 117. Henches continued to dispute the amount owed over the next months, and eventually filed this lawsuit in January 2005.² Shortly after filing suit, Henches added the words "attorney/fee" on the check's notation line over the typed word "final," and deposited the check. Clerk's Papers at 119.

The court dismissed Henches' lawsuit on summary judgment, ruling that deposit of the check constituted accord and satisfaction and discharged the debt. The usual standard of review on summary judgment applies.³

DISCUSSION

Waiver

Preliminarily, we reject Henches' assertion that Taylor waived the affirmative defense of accord and satisfaction by filing an answer failing to raise the defense. It is evident that the document in question was a notice of appearance, not an answer,

² Henches initially sued Taylor, Harris (as an individual), the firm of Paglialunga & Harris, Safeco Insurance Company (the firm's insurer), as well as Firesafe Fire Safety and Equipment Company and Matt Gefree, the two liable parties in Taylor's personal injury suit. Only Taylor and Harris remain parties on appeal. For convenience, we refer to both respondents collectively as "Taylor," and to Harris by name in his capacity as Taylor's lawyer.

³ This court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. U.S. Bank Nat'l Ass'n v. Whitney, 119 Wn. App. 339, 347, 81 P.3d 135 (2003). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c).

and that the word “answer” in the caption is a clerical error. When Taylor did file an answer, he pleaded the defense.⁴ Henches did not move to strike the answer, nor did he appeal an order accepting the answer with its affirmative defenses. The defense was not waived.

Accord and Satisfaction

A debt is discharged by accord and satisfaction when the debtor and creditor agree to settle a claim by some performance other than that which is claimed due, and the creditor accepts the substituted performance as full satisfaction of the claim. Northwest Motors, Ltd. v. James, 118 Wn.2d 294, 303, 822 P.2d 280 (1992) (citing 6 A. Corbin, Corbin on Contracts § 1276, at 115 (1962)). Accord and satisfaction requires a bona fide dispute, an agreement to settle the dispute for a certain sum, and performance of the agreement. Ward v. Richards & Rossano, Inc., P.S., 51 Wn. App. 423, 429, 754 P.2d 120 (1988); Perez v. Pappas, 98 Wn.2d 835, 843, 659 P.2d 475 (1983).

Where the amount owed is disputed or unliquidated, accord and satisfaction may be implied from surrounding circumstances. U.S. Bank Nat’l Ass’n v. Whitney, 119 Wn. App. 339, 350, 81 P.3d 135 (2003). In such cases, the creditor’s acceptance of a draft tendered in full payment of the debt creates an accord and satisfaction binding on both parties. Id.; Or. Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 413, 36 P.3d 1065 (2001). The party asserting accord and satisfaction as a

⁴ See Clerk’s Papers at 21–24. Henches’ claim that the answer was untimely and the defense therefore waived is unsupported by authority, and we reject it.

defense bears the burden of proof. U.S. Bank, 119 Wn. App. at 350. Whether there has been an accord and satisfaction is usually a mixed question of fact and law. But where the facts are not in controversy, it is a pure question of law. Id.

Bona Fide Dispute

Taylor easily satisfied the first element of accord and satisfaction. The parties' contracts did not establish a liquidated amount for the services provided, and the letter that accompanied Taylor's check to Henches demonstrates a good faith dispute over the amount owed.

Henches contends, however, that Taylor's arguments are precluded by the doctrine of judicial estoppel. Specifically, he contends Taylor is estopped from denying that he hired Henches as an expert witness because Henches was so listed in the accident litigation, and from claiming his debt was less than \$7,000 because Taylor claimed that sum for Henches' medical services as proof of special damages. Henches appears to advance these arguments as evidence that there was no bona fide dispute as to his bill.

These arguments have no merit. Judicial estoppel is not established, and estoppel does not apply in these circumstances in any event.

Judicial estoppel is an equitable doctrine that prevents a party from gaining advantage by convincing a court to accept a position in one court proceeding and then seeking advantage by taking a different, inconsistent position in a later proceeding. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224, 108 P.3d 147 (2005); Browning Mfg. v. Mims (In re Coastal Plains, Inc.), 179

F.3d 197, 206 (5th Cir. 1999). Taylor took no position in his personal injury suit regarding his debt to Henches, and never asked the court to take any position with respect to these facts. His intention (or lack thereof) to call Henches as an expert witness is a procedural matter. A party's freedom to arrange for trial witnesses is not a fact averred in a court proceeding. See, e.g., Cunningham, 126 Wn. App. at 227–28; Johnson v. SI-COR, Inc., 107 Wn. App. 902, 906, 28 P.3d 832 (2001). Similarly, inclusion of Henches' bill for \$7,041.21 in an ER 904 disclosure does not constitute a representation that the bill was reasonable or that Taylor planned to seek that amount in damages at trial. There is no basis for assertion of judicial estoppel here.

Moreover, the value of Henches' services or the amount owed by Taylor are irrelevant to accord and satisfaction, which occurs only in the context of a dispute as to what was owed. There is no question that a dispute existed. This case is about whether Henches accepted a lesser amount in satisfaction of the debt, regardless of the validity of the amount he claimed was owed.

Agreement to Settle

As with any contract, an accord and satisfaction cannot be formed without a meeting of the minds. U.S. Bank, 119 Wn. App. at 351. But the required intent is shown when payment is offered in full satisfaction and is accompanied by conduct from which the creditor cannot fail to understand that payment is tendered on condition its acceptance constitute satisfaction. Id.; Ingram v. Sauset, 121 Wash. 444, 446–47, 209 P. 699 (1922).

For example, in Oregon Mutual Insurance Company v. Barton, 109 Wn. App. 405, 410, 36 P.3d 1065 (2001), accord and satisfaction was formed when an insured deposited a settlement check given in “full settlement” of his claim and accompanied by a letter from the insurance company confirming the settlement. By contrast, no accord and satisfaction is formed where the notation “full and final payment” is a pro forma notation made on every business check in typeface too small to be read easily, or where testimony from both the debtor and the creditor shows the payment was accepted on specific disavowal that an accord was being created. Kibler v. Frank L. Garrett & Sons, Inc., 73 Wn.2d 523, 528, 439 P.2d 416 (1968); U.S. Bank, 119 Wn. App. at 351.

Given the undisputed facts here, Henches could not fail to understand that the check was offered on condition of full settlement. Henches’ alteration of the “final payment” language is further demonstration that he read and understood the notation. Taylor tendered a check in final payment and Henches deposited the check, thereby accepting that payment. See State, Dep’t of Fisheries v. J-Z Sales Corp., 25 Wn. App. 671, 680, 610 P.2d 390 (1980) (endorsement and deposit of check constitutes acceptance; funds are accepted when creditor removes funds from debtor’s control).

Performance of the Agreement

A creditor can accept payment and avoid formation of an accord only where both parties understand before payment is accepted that the payment will not settle the claim. U.S. Bank, 119 Wn. App. at 351. Thus a creditor’s deposit of a check did

not create an accord and satisfaction where testimony from both parties showed that the creditor “accepted the check on the clear understanding that no accord had been reached” and that tender “was not conditioned on” acceptance of the debtor’s accounting. Id. at 344.

Henches contends his alteration of the check prevents accord and satisfaction. But a creditor cannot prevent formation of an accord by making a unilateral change to a draft tendered in full payment, even if the creditor endorses the check with the words “accepted as partial payment . . . and not as payment in full and not as an accord and satisfaction of the known full amount legally due and owing.” Evans v. Columbia International Corp., 3 Wn. App. 955, 956, 958, 478 P.2d 785 (1970). The court explained the rationale for this rule in State Department of Fisheries v. J-Z Sales, 25 Wn. App. 671, 674, 610 P.2d 390 (1980). There, the debtor tendered a check in an amount substantially less than the creditor claimed was owed (and marked it “payment in full”). The debtor then refused the creditor’s return of the check. The creditor endorsed the check to the clerk of court pending resolution of the case. Id. at 675. The court ruled the debt was discharged by accord and satisfaction when the creditor removed the funds from the debtor’s control by endorsing the check, even under protest. Id. at 680. The court quoted Corbin’s treatise:

“Where the amount due is in dispute, and the debtor sends cash or check for less than the amount claimed, clearly expressing his intention that it is sent as a settlement in full, and not on account or in part payment, the retention and use of the money or the cashing of the check is almost always held to be an acceptance of the offer operating as full satisfaction, even though the creditor may assert or send word to

the debtor that the sum is received only in part payment. The fact that the creditor scratches out the words 'in full payment,' or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge. The creditor's action in such case is quite inconsistent with his words.”

Id. at 681 (quoting 6 A. Corbin, Corbin on Contracts § 1279, at 126–30 (1962)).

The accord and satisfaction is completed in such circumstances because, despite the creditor’s unilateral modification of the tendered check, retention of the money operates as assent to the discharge. 13 Sarah h. jenkins, corbin on contracts § 70.2(3) (2003).

Henches’ alteration of the check was a unilateral act not communicated to Taylor. It had no effect. Henches assented to the accord when he deposited Taylor’s check.

Finally, Henches contends a factual dispute exists as to whether Taylor’s attorney Harris owed him a fiduciary duty such that Taylor should be required to prove an additional element to establish accord and satisfaction. See Ward v. Richards & Rossano, Inc., P.S., 51 Wn. App. 423, 429, 754 P.2d 120 (1988) (party seeking to prove accord and satisfaction between fiduciaries must prove an express agreement made upon full revelation). Henches pushes the bounds of credulity with this contention.

His argument is based upon attorney Harris’s agreement to withhold funds from proceeds recovered in the personal injury litigation as necessary to “adequately protect” Henches. Clerk’s Papers at 256. Henches knew Harris represented Taylor,

