[Cite as *Herres v. Millwood Homeowners Assn., Inc.*, 2010-Ohio-3533.]

STATE OF OHIO, MONTGOMERYCOUNTY

IN THE COURT OF APPEALS

SECOND DISTRICT

MARK HERRES, PLAINTIFF-APPELLANT, VS. MILLWOOD HOMEOWNERS ASSN., INC. DEFENDANT-APPELLEE.	))))))))))	CASE NO. 23552 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Vandalia Municipal Court of Montgomery County, Ohio Case No. 08-CVF-01043
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellant	Attorney Don A. Little 7501 Paragon Road, Lower Level Centerville, Ohio 45459
For Defendant-Appellee	Attorney Gregory B. O'Connor McNamee & McNamee, PLL 2625 Commons Blvd. Beavercreek, Ohio 45431

JUDGES:

Hon. Gene Donofrio
(Seventh District Court of Appeals
Sitting by assignment of the Chief
Justice of the Supreme Court of Ohio)
Hon. Mike Fain
Hon. Jeffrey E. Froelich

Dated: July 30, 2010

DONOFRIO, J.

{¶ 1} Plaintiff-appellant Mark Herres appeals a decision of Vandalia Municipal Court awarding summary judgment in favor of defendant-appellee Millwood Homeowners Association, Inc. on his claims for breach of contract, quantum meruit, and action on account. The trial court ruled that Herres' claims were barred by Millwood's affirmative defense of accord and satisfaction. The court also granted Millwood summary judgment on its counterclaim for unpaid homeowner's association dues. Herres argues that the court erred in awarding Millwood summary judgment because Millwood still owed him money for services performed.

{¶ 2} Herres owns a home in Millwood Estates and operates a landscaping business known as Creative Artworks Landscape & Design. In November 1999, Millwood distributed a request for estimates for lawn care services on Millwood's common areas for the spring, summer, and fall seasons of 2000. In response, Herres submitted an estimate of $5,180.00. Although the parties never executed a formal written contract, Herres performed certain lawn care services for Millwood's common areas during 2000 and 2001.

{¶ 3} Herres submitted various invoices for work performed to Millwood, some of which Millwood considered either not authorized or not performed. On August 6, 2001, Millwood sent Herres a letter itemizing the list of outstanding invoices from Herres and detailing its disputes with each.

{¶ 4} "Mr. Herres,

{¶ 5} "The Millwood Association met on August 5th, 2001 in regards to invoices presented to the association. The following breakdown summarizes the invoice payments.

"Invoice #2784	$905.00	Paid in full
"Invoice #2785	$540.00	Paid in full – 2795 Inv.
"Invoice #2797	$350.00	Paid in full
"Invoice #2798	$0.00	Work not authorized or completed
"Invoice #1	$205.00	One Hour installation of fixture & cost of materials
"Invoice #2802	$370.00	Trimming of trees not authorized

{¶ 6} "The check enclosed totals $2380.00 which is consolidated as payment in full for all services provided by Creative Artworks Landscape & Design. Millwood Association has voted to discontinue all services previously provided to the Association."

{¶ 7} Enclosed with the letter was a check, numbered 337, for $2380.00 dated August 8, 2001. The memo line listed invoice numbers 2802, 2784, 2785, 2798 and 2798, with the notation "payment in full." Herres also received another check from Millwood dated August 8, 2001. It was check number 338. The memo line listed invoice number 2796, but did not include a notation of "payment in full." Herres cashed both checks.

{¶ 8} On June 19, 2008, Herres filed a complaint against Millwood setting forth three claims: (1) breach of contract, (2) quantum meruit, and (3) action on

account. Millwood answered raising the affirmative defense of accord and satisfaction and asserting a counterclaim for unpaid homeowner's association dues for the years 2007 and 2008.

{¶ 9} Following discovery Millwood filed a motion for summary judgment of Herres' claims and its counterclaims. Millwood supported its summary judgment with the affidavits of it president and treasurer. Millwood argued that in its August 6, 2001 letter Herres supported its defense of accord and satisfaction. Millwood also argued that there was no genuine issue of material fact regarding its claims for unpaid association dues. Herres filed a motion in opposition to Millwood's summary judgment motion.

{¶ 10} On May 11, 2009, a magistrate granted Millwood's motion in full. The magistrate reasoned that Herres' claims were barred by Millwood's defense of accord and satisfaction. The magistrate also found that there was no genuine issue of material fact regarding Herres' liability for Millwood's counterclaim for unpaid association dues. The magistrate deferred the issue of damages of Millwood's counterclaim for a further hearing.

{¶ 11} Since Millwood confirmed that it was not seeking attorneys' fees in relation to its counterclaim, the parties agreed that the amount of damages was not in dispute. Accordingly, the magistrate issued an amended decision awarding Millwood damages in the amount of $170.00, plus 12 percent interest, for each year of unpaid dues.

{¶ 12} Herres filed objections and then belated supplemental objections to the magistrate's decision and Millwood filed a response to each. The trial court

adopted the magistrate's decision in full. This appeal followed.

{¶ 13} Herres' sole assignment of error states:

{¶ 14} "THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE MILLWOOD HOMEOWNERS ASSOCIATION, INC. AS GENUINE ISSUES OF MATERIAL FACT REMAIN IN DISPUTE."

{¶ 15} Herres argues that the August 6, 2001 letter and enclosed check were insufficient to constitute an accord and satisfaction. His argument is based, in part, on the second check written by Millwood (no. 338) which identified an invoice number not mentioned in the August 6, 2001 letter and did not include the notation "payment in full." Herres argues that he reasonably believed that Millwood intended to pay further invoices, that there were other invoices still due and owing, and that he had performed other work not identified by the invoice numbers listed on the two checks. On appeal, Herres does not take issue with the trial court's decision regarding Millwood's counterclaim.

{¶ 16} In response, Millwood argues that the August 6, 2001 letter and enclosed check constituted an accord and satisfaction. Millwood also argues that Herres failed to present any evidence of "further invoices" or "other work" for which he remains unpaid.

{¶ 17} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶24. Summary judgment is properly granted when: (1) there is no genuine issue as to any material fact; (2) the

moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1976), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46; Civ.R. 56(C).

{¶ 18} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party' s claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. * * *" (Emphasis sic.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

{¶ 19} The "portions of the record" or evidentiary materials listed in Civ.R. 56(C) include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. The court is obligated to view all the evidentiary material in a light most favorable to the nonmoving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267.

{¶ 20} "If the moving party fails to satisfy its initial burden, the motion for

summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264.

{¶ 21} Summary judgment is appropriate when there is no genuine issue as to any material fact. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, 662 N.E.2d 1088, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

{¶ 22} Here, the substantive law of the issue being litigated is accord and satisfaction. " Accord and satisfaction is an affirmative defense to a claim for money damages. If a party against whom a claim for damages is made can prove accord and satisfaction, that party's debt is discharged by operation of law." *Allen v. R.G. Industrial Supply* (1994), 66 Ohio St.3d 229, 231, 611 N.E.2d 794.

{¶ 23} "When an accord and satisfaction is pled by the defendant as an affirmative defense, the court's analysis must be divided into three distinct inquiries. First, the defendant must show that the parties went through a process of offer and acceptance-an accord. Second, the accord must have been carried out-a satisfaction. Third, if there was an accord and satisfaction, it must have been supported by consideration." Id. at paragraph one of the syllabus.

{¶ 24} When the accord and satisfaction relates to the cashing of a check,

the plaintiff "'must have reasonable notice that the check is intended to be in full satisfaction of the debt.'" Id. at paragraph two of the syllabus.

{¶ 25} In this case, the three inquiries of accord and satisfaction have been met. First, Millwood included in the August 6, 2001 letter to Herres a check for $2,380.00 as an offer for final payment in full of all services rendered by him and Herres accepted the check. The letter detailed the disputed invoices and charges. Second, the accord was carried out (i.e. satisfaction) – Herres cashed the check. Third, the accord and satisfaction was supported by consideration – $2,380.00.

{¶ 26} The more central question of this case is whether Herres had reasonable notice that the check was intended to be in full satisfaction of the debt. Here, the August 6, 2001 letter clearly stated that the enclosed check was "payment in full for all services provided by" Herres. The check itself included the notion "payment in full."

{¶ 27} Millwood cites a case similar to the case at hand. In *First National Bank & Trust Co. v. Fireproof Warehouse and Storage* (1983), 8 Ohio App.3d 253, 8 OBR 326, 456 N.E.2d 1336, the debtor sent a check for less than the amount owed, which was accompanied by a letter briefly stating the debtor's grievance with the creditor's service, and a statement that the reduced payment "constitutes our fulfillment of our agreement" with the creditor. The creditor cashed the check and filed suit to collect the difference.

{¶ 28} Holding that the claim was barred by accord and satisfaction, the Tenth District Court of Appeals highlighted the letter that accompanied the final payment:

{¶ 29} "Where a check is tendered as payment in full of a disputed claim, the creditor '* * * must accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely * * *.' *Seeds Grain & Hay Co. v. Conger* (1910), 83 Ohio St. 169, 93 N.E. 892, paragraph one of the syllabus. Furthermore, even if after cashing the check the creditor notifies the debtor that he does not intend to do other than place the amount paid to credit of the debtor, the cashing of the check tendered in full satisfaction of the debt constitutes an accord and satisfaction since silence by the debtor as to the creditor's claim does not constitute a waiver of the condition accompanying the tender of the check. *Seeds Grain & Hay Co., supra,* paragraph two of the syllabus. *Indication that the check is tendered as payment in full need not necessarily be made on the check itself, it being sufficient that such statement is included with a letter accompanying the tendered payment by check* . *Venzie Corp. v. Riethmiller* (1957), 103 Ohio App. 343, 145 N.E.2d 460 [3 O.O.2d 369]. See, also, R.C. 1303.18." (Emphasis added.)

{¶ 30} In this case, the August 6, 2001 letter gave Herres reasonable notice that the check was intended to be in full satisfaction of the debt. Contrary to Herres' contention, the second check did nothing to call into question the import of the August 6, 2001 letter. The second check was dated the same day as the first. The letter clearly indicated that his services were being terminated and the enclosed check was final payment for all services. Herres never claimed to be owed for any services provided after August 6, 2001.

{¶ 31} Furthermore, the record is devoid of any substantive evidence that

Herres is still owed money for services performed. Herres did provide his own affidavit in opposition to summary judgment. Herres spoke of "further invoices" that existed and "other work" that was performed. However, his statements were conclusory in nature, unsupported by evidence. The assertion that he was owed money for "further invoices" for "other work" is not enough. He did not say how much he was owed or identify any invoices by number or any invoices at all. He did not indicate with any specificity what "other work" for which he remained unpaid.

{¶ 32} In sum, the trial court did not err in finding that the check and letter in question were sufficient to constitute an accord and satisfaction. The trial court properly entered summary judgment in Millwood's favor where, after construing the evidence most strongly in Herres' favor, there was no genuine issue as to any material fact, Millwood was entitled to judgment on Herres' complaint as a matter of law, and reasonable minds could come to but one conclusion, and that conclusion was adverse to Herres.

{¶ 33} Accordingly, Herres' sole assignment of error is without merit.

{¶ 34} The judgment of the trial court is hereby affirmed.

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FAIN, J., and FROELICH, J., concur.

Copies mailed to:

Don A. Little
Gregory B. O'Connor
Hon. Cynthia M. Heck