

STATE OF MICHIGAN  
COURT OF APPEALS

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AMERICAN HOME INSURANCE COMPANY,

Plaintiff-Appellee,

v

ROBERT BAILEY,

Defendant-Appellant.

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UNPUBLISHED

August 15, 1997

No. 194727

Oakland Circuit Court

LC No. 95-498915

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's orders granting plaintiff's MCR 2.116(C)(10) motion for summary disposition and awarding plaintiff \$56,253, the amount defendant owed plaintiff pursuant to a promissory agreement. We affirm.

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition because it was unnecessary for him to show that plaintiff's claim was unliquidated and the subject of a good faith dispute in order for him to establish the existence of a valid accord and satisfaction. We disagree.

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed that might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc.*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider any depositions, affidavits, admissions, and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Jackhill, supra*.

Accord and satisfaction is an affirmative defense that defendant bears the burden of establishing. *Nationwide Mutual Ins Co v Quality Builders, Inc.*, 192 Mich App 643, 646; 482 NW2d 474

(1992). Accord and satisfaction is based on contract principles and is generally contractual in nature. *Id.* “An ‘accord’ is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and ‘satisfaction’ is the performance or execution of the new agreement.” *Id.*; see, also, *Fuller v Integrated Metal Technology, Inc.*, 154 Mich App 601, 607; 397 NW2d 846 (1986). The law in Michigan governing accord and satisfaction requires defendant to show (1) that he had a good faith dispute of (2) an unliquidated claim of plaintiff’s, (3) that he tendered money in satisfaction of the claim, and (4) that plaintiff accepted the tender. *Nationwide Mutual*, *supra* at 647. Payment on an undisputed, existing claim does not, without more, work an accord and satisfaction. *Gitre v Kessler Products Co, Inc.*, 387 Mich 619, 624; 198 NW2d 405 (1972); see, also, *Puett v Walker*, 332 Mich 117, 122-123; 50 NW2d 740 (1952); *Fuller*, *supra* at 611.

Here, evidence establishes that defendant did nothing more than tender \$1,000 to plaintiff in an attempt to obtain discharge of his \$56,253 debt. Defendant did not submit evidence to establish that plaintiff’s claim was unliquidated, nor that he had a good faith dispute concerning the claim. Because defendant failed to establish a valid accord and satisfaction, see *Nationwide Mutual*, *supra*, the trial court did not err in granting plaintiff’s motion for summary disposition.

Defendant argued in the trial court, and now argues on appeal, that he is not required to show that plaintiff’s claim was unliquidated and subject to a good faith dispute in order to establish an accord and satisfaction because Michigan has abolished the requirement that a contractual modification must be supported by additional consideration. See MCL 566.1; MSA 26.978(1).<sup>1</sup> Historically, an accord and satisfaction was valid only if supported by additional consideration, and the distinction between liquidated and unliquidated claims related to this requirement:

The distinction between liquidated and unliquidated claims is grounded upon the requirement that an accord and satisfaction must be supported by consideration, and is important in light of the general rule that an accord and satisfaction may not result from part payment of a liquidated claim in the absence of additional consideration, but may result from part payment of an unliquidated or disputed claim in the absence of such consideration, because the settlement of an unliquidated or disputed claim is considered to be sufficient consideration in and of itself to support an accord and satisfaction. [1 Am Jur 2d, Accord and Satisfaction, §7, p 474.]

Thus, defendant argues that because accord and satisfaction is generally contractual in nature and consideration is not required for modification of a contract, MCL 566.1; MSA 26.978(1), a liquidated, undisputed claim can be the subject of an accord and satisfaction.

We find this argument unpersuasive.<sup>2</sup> Defendant’s argument rests on the incorrect assumption that an accord and satisfaction is merely a contractual modification, i.e. a change in the terms of an existing contract. See *Rasch v National Steel Corp*, 22 Mich App 257, 260; 177 NW2d 428 (1970). Instead, an accord and satisfaction is the substitution of an entirely new agreement for an existing agreement. *Nationwide Mutual*, *supra* at 646; *Fuller*, *supra* at 607. In essence, it is the

execution of a new contract, the enforceability of which depends on consideration. See *Hisaw v Hayes*, 133 Mich App 639, 643; 350 NW2d 302 (1984). Thus, where there is no new consideration, as in the present case, the parties have not entered into a valid accord and satisfaction.

Defendant also raises several issues for the first time on appeal. We are not obligated to address them. *In re Forfeiture of \$19,250*, 209 Mich App 20, 32; 530 NW2d 759 (1995). Moreover, even if we found some merit to defendant's legal arguments, his success on appeal would depend on our acceptance of his assertion that we must presume, even in the absence of supporting evidence, certain of his factual allegations to be true (e.g., defendant's poor financial situation). Contrary to defendant's assertion, we are only required to give him the benefit of any reasonable doubt when reviewing the trial court's grant of summary disposition in plaintiff's favor pursuant to MCR 2.116(C)(10); we need not presume the existence of facts for which defendant has merely alleged and has failed to garner evidentiary support. *Patterson, supra*; *Jackhill, supra*.

We affirm.

/s/ Helene N. White  
/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski

<sup>1</sup> MCL 566.1; MSA 26.978(1) provides, in pertinent part, that "[a]n agreement . . . made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease . . . shall not be invalid because of the absence of consideration . . . ."

<sup>2</sup> Of course, until the Supreme Court reverses itself, we are bound by its prior opinions holding that lesser payment of a liquidated (i.e., undisputed) claim cannot constitute an accord and satisfaction. *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995). For the purposes of dispelling defendant's argument, however, we will ignore this limitation.