IN THE COURT OF APPEALS OF IOWA

No. 9-1051 / 09-0597
Filed February 24, 2010

QWEST BUSINESS &
GOVERNMENT SERVICES,
Plaintiff-Appellee,

vs.

LAWCHEK, LTD.,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, James H. Carter, Judge.

Defendant appeals from the district court's order with regard to its challenge to plaintiff's levy upon the trust account of defendant's attorney. **AFFIRMED.**

John J. Hines of Dutton, Braun, Staack, Hellman, P.L.C., Waterloo, and Richard A. Pundt of Pundt Law Office, Cedar Rapids, for appellant.

Billy J. Mallory and Brooke S. Van Vliet of Brick, Gentry, Bowers, Swartz & Levis, P.C., West Des Moines, until their withdrawal, and then Stephen J. Holtman and Jason M. Steffens of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Defendant Lawchek, Ltd. (Lawchek)[1] appeals from the district court's order with regard to its challenge to levy by Plaintiff Qwest Business & Government Services (Qwest), in which the district court denied the challenge to Qwest's levy or garnishment upon Lawchek's attorney's trust account. Lawchek argues the district court erred in (1) failing to find there was a $500,000 settlement agreement between the parties and (2) determining the levy upon Lawchek's attorney's trust account was upon unrestricted funds. We affirm.

I. Background Facts and Proceedings.

In April 2003, a Colorado district court entered a judgment, stipulated between the parties, in favor of Qwest in the amount of $2,032,896.08 (plus $559.40 per day in post-judgment interest), for Lawchek's failure to pay monies owed to Qwest under a contract. In 2006, Qwest transcribed the judgment to the Iowa District Court of Linn County for collection. This case arises out of Qwest's attempt to collect on the judgment.

In late October 2008, Lawchek contacted Heather Shull, senior attorney for Qwest, seeking to compromise the judgment, which was then worth approximately $3.1 million. Lawchek proposed settling the judgment for $500,000. Shull indicated she was hopeful the parties could reach a settlement agreement and that Qwest would like to reach agreement by the end of the year.

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[1] Lawchek is the entity named in this case; however, it is clear the action was also brought on behalf of Enlighten Technologies, Inc. Unless otherwise specified, references to "Lawchek" refer to statements and actions by Richard Pundt, C.E.O. and attorney of Lawchek, acting on behalf of Lawchek and Enlighten.

It is undisputed that the parties thereafter entered into negotiations regarding the potential settlement of the judgment.

At the onset of negotiations, Shull requested a copy of Lawchek's financials. Lawchek supplied the financials, with a period ending July 31, 2008. Shull also requested that Lawchek's counsel prepare the release agreements so Quest did not incur outside counsel fees. She also furnished Lawchek's attorney, Larry Thorson of Cedar Rapids, with Qwest's correct company name to be included in the forms for release and satisfaction of the judgment. Lawchek also retained a Colorado attorney to help prepare the settlement documents in accordance with Colorado law. In December 2008, Lawchek supplied Shull with the prepared release documents necessary to settle the matter for $500,000. Lawchek also informed Shull it had placed $500,000 for settlement purposes into the trust account of Attorney Thorson.

Since some time had passed, and in order to conduct a due diligence, Shull indicated to Lawchek that Qwest would need additional, updated financial documentation before a settlement, if any, could be reached. Lawchek refused to provide additional financials. Correspondence between the parties became less frequent by mid-December 2008, as Shull became concerned by Lawchek's unwillingness to provide updated financials. Shull and other Qwest employees also began to take holiday leave around this time.

Although no correspondence between the parties established whether Qwest intended to be bound by the settlement agreement, Lawchek assumed

Shull's inaction to be an acceptance of the agreement.[2] In contrast, Shull understood that Qwest did not intend to be bound by the terms of a proposed settlement agreement until Qwest received updated financials or loan information from Lawchek, she received written authority from her superiors, and Qwest signed the release documents.[3] On January 23, 2009, Qwest initiated the levy or garnishment on the Lawchek funds held in Attorney Thorson's trust account.

Lawchek initiated the instant action on February 4, 2009, by filing challenge to levy, pursuant to Iowa Code section 642.15 (2009). Qwest resisted Lawchek's challenge. On March 4, after an evidentiary hearing, the district court denied Lawchek's challenge to levy. Among other things, the district court determined the record contained no evidence of Qwest's assent to Lawchek's settlement proposal and that the $500,000 placed in Attorney Thorson's trust account were unrestricted funds subject to levy of execution. Lawchek filed a motion to reconsider, which the court denied. Lawchek now appeals.

II. Standard of Review.

The parties dispute the appropriate standard of review this court is to use in this case. Lawchek contends that because the action was tried in equity, our review is de novo. Iowa R. App. P. 6.907; *see Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). In equity actions, we give weight to the factual findings of

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[2] A December 15, 2008 email from Lawchek to Shull, however, indicates Lawchek's belief that the deal may have fallen through based on a conversation Lawchek had with Shull on December 12, 2008. Lawchek also sought to sweeten its settlement offer by offering Qwest a share of any sums to be collected from a judgment against Paul Hanna, a debtor to Lawchek who had filed for bankruptcy.

[3] The parties dispute whether Shull informed Lawchek that she would have to get authority before she could settle the case.

the district court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *Owens*, 610 N.W.2d at 865.

Qwest notes that the action was filed pursuant to section 642.15, and that "a garnishment proceeding belongs to the law side of the court." *Jasper County Sav. Bank v. Klauenberg*, 218 Iowa 578, 581, 255 N.W. 884, 885 (1934). Therefore, Qwest argues this matter was tried as an ordinary proceeding and our review is for correction of errors at law. Iowa R. App. P. 6.907.

We agree with Qwest that a garnishment proceeding is a proceeding at law. *Ellefson v. Centech Corp.*, 606 N.W.2d 324, 330 (Iowa 2000). Although the matter was tried in law, "it does not follow that the equitable rights of third parties may be ignored in determining the liability of a garnishee . . . ." *Hamm Brewing Co. v. Flagstad*, 182 Iowa 826, 833, 166 N.W. 289, 291 (1918). However, for the sake of determining our standard of review, we note that an action tried in law is reviewed for corrections of errors at law. *See Ellefson*, 606 N.W.2d at 330.

Findings of fact in a law action are binding on appeal if they are supported by substantial evidence. Iowa R. App. P. 6.904(3)(*a*); *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Beal Bank v. Siems*, 670 N.W.2d 119, 125 (Iowa 2003). The evidence is viewed in a light most favorable to the district court's judgment. *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 689 (Iowa 1999).

III. Issues on Appeal.

A. Existence of a Settlement Agreement.

Lawchek argues the district court erred in failing to find there was a $500,000 settlement agreement between the parties. Lawchek contends (1) the terms of the settlement agreement were not required to be evidenced by a signed agreement in order to be binding; (2) that Lawchek could rely upon Qwest's failure to repudiate the terms presented by Lawchek in settlement documents as Qwest's assent to the settlement; (3) any repudiation by Qwest of the settlement agreement was required to be definite and unequivocal; and (4) Shull, acting on behalf of Quest, obligated Qwest to the settlement agreement when she requested Lawchek to reduce the terms of a settlement to writing and thereafter failed to either reject or modify the terms.

Under Iowa law, oral settlement agreements can be enforceable. *Wende v. Orv Rocker Ford Lincoln Mercury, Inc.*, 530 N.W.2d 92, 94 (Iowa Ct. App. 1995). As with any contract, the only required elements of a binding settlement agreement are mutual assent to the contractual terms manifested by an offer and acceptance. *In re Guardianship/Conservatorship of Price*, 571 N.W.2d 214, 216 (Iowa Ct. App. 1997). The existence of an oral contract, as well as its terms, are ordinarily questions for the trier of fact. *Gallagher, Langlas, Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). To prove the existence of an oral contract, there must be sufficient evidence of its terms to ascertain the duties and conditions established. *Price*, 571 N.W.2d at 216. Moreover, for an oral contract to be found and enforceable, the terms must be so definitely fixed so that nothing

remained except to reduce the terms to writing. *Id.* An oral contract must be established by clear, satisfactory, and convincing proof. *See Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa 1997).

A settlement agreement requires the manifestation of assent by the party sought to be bound. *See id.* Our supreme court has set forth the requirements for proving a valid assent as follows:

> Assent to the formation of an informal contract is operative only to the extent that it is manifested. Manifestation may be wholly or partly by written or spoken words or by other acts or failure to act. The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.

Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 789 (Iowa 1976).

In this case, the district court concluded Qwest (or Shull on behalf of Qwest) had not assented to the settlement agreement. As the district court stated:

> There is no evidence in the record identifying a specific act of assent to the proposed settlement by the representative of Qwest with whom Lawchek was negotiating. In the examination of Richard Pundt, CEO of Lawchek, he was asked if a settlement had been reached during his negotiations with Qwest, and he answered in the affirmative. He later repeated his assertion that the Qwest judgment debt had been settled. Although he expressed the belief that the time of the settlement was in late October or early November, he failed to identify any particular conversation in which assent to the settlement was communicated. Attorney Thorson and Lawchek's Colorado counsel, Jeff Esses, believed there had been a settlement and appear to have acted consistent to that belief. Their belief in this regard was, however, based entirely on their being told so by Pundt. Neither had any personal knowledge that Qwest had assented to Lawchek's settlement proposal. The Court does not doubt that Pundt's belief that the matter had been settled was sincere. But in order to uphold that view, the Court must have evidence of Qwest's assent. Absent direct evidence, the Court,

> under the *Harper v. Cedar Rapids Television Co.* criteria, must search for indirect assent to settlement on Qwest's part. Lawchek's negotiations in seeking to compromise Qwest's judgment were carried on entirely with house counsel, Heather Shull. She testified at trial and stated that she had not been given authority within the company to accept Lawchek's proposal. As a matter of agency law, the Court concludes that, because the company had entrusted Shull with the negotiations and her lack of authority had not been communicated, assent to the deal by Shull would have bound Qwest. Nevertheless, in searching for acts by Shull that would constitute assent to Lawchek's proposal, the Court is satisfied that she believed that she must obtain the consent of her superiors to complete the deal and acted accordingly.

We agree with Lawchek that the terms of the settlement agreement were not required to be evidenced by a signed agreement in order to be binding. *See Wende*, 530 N.W.2d at 94. This is not to say, however, that a settlement agreement existed. In order to have an enforceable agreement, there must be sufficient evidence to show that Qwest assented to the agreement. *See Price*, 571 N.W.2d at 216. Lawchek contends that it could rely upon Qwest's failure to repudiate the terms presented by Lawchek in settlement documents as Qwest's assent to the settlement. Basically, Lawchek contends that Qwest's (or rather, Shull's) inaction after Lawchek provided a written agreement to Quest constituted Qwest's manifestation of assent to the agreement.

Upon our review of the facts of this case, we disagree. It is clear from the record that at all times throughout the parties' negotiations, Shull understood (1) Qwest did not intend to be bound by the terms of a proposed settlement agreement until Qwest received updated financials or loan information from Lawchek; (2) she was not able to complete an agreement with Lawchek until she had received written authority from her superiors; and (3) Qwest could not be

bound be the agreement until a written settlement agreement or release was signed. These facts indicate Qwest did not assent to the settlement agreement, as Shull did not intend to bind Qwest to an agreement nor did she have reason to know that Lawchek may infer from her conduct that Qwest assented to the settlement agreement. *Harper*, 244 N.W.2d at 789.

Further, there are a number of facts in the record that indicate that Lawchek itself did not believe that a deal had been completed, including: (1) Lawchek's December 15, 2008 email that stated, "It was good to speak with you this past Friday, December 12; however, I was both disappointed and discouraged that what we understood was a settlement may not proceed"; (2) Lawchek's attempt to sweeten the settlement deal after it had submitted the written agreement to Qwest; and (3) Shull's indication to Attorney Thorson and Attorney Esses that Qwest was requiring updated financials and loan documents from Lawchek, which were not furnished.

We further reject Lawchek's contentions that any repudiation by Qwest of the alleged settlement agreement was required, or that Shull obligated Qwest to the settlement agreement when she requested Lawchek to prepare an approved release and thereafter failed to either reject or modify the terms.[4] We have determined that no settlement agreement existed between Lawchek and Qwest. Qwest was not required to repudiate a settlement agreement that did not exist.

[4] Qwest argues Lawchek has failed to preserve these issues for our review. We address these arguments assuming, *arguendo*, that Lawchek has properly preserved them for our review.

In addition, we have also determined that Shull's inaction did not constitute Qwest's consent to be bound by the agreement.

We agree with the district court's determination that no settlement agreement existed in this case between Qwest and Lawchek. Finding no error, we affirm as to this issue.[5]

B. Levy upon the Trust Fund.

Lawchek contends the district court erred in determining that the levy upon Attorney Thorson's trust account was permissible. Lawchek argues the levy was improper because Qwest, after engaging in settlement discussions with Lawchek, knew the funds were placed in Attorney Thorson's trust account for the specific purpose of settlement. Lawchek further alleges the levy was improper because Qwest's actions in modifying its position and in denying that a settlement was reached constituted bad faith or a violation of the covenants of good faith and fair dealing.[6]

Unrestricted property of a judgment debtor is subject to levy of execution. *See Hamilton v. Imes*, 216 Iowa 855, 857, 249 N.W. 135, 135-36 (1933); *First Nat'l Bank v. Propp*, 198 Iowa 809, 811, 200 N.W. 428, 428-29 (1924); *Iowa Mut. Liability Ins. Co. v. De La Hunt*, 197 Iowa 227, 228-30, 196 N.W. 17, 18-19

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[5] We have reviewed these facts, as did the district court, in terms of whether Quest assented to an agreement; however, we doubt any such agreement would have been binding upon Qwest. Such an agreement involved a preexisting debt and no apparent consideration. Although a preexisting debt can be the subject of an accord and satisfaction, the debt that is the subject matter of the contract must be unliquidated. *Olson v. Wilson & Co.*, 244 Iowa 895, 900-03, 58 N.W.2d 381, 385-386 (1953). The difficulty here is that the judgment debt was clearly a liquidated debt as that term is defined. *Id.*

[6] Qwest argues Lawchek has failed to preserve these issues for our review. We find the issues have been properly preserved, as bad faith conduct was raised in Lawchek's challenge to levy and the district court addressed Qwest's tactics in its ruling.

(1923). However, deposits in an account placed in the account "for a specific purpose" are beyond the reach of levy. *See Iowa Mut. Liability Ins. Co.*, 197 Iowa at 227, 196 N.W. at 18. To determine whether the funds in an account are eligible for levy, courts must evaluate whether "the evidence show such an agreement, arrangement, or understanding of the parties as is necessary to give the funds the character of a deposit for a specific purpose." *Id.*

In this case, the district court determined the $500,000 in Attorney Thorson's trust account was the unrestricted property of Lawchek and was therefore subject to levy of execution. As the court stated:

> On the matter of its claim of trust for a special purpose, Lawchek relies on the cases of *Hamilton v. Imes*, 216 Iowa 855, 249 N.W. 135, 135-36 (1933); *First Nat'l Bank v. Propp*, 198 Iowa 809, 200 N. W. 428, 428-29 (1924); and *Iowa Mut. Liability Ins. Co. v. De La Hunt*, 197 Iowa 227, 196 N. W. 17, 18-19 (1923). In each of these cases, where garnishment was quashed, funds had been deposited in a bank with specific directions that the funds were to be paid to specified entities other than the levying judgment creditor. The Court held that under such agreements, the funds were no longer the unrestricted property of the judgment debtor who made the special deposits.
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> In the present case, the $500,000 that was placed in attorney Thorson's trust account was not designated for payment to entities other than the judgment creditor. It was Lawchek's hope that these funds would serve as consideration for an agreement settling its liability under the Colorado judgment. However, Lawchek was free to withdraw these funds at any time and, in fact, threatened to do so in a communication to Qwest's attorney. The $500,000 was, at all times material here, the unrestricted funds of Lawchek and, as such, subject to levy of execution. If a contrary result was reached in this or similar situations, it would create an unwarranted opportunity to place assets beyond the reach of creditors. This conclusion only applies to the $500,000 intended as settlement money. Other funds that Lawchek or Enlighten deposited in attorney Thorson's trust account were for a specified purpose involving a party or parties other than Qwest and are not subject to levy of execution . . . .

We agree. Although Lawchek hoped the $500,000 placed in Attorney Thorson's trust account would serve as payment for a settlement agreement with Qwest, the fact remains that Lawchek was free to withdraw its funds at any time and use them for any purpose. The record fails to show an agreement, arrangement, or understanding of the parties as is necessary to give the funds the character of a deposit for a specific purpose. *Id.* As such, the funds were unrestricted and subject to levy.

Lawchek also contends Qwest's actions are contrary to a party's duty of good faith and fair dealing. However, this contractual duty only applies to the performance and enforcement of a contract, not negotiations. *Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990). Although sanctions and tort remedies may be available, without evidentiary support for the existence of a contract, this claim has no application here.[7] *Id.*

Notwithstanding our distaste for Qwest's tactics, we conclude neither Qwest's actions nor its inactions provide relief to Lawchek in this action.

Finding no error, we affirm the ruling of the district court.

AFFIRMED.

Doyle, J., concurs; Sackett, C.J., concurs in part and dissents in part.

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[7] If this debt had been an unliquidated debt and a proper subject of an accord and satisfaction, there is support for an obligation or duty, to consummate the contract "fairly and honestly, without fraud, misrepresentation, duress, imposition, overreaching, or coercion or compulsion because of the inherent advantage of the dominant party because of the relationship of the parties." *Kellogg v. Iowa State Traveling Men's Ass'n.*, 239 Iowa 196, 210-11, 29 N.W.2d 559, 567 (1947). However, the judgment amount was a liquidated debt. *See Olson*, 244 Iowa at 900-03, 58 N.W.2d at 385-86.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority and the district court that what Qwest's attorney did here was distasteful. I also agree with the majority that what happened here does not follow the custom of the bar in this state of honoring oral agreements. That said, I cannot agree with the majority's decision that there was no error. The Lawchek money came into the attorney's trust account after an officer of Lawchek, who was an attorney, was of the opinion that he had reached a settlement with the attorney for Qwest that required Lawchek to pay $500,000. Qwest's attorney learned the deposit had been made in the attorney's trust account while discussing the documents necessary for the agreed settlement. Qwest's attorney knew that the money was deposited in the trust account for the specific purpose of paying an agreed settlement. Qwest's attorney levied while settlement papers were being prepared and without notifying Lawchek's attorney that the settlement was called off. Qwest's attorney never in clear written or spoken words indicated the terms of the settlement were denied, disputed, or unacceptable.

Clearly the deposit in the attorney trust account was a special deposit for the purpose of settling the judgment. The attorney for Lawchek was restricted from releasing the money until the settlement was finalized. He could not have released it for any other purpose and the garnishment is subordinate to that purpose. *See Hamilton v. Imes*, 216 Iowa 855, 859, 249 N.W. 135, 136 (1933).