

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
HEARTLAND PROMOTIONS, INC., ) CASE NO. BK94-81541  
 )  
  
DEBTOR ) CH. 11

MEMORANDUM

Hearing was held on June 12, 1996, on Debtor's Objection to Claim of Tech Web, Inc. Appearances: Jeff Wegner, Attorney for debtor; David Roston, Attorney for Tech Web, Inc. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

**Background**

Over a period of time ending in June 1991, Heartland Promotions, Inc. (Heartland) placed printing orders with Tech Web, Inc. (Tech Web). (Cert. Statement of Peter Thompson at par. 1-4). Tech Web filled the printing orders, shipped the completed materials to Heartland customers, and invoiced Heartland for the costs of printing and shipping. (Cert. State. of Thompson at par. 3-4).

On January 17, 1992, Peter Thompson, an employee of Tech Web, wrote to Steve Dean, an officer of Heartland, informing him that there was an outstanding balance of \$39,361.47 due and owing from Heartland to Tech Web. The letter also indicated that Tech Web would turn the account over for collection unless the amount due was paid in full within 10 days. (Cert. Statement of Thompson at par. 11-12).

In a certified statement, Thompson alleges that he phoned Dean on January 21, 1992 regarding his January 17, 1992 letter, and reiterated that Heartland owed Tech Web \$39,361.47. He stated that Dean responded that he would consider whether Heartland would pay the amounts due or let the account be turned over for collection. (Cert. Statement of Thompson at par. 13).

Both Thompson and Daniel Weymouth, the president of Tech Web, contend that Heartland never disputed the invoices in question, and that Tech Web never received any correspondence

from Heartland relating to a dispute or seeking to compromise any debt owed by Heartland to Tech Web. (Cert. Statement of Thompson at par. 18; Cert. Statement of Daniel Weymouth at par. 4). Thompson stated that in his January 21, 1992 conversation with Dean, no agreement was reached with Heartland whereby Heartland would pay an amount less than \$39,361.47, though he did offer Dean a 10% discount if Heartland would pay the amount immediately. (Cert. Statement of Thompson at par. 13-14).

Dean, however, offered a different account of the events. He maintains that he reached an agreement with Tech Web regarding the amounts that were due and owing, and tendered two checks that were in satisfaction of all outstanding invoices. (Filing #370 (Affidavit of Steven Dean) at par. 3-9).

On February 5, 1992, Dean sent a letter to Thompson, wherein he stated "[e]nclosed is the check that we discussed as settlement in full for the invoice." (Filing #370 Ex. A). A check in the amount of \$5,000, made out in the name of Tech Web and dated February 5, 1992, was, according to Dean, included in the letter. On the reverse side of the check was written "[e]ndorsement for Negotiation of the Check Constitute (sic) full Settlement of Invoice 32588." (Filing #370 Ex. B). The check was not endorsed by Tech Web, but rather was endorsed by its bank.

On March 13, 1992, Dean again wrote to Thompson, stating that Heartland's obligation had been paid in full. (Filing #370 Ex. D). This letter was based on a check from Heartland in the amount of \$1,986.52, made out to Tech Web and dated February 21, 1992. The reverse side of the check stated "[e]ndorsement for Negotiation of this Check Constitute (sic) the Settlement of Invoice 32769, 33192, 33193, 33191, 33040, 32741, 32752, 32799, 32972." (Filing #370 Ex. C).

The letters and the checks were not mailed to Tech Web's mailing address, but rather were sent to Tech Web's bank lock box. (Filing 370 Ex. A-D; Cert. Statement of Weymouth at par. 2-3; Cert. Statement of Thompson at par. 15-16). During 1991 and 1992, Tech Web had a financing agreement with Lake Shore National Bank, whereby Tech Web was required to maintain a cash collateral account at the bank. Pursuant to this requirement, Tech Web's customers were directed to send their payments to the bank's lock box. Tech Web did not have access to this lock box, and did not review the checks received by the bank. (Cert. Statement of Weymouth at par. 3). According to Tech Web, Dean's letters of February 5, 1992 and March 13, 1992 were received by the bank in its lock box and were forwarded on to Tech Web without and enclosures. (Tape of Telephonic Hearing at 1270).

Tech Web instituted a suit for collection of the amount it alleged was owing on June 26, 1992. (Tape of telephonic hearing

at 2200). This suit was stayed following the filing of Heartland's voluntary petition (Tape of Telephonic Hearing at 1300), and Tech Web filed a claim for \$31,739.35. (Filing #368). Heartland has objected to this claim, asserting that an accord and satisfaction was reached and that it is not indebted to Tech Web for any amount. (Filing #368).

### **Decision**

Heartland has failed to prove by a preponderance of the evidence that an accord and satisfaction was reached between it and Tech Web regarding the amounts Tech Web asserts are due and owing. Therefore, Heartland's objection to Tech Web's claim is overruled.

### **Discussion**

The party seeking to enforce an accord and satisfaction bears the burden of proving its existence. Lone Cedar Ranches, Inc. v. Jandebeur, 246 Neb. 769, 523 N.W.2d 364 (1994).<sup>1</sup> "To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance." Id. at 775, 523 N.W.2d at 369.

Both parties disagree as to whether there ever was a dispute concerning the amount owed by Heartland to Tech Web. Heartland, however, bears the burden of proof on this issue, and apart from Dean's statement that there was a dispute, there is no other evidence in the record that substantiates his assertion. Heartland did not produce any notes from conversations with Tech Web concerning a dispute over the invoices sent by Tech Web, nor any correspondence with Tech Web concerning such a dispute. During his deposition, Dean was unable to describe the nature of the dispute in any way. (Deposition of Dean at 45:12-59:18).

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<sup>1</sup> There is a question as to whether this court should apply the substantive law of Nebraska or Illinois. The rights and duties of contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. The relevant principles a court should consider are the place of contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicile or residence of the parties. Powell v. American Charter Fed. Sav. & Loan Ass'n, 245 Neb. 551, 514 N.W.2d 326 (1994). Without deciding the issue, it is apparent to the court that the result would be the same under the law of either state, and therefore the court will utilize the law of Nebraska. Compare Sherman v. Rocacz, 182 Ill. App. 3d 1037, 538 N.E.2d 898 (1989) with Cass Constr. Co. v. Brennan, 222 Neb. 69, 382 N.W.2d 313 (1986).

While Heartland argues that it is not required to prove the nature of the dispute, but rather only the fact that a dispute existed, Dean's inability to describe the nature of the dispute, coupled with the lack of any documentation of the dispute, lead to the conclusion that Heartland has failed to carry its burden.

The mere fact that Heartland was late in making payments on the invoices in question and refused to pay any more than the tendered amount of the two checks does not amount to consideration necessary to support an accord and satisfaction. The Nebraska Supreme Court has stated:

A bona fide dispute serves as the necessary consideration underlying the new agreement in an accord and satisfaction. This form of consideration is based on the theory that if the amount due is disputed or unliquidated, the forbearance from suit and the willingness to compromise is in itself valuable consideration, even if an ultimate factual showing may later establish that the claim or defense was invalid in whole or in part.

With regard to good faith in an accord and satisfaction, one court has defined it as follows:

An indispensable element contributing to the establishment of this defense consists in an actual and substantial difference of opinion. One must assert the validity of his claim and the other must in good faith deny all or part of it. His denial cannot be fabricated for use as a pretext to evade the discharge of an obligation. Disclaimer must be bona fide and based upon real faith that the demand is not meritorious.

. . . Another court put it this way: "A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained."

Cass Constr. Co. v. Brennan, 222 Neb. 69, 81-82, 382 N.W.2d 313, 321 (1986) (citations omitted).

To constitute an accord and satisfaction, it is essential that there be a bona fide dispute between the parties, Mackiewicz v. J.J. & Assoc., 245 Neb. 568, 583, 514 N.W.2d 613, 623 (1994), and this Heartland failed to prove. Therefore, accord and

satisfaction is not an available defense for Heartland to the amounts Tech Web asserts are due and owing it, and Heartland's objection to Tech Web's claim is overruled.

Separate journal entry to be filed.

DATED: August 8, 1996

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

BOTHE, ROBERT	341-0216
WEGNER, JEFFREY	346-1148

Copies mailed by the Court to:

David Roston, Altheimer & Gray, 10 So. Wacker Dr., Chicago,  
IL 60606  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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JOURNAL ENTRY

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IT IS ORDERED:

( ) Under Advisement ( ) Deferred ( ) Granted ( ) Denied

**Heartland objection to claim of Tech Web, Inc., denied.**

DATED: August 8, 1996

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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