No.13-110094-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GLASSMAN CORPORATION
Appellant, Plaintiff

v.

CHAMPION BLDRS, L.L.C.
Appellee, Defendant

BRIEF OF APPELLEE CHAMPION BLDRS, L.L.C.

Appeal from the District Court of Shawnee County, Kansas,
Honorable Franklin R. Theis, Judge
District Court Case No. 12-C-141

Anthony S. Barry, KS #14320
Barry Law Offices, L.L.C.
5340 SW 17th Street, P.O. Box 4816
Topeka, KS 66604
(785)273-3153
(785)273-3159 Fax
Email: tonyb@inlandnet.net
Attorneys for the Appellee/Defendant
Champion BLDRS, L.L.C.

TABLE OF CONTENTS

NATURE OF THE CASE

Plaintiff Glassman Corporation ("Plaintiff") filed suit against Defendant Champion BLDRS, LLC ("Defendant") for breach of contract and quantum meruit for money Plaintiff claimed it was owed for its subcontract work at the Manhattan-Ogden Unified School District #383 for the renovation to the Ogden Elementary School (the "Project"). Defendant was the general contractor for the Project, and Plaintiff was the mechanical and plumbing subcontractor to Defendant. Prior to answering, Defendant filed a Motion to Dismiss for Failure to State a Claim pursuant to K.S.A. §60-212(b)(6) and/or in the alternative for Summary Judgment pursuant to K.S.A. §60-256. The District Court elected to treat the Defendant's Motion as one for Summary Judgment. The District Court dismissed Plaintiff's claims ruling that such claims were barred by the common law doctrine of accord and satisfaction as codified in the Uniform Commercial Code K.S.A. §84-3-311, Accord and Satisfaction By Use of An Instrument. Plaintiff filed this appeal following such ruling.

STATEMENT OF THE ISSUE

Did the District Court err in dismissing Plaintiff's claims based on the affirmative defense of accord and satisfaction? No, the District Court correctly held that Check No.(s) 7287 & 7288 were offered to Plaintiff as full and "FINAL" satisfaction of Plaintiff's claims and such instruments contained conspicuous statements that such checks were "FINAL" payment.[1] Instead of rejecting Defendant's FINAL offer of settlement and returning the checks, Plaintiff deposited the checks and thus accepted Defendant's offer of settlement.

[1] Defendant will refer to Check No.(s) 7287 & 7288 as **"FINAL"** payments throughout this brief in all caps just as the word **"FINAL"** was typed in all caps on the check stubs of said instruments. *See Appellee's Appendix* attached hereto.

STATEMENT OF THE FACTS

Generally, Defendant does not object to the Plaintiff's statement of the facts regarding this matter. There are a couple of statements that must be clarified for the Court of Appeals understanding of the events as they unfolded on the Project before the FINAL checks in question were issued in full satisfaction of all of Plaintiff's claims.

The undisputed and most critical material fact in this appeal is that Plaintiff and Defendant had a dispute as to how much money Plaintiff was owed for its subcontract work at the Project. (R.O.A. Vol. I, p. 5, Petition ¶6); (R.O.A. Vol. I, p. 20, Petition, Exhibit A, Change Order Three); (R.O.A., Vol. I, p. 50, May 13th, 2011, letter from Appellant's counsel); (R.O.A. Vol. IV, p. 4, Affidavit of Gregory C. Hughes ¶5) and (R.O.A., Vol. IV, p. 14, Affidavit of Christy Phlieger, ¶3.). Plaintiff's claims for additional compensation to Defendant were therefore unliquidated and subject to a bona fide dispute.

On page 1 of Appellant's brief, Plaintiff claims that it performed additional work for the Defendant, *at Defendant's request*, at a cost of $9,969.50. (R.O.A. Vol. I, p. 21). Although this statement is not a material fact, such statement is incorrect. Such statement is a reference to Plaintiff's Invoices dated November 15, 2010, submitted to Defendant for *"extra wiring expense"* allegedly incurred for wiring the VFD's [Variable Frequency Drives] for the Project. (R.O.A. Vol. I, p. 21, Petition, Exhibit B-- Invoice).

Plaintiff made a claim for this additional compensation during construction of the Project. (R.O.A. Vol. I, p. 50). The Owner's representatives (architect and engineer) held on May 3rd, 2011, that Plaintiff was not entitled to such additional compensation because it was the Plaintiff's responsibility to provide the correct equipment for the Project, which the Plaintiff failed to do. (R.O.A., Vol. I, pp. 27-28). For clarification purposes only, Defendant did not

request Plaintiff to do extra wiring work, only to perform its subcontract requirements. It was the Owner's representative who stated such work was Plaintiff's responsibility, and it was the Owner's representatives who rejected Plaintiff's claims for additional compensation.

Following this decision by the Owner's representatives, Defendant Champion BLDRS offered Check No.(s) 7287 & 7288 to Plaintiff on May 10th, 2011, as FINAL payment. Defendant used the word FINAL in the check stubs of such checks, and the checks also contained conspicuous restrictive endorsements on the back of both instruments identifying such payments were offered for "*full payment for labor and materials furnished.*" (R.O.A., Vol. I, p. 5, Petition ¶10.); (R.O.A. Vol. I, p.29); (R.O.A., Vol. IV, p.4 & 6-10, Affidavit of Gregory C. Hughes, ¶¶6-8) and (R.O.A. Vol. IV, p. 14, Affidavit of Christy Phlieger ¶4). *See Appellee's Appendix* containing copies of Check No.(s) 7287 & 7288, and a copy of the restrictive endorsement language that was on the back of said checks, attached hereto for the Court's convenience.

Counsel for Plaintiff further expanded upon the parties dispute in their letter to Defendant dated May 13th, 2011, which letter clearly stated that the parties had a dispute as to how much Plaintiff was owed for its work on the Project. (R.O.A. Vol. I, p. 50). Counsel's May 13th, 2011, letter also confirms Check No.(s) 7287 & 7288 were offered by Defendant Champion BLDRS as FINAL payment and contained conspicuous statements putting Plaintiff on notice of this material fact. (R.O.A. Vol. I, p. 50)

Plaintiff removed the restrictive endorsements on the back of Check No.(s) 7287 & 7288. (R.O.A., Vol. I, p. 5, Petition ¶10); (R.O.A. Vol. I, p. 30, Defendant's Memorandum In Support, ¶10.); (R.O.A. Vol. I, p. 43, Plaintiff's Memorandum In Support, ¶13); (R.O.A. Vol. IV, p. 4, Affidavit of Gregory C. Hughes ¶9) and (R.O.A. Vol. IV, p. 14, Affidavit of Christy Phlieger

¶6.). Armed with the knowledge the checks were offered as FINAL payment, Plaintiff deposited Checks No.(s) 7287 & 7288 and obtained payment from Defendant Champion BLDRS. (R.O.A. Vol. I, p. 30, ¶11 Defendant's Memorandum In Support) and R.O.A., Vol. IV, p. 15, Affidavit of Christy Phlieger, ¶7). These material facts are uncontroverted. As will be shown below in the arguments and authorities, the Plaintiff's removal of the restrictive endorsements was legally immaterial, and Defendant could not remove the word "FINAL" from the check stubs. By cashing Checks No.(s) 7287 & 7288, Plaintiff accepted Defendant's offer of FINAL payment of any and all claims of the Plaintiff. Plaintiff's claims are barred by the common law affirmative defense of accord and satisfaction, and pursuant to the affirmative defense set forth in K.S.A. §84-3-311(b) Accord and Satisfaction By Use of An Instrument.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW:

The court's standard for reviewing a district court's grant of summary judgment is well-known. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact.... On appeal, the appellate court applies the same rules and where the appellate court finds that reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P. 3d 888 (2011) *and Lumry v. State*, Docket No. 108,425, p. 9-10, 307 P. 3d 232 (Kan. App. 8-16-2013). *See*

also, *Simmons v. Porter*, Docket No. 102,662, p. 7 (Kansas Sup. Ct., November 8, 2013)(Citing to *Osterhaus*, and holding that the applicability of a common-law doctrine such as accord and satisfaction is a question of law over which the appellate court has unlimited review.).

Generally, Defendant does not object to the general principals set forth by Plaintiff that the Court must afford the Plaintiff in response to a motion to dismiss or summary judgment. However, Defendant points out that the Court is not required to accept Plaintiff's conclusory allegations or the legal effects of events that Plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if the allegations are contradicted by the description itself. *Dye v WMC,* 38 Kan. App. 2d, 655, 661 (2007) citing to *Halley v. Barnabe,* 271 Kan. 652, 656, 24 P.3d 140 (2001). In this matter the material facts are not in dispute, and it was up to Plaintiff to come forward with evidence to establish a dispute as to a material fact. *Osterhaus at p. 768.* Plaintiff failed to come forward with any such evidence, and Plaintiff's interpretation of the legal effect of what happened in this matter is not supported by Kansas case and statutory law regarding accord and satisfaction. The issuance of summary judgment by the District Court was therefore proper.

ACCORD AND SATISFACTION:

The Supreme Court of Kansas set forth an excellent explanation of the common law affirmative defense of accord and satisfaction in the case of *Amino Brothers Co., Inc. v. Twin Caney Watershed District, 206 Kan. 68, 476 P. 2d 228 (1970).* In the *Amino Brothers* case, the Supreme Court noted that there are two different scenarios or distinctions as set forth in the Kansas law regarding accord and satisfaction. Claims that are unliquidated or disputed (you say I owe you $100.00 and I say that I only owe you $50.00) and those that are liquidated or undisputed (I agree I owe you $100.00 but I just don't want to pay you). Kansas case law

recognizes this distinction. *Amino Bros. at p.72.* Based on the undisputed material facts as claimed in Plaintiff's Petition ¶6; Plaintiff's counsel's May 13th, 2011, letter and in paragraph 3. of Christy Philieger's affidavit there was a bona fide dispute between the parties over the subcontract amount claimed to be owed to Plaintiff. (R.O.A., Vol. I, p. 5); (R.O.A.. Vol. I, p. 50) and (R.O.A., Vol. IV, p. 14). Therefore, the amount owed to Plaintiff was unliquidated and disputed.

In *Amino Brothers* the Supreme Court stated "where a creditor and a debtor have a dispute as to the amount of a debt, and the debtor remits checks for the amount he contends the debt to be, the intending remittance to be in full payment thereof, and the creditor accepts and knowingly retains the amount thus remitted, the legal consequence is that of accord and satisfaction, notwithstanding the creditor immediately wrote to the debtor stating he had deposited the checks and endorsed under protest." The effective way to protest the debtor's offer of settlement would have been to decline the checks, and not having done so the claimant is estopped to deny settlement of its claims. *Id. at p. 73-74.*

In *Amino Brothers* , the *Amino Brothers* brought an action for additional money for claimed extra work in the amount of $22,342.96. Defendant tendered a check to the plaintiff in the amount of $2,944.72 with the endorsement on such check that "endorsement of payee will constitute a receipt in full when check is paid." *Amino Brothers* endorsed and cashed the check. *Id. at p. 68-70.* The Supreme Court held that the legal consequence of cashing the checks issued as final payment was that the *Amino Brothers'* claims for additional compensation were barred by the affirmative defense of accord and satisfaction. If the *Amino Brothers* wanted to protest or reject the debtor's offer of settlement the Court stated they should have sent the checks back and declined final payment. *Id. at p. 73-74.* That is precisely what Plaintiff should have done in this

matter, Plaintiff should have sent the checks back to Defendant Champion BLDRS. When Plaintiff kept and deposited Check No.(s) 7287 & 7288, Plaintiff accepted Defendants offer of FINAL settlement. Plaintiff's claims are therefore barred by the common law affirmative defense of accord and satisfaction.

The case of *Wedensaul v. Greenhouse Restaurant of Lawrence,* 13 Kan. App. 2d 95, 762 P. 2d 196 (1988) is also instructive on the affirmative defense of accord and satisfaction. In *Wedensaul* there was a dispute over the extent and value of materials and work performed by the claimant *Wedensaul.* The claimant sought $180,000.00 for labor and materials. Debtor issued a $75,000.00 check with the notation "payment in full for construction done" written on the face of the check. The claimant in *Wedensaul* negotiated the check after writing "without prejudice and under protest" on the face of the check and writing "partial payment" on the back of the check above claimant's signature. *Held,* claimant's claim for additional compensation was barred by the affirmative defense of accord and satisfaction. The Court of Appeals citing to the *Amino Brothers* decision stated that the effective way to protest the offer of settlement was to decline the check. The acceptance and use of the check by the claimant will be regarded as assent to the conditions of the check and amounts to an accord and satisfaction of the claim, and the intent of the claimant is immaterial. By endorsing and collecting the check with knowledge that it is offered in full satisfaction of a disputed claim, the creditor agrees to these conditions and the creditor is estopped from denying the agreement. *Wedensaul at pp. 96 & 97* (emphasis added)

The same is true in this matter, by depositing Check No(s). 7287 & 7288 marked as FINAL payment in the check stubs (even after Plaintiff removed the additional restrictive endorsement on the back of such instruments), the Plaintiff agreed to the conditions that the checks were offered as FINAL payment of its disputed claims and Plaintiff is estopped from

denying its agreement to compromise its claim. The intent of the Plaintiff is immaterial (i.e. that Plaintiff was treating the payments as partial payments). *Wedensaul at pp. 96 & 97* (emphasis added)

Plaintiff cites to *Lighthouse For the Blind v. Miller,* 149 Kan. 165, 86 P. 2d 508 (1939), as support for its position. However, *Lighthouse* is actually in accordance with the *Wedensaul and Amino Brothers* decisions. In the *Lighthouse* case the Supreme Court stated that when a claim is disputed or unliquidated in order to constitute an accord and satisfaction, such payment must have been offered as full satisfaction of a claim accompanied by such declarations or under such circumstances as would amount to a condition that if accepted by the creditor would be in full satisfaction of the debt. The debtor must make it clear that the check was offered only on the condition that it is taken in full payment of claims. *Id. at p. 509. Lighthouse* also set forth that *"when a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted in full force and satisfaction of the claim or not at all, the retention and use thereof by the creditor constitutes an accord and satisfaction." Id. at 509* (emphasis added).

Here, Defendant's tender of Check no(s). 7287 & 7288 contained clear and conspicuous statements in the check stubs and in the restrictive endorsements placed on the backs of such instruments, that such instruments were tendered as a full and FINAL payment for labor and materials supplied to the Project. Plaintiff's acceptance and use of such funds constituted an accord and satisfaction of any and all of Plaintiff's claims. Therefore, Plaintiff failed to state a legally supportable claim upon which relief could ever be granted in this matter. The District Court's Journal Entry of summary judgment and dismissal based upon the common law affirmative defense of accord and satisfaction was correct and should be affirmed.

UNIFORM COMMERCIAL CODE--- K.S.A. §84-3-311
***ACCORD & SATISFACTION BY USE OF AN INSTRUMENT*:**

The Uniform Commercial Code K.S.A. §84-3-311 also provides support for the District Court's Journal Entry of Summary Judgment. It is undisputed that the parties had a dispute as to the amount Defendant owed Plaintiff for work on the Project. (R.O.A., Vol. I, p. 5) and (R.O.A., Vol. IV, pp. 4 & 14). It is undisputed that Checks No(s). 7287 & 7288 were issued as FINAL payment. (R.O.A., Vol. I, p. 5) and (R.O.A. Vol. IV, p. 4). It is also undisputed that Plaintiff deposited Check No(s). 7287 & 7288 and obtained payment from Defendant. (R.O.A., Vol. I, p 5) and (R.O.A., Vol. IV, pp. 14-15).

Therefore, Plaintiff was paid in full and the affirmative defense of accord and satisfaction by use of an instrument as set forth in K.S.A. §84-3-311(a) bars Plaintiff's claims. K.S.A. §84-3-311 Accord and Satisfaction By Use of Instrument provides as follows:

> (a) If a person against whom a claim is asserted proves that (1) that person in good faith **tendered an instrument to the claimant as full satisfaction** of the claim, (2) **the amount of the claim was unliquidated or subject to a bona fide dispute**, and (3) **claimant obtained payment of the instrument**, the following subsections apply. (*emphasis added*)
>
> (b) Unless subsection (c) applies, ***the claim is discharged*** if the person against whom the claim is asserted proves **that the instrument** or an accompanying written communication **contained a conspicuous statement** to the effect that the instrument was tendered as full satisfaction of the claim. (*emphasis added*)

Plaintiff specifically plead in its Petition elements 1-3 of K.S.A. §84-3-311(a). *(R.O.A., Vo. I, p. 5, Petition ¶¶6 & 10).* Plaintiff plead that Defendant tendered two instruments as full satisfaction; that the parties had a bona fide dispute; that Plaintiff obtained payment on the instruments and that Defendant conspicuously placed statements on the instruments to the effect that the instruments were tendered as full satisfaction of Plaintiff's claims, i.e. the restrictive endorsements on the backs of such instruments and the word FINAL in the check stubs. *(R.O.A.,*

Vo. I, p. 5, Petition ¶¶6 & 10). Therefore, pursuant to K.S.A. §84-3-311(b), Plaintiff's claims are barred by the affirmative defense of accord and satisfaction by use of instrument, i.e., by accepting payment of the FINAL Checks No(s). 7287 & 7288.

There is only one case in Kansas analyzing K.S.A. §84-3-311(a), but such case is directly on point and factually identical to the case at hand. *In Re Al Muehlberger Concrete Construction, Inc.,* 319 B.R. 663, Bankruptcy No. 04-20212, Adv. 04-6088 (United States Bankruptcy Court, D. Kan. January 30th, 2005). The sole issue for consideration in *In Re Al Muehlberger* was whether a check marked **"Final Payment"** on its face issued by the defendant general contractor and negotiated by the plaintiff subcontractor, constituted an accord and satisfaction under Kansas law. *Id. at p. 664.* The defendant was a general contractor, and the plaintiff was a subcontractor who supplied labor and material pursuant to a subcontract agreement. The plaintiff subcontractor *Muehlberger* invoiced the general contractor the sum of $4,145.63. Thereafter, the defendant *McQuaid* sent *Meuhlberger* a check marked **"Final Payment"** on its face for $2,072.82. A letter also accompanied the check from *McQuaid.* As in this matter, the creditor Muehlberger **negotiated the check *after crossing out the "Final Payment" language***. *Id at p. 655.* (emphasis added)

The court in *In Re Al Muelberger* held that there was no disagreement that the check and accompanying letter contained conspicuous statements that identified the check was being tendered in full satisfaction of the entire debt. In addition, neither party questioned the existence of a bona fide dispute. Therefore, the Court found that the general contractor tendered a check as full satisfaction of a claim that was subject to bona fide dispute, that the instrument contained conspicuous statements to the effect that the instrument was tendered as full satisfaction of the claim, and that the subcontractor obtained payment of the instrument, which satisfied the

prerequisites of K.S.A. §84-3-311(b) for discharging the claim of the subcontractor. *Id. at p. 666.* Therefore, the debt between the general contractor defendant and the subcontractor plaintiff was discharged and the general contractor no longer owed any money to the now bankrupt subcontractor. *Id. at p. 667.* Here, Check No(s). 7287 & 7288 were tendered as FINAL payment and they contained conspicuous language to that fact. (R.O.A. Vol. I, p. 5) and (R.O.A. Vol. IV, pp. 4-10). *See Appellee's Appendix attached hereto.*

As in *In Re Al Muelberger*, Plaintiff attempted to eliminate the restrictive endorsements by whiting out the restrictive endorsement altering the checks before depositing them. Plaintiff's alteration and whiting out the restrictive endorsement did not change the fact that the checks were tendered or offered as FINAL payment to Plaintiff of a disputed amount, or that Plaintiff obtained payment on such checks. Plaintiff's claims are barred by the affirmative defense of accord and satisfaction according to K.S.A. §84-3-311(b) and Plaintiff's claims are therefore discharged. The Court of Appeals should uphold the District Court's summary judgment ruling that Plaintiff's claims are barred by the affirmative defense of accord and satisfaction by use of an instrument. Additionally, K.S.A. §84-3-311(c)(2) provided Plaintiff with a ninety (90) day safe harbor to return the money to Defendant to prevent the application of discharge, which Plaintiff failed to do. Plaintiff's claims are therefore discharged pursuant to K.S.A. §84-3-311(b).

Plaintiff spends nearly two pages citing to the Uniform Commercial Code §3-311 and comment 4 for the position that the conspicuous statement must be visible at the time of negation so the public is on notice that the accord has been formed. This position is wrong and without any support in any of the U.C.C comments to §3-311 (1991). Comment 4 actually states that "if the claimant can reasonably be expected to examine the check, almost any statement on the

check should be noticed and therefore conspicuous....since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's indorsement of the check, the claimant [Plaintiff] "ought to have noticed" the statement." There is no mention about the need for the public being on notice in Comment 4 of the accord and satisfaction. Comment 2 to U.C.C. §3-311 is more instructive on this matter. In relevant part Comment 2 provides as follows:

> Under the common law rule the seller, by obtaining payment of the check accepts the offer of compromise by the buyer. The result is the same if the seller adds a notation to the check indicating that the check is accepted under protest or in only partial satisfaction of the claim. Under the common law rule the seller can refuse the check or can accept it subject to the condition stated by the buyer, but the seller can't accept the check and refuse to be bound by the condition. The rule applies only to an unliquidated claim or a claim disputed in good faith by the buyer. The dispute in the courts was whether Section 1-207 changed the common law. The Restatement states that section "need not be read as changing this well established rule."

Comment 3 of U.C.C. §3-311 provides that Section 3-311 follows the common law rule of accord and satisfaction, and Section 3-311 is based upon the belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged. The official comments to U.C.C. §3-311 provide no support for Plaintiff's position; rather such comments are in complete support of the Kansas common and statutory law regarding accord and satisfaction.

In *Wedensaul v. Greenhouse Restaurant of Lawrence, 13 Kan. App. 2d 95, 762 P. 2d 196 (1988),* the Court held that the Uniform Commercial Code did not affect common-law doctrines such as accord and satisfaction in Kansas, unless it explicitly disregarded or replaced them as set forth in K.S.A. §84-1-103. As set forth above, *Wedensaul,* held that when a check is sent out upon the condition that it be accepted in full satisfaction of a disputed claim it is an offer of settlement. The creditor has the option of accepting the offer by depositing the check, or

rejecting the offer by returning the check to the debtor. The intent of the creditor is immaterial (i.e. Plaintiff's claim here that they were intending only to accept the checks as partial payment). By endorsing and collecting the check with knowledge that it is offered in full satisfaction of a disputed claim, the creditor (the Plaintiff) agreed to such conditions and is estopped from denying such agreement. *Wedensaul at page 97.* Plaintiff is estopped from denying that it accepted the terms of Defendant's full and FINAL offer of settlement. Plaintiff's claims are barred by Accord and Satisfaction by Use of an Instrument as well as according to the common law of accord and satisfaction. The District Court's Journal Entry of dismissal with prejudice was correct and should be affirmed by the Court of Appeals.

ALTERATION OF AN INSTRUMENT---K.S.A. §84-3-407:

Plaintiff altered Check No(s). 7287 & 7288 by whiting out the restrictive endorsements which Defendant placed on the back of such instruments. Defendant did not authorize such alteration. However, Plaintiff could not and did white out the words FINAL in the check stubs that clearly and conspicuously signified that the payments were FINAL payments of a disputed amount. Therefore, pursuant to K.S.A. §84-3-407(b) an alteration fraudulently made also discharges a party whose obligation is affected thereby. Defendant issued FINAL payment to Plaintiff, and by depositing such payments Defendant has been released by the affirmative defense of accord and satisfaction. Therefore, this Court should affirm the District Court's decision to grant summary judgment dismissing Plaintiff's claims with prejudice according to K.S.A. §60-256.

APPELLANT'S CLAIM OF EQUITABLE ESTOPPEL:

Plaintiff makes a last ditch effort to claim that Defendant sat silent after Plaintiff inappropriately whited out the release of claims restrictive endorsements and because

Defendant allowed the checks to go through its bank and Defendant should be estopped from claiming accord and satisfction. Plaintiff cites to *Bowen v. Westerhaus,* 224 Kan. 42, 578 P.2d 42 (1978) for support. The doctrine of equitable estoppel is based upon the principle that a person is held to a representation or a position assumed when otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances, has in good faith relied thereon. *Id. at p. 45.* There is no allegation in the Petition that Defendant made any representations that lulled Plaintiff into a position that would be inequitable, and there was no duty of Defendant to speak or educate the Plaintiff on what the law of accord and satisfaction is in Kansas.

Defendant did, however, inform the Plaintiff on June 22, 2011, that Defendant issued two full and FINAL checks which were cashed by the Plaintiff, which was an accord and satisfaction. Thereafter, K.S.A. §84-3-311(c)(2) would have allowed Plaintiff up to ninety (90) days after receipt of payment to repay the money to Defendant to try and avoid the application of the defense of accord and satisfaction. Plaintiff had until August 24th, 2011(two additional months), to return the money to Defendant. Since Plaintiff failed to return the money and since Plaintiff knew that Defendant tendered the two FINAL checks as full satisfaction the Plaintiff's claims, Plaintiff's claims are discharged as an accord and satisfaction pursuant to Kansas common law and K.S.A. §84-3-311(b) By Use of An Instrument.

CONCLUSION

The District Court correctly dismissed Plaintiff's claims for breach of contract and quantum meruit pursuant to K.S.A. §60-256. Judgment should be entered by the Court of Appeals affirming the District Court's Entry of Summary Judgment and this Court should dismiss Appellant's claims and appeal with prejudice as a matter of law.

Dated the 16th day of December, 2013.

Barry Law Offices, L.L.C.

By: _____
Anthony S. Barry, #14320
5340 SW 17th Street
Topeka, KS 66604
(785) 273-3153
(785) 273-3159 – Fax
Email: tonyb@inlandnet.net
Attorneys for Appellee/Defendant
Champion BDLRS, L.L.C.

APPELLEE'S APPENDIX
PURSUANT TO S.C. RULE 6.03(b)

I.	**Check No.(s) 7287 & 7288**	**(R.O.A., Vol. IV, pages 7 & 8)**
II.	**Restrictive Endorsement**	**(R.O.A., Vol. IV, page 10)**

CHECK DATE 05/10/2011 CHECK NO. 7287

INVOICE	INV DATE	DESCRIPTION	GROSS AMOUNT	ADJUSTMENTS	NET AMOUNT
0904-10	01/31/2011	Ogden	8,693.54		8,693.54
0904-12	04/01/2011	Ogden	1,988.20		1,988.20
0904-FINAL	04/01/2011	Ogden	5,934.30		5,934.30

VENDOR NO.	VENDOR NAME	TOTAL GROSS	TOTAL ADJ.	TOTAL NET
GLAS	THERMAL COMFORT AIR AND Glassman Corporation	16,616.04		16,616.04

CHAMPION BUILDERS, LLC
P. O. BOX 19881
TOPEKA, KS 66619-1488
785-969-6909

ALLIANCE BANK 88-1478/1011 07
Topeka, Kansas

007287

DATE	CHECK NO.	AMOUNT
05/10/2011	7287	$16,616.04

PAY SIXTEEN THOUSAND SIX HUNDRED SIXTEEN AND 04 / 100 DOLLARS

TO THE ORDER OF
THERMAL COMFORT AIR AND
Glassman Corporation
PO Box 218
Hays KS 67601

Ogden

⑈007287⑈ ⑆101114798⑆ 10 005 554⑈

AMPION BUILDERS, LLC CHECK DATE 05/10/2011 CHECK NO. 7287

INVOICE	INV DATE	DESCRIPTION	GROSS AMOUNT	ADJUSTMENTS	NET AMOUNT
0904-10	01/31/2011	Ogden	8,693.54		8,693.54
0904-12	04/01/2011	Ogden	1,988.20		1,988.20
0904-FINAL	04/01/2011	Ogden	5,934.30		5,934.30

VENDOR NO.	VENDOR NAME	TOTAL GROSS	TOTAL ADJ.	TOTAL NET
GLAS	THERMAL COMFORT AIR AND Glassman Corporation	16,616.04		16,616.04

CHECK DATE 05/10/2011 CHECK NO 7288

INVOICE	INV DATE	DESCRIPTION	GROSS AMOUNT	ADJUSTMENTS	NET AMOUNT
0904-12	04/01/2011	Ogden	1,704.80		1,704.80
0904-FINAL	04/01/2011	Ogden	36,599.25		36,599.25

VENDOR NO.	VENDOR NAME	TOTAL GROSS	TOTAL ADJ.	TOTAL NET
GLAS	Glassman Corporation	38,304.05		38,304.05

ALLIANCE BANK 99-1479/1011
Topeka, Kansas 01

007288

CHAMPION BUILDERS, LLC
P. O. BOX [illegible]
TOPEKA, KS [illegible]
[illegible]

DATE	CHECK NO.	AMOUNT
05/10/2011	7288	$38,304.05

***THIRTY-EIGHT THOUSAND THREE HUNDRED FOUR AND 05 / 100 DOLLARS

TO THE ORDER OF

Glassman Corporation
PO Box 218
Hays KS 67601

Ogden

⑈007288⑈ ⑆101114798⑆ 10 005 551⑈

CHAMPION BUILDERS, LLC

CHECK DATE 05/10/2011 CHECK NO. 7288

INVOICE	INV DATE	DESCRIPTION	GROSS AMOUNT	ADJUSTMENTS	NET AMOUNT
0904-12	04/01/2011	Ogden	1,704.80		1,704.80
0904-FINAL	04/01/2011	Ogden	36,599.25		36,599.25

VENDOR NO.	VENDOR NAME	TOTAL GROSS	TOTAL ADJ.	TOTAL NET
GLAS	Glassman Corporation	38,304.05		38,304.05

The undersigned payee acknowledges full payment for labor and/or materials furnished to date for the benefit of the real estate noted on the face hereof, and the undersigned payee does waive and release lien rights for labor and for materials furnished heron to date. The undersigned payee further affirms that all subs, laborers and suppliers used by him on said property have been paid in full. This agreement shall not be changed or altered, and endorsement of this check is required before it can be cashed or credited to the named subcontractor and/or supplier.

The undersigned payee acknowledges full payment for labor and/or materials furnished to date for the benefit of the real estate noted on the face hereof, and the undersigned payee does waive and release lien rights for labor and for materials furnished heron to date. The undersigned payee further affirms that all subs, laborers and suppliers used by him on said property have been paid in full. This agreement shall not be changed or altered, and endorsement of this check is required before it can be cashed or credited to the named subcontractor and/or supplier.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he deposited true and correct copies of the above and foregoing pleading in the United States Mail on this 16th day of December 2013, postage prepaid and properly addressed to:

Carol M. Park (#22625)
John T. Bird (#8419)
Glassman, Bird, Braun & Schwartz, L.L.P.
200 W. 13th St.
Hays, Kansas 67601
Tel: 785-625-6919
Fax: 785-625-2473
Attorneys for Appellant/Plaintiff
Glassman Corporation

and VIA FACSIMILE to (785) 296-1028 to:
The Clerk of the Appellate Court
374 Kansas Judicial Center
301 S.W. 10th Ave.
Topeka, KS 66612-1507

Anthony S. Barry, #14320