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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0856**

Commercial Plumbing and Heating, Inc.,  
Appellant,

vs.

Fisher Sheetmetal Company, Inc., et al.,  
Defendants,

G R Mechanical Plumbing & Heating, Inc.,  
Respondent,

Northern Air Corporation, et al.,  
Respondents.

**Filed May 13, 2008  
Affirmed  
Minge, Judge**

Ramsey County District Court  
File No. 62-C8-05-000072, 62-C4-05-002658

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and  
Connolly, Judge.

## UNPUBLISHED OPINION

**MINGE**, Judge

Appellant Commercial Plumbing & Heating (CPH), a creditor of J.K. Inc., (JK), held a security interest in and assignment of JK's accounts payable. CPH challenges payments that were made to JK by respondents G.R. Mechanical Plumbing & Heating, Inc., Northern Air Corporation, and Fisher Sheetmetal Company (account payors). CPH claims that these payments violated the assignment by JK to CPH of its accounts payable. CPH contends that the district court erred in granting summary judgment based on findings (1) that CPH gave inadequate notice of its security interest/assignment of accounts to the respondents; (2) that even if such notice was adequate, it only operated to assign amounts payable at the time notice was given; and (3) that CPH had waived its security interest. Because we conclude that the district court did not err in determining that CPH waived its right to enforce its security interest, we affirm. We do not reach CPH's other arguments.

### FACTS

As a part of an ongoing financing arrangement, JK, as a debtor, granted CPH a security agreement and assigned all its accounts payable to CPH. On October 31, 2001, CPH sent a written notice of this security interest/assignment to respondents and instructed them to pay any amounts owed to JK directly to CPH. The following week, JK's attorney sent each of the respondents a letter contesting CPH's claim of a security interest in accounts and denying the existence of an effective assignment. The letter instructed respondents to pay JK directly. Although CPH knew of the letter, it did

nothing further with respect to the assignment until this litigation. Respondents made payment to JK. Over three years after sending notice of assignment, CPH commenced suit demanding that respondents pay CPH the amounts they had earlier paid JK. The parties filed cross-motions for summary judgment, and the district court ruled in favor of respondents. This appeal follows.

## D E C I S I O N

The enforcement of a security interest in accounts and the rights of account payors is governed by the Minnesota codification of the Uniform Commercial Code. *See* Minn. Stat. § 336.9-406 (2006). Although the parties have presented a variety of issues under the commercial code, we begin by assuming that CPH's notice of the security interest was adequate and covered the challenged payments to JK. We consider whether CPH waived its rights to enforce the assignment against respondents as account payors.

The assignee of accounts may waive its enforcement rights against account payors by its conduct. *Allstate Fin. Corp. v. Dundee Mills, Inc.*, 800 F.2d 1073, 1075 (11th Cir. 1986). Common law principles govern whether a waiver has occurred. *See id.* (using Georgia law to define waiver). Although waiver is typically a jury question, *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 312, 41 N.W.2d 422, 424 (1950), a district court may decide it as a legal question on cross-motions for summary judgment if the parties agree on the necessary facts in the underlying motion, *see Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790-91 (Minn. 1993) (holding that undisputed facts supported legal conclusion that child was resident of father's household); *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 344 (Minn. App. 2008) (acknowledging tacit

agreement to material facts when parties make cross-motions for summary judgment); *accord Allstate Fin. Corp.*, 800 F.2d at 1075 (stating that waiver is typically a jury question, but the district court is entitled to decide the legal issue on cross-motions for summary judgment if the parties agreed on the necessary facts).

Waiver is the intentional relinquishment of a known right, or being estopped from enforcing it. *In re Civil Commitment of Giem*, 742 N.W.2d 422, 432 (Minn. 2007). “Waiver is consensual in nature. It arises from voluntary choice, not mere negligence. Intent and knowledge are essential elements of a finding of waiver.” *Id.* (citations omitted). However, waiver can be inferred from conduct or acquiescence. *Id.*

Respondents cite several cases for the proposition that CPH, by failing to act on the assignment for three years after sending its notice of assignment to respondents, waived its rights. An assignee can waive its rights if it fails to protest the account payor’s remittance of funds directly to the assignor. *King v. Tuxedo Enters., Inc.*, 975 F. Supp. 448, 454 (E.D.N.Y. 1997). But, where the assignee does not know that payments are being made, or where it has repeatedly demanded payment, there is no waiver. *See id.* (holding that there is no waiver of assignment when assignee had no knowledge that account payor was making regular payments to assignor until after the suit was filed; but that even if the assignee had known, its repeated demands that account payors pay assignee directly precludes finding of waiver).

Other cases have reached the same result. *See Warrington v. Dawson*, 798 F.2d 1533, 1539 (5th Cir. 1986) (“[E]ven though an account [payor] is aware that a valid assignment has been made, if the account [payor] continues to pay the assignor and the

assignee does not object, the account [payor] is not bound by the assignment.”); *Allstate Fin. Corp.*, 800 F.2d at 1076 (creditor waived security interest in account receivable when it had actual knowledge of payment made to third parties and failed to object). In a case considering an invalid notification of assignment in tandem with possible waiver of the creditor’s rights, the Illinois appellate court stated:

[T]he [district] court’s conclusion that the assignment itself was not intended as a demand for payment directly to First Trust is fortified by the fact that First Trust acquiesced for so long in the payments to the assignor. In *East St. Louis*, the assignee-bank took no action to enforce its right to payments under the assignment for over three years. The court concluded that the bank’s failure to take action amounted to a waiver of its rights against the account [payor]. It emphasized that “. . . common prudence would seem to have dictated an earlier and more searching investigation and insistence in clear terms that payments be made directly to the [assignee/creditor] bank . . . .” [*First Nat’l Bank at East St. Louis v. Bd. of Educ. Sch. Dist. No. 189*, 385 N.E.2d 811, 814 (Ill. App. Ct. 1979)]. First Trust’s failure in the present case to investigate whether and to whom payments were being made for over a 2 1/2 year period constituted a lack of common prudence at least equal to that demonstrated by the bank in *East St. Louis*. Accordingly, we hold that First Trust, by its failure to demand direct payments, waived its rights to impose liability upon Skokie Federal.

*First Trust & Sav. Bank of Glenview v. Skokie Fed. Sav. & Loan Ass’n*, 466 N.E.2d 1048, 1050 (Ill. App. Ct. 1984).

Here, the district court concluded that CPH had waived its right to assignment because of its failure to pursue payment from respondents from October 1, 2001 until the commencement of suit in early January 2005, more than three years later. The district court’s memorandum states:

Whether [CPH] actually knew that [account payors] made payment to [JK] is, again, irrelevant. [CPH], as previously noted, concedes that it did not receive payments from [respondents] because they “apparently” relied upon [JK’s] letter. Having conceded that reliance, [CPH] could only assume that [account payors] were continuing to pay [JK]. Given that *possibility*, [CPH] was obligated to protect its alleged rights. It did not do so, and is deemed to have waived those rights.

We disagree with the district court’s suggestion that CPH’s knowledge is irrelevant. A waiver must be an intentional relinquishment. *Giem*, 742 N.W.2d at 432. Courts have looked to whether an assignee/secured creditor has actual or constructive knowledge that payments are still being made to the assignor/debtor in determining whether there has been a waiver. *See King*, 975 F. Supp. at 454; *Allstate Fin. Corp.*, 800 F.2d at 1076.

Here, CPH sent its notice of assignment to respondents. JK immediately sent respondents a letter instructing them to disregard the CPH notice. Because copies of JK’s letter were furnished to CPH shortly after it was sent, CPH was aware that JK had denied the assignment. CPH did not react: It did not contact respondents regarding the assignment, demand payment, or contest JK’s assertion that the assignment was not valid. At least one court has characterized this as a failure to preserve assignment rights. *See King*, 975 F. Supp. at 454.<sup>1</sup>

In this context, respondents continued to make payments to JK directly. CPH’s silence continued; it did not contact respondents regarding the assignment for

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<sup>1</sup> We note that under Minn. Stat. § 336.9-406(c), the secured party (here CPH) would be obliged to provide the respondents with reasonable proof of its security interest to protect its position if demanded by an account payor. We do not consider the question of whether transmission of the letter from JK’s attorney to CPH denying an effective assignment would constitute such a demand.

approximately three years. *Compare Skokie Fed. Sav. & Loan Ass'n*, 466 N.E.2d at 1050 (determining that an assignee/creditor had waived its assignment rights when it took no action for two and one-half years).

The passage of time presents inherent problems of prejudice to account payors like respondents. To the extent they mistakenly paid the assignor, they face the risk of double liability. *See Tradex, Inc. v. Modern Merch., Inc.*, 386 N.W.2d 800, 803 (Minn. App. 1986) (“Payment to an assignor after notification of assignment does not relieve the account [payor] of his obligation to pay the assignee unless the assignee consents to such a collection process.” (emphasis omitted) (quotation omitted)). As a result, parties in the position of respondents may be prejudiced by lack of any follow-up by the assignee, here CPH, because they may not take any action to protect their ability to collect reimbursement.

Based on the record in this proceeding, we conclude that CPH waived its rights as a matter of law and that, as a result, the district court did not err by entering summary judgment in favor of respondents.

**Affirmed.**

Dated: