2012 IL App (1st) 112853-U

FOURTH DIVISION
December 20, 2012

No. 1-11-2853

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTHONY MARANO COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 09 L 51069
	)	
WAYNE PASSOFF,	)	Honorable
	)	James C. Murray, Jr.,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in ruling that a compensation modification imposed by an employer impermissibly made employee responsible for "bad debt" of the employer from prior years. Even assuming such modification was proper, the employee's "acceptance" of the modification cannot be deemed valid without unequivocal notification regarding the nature and scope of the modification. The employee's setoff claim, although improperly asserted as an affirmative defense to the employer's claim against the employee based on a promissory note, was fully and fairly litigated.

¶ 2 Plaintiff Anthony Marano Company (the Company) sued defendant Wayne Passoff, a former employee of the Company, to recover on a promissory note Passoff had executed in favor of the Company. Passoff filed an affirmative defense asserting a setoff claim against the

Company for unpaid commissions. Specifically, Passoff contended that he did not accept a modification to his compensation arrangement, effective January 1, 2009, pursuant to which certain "bad debt" from prior years was deducted from Passoff's 2009 paychecks. After a bench trial, the trial court ruled in favor of Passoff; no monetary judgment was awarded against either party.

¶ 3 On appeal, the Company contends that it could "unilaterally and prospectively" change Passoff's commission structure when he continued to "receive and accept wages under the new commission structure without explicit objection." The Company also contends that Passoff is not entitled to a setoff because he "waived the issue by improperly pleading it as an affirmative defense." For the reasons stated herein, we affirm.

¶ 4 BACKGROUND

¶ 5 Passoff worked for the Company, a produce company, as a salesperson in the tomato department. Passoff was an employee of the Company for approximately eight years, from 2002 or 2003 until the end of July, 2009, when Passoff terminated his employment.

¶ 6 On December 1, 2008, Passoff signed a promissory note to the Company in the amount of $75,000. He paid $23,000 on the note; $52,000 remains unpaid.

¶ 7 The Company commenced an action in the circuit court of Cook County to recover from Passoff on the note. Passoff filed an affirmative defense asserting a setoff claim against the Company based on the Company's alleged failure to pay certain commissions to Passoff. The Company moved to strike the affirmative defense, arguing that the setoff claim should be pled as a counterclaim; the trial court denied the motion.

¶ 8 During the bench trial, Passoff's counsel confirmed that Passoff signed the note and that the list of payments presented by the Company to the court was accurate. The remainder of the trial focused on Passoff's setoff argument.

¶ 9 Passoff testified[1] that he never had an written employment agreement, and his compensation changed each year. Anton Marano and Jody Marano would discuss pay arrangements with Passoff at the end of the year; Anton Marano made all decisions for the Company. Except for his first year of employment with the Company, Passoff was paid commissions.

¶ 10 Passoff testified that he did not participate in a meeting held in December, 2008, at which employees were told they were responsible for bad debts[2] of the Company; he stated he was specifically excluded from the meeting. Passoff asked several people about the matters discussed at the meeting, including Salvatore Palandri and Anton Marano. Although Passoff denied attending the meeting, he testified that he learned about the discussion of the new commission structure a few hours after the meeting from other salespeople who were in attendance.

¶ 11 In the second week of January 2009, Passoff asked Anton Marano about deductions for bad debts. Passoff testified that he did not receive an explanation. Passoff continued to ask other department heads of the Company about the deductions. He was told the bad debts would be

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[1]The parties submitted a Bystander's Report regarding the trial testimony and related matters. The court entered a written order on the date of trial ruling in favor of Passoff and against the Company "for the reasons stated in open court and transcribed by the court reporter."

[2] The trial court described the bad debt deduction as "calculated as basically what were the costs of goods of the tomatoes that were sold, and the Anthony Marano Company would take 50 percent of that bad debt and then Mr. Passoff would take 50 percent of the bad debt on the cost of goods basis."

deducted over a ten month period: monthly deductions of $4,700 until the total of $47,000 was deducted.

¶ 12 During trial, Passoff was shown his direct deposit checks from January, February, and December 2009.[3] He testified that these documents did not include any deductions for bad debt and that he did not receive any other document from the Company showing bad debt deductions. Passoff stated that he never agreed to pay a portion of the bad debts and that such deductions were not part of his compensation arrangement. Passoff further testified that he never agreed to the modification to his commissions.

¶ 13 The Bystander's Report describes a portion of Passoff's testimony as follows: "Mr. Passoff asked Anton Marano about the deductions and Anton Marano said that Mr. Passoff was part of the tomato mix and the Anthony Marano Company has been deducting bad debt for years. Mr. Passoff stated that he was not entitled to commissions if the merchandise was not paid for by the customer."

¶ 14 Passoff continued to accept paychecks after January 1, 2009. From January 2009 until his departure on July 30, 2009, Passoff never expressly told Anton Marano that he would work only under the previous commission plan.

¶ 15 Sal Palandri, referred to by the trial court as the Company's chief financial officer, testified, among other things, that: (a) Passoff attended the salesperson meeting in December 2008 and was told about the bad debt deductions; (b) Passoff was provided monthly statements

[3] Passoff's last date of employment was in July 2009; he testified that he did not know the reason for the delay in his final payroll check.

that reflected the deductions from his pay; (c) the deduction for bad debt had always been the policy of the Company; and (d) the bad debt deductions were taken from all the salespeople at the Company.

¶ 16 Torre Palandri testified, among other things, that: (a) the checks to Passoff did not contain any information regarding bad debt deductions; (b) no Company employee who had bad debt deductions received paychecks containing any information regarding such deductions; (c) all Company salespeople had bad debt deductions; (d) Passoff was given an Excel spreadsheet each month that contained his salary deductions, including bad debt deductions; (e) the Company implemented the new commission plan in January, 2009 for its commissioned sales people; and (f) the bad debt deduction was deducted from Mr. Passoff's commission and, as a result, he never had to pay income tax on the bad debt deductions.

¶ 17 Referencing Torre Palandri's testimony that the bad debt was already deducted from the commissions when Passoff received his paychecks, the court noted Passoff's argument that "essentially he's unpaid the commissions. Mr. Passoff is claiming he's–basically in effect those commissions weren't paid to him. Well, if they weren't paid to him, they're still owed to him."

¶ 18 The court stated that "compensation decisions, especially where Mr. Passoff was concerned, would be made at the end of the year, and he would be sat down and he would be talked to, and he would know exactly what he was going to get." Noting the variations in Passoff's compensation during his employment with the Company, the court concluded that "each year there was a conversation with it, and they would come to an agreement. The court noted that "for the most part***he would be dealing with the owner, Anthony Marano."

¶ 19 The court deemed Sal Palandri's testimony to be "very evasive" regarding the compensation matters. Conversely, the court found Passoff's testimony to be "clear and unequivocal that he never agreed to have his commissions set off by any formula for recompensing the Plaintiff for bad debts. He never agreed to it, and in fact that's what led to him terminating his employment."

¶ 20 The court referenced certain provisions of the Illinois Wage and Payment Collection Act, 820 ILCS 115/1, *et seq.* (West 2010) (the Wage Act), including the requirement that employees receive an itemized statement of wage deductions and that any changes in employment be in writing and acknowledged by both parties. The court also cited *Bartinikas v. Clarklift of Chicago North Inc.*, 508 F. Supp 959 (N.D. Ill. 1981), finding that Passoff, like Bartinikas, specifically and repeatedly rejected the modification to his employment terms. The court noted that the debt being "charged off of were so-called bad debts that arose six or seven years ago. So he was basically reimbursing the employer for bad debts that any reasonable or normal employer would have written off a long time ago."

¶ 21 The court ruled that the Company was entitled to $52,000 on the note. The court further held that Passoff was entitled to a setoff based on unpaid commissions in the amount of $54,968.88. Because Passoff "never sought a judgment," the court concluded that no dollar judgment should be entered in favor of the Company or Passoff. In denying the Company's motion for reconsideration, the court stated that "it was not a matter of changing compensation," but rather that the court did not have legal authority to pass off the Company's losses to Passoff. The Company filed this appeal.

¶ 22 ANALYSIS

¶ 23 Distilling the arguments in the parties' respective briefs, the Company and Passoff disagree on three key issues.

¶ 24 First, the Company contends the trial court erred in ruling that the January 1, 2009 modification was retroactive; Passoff asserts that the Company applied compensation changes to commissions he already earned. The parties appear to agree that a unilateral retroactive modification of an employee's compensation is impermissible. The parties also appear to agree that the modification to Passoff's commissions related, at least in part, to bad debt from prior years.

¶ 25 Second, the Company contends that Passoff's continued employment after the modification indicates his acceptance of, and constitutes the consideration for, the modification, and his verbal objections do not negate the acceptance. Conversely, Passoff claims on appeal that he "struggled to obtain information about the proposed change" and "[w]hen he finally had an understanding of what was to occur, he quit." Passoff asserts that he never accepted the modification to his compensation arrangement.

¶ 26 Third, the Company claims the trial court erred in denying its motion to strike Passoff's affirmative defense. Passoff counters that the trial court properly held that he "was entitled to a setoff that he had affirmatively alleged."

¶ 27 Retroactive or prospective modification of employment terms

¶ 28 The issue presented for review is whether the trial court's ruling regarding "retroactivity" is supported by sufficient evidence, thus necessitating the manifest weight of the evidence

standard, with its attendant deference. See *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 13.

¶ 29 The parties agree that Passoff was an at-will employee of the Company. Generally, an at-will employment agreement can be modified by an employer as a condition of its continuance. *Wyatt v. Dishong,* 127 Ill. App. 3d 716, 720 (1984) (noting that "a contract terminable at the will of either party can be modified at any time by either party as a condition to its continuance"); *Wignes v. AON Corporation Excess Benefit Plan*, 2010 WL 1193756, *4 (N.D. Ill.). The right to unilaterally modify at-will employment terms includes the right to modify compensation terms. *Geary v. Telular Corp*., 341 Ill. App. 3d 694, 698 (2003).

¶ 30 However, Illinois cases do not provide for the unilateral modification of compensation terms *retroactively.* The Company acknowledges that "[e]mployers can make prospective changes to commission structures but cannot apply compensation changes to commissions already earned." See also *Geary*, 341 Ill. App. 3d at 653 (permitting "prospective" changes to the employee's compensation plan and finding that the modified commission plan did not affect commissions earned up until the date of the modification); *Baker v. Internap Services Corp*., 2010 WL 3834003, *4 (N.D. Ill.) ("Unlike an employer's decision to change a compensation structure going forward, a retroactive adjustment to the compensation schedule, without prior notice to the employee, does not bear the hallmarks of an offer as that term is used in contract law"); *Malone v. American Business Information, Inc.*, 647 N.W. 2d 569, 575 (Neb. 2002) (stating that "even if there is an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that had already been rendered or for commissions

that have already accrued"); *DiGiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629 (1997) (noting that "[a]n employer may *** modify the employment contract so long as the modification applies only prospectively").

¶ 31 The Company contends that the change to defendant's commission was prospective. Specifically, the Company asserts that "[b]efore December 2008, [the Company] announced that starting the following year, their new commission plan would offset commissions on future sales against previous bad debts." The Company claims that "this system did not reduce or modify the salesman's previous commission payments, as those had already been paid out. Instead the commission plan offset unearned commissions and administrative costs against future commissions."

¶ 32 Passoff counters that "employers cannot apply compensation changes to commissions already earned." He states that the trial court found that the Company "was attempting to make Passoff responsible for bad debts which were created during the prior six to seven years."

¶ 33 Both the Company and Passoff cite *Kulins v. Malco, a Microdot Company, Inc.*, 121 Ill. App. 3d 520 (1984). In *Kulins*, under the employer's original severance policy, eligible employees received one week's pay for each year of service; an amended policy instituted years later rescinded all prior policies and capped severance at five weeks. *Id.* at 522. Shortly after putting the amended severance policy into effect, the employer laid off large numbers of employees, who were paid severance benefits pursuant to the provisions of the amended policy. The employees did not contend that the modified plan was ineffective, but rather that its provisions could not be "applied retroactively to divest them of their rights to severance pay

accrued during the term of the [original] policy." *Id.* at 522-23. The appellate court concluded that the right to earn severance pay "arose and vested" during the term of the original policy and consequently survived the termination or modification of that policy. *Id.* at 527. However, once the policy was modified, accrual under the original policy ended. *Id.*

¶ 34 The Company contends that the severance plan in *Kulins* is similar to the commission structure in this case, arguing that its employees were subject to the new commission structure for future earnings only. Passoff counters that the *Kulins* modification "related to severance changes applicable in the future, not the past" and that, in contrast, the Company "sought to change the payment arrangement for prior years."

¶ 35 Applying the *Kulins* rationale, we view the bad debt deductions as retroactive, not prospective. Similar to the employees in *Kulins*, it appears from the record that Passoff earned and received his pre-2009 commissions prior to the implementation of the modified compensation program in 2009. Specifically, Passoff testified at trial that he did not receive advance commissions. Therefore, like the modified severance program in *Kulins*, Passoff's right to payment of commissions earned prior to 2009 vested prior to the Company's modifications. Regardless of the Company's characterization, the bad debt deductions, as a practical matter, constituted a forced repayment of previously-earned commissions.

¶ 36 Perhaps more problematic, the bad debt deductions appear not only to effectively mandate the return of previously-earned commissions, but also make Passoff responsible for half of the cost of goods not paid for by the Company's customers. As the trial court found, Passoff "was basically reimbursing the employer for bad debts that any reasonable or normal employer

would have written off long ago." Section 9 of the Wage Act, referenced by the trial court in its ruling, discusses prohibited deductions from wages; the deductions in question are not otherwise authorized by this statute and therefore would need to be "made with the express written consent of the employee, given freely at the time the deduction was made." 820 ILCS 115/9 (West 2010). As the trial court noted, Passoff did not give his express written consent to the bad debt deductions. Particularly where, as here, the employee was not part of the credit decisions of the employer, it seems unjust to charge the employee not only for his previously earned and paid commission, but also for a portion of the cost of the goods.

¶ 37 As discussed below, the exact nature and timing of the modification is unclear. However, even accepting the Company's description of the modification in its appellate briefs, we do not agree with its conclusion that the modification was prospective, not retroactive. Therefore, we conclude the trial court did not err in its conclusion that the amounts being charged to Passoff pursuant to the 2009 modification were not permitted.

¶ 38 Acceptance of the Modification

¶ 39 Even assuming *arguendo* that a retroactive modification of compensation were permissible–which we believe it is not in this case–a key question is whether Passoff "assented to the modification." The issue presented for review is whether the trial court's ruling regarding Passoff's "acceptance" is supported by sufficient evidence; we therefore apply a "manifest weight of the evidence standard" for our review. See *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 13.

¶ 40 The trial court, discussing *Bartinikas*, stated:

> "The only issue is whether the employee assented to the modification. Had Bartinikas remained silent and continued to work for Clarklift after being notified of the proposed modification, Clarklift- the Court and Clarklift could have reasonably presumed that Bartinikas sent it[4] to the proposed modification and terms and thus accepted the offer. But Bartinikas did not remain silent, he specifically and repeatedly rejected the modification. According to the testimony here, Wayne Passoff did consistently and persistently reject[] the modification that was being imposed upon his offsets, being imposed upon his commissions he had earned."

¶ 41 The Company contends that the trial court's "over-reliance on *Bartinikas* was erroneous as *Bartinikas* is not on point with the case at bar and has been contradicted by other, more persuasive, authority that is binding upon the circuit court." The Company points to *Schoppert v. CCTC International, Inc.*, 972 F. Supp. 444 (N.D. Ill. 1997), and other cases for the proposition that when an at-will employee continues to work after a change in commission plan, he is deemed to have accepted the change.

¶ 42 As a preliminary matter, we do not consider *Bartinikas* to be the best recitation of the current state of Illinois law on this topic. In *Bartinikas*, after the employer modified the employee's contract, the employee refused to sign the modified contract, repeatedly objected to the modification and eventually resigned. *Id.* at 960. The *Bartinikas* court relied on the employee's "explicit rejection" as an indication of the absence of acceptance of the modification by the employee. The court concluded: "Once Bartinikas rejected the modification Clarklift

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[4]We suspect the words "sent it" should read as "consented."

could have fired Bartinikas, but it could not enforce the modification *ex parte*. [Citation.] Clarklift, however, chose not to fire Bartinikas, but rather to continue taking advantage of his talents, and by so doing, continued to be bound by the terms of the contract in existence between the parties prior to the proposed modification." *Id.*

¶ 43 The courts in *Schoppert* and other cases since *Bartinikas* have instead viewed the employee's continued employment after a modification of their employment arrangement to indicate acceptance of the modification. As noted in *Schoppert*, "action speak louder than words," so an employee's continuing to work after a modification must be seen in legal terms as acceptance of the modification, as "grudging and protest-filled" as the acceptance may be. *Schoppert*, 972 F. Supp. at 447. "In an at-will relationship where neither side is obligated to render future performance, continued performance by both parties serves as acceptance by one side and consideration by the other." *Id.* See also *Landers-Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1068 (2005) ("employers and employees can manifest their assent to conditions of employment by conduct alone"); *Geary*, 341 Ill. App. 3d at 653 (stating the employee accepted modifications to a compensation plan when he accepted payment of commission under the modified plan and continued employment); see also *Barkl v. Kaysun Corp.*, 2011 WL 4928996 (N.D. Ill. 2011) (holding that continued employment after modification to an employment agreement is deemed to be consent to that modification); *Wignes*, 2010 WL 1193756 at *4 (same).

¶ 44 As a New Mexico court has noted, "[a]lthough the *Bartinikas* case states that its approach is consistent with 'modern notions of fairness in the workplace,' we find such statement illogical

in light of the court's later concession that the employer can fire any employee who does not accept the proposed modification. Thus, the *Bartinikas* approach encourages employers to fire employees, an approach that we hardly believe is in accordance with notions of fairness in the workplace." *Steiber v. Journal Publishing Co.* 901 P.2d 201, 204 (N.M. Ct. App. 1995); see also *Kauffman v. Int'l Brotherhood of Teamsters,* 950 A.2d 44, 48 (D.C. 2008) (permitting modification of at-will employment arrangements to "avoid[] the undesirable result of encouraging employers to fire employees who do not expressly agree to new terms").

¶ 45 However, in order for Passoff's continued employment for seven months in 2009 to be deemed acceptance of the modification under *Schoppert* and its progeny, the Company was required to notify him of the modification. "A modification must satisfy the elements of a contract: a meeting of the minds supported by consideration." *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). "To prove notice, an employer asserting a modification must prove that he unequivocally notified the employee of definite changes in employment terms." *Id.* at 229. See also *Martin v. Golden Corral Corp*., 601 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1992) (the party asserting a modification of an at-will employment contract must prove "(1) notice of the change; and (2) acceptance of the change"). For example, in *Kamboj v. Eli Lilly*, 2007 WL 178434 (N.D. Ill.), a federal district court interpreting Illinois law found that only after an "initial five- or six-month period" did the employee definitively know about her compensation arrangement and thus her continued employment would constitute acceptance; the court found that for the initial period where the employee was "unaware" of the exact status of her employment agreement, summary judgment for the employer on the employee's breach of

contract claim was not appropriate. *Kamboj*, 2007 WL 178434 at *9.

¶ 46 Passoff contends that "he tried for several months in 2009 to obtain information regarding the Company's decision to make salespeople responsible for bad debts and was unsuccessful. Finally, when he found out what was actually happening with his compensation he quit." The Company counters that Passoff "became aware of the new commission structure merely hours after the December 2008 meeting that explained the commission structure" and that Passoff "*never* told Anton Marano that he would only work under the new commission structure."

¶ 47 Although we agree with the Company that neither the trial testimony (as reflected in the Bystander's Report) nor the trial court's ruling state that Passoff was unaware of a modification to Passoff's compensation structure, both indicate significant ambiguity surrounding the modification. For example, the court noted that according to the trial testimony, "compensation decisions, especially where Mr. Passoff was concerned, would be made at the end of the year, and he would be sat down and he would be talked to, and he would know exactly what he was going to get." However, with respect the modified structure for 2009, there was a general meeting which Passoff states he did not attend and the Company asserts he did; Passoff testified that he was specifically excluded from the meeting. The communications regarding the 2009 modification differed from prior years, when "there was a conversation with it, and they would come to an agreement."

¶ 48 The trial court also expressed concerns about Sal Palandri's testimony. The court stated:

> "The issue, though, to the Court which has to be resolved initially, is when did this formula actually arise? According to the testimony of the chief financial officer [Sal

> Palandri], he said that it always existed. But when the Court asked questions of the young accountant about in the sheets that are given to each of the salesmen which would reflect what the bad debts would be, did Wayne Passoff, during the period of time there were no deductions to his compensation, would that be reflected on those sheets, and he said, Well no, because he didn't get any bad debts."

The court found the testimony of Sal Palandri to be "very evasive as far as his knowledge of any compensation decisions that were agreed to by Mr. Passoff and the company." The court stated that "it would seem to this Court that given his particular position, he would be well versed and well knowledgeable as to exactly what was agreed to regarding compensation."

¶ 49 Furthermore, as Torre Palandri testified, Passoff's checks would not include deductions because "the bad debt deductions would have already been reflected on the sheets that he testified would have been passed out to all the commission salesmen, and whatever the figure was, that it the total amount of commissions earned less what was deducted, then that figure would be reflected on the checks." Where the parties disagree whether Passoff received monthly spreadsheets showing the deductions, the failure to state the deductions on Passoff's paychecks is, at best, confusing. As the trial court noted, section 10 of the Wage Act requires employers to "furnish each employee with an itemized statement of deductions made from his wages for each pay period." 820 ILCS 115/10 (West 2010).

¶ 50 In summary, although continued employment indicates acceptance of a modification to an at-will employment agreement, such acceptance cannot be inferred absent a showing that the employee was put on notice of the precise nature of the modification. We believe that such

notification was questionable, in light of, among other things, the deviation from the prior practice of a year-end negotiation between Anton Marano and Passoff, the ambiguity in Sal Palandri's testimony regarding the exact nature of Passoff's compensation, and the Company's failure to state the deductions in Passoff's paychecks. Although Passoff testified that he was told about ten monthly deductions of $4,700 in bad debt, the timing of such communication is unclear and his checks did not reference such deductions.

¶ 51 Furthermore, even though Passoff may have "consistently and persistently rejected the modification," according to the trial court, it is not clear, after a review of the record, what the "modification" exactly was. Passoff testified that Anton Marano told him the Company had "been deducting bad debts for years." Passoff further stated that "he was not entitled to commission if the merchandise was not paid for by the customer." Sal Palandri testified that "[t]he deduction for bad debt had always been the policy" of the Company. We believe the record supports the conclusion that Passoff could not "accept" the modification–even through his continued employment–if the precise nature of the modification was uncertain to Passoff.

¶ 52 Affirmative Defense or Counterclaim

¶ 53 Passoff asserted his setoff claim as an affirmative defense. Prior to trial, the Company moved to strike the affirmative defense "on the basis that this theory would be more properly plead as a counterclaim rather than an affirmative defense." The Company contends that the lower court erred in denying the Company's motion to strike the affirmative defense. We review this question of law *de novo*. *In re Marriage of McGrath*, 2012 IL 112792, ¶ 10.

¶ 54 We agree with the Company that, as a technical matter, Passoff's setoff claim should have

been asserted as a counterclaim. "Counterclaims differ from affirmative defenses in that counterclaims seek affirmative relief whereas affirmative defenses attempt to defeat a plaintiff's *** cause of action." *Dudek, Inc. v. Shred Pax Corp.*, 254 Ill. App. 3d 862, 871 (1994). "Setoff most commonly appears as a counterclaim filed by a defendant, based upon a transaction extrinsic to that which is the basis of the plaintiff's cause of action." *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 462 (1995).

¶ 55 In this case, Passoff's setoff claim is based upon a transaction–his modified compensation arrangement–extrinsic to the basis for the Company's cause of action, *i.e.*, the note. However, Passoff did not seek affirmative relief; he was attempting to defeat the Company's action. This may have led Passoff to assert it as an affirmative defense. However, "the procedural concept of setoff is subsumed under the term 'counterclaim' even where no affirmative relief is sought." *Id.* The Company cites *Doherty v. Kill*, 140 Ill. App. 3d 158 (1986), in which the appellate court did not allow the plaintiffs who improperly pled their claim as an affirmative defense to amend their pleadings to "conform to the proof and include a counterclaim." *Doherty*, 140 Ill. App. at 165. However, a significant difference between *Doherty* and the instant case is that the trial court in *Doherty* awarded a monetary judgment. *Id.* In this case, Passoff did not seek a monetary judgment for the amount by which his alleged damages exceeded the judgment for the Company on the note.

¶ 56 In *Norman Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385 (1997), our supreme court addressed a statute of limitation issue involving a lien asserted by an architecture firm in its answer, not a counterclaim. The supreme court held that the firm "asserted its lien in a timely

fashion although it failed to correctly label its claim as a counterclaim." The court noted:

> "The Code of Civil Procedure is to be liberally construed, so that cases are decided on the basis of the substantive rights of the litigants. [Citation.] It also states that '[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim of defense which he or she is called upon to meet.' "

Section 2-603(c) of the Code of Civil Procedure further provides that "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c) (West 2010).

¶ 57 We do not believe that either party in this case was prejudiced by Passoff's assertion of his setoff claim as an affirmative defense. The Company was aware of Passoff's affirmative defense for almost two years prior to trial, and the trial primarily focused on the setoff issue. As noted in *Lake County Grading*, "regardless of whether the affirmative defense of setoff should properly have been labelled a counterclaim under section 2-608, there can be no doubt that it was asserted in a procedurally appropriate manner." *Lake County Grading*, 275 Ill. App. 3d at 462. "Pleadings are not intended to create obstacles of a technical nature to prevent reaching the merits of a case," but instead are intended to "facilitate the resolution of real and substantial controversies. [Citation.]" *Norman A. Koglin Associates,* 176 Ill. 2d at 395. We decline to vacate the judgment of the trial court.

¶ 58 CONCLUSION

¶ 59 We conclude that trial court did not err in ruling that the compensation modification imposed by the Company impermissibly made Passoff responsible for "bad debt" on the

Company from prior years. Even assuming such modification were valid, we do not believe the Company unequivocally notified Passoff of definite changes in his employment terms; without such notification, we cannot deem Passoff's continued employment to constitute "acceptance." Finally, we conclude that the setoff issue was fully and fairly litigated. We therefore affirm the judgment of the trial court.

¶ 60 Affirmed.