

64294-4

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No. 64294-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CONNER RUBIN, LLC,
a Washington Limited
Liability Company,
Respondent

v.

BIG CONSTRUCTION, INC., a Washington
Corporation;
Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE WILLIAM DOWNING

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

A. The Trial Court erred by granting the Plaintiff's motion for summary judgment when the Plaintiff had not requested enforcement of the settlement agreement in their complaint.

B. The Trial Court erred by granting the Plaintiff's motion for summary judgment when the Plaintiff had not answered BIG Construction's (BIG) counterclaim, essentially admitting the allegations and facts set forth in the counterclaim and BIG's cross motion for summary judgment.

C. The Trial Court erred by granting the Plaintiff's motion for summary judgment when there are genuine issues of material facts still in dispute.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the Trial Court erred by granting the Plaintiff's motion for summary judgment when the Plaintiff had not requested enforcement of the settlement agreement in their complaint?

B. Whether the Trial Court erred by granting the Plaintiff's motion for summary judgment when the Plaintiff had not answered BIG's counterclaim, essentially admitted the allegations and facts set forth in the counterclaim and in the BIG's cross motion for summary judgment?

C. Whether the Trial Court erred by granting the Plaintiff's motion for summary judgment when there are genuine issues of material facts still in dispute?

II. STATEMENT OF THE CASE

A. The Contract

On 03/14/2007, BIG and Connor Rubin entered into a construction contract in order to remodel a card room and restaurant in Shoreline. Danny Kim of BIG Construction and Danny Rubin of Conner Rubin, negotiated the terms of the agreement however the agreement was signed by Yasuko Conner. The agreement states clearly that the contract price was approximate, based on the information Connor Rubin provided and the walk through of the property during the proposal process. Right after the contract was executed; Danny Rubin stated that he wanted the roof of the building raised 4-8 feet. This item was not added to the contract but was agreed to by the parties.

After starting the work, it was discovered that most of the foundation of the building and the footings had to be replaced. This required the parties to enter into a change order that was dated 03/29/2007. Throughout the project, the Plaintiff requested modification after modification which added additional work and costs to the project.

B. Payment History

Upon signing the agreement, the Plaintiff paid BIG \$50,000 on 03/14/2007. The contract required the Plaintiff to pay another \$100,000. The Plaintiff paid BIG two checks of \$50,000 on 03/22/2007 and another \$50,000 on 03/27/2007. The next invoices submitted by BIG, No. 22 and No. 26, were paid in full except No. 26, of which the Plaintiff paid \$130,000 instead of the billed amount of \$130,560. From that point on, the Plaintiff only made partial payments on the invoices submitted to them. On or about 09/24/2007, BIG submitted invoice number 35 which billed the Plaintiff \$147,744.64. The Plaintiff paid only \$30,000 of that invoice. After that date, the Plaintiff did not pay any other invoices submitted by BIG.

C. Settlement Agreement

The parties entered into discussions about the project and based on these discussions, the Plaintiff promised to provide BIG with jobs on property that they owned and that they would pay BIG \$150,000, if they would take a reduced amount owed them by the Plaintiff. The parties verbally agreed to this arrangement. On 10/4/2007, Mr. Kim of BIG arrived at the worksite and Mr. Rubin presented Mr. Kim with a Pre Lien Release Form and a one page document that was attached to the Pre Release Form. None of the documents represented the prior discussions between Mr. Kim and Mr. Rubin. On the face of the Pre-Release Form, the full

contract price was listed as \$510,000. At the time of the execution of this settlement agreement, the Plaintiff had paid only \$469,569.28, so according to the Pre-Release Form, the Plaintiff owed BIG an additional \$40,430.72. When asked about the lien form and his understanding of the terms of the agreement, Mr. Rubin stated that he did not understand the terms of the agreement, they did not know where the numbers came from and that they did not draft the agreement. The document attached to the Pre Release Lien called for another \$96,000 to be paid to BIG to complete the rest of the job. The same \$68,000 payment paid under the Pre Lien Release agreement was said to support the other agreement that was attached to that Form. Danny Kim of BIG said he was forced to take the money and sign the agreement because he had to pay his employees and his subcontractors and the Plaintiff was not going to give him any money if he did not sign the agreement.

The total payments under the settlement agreement came to \$606,000. The Plaintiff admits that they have made payments totaling only \$572,569.28. Also, the Plaintiff added additional items other than those items listed in the settlement agreement. The Plaintiff required BIG to remove and reframe a wall, remodel Danny Rubin's office in the basement, cut a concrete wall and excavate the crawl space, insulate the basement with special insulation, add an air conditioned security room and they had to build and tear down the cashier cage four to five times at the request of

Danny Rubin. BIG requested payment as agreed under the verbal agreement and the Plaintiff refused to honor the verbal agreement. BIG also requested payment for the additional work done after the signing of the 10/4/2007 settlement agreement and Conner Rubin refused to pay for those additions.

Based on the Plaintiff's failure to pay the full \$606,000 they agreed to pay under the settlement agreement and the Pre Lien Release Form dated 10/4/2007 and based on the additions made to that agreement made by the Plaintiff that they did not pay for, the Plaintiff did not fully execute the settlement agreement and BIG filed a lien for the unpaid invoices numbered 34 and 87 in the amount of \$353,137.44.

D. Motion for Summary Judgment

On 09/18/2009, the Trial Court granted the Plaintiff's motion for summary judgment which determined that the settlement agreement entered into by the parties was enforceable and valid. At the time the Plaintiff filed their motion, they had not set forth in their complaint that they wanted to have the court enforce the settlement agreement, nor did they assert the settlement agreement as an affirmative defense. Furthermore, the Plaintiff had not answered BIG's counterclaim before they filed their motion for summary judgment. On 09/17/2009, a day before the summary judgment motion was to be heard, the Plaintiff answered BIG's counterclaim and also

and added the affirmative defense that BIG's claims were barred by accord and satisfaction.

III. ARGUMENT

A. Conner Rubin Did Not Plead Enforcement of the Settlement Agreement in their Pleadings and They Have Not Amended their Complaint.

Conner Rubin never requested in their complaint that the settlement agreement signed on 10/4/2007, be enforced. Conner Rubin also has not made a motion to amend their complaint. Without an amendment to their complaint requesting the Trial Court to enforce the settlement agreement, the Plaintiff can not now set forth facts that were never pled in their pleadings and ask the Trial Court for relief that they never sought when they filed their complaint. Therefore, the issues in Plaintiff's motion for summary judgment were not properly before the Trial Court and their motion should have been denied and BIG's cross motion for summary judgment should have been granted.

B. Conner Rubin Did Not Answer the Counterclaim of BIG at the time their Summary Judgment Motion was Filed.

Conner Rubin had not filed an answer to BIG's counterclaim as required by Civil Rule 8(d) prior to the filing of their motion. Civil rule 8(d)

states that:

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

C R 8(d).

Thus, under this rule, if a party does not answer a counterclaim, the facts set forth in that counterclaim are admitted; and as such, the Plaintiff has admitted that they owe BIG the \$353,137.44; and therefore the Plaintiff's motion should have been denied and BIG's cross motion for summary judgment should have been granted because the facts set forth in BIG's cross motion were not in dispute.

C. Rule 8(d) Does Not Allow the Court to Exercise Discretion but Requires the Court to Accept the Unanswered Pleadings as Admitted Facts.

Civil rule 8(d) states:

Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. ...

CR 8(d).

The rule does not give the Court the discretion to make any other determination. The language in the rules states definitively that averments are admitted. The Trial Court therefore had to accept the facts set forth in

BIG's counterclaim as admitted and based on that, the Trial Court had no other choice but to grant BIG's cross motion for summary judgment because the factual basis for BIG's motion was not in dispute; i.e. the Plaintiff had not fulfilled the settlement agreement, that the settlement agreement was not enforceable, that BIG's claim was admitted and that BIG was entitled to judgment on their claim. There is no other ruling the Trial Court could make based on the pleadings and Civil Rule 8(d). By not ruling in BIG's favor, the Trial Court abused their discretion and this Court should overturn the Trial Court's order and grant BIG's Cross motion for summary judgment.

D. Because Conner Rubin Did Not Answer the Counterclaim the Only Motion Properly Before the Court was BIG's Cross Motion.

The Plaintiff did not deny the facts and claims set forth in BIG's counterclaim and therefore the facts supporting BIG's claims were not in dispute. Thus, because the facts and claims in the counterclaim were not in dispute, due to the Plaintiff's failure to answer the counterclaim, their motion was filed prematurely and was made without proper factual basis. On the other hand, BIG had answered the Plaintiff's complaint and had set forth facts and claims that their cross motion for summary judgment was based on. Therefore because BIG's cross motion was the only motion properly before the Trial Court based on the record and files in this case, the

Trial Court could not, under the civil rules set forth above, properly grant the Plaintiff's motion and therefore the order granting Plaintiff's motion should be vacated.

E. Since Conner Rubin Did Not Request that the Settlement Agreement be Enforced in their Complaint, ER-408 Forbids Them from offering this Agreement into Evidence.

Since the Plaintiff did not request that the settlement agreement be enforced in their complaint, they can not introduce it into evidence pursuant to Evidence Rule 408. Evidence Rule 408 states in pertinent part:

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

ER. 408.

While it is true that if a settlement agreement is the subject of an action, it can be offered into evidence, see *Willapa Trading Co. v. Muscanto, Inc.* 45 Wn. App. 779, 727 P.2d 687 (1986); however, as stated above, the Plaintiff did not make the settlement agreement the subject of this action and therefore it can not be offered into evidence under ER-408.

F. There are Factual Disputes that Should have Prevented the Trial Court from Granting Summary Judgment.

BIG does not believe this Court can get to the issues before them in

the summary judgment and the cross motion for summary judgment given the procedural violations by the Plaintiff, however, there are factual disputes that should have prevented the Trial Court from granting a motion for summary judgment.

1. Fact One

The Plaintiff alleges that the settlement agreement sets forth the items to be completed and BIG sets forth items that were added to the agreement. Under Washington law, a party to a contract can not alter the contract without the other party's consent. *Jones v. Best*, 134 Wn. 2d 232, 240, 950 P.2d 1 (1998). There is clearly a factual dispute as to whether the October 4, 2007 agreement was modified preventing the Trial Court from granting Plaintiff's motion for summary judgment. Interpretation of a contract is only appropriate for summary judgment if; (1) interpretation does not depend on extrinsic evidence; or (2) only one reasonable inference can be drawn from the extrinsic evidence. *Transalta v. Sickelsteel Cranes*, 134 Wn. App. 819, 826, 142 P.3d 209 (2006). It is clear from the evidence presented at the time of the motion that more than one inference could be drawn from the evidence. The Plaintiff contends that the agreement did not have any additions made to it; whereas BIG contends that there were additions and he has provided evidence to support his contentions. Thus, there are two possible inferences that can be made from the evidence and

therefore summary judgment was inappropriate.

2. Fact Two

There is also a dispute as to whether the October 4, 2007 agreement was fully performed. The parties entered into a Pre-Lien Release agreement that required the Plaintiff to pay BIG \$68,000. In a separate agreement, the parties said that the remaining balance on the contract was \$96,000. The Pre-Lien Release stated that the contract price was \$510,000. The agreement dated 10/4/2007 stated that the amount of the payment due for the remaining work under the contract was \$96,000. Thus, the total due under these agreements was \$606,000. The Plaintiff admits that they only paid \$572,569.72. Failure to make a payment under a settlement agreement is a breach of the contract, so material in nature that it operated as a discharge of it and thus a party is barred from trying to enforce a contract they have materially breached. *Rosen v. Ascentry Techs, Inc.* 143 Wn. App. 364, 177 P.3d 765 (2008). Since the Plaintiff failed to pay the full amount of the settlement agreement, they have materially breached the agreement and they can not seek enforcement of that agreement.

3. Fact Three

The settlement agreement required BIG to complete the building they were already obligated to complete and allowed the Plaintiff to pay them an amount less than the amount billed for the work already performed.

This did not constitute new consideration. In *Rosellini v. Banchemo*, 83 Wn. 2d 268, 517 P.2d 955 (1974), the debtor entered into an agreement to pay the contractor less than the contract price. The *Rosellini* Court held that the subject agreement was not supported by new consideration because the contractor had an antecedent duty to complete the building; the owner had an antecedent duty to pay the contract price. In the agreement, the contractor had the same duty while the owner had a lesser duty unsupported by consideration. *Rosellini* at 273. BIG was still obligated to finish the building and the only change was that the Plaintiff would pay an amount less than what they had already been billed. Thus, this agreement was not supported by any new consideration and was never a valid agreement. In addition, the Plaintiff paid \$68,000 to BIG as consideration for the Pre Release Lien agreement and the settlement agreement of 10/4/2007. The Pre-Lien Release agreement said it was conditioned on the \$68,000 payment however, the settlement agreement just makes reference to the same payment. There was no second payment of \$68,000 made by the Plaintiff to support the settlement agreement dated 10/4/2007 and thus there was no new consideration to support the settlement agreement. It is clear that there are two inferences that can be drawn from this evidence and therefore the Trial Court's order granting the Plaintiff's summary judgment motion was inappropriate.

4. Fact Four

In *Douglas NW v O'Brien & Sons*, 64 Wn. App. 661, 828 P.2d 565 (1992), the Court held that the party alleging a settlement (aka accord and satisfaction) must prove there was a meeting of the minds and that both parties understood that such would be the result. *Douglas* at 686. Mr. Kim stated that in addition to the amount listed on the settlement agreement, he also expected to receive \$150,000 plus two other contracts based on the parties' prior discussions. Mr. Kim also testified that he understood that the \$96,000 was the amount being paid under the balance of the contract and not the amount paid for the change orders still outstanding and unpaid. The Plaintiff refused to honor his verbal contract and this shows there was never a meeting of the minds about the amount to be paid under the contract. The question of whether a merger of oral and written terms occurred is a question for the trier of fact. *Flower v. TRA Industries, Inc.*, 127 Wn. App. 13, 30, 111 P.3d 1192 (2005). Therefore, summary judgment was improper.

IV. CONCLUSION

BIG is entitled to judgment as a matter of law on the lien less the payments made by the Plaintiff and this Court should reverse the Trial Court's order granting the Plaintiff's motion for summary judgment and

grant BIG's cross motion for summary judgment and award BIG damages in the amount of \$353,137.44 less any payments made by the Plaintiff.

RESPECTFULLY SUBMITTED this 24th day of December, 2009.



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