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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38637-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PENNEBAKER CONSTRUCTION SERVICES, INC., a Washington
corporation,

Appellant,

v.

PHIL NOTHSTEIN, an individual,

Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

A construction payment dispute was resolved through settlement. The contractor compromised on the payoff amount, performed additional work, and executed a lien release. The homeowner obtained all these benefits from the contractor and then sued the contractor on the same claims that were resolved through settlement. The trial court committed reversible error by allowing the homeowner to “undo” the settlement. The trial court then committed other reversible errors.

II. ASSIGNMENTS OF ERROR

Assignment of Error #1: The trial court erred by allowing the homeowner to pursue claims against the contractor after having obtained the benefits of settlement.

Issues pertaining to Assignment of Error #1:

- Settlement agreements must be enforced as contracts.
- The Contractor gave consideration for settlement and waived rights as a result.

Assignment of Error #2: The trial court erred by not enforcing the settlement agreement which provided that payment by the homeowner was the event that proved completion of the “punch-list.”

Issues pertaining to Assignment of Error #2:

- Courts enforce the agreement of the parties.
- Courts do not re-write the parties’ agreement.

- The parties' settlement agreement included a mechanism that assured the homeowner the right to make the final decision.
- The payment of the funds ratified and concluded the agreement.

Assignment of Error #3: The trial court erred by relying on his own non-expert judicial opinion about whether siding work was defective in contrast to the settlement agreement which required that any such determination about the siding must be made by the product manufacturer.

Issues pertaining to Assignment of Error #3:

- Courts enforce the agreement of the parties.
- Courts do not re-write the parties agreement.
- Whether or not caulking reacted with siding required and constituted defective workmanship is an issue for an expert.
- The Court improperly asserted itself as an expert without regard to the differences between an installation defect, a manufacturing defect, or a cosmetic issue.
- The Court improperly held the contractor liable for a decision made by the homeowner to install caulking.

Assignment of Error #4: Having ruled in favor of defendant contractor on 93% of the settlement agreement claims, the trial court erred by not finding the defendant to be the prevailing party. Sub-issues:

- The trial court erred by ruling that the attorney fee provision in the settlement agreement was based only on who prevailed with regard to the "accord and satisfaction" defense.
- The trial court erred by not applying the "Proportionality Approach."

III. STATEMENT OF THE CASE

The Parties

Appellant-Defendant Pennebaker Construction Services was a licensed and registered construction contractor. Respondent-Plaintiff Phil Nothstein is a homeowner. Nothstein filed suit against Pennebaker raising the same issues that were resolved by an earlier settlement.¹ Nothstein had paid \$28,000.00 to complete a settlement agreement and in reliance on that Pennebaker compromised on the amount it was owed and also released its claim of lien.² Because the plain terms of the Settlement Agreement and Nothstein's own actions demonstrate that payment of the \$28,000.00 by Nothstein was an acknowledgement that Pennebaker did all it was supposed to do under the Settlement Agreement, such payment discharged any further obligations of Pennebaker.³

Facts

The material facts in this matter are undisputed and established by the Clerks Papers. In April 2003, Appellant Pennebaker contracted with Nothstein to build a home for Nothstein located at 10816 250th Street East, Graham, Washington (Pierce County). The home was completed in the

¹ Trial Exhibit 2, Defendant's Notebook, Doc. #1, pg. 1-2

² Trial Exhibit 2, Defendant's Notebook, Doc. #13, pg. 1

³ Trial Exhibit 2, Defendant's Notebook, Doc. #8, pg. 1-3

summer 2004.⁴ Because of allowances, changes to the work, and sales tax, the total cost for the completed home was \$246,189.62.⁵

Nothstein withheld payment on Pennebaker's final two invoices dated May 12, 2004 and June 24, 2004, totaling \$42,965.92. On July 2, 2004, Pennebaker filed a claim of lien against Nothstein for that amount plus \$1,114.00 in lien fees (total \$44,079.92).⁶ To resolve the dispute over the amounts remaining to be paid, Pennebaker provided an accounting and agreed to mediate on September 30, 2004.⁷

A settlement was reached between Pennebaker and Nothstein and the binding Settlement Agreement at issue was signed by both on September 30, 2005 (the "Agreement").⁸ The Agreement identified certain items to be completed by Pennebaker, and once Nothstein was satisfied that the items were completed, required Nothstein to pay Pennebaker \$28,000.00 of the outstanding contract amount.⁹

The terms of the Agreement were as follows:

- 1.) Pennebaker to complete punch list per attached eight page list within two weeks from settlement.

⁴ Trial Exhibit 2, Defendant's Notebook, Doc. #1, pg.2; Doc.#3, pg.1-5

⁵ Trial Exhibit 2, Defendant's Notebook, Doc. #3, pg.2; Doc.#3, pg.2-6

⁶ Trial Exhibit 2, Defendant's Notebook, Doc. #5, pg. 1-2

⁷ CP 40

⁸ Trial Exhibit 2, Defendant's Notebook, Doc. #6, pg. 1

⁹ *Id.*, pg. 1-9

- 2.) Nothstein to pay Pennebaker \$28,000.00 within 30 days from settlement provided punch list terms complete.
- 3.) Pennebaker to provide release of lien within one week to Athan Tramountanas. Nothstein to sign promissory note & DOT securing amount owed Pennebaker (to be held in trust by Athan Tramountanas). The promissory note & DOT will be destroyed upon satisfaction of payment.
- 4.) Address Hardy Plank per manufacturer rep's recommendation & make repair if necessary. Parties to be present at site when manufacturing rep looks at house.
- 5.) Binding settlement agreement enforceable in Pierce County Superior Court.
- 6.) Prevailing party in litigation to enforce this Agreement is entitled to reasonable attorney's fees.¹⁰

Per the Agreement, Pennebaker executed a release of its lien on October 8, 2004, but did not file it.¹¹ On or about October 13, 2004, Pennebaker took two siders, two painters, a plumber, and three carpenters and spent the day addressing the items on Nothstein's punch list at Pennebaker's own expense. A salesman from Lumberman's who sold the Hardy Plank siding was also present at the site during the punch list work. Pennebaker also brought in a professional cleaning crew on October 19,

¹⁰ *Id.*, pg. 1

¹¹ Trial Exhibit 2, Defendant's Notebook, Doc. #7, pg. 1-2

2004 to clean the house. Nothstein made no objections to the work at that time.¹²

A post-dated check dated November 6, 2004 in the amount of \$25,000.00 was received by counsel for Pennebaker from Nothstein on November 1, 2004. Accompanying the check was a letter from Nothstein, himself, directing Pennebaker's counsel to "not cash this check until I get the punch list complete" and stating that he "will fund this account when [Pennebaker] finish[es] the work" and that he "will send the \$3,000.00 when list complete."¹³ Although no such notice has been provided when Pennebaker was on site, that letter also contained a list of items that Nothstein asserted remained incomplete.¹⁴

By letter dated November 5, 2004, Pennebaker, through counsel, informed Nothstein that the items identified in the letter accompanying that check, in each instance, were performed in a workmanlike manner or else were work outside the punch-list or were impracticable for reasons beyond Pennebaker's control.¹⁵ On November 9, 2004, counsel for Pennebaker received a check dated November 8, 2004 for the remaining

¹² Verbatim Report of Proceedings, Nothstein, Vol. II, 11/16/07, filed 12/3/07, pg. 53-54

¹³ Trial Exhibit 2, Defendant's Notebook, Doc. #8, pg. 1

¹⁴ *Id.*, pg. 1-3

¹⁵ Trial Exhibit 2, Defendant's Notebook, Doc. #9, pg. 1

\$3,000.00 unaccompanied by any correspondence or note.¹⁶ Nothstein also funded the \$25,000.00 check. Before depositing the checks, counsel for Pennebaker confirmed that the matter was resolved. Counsel for Nothstein acknowledged that the matter was resolved and authorized Pennebaker to cash the checks. Pennebaker then allowed the release of its lien to be filed.¹⁷

On or about September 27, 2005, nearly a year later, Nothstein filed a lawsuit against Pennebaker. Nothstein's lawsuit asserted that Pennebaker failed to complete the punch list, failed to resolve the "Hardy Plank issue," and that Pennebaker's construction work was not "performed in a workmanlike manner," all in breach of the Agreement.¹⁸

At trial, Judge Pro Tempore Peterson did not apply the legal doctrine of "accord and satisfaction" and allowed Nothstein to undo the settlement. Judge Peterson denied almost all of Nothstein's claims but granted judgment for Nothstein on a couple of items.¹⁹ Although the settlement agreement required that a Hardy Plank representative must determine whether any repairs to the siding were necessary²⁰, Judge Peterson substituted his own judicial opinion, rewrote the agreement, and

¹⁶ Trial Exhibit 2, Defendant's Notebook, Doc. #10, pg. 1

¹⁷ Trial Exhibit 2, Defendant's Notebook, Doc. #11, pg. 1

¹⁸ Trial Exhibit 2, Defendant's Notebook, Doc. #1, pg. 1-4

¹⁹ CP 54-58

²⁰ Trial Exhibit 2, Defendant's Notebook, Doc. #6, pg. 1

required that Pennebaker pay enough money to Nothstein to paint the exterior of the house. Although Appellant Pennebaker had prevailed on almost all the claim items advanced by Nothstein, Judge Peterson did not give Pennebaker a fee award and instead provided a fee award for Nothstein.²¹

IV. AUTHORITY

Out-of-court settlements are binding contracts and it would severely upset our legal system if parties were allowed to “undo” their out-of-court settlements. The trial court’s decision below needs to be reversed.

A. The Agreement was fully performed by the Parties based on the clear and unambiguous requirements of the Agreement as intended by the Parties.

Viewing the clear and unambiguous language of the Agreement (requiring \$28,000 payment by Nothstein provided Pennebaker completes the punch list) in light of the fact that Nothstein paid \$28,000 after Pennebaker completed the punch list, the Agreement was fully performed.

Settlement agreements are contracts. *Stottlemyre v. Reed*, 35 Wash. App. 169, 171, 665 P.2d 1383 (1983). “In construing the contract, this court must first look to the language of the agreement...” *Hadley v. Cowen*, 60 Wash. App. 433, 438, 804 P.2d 1271 (1991). “The court must

²¹ CP 54-58

enforce the contract as written if the language is clear and unambiguous.”
WPUDUS v. PUD No. 1 of Clallam County, 112 Wash.2d 1, 10, 771 P.2d
701 (1989).

Here, the Agreement clearly and unambiguously only required Nothstein to pay the \$28,000.00 settlement amount “provided punch list terms complete.” A condition precedent to Nothstein’s payment obligation, then, is the completed punch list by Pennebaker. Pennebaker completed all the items on the punch list except for those items whose completion was hindered by circumstances beyond Pennebaker’s control, all of which was explained in writing to Nothstein. Thereafter, Nothstein paid the \$28,000.00. Interpreting the Agreement as written, Nothstein’s \$28,000.00 payment indicates satisfaction of the condition precedent, *i.e.* completion of the punch list by Pennebaker.

B. There was an accord and satisfaction of the claims asserted by Nothstein in this lawsuit.

“An accord and satisfaction consists of: (1) a bona fide dispute; (2) an agreement to settle that dispute; and (3) performance of that agreement.” *Ward v. Richards & Rossano, Inc.*, 51 Wash. App. 423, 429, 754 P.2d 120 (1988); See also *St. John Medical Center v. State, Department of Social and Health Services*, 110 Wash. App. 51, 69, 38 P.3d 383 (2002) (“The elements of a satisfaction and accord are: (1) a

bona fide dispute, (2) an agreement to settle that dispute, and (3) performance of that agreement.”). A “bona fide dispute” requires that:

the claim underlying the dispute must be made in good faith. A claimant must do more than make a bald assertion of a claim. Rather, the claimant must have a bona fide belief in the validity of his or her position with respect to the claim.

Ward, 51 Wash. App. at 429.

Those elements were all satisfied here. Pennebaker took a crew of workers out to the house to complete the punch list. Nothstein did not voice any concerns or objections on the work completed that day or afterward until he tendered his unfunded \$25,000.00 check. Nothstein indicated that he would fund the check and pay the remaining \$3,000 when the punch list work was complete. Pennebaker, through counsel, then informed Nothstein in writing that his complaints concerned items that were either not on the list or were impossible because of conditions outside of Pennebaker’s control (i.e., “bona fide” dispute). Then, without further objection, Nothstein funded the \$25,000.00 and tendered the remaining \$3,000.00.

The Agreement says that the \$28,000 was to be paid when the punch list was completed. Nothstein indicated separately that he would pay the \$28,000 when the punch list was completed. Nothstein paid the \$28,000, thereby indicating his agreement that the punch list was

completed. Pennebaker then released its lien on the property. Accordingly, the Agreement was fully performed and performance was accepted by the parties, satisfying the third element for an accord and satisfaction.

C. Under the terms of the Agreement, Pennebaker is entitled to its reasonable attorney's fees as the prevailing party in a lawsuit to enforce the terms of the Agreement.

As noted above, item 6 of the Agreement provides that the “[p]revailing party in litigation to enforce this settlement agreement is entitled to reasonable attorney’s fees.” Attorney fees are recoverable when authorized by contract. *See Mehlenbacher v. DeMont*, 103 Wn. App. 240, 244, 11 P.3d 871 (2000). Further: “In any action on a contract which allows attorney fees incurred to enforce the contract provision, attorney fees should be awarded to the ‘prevailing party.’ RCW 4.84.330. Our courts have defined “prevailing party”:

That, in turn, has been interpreted to mean the party who substantially prevailed. *Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290, *rev. denied*, 111 Wn.2d 1013 (1988). Accordingly, if both parties prevail on a major issue, neither is a prevailing party. *Wesche v. Martin*, 64 Wn. App. 1, 13, 822 P.2d 812 (1992); *Marine Enters.*, 50 Wn. App. At 773.

Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).

Our courts have confirmed that a party such as Respondent-Plaintiff may obtain judgment on only limited grounds and thereby leave the Appellant-Defendant as the substantially prevailing party. *Richter v. Trimberger*, 50 Wn. App. 780, 783-84, 750 P.2d 1279 (1988) (awarding attorney fees to defendant while awarding a partial judgment to plaintiff). At the very least, the trial court below was obligated to utilize the Proportionality Approach. The dispute below was similar to a holding issued in a case where a plaintiff prevailed on only 2 of 12 different claims. *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993). In that authority: “[T]he court held that concluding the plaintiff had prevailed was unjust when the defendant successfully defended against the majority of claims.” *Id.* at 916-17. Likewise, it was unjust here to award Plaintiff fees without applying the Proportionality Approach.

We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon.

Id. at 917. That law is well established:

In situations such as the one at bar, where one claim constitutes two-thirds of an action and the other claim one-third, if each party prevails on an issue, the proportionality approach is the only approach that provides a fair determination of the fee award. Because in these situations, ‘the question of which party has substantially

prevailed becomes extremely subjective and difficult to assess,' the proportionality approach is appropriate in all contract and lease cases where multiple distinct and severable claims are at issue.

JDFJ Corp. v. International Raceway, Inc., 97 Wn.App. 1, 8-9, 970 P.2d 343 (1999). Even with the errors of law made by the trial court, Respondent-Plaintiff prevailed on only 7% of the claims pursued. Under the applicable caselaw, Appellant-Respondent was the substantially prevailing party.

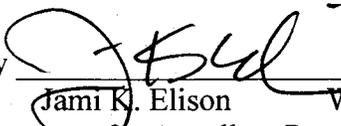
V. CONCLUSION

The trial court erred by allowing Respondent-Plaintiff to undo a settlement agreement after obtaining the benefits of that agreement. The trial court erred by allowing a partial judgment for the cost of painting the house when there is no evidence that a Hardy Plank representative ever determined that the siding was installed defectively. The trial court erred by not allowing fees to Appellant-Defendant even after Appellant-Defendant substantially prevailed. Appellant-Defendant respectfully requests that his Court of Appeals reverse the decision below.

DATED this 30th day of March, 2009.

MARSTON ELISON, PLLC

By


Jami K. Elison WSBA # 31007
Attorneys for Appellant Pennebaker
Construction Services, Inc.

NO. 38637-2-II

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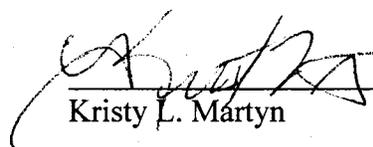
Respondent.

PROOF OF SERVICE

I certify under penalty of perjury that on the 30th day of March,
2009, I served a copy of Appellant's Brief via U.S. Mail on the following:

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Dated at Redmond, Washington this 30th day of March, 2009.



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