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COURT OF APPEALS
DIVISION II

10 JAN 20 PM 12:00

STATE OF WASHINGTON
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No. 39766-8-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

RON COLEMAN d/b/a COLEMAN AND SONS
CONSTRUCTION
Plaintiff/Respondent,

v.

DAVID AND VIRGINIA MILNE, et. al.,
Defendants/Appellants,

APPELLANTS' REPLY BRIEF

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ARGUMENT AND AUTHORITY IN REPLY
TO RESPONDENT'S BRIEF

A. Milne's evidence was competent and admissible and raised genuine issues of material fact. Coleman asserts that the declarations filed in opposition to Coleman's motion for summary judgment were conclusory, inadmissible and did not raise any genuine issue of material fact. See Respondent's Brief, pages 5-6.

In opposition to Coleman's motion for summary judgment, Milne submitted his declaration stating that the consideration for his signature on the promissory note was Coleman's promise to release the materialmens lien filed against the property of David Alan Development, LLC ("DAD") and for Coleman's promise to return to work and complete the development pursuant to the Amended Agreement. Coleman argues that that testimony contradicts the terms of the Amended Agreement and that Milne's testimony is not admissible to vary the terms of the agreement, citing *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P.2d 222 (1990). Coleman is wrong.

Proof of the real consideration, or lack of it, is an exception to the general rule that oral or extrinsic evidence cannot be asserted to vary the terms of a written instrument. Recitals of consideration in a written instrument are not conclusive. It is competent to inquire into the consideration and show, by parol evidence, the real or true consideration. It may be

shown by parol evidence that the real consideration was greater than that which was expressed in the instrument, or that there was some other consideration in addition to that set forth. [Citations omitted]

Crow v. Crow, 66 Wn. 2d 108, 110, 410 P.2d 328 (1965).

In his declaration, David Milne testified that the consideration for his signature on the promissory note included Coleman's promise to return to work and complete the construction of the plat in accordance with the approved construction plans. (CP 73). That evidence was clearly admissible and to the extent it contradicted Coleman's assertions, it created a genuine issue of material fact and summary judgment should not have been granted. Coleman did not complete the construction of the plat in accordance with the plans (CP 73-73; CP 75; CP 96-103). Milne contended that those failures constituted a failure of consideration for the promissory note, resulting in an unenforceable promissory note. *Burton v. Dunn*, 55 Wn. 2d 368, 347 P.2d 1068 (1960).

B. Coleman's own inconsistent statements raise genuine issues of material fact. Coleman argues in his brief that the promissory note was given only in exchange for the release of the lien which Coleman filed based on disputed invoices. See Respondent's Brief pages 2-3. ("In exchange for \$33,176.67 in certified funds and a personal promissory note from David Milne for \$63,733.00 Coleman agreed to release his lien.")

However, in Coleman's motion for summary judgment, Coleman stated: "In exchange for the delivery of certified funds in the amount of \$33,176.67 and a personal promissory note from David Milne for \$63,733.00 Coleman agreed to release his lien, **AND** return to work. (CP 31). (Emphasis Added).

Coleman argues that the promissory note and the Amended Agreement were separate transactions. According to Coleman, the promissory note given by Milne to Coleman was the consideration for Coleman's release of the materialmens lien and the Amended Agreement was a separate transaction between Coleman and DAD for future work. The two were not related. However, that is not what the Amended Agreement says. Paragraph 2 of the Amended Agreement (CP 43-48) provides:

2. **Lien Release.** Upon execution of this Amended Contract, Contractor shall cause a lien release in the form previously provided

Clearly it was the execution of the Amended Agreement by the Owner, DAD, that was part of the consideration for Coleman's agreement to release the lien, just as Coleman's agreement to release the lien and return to work were part of the consideration for Milne's signature on the promissory note. The release of the lien, Coleman's agreement to return to work and his promise to complete the project in accordance with the

Preliminary Plan all were the consideration for Milne to sign the promissory note. Coleman did not complete the plat in accordance with the Preliminary Plan and the consideration for the promissory note failed.

C. It was propert for Milne to raise Coleman's failure to complete the plat as a defense to payment of the promissory note.

Coleman asserts that Milne was not a party to the Amended Agreement and therefor cannot raise Coleman's breach of that agreement as a defense to Coleman's suit to collect the note. In support of that argument, Coleman cites *Emmerson v. Beckett*, 30 Wn. App. 456, 635 P.2d 747 (1981). That case is inapposite. In that case, Beckett had signed a promissory note in favor of Emmerson for the down payment on the purchase of an apartment building from Emmerson by a limited partnership, Sherwood Properties, of which Beckett was a partner. Emmerson sold the apartment building to Sherwood Properties. When Beckett did not pay the amounts owing under the note, Emmerson sued Beckett to collect the money due under the promissory note. Beckett claimed that he had signed the note based on representations by Emmerson that the coin-operated laundry machines in the apartment complex would average \$150.00 per month and in defense of Emmerson's lawsuit on the note, Beckett alleged estoppel, failure of consideration, misrepresentation, payment and waiver.

The trial court ruled that the promissory note given as down payment on a real estate contract was separate and distinct from the real estate contract itself and the misrepresentation claims of Beckett did not affect the enforceability of the note. The Court of Appeals reasoned that Beckett could not raise the misrepresentation defense in Emmerson's lawsuit because Sherwood Properties was not a party to Emmerson's lawsuit and Sherwood Properties had never asked for or obtained rescission of the contract based on any misrepresentation.

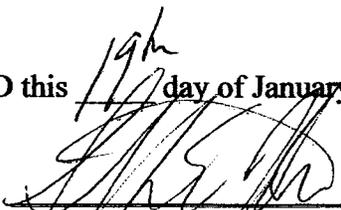
Such is not the case here. David Alan Development, LLC is a party to this lawsuit and has asserted claims against Coleman based on Coleman's failure to complete the construction in accordance with the parties agreement. (CP 21-25). Moreover, in *Emmerson*, it was clear that the promissory note was given in order that Emmerson would sell the apartment complex to Beckett's partnership. That was done. Here, Milne contends that the promissory note was not given merely to obtain a release of the materialmens lien, but also to insure that Coleman would return to work and complete the project. That was not done and Milne's defense to Coleman's suit on the promissory note was based on a failure of that consideration, relying on *Burton v. Dunn*, 55 Wn. 2d 368, 347 P.2d 1065 (1960).

D. Milne's execution of the promissory note was not an accord and satisfaction. Coleman asserts that Milne's delivery of the promissory note was an accord and satisfaction of the amounts owed on the past due invoices. However, it is undisputed that Milne had no personal liability to pay the past invoices. See Respondent's Brief, page 9. Only the owner, David Alan Development, LLC, was potentially liable for the past due invoices and DAD was the only party that could enter into an accord and satisfaction. Coleman wants the court to believe that Milne and Coleman entered into an accord and satisfaction of the past due invoices and Milne agreed to pay them, part in certified funds and part by a promissory note and that was that. Then, according to Coleman's argument, Coleman and DAD entered into the Amended Agreement to control the future work on the project. This does not make any sense and is contrary to the clear terms of the Amended Agreement. Milne simply had no reason to pay or agree to pay the obligations of DAD without some benefit to him. The only benefit would be if Coleman returned to work on the project and completed it according to the approved plans. That was the consideration for Milne agreeing to pay the past due invoices and when Coleman failed to complete the work on the project in accordance with the plans, the consideration for Milne's promissory note failed.

IV. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, Milne submits that there were genuine issues of material fact concerning the nature of the consideration for the promissory note and whether there was a failure of that consideration. It was error for the trial court to conclude that no genuine issues of material fact existed and to enter judgment on the promissory note. The judgment should be reversed and the matter remanded for trial on these issues.

RESPECTFULLY SUBMITTED this ^{19th} day of January, 2010.



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DECLARATION OF MAILING

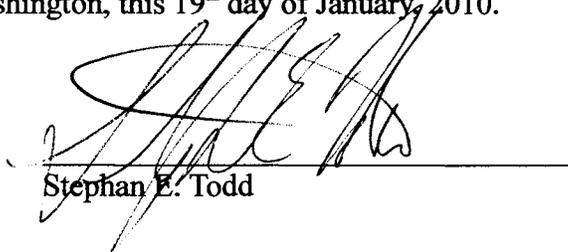
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On Jan 19, 2010, the undersigned cause to be sent by first class mail, with postage prepaid in the mails of the United States at Mill Creek, Washington a copy of the Appellant's Rely Brief to the following:

David P. Horton
3212 NW Byron Street, Suite 104
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Attorney for Respondent

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Mill Creek, Washington, this 19th day of January, 2010.



Stephan E. Todd