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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 329429

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

ISIB, LLC

Respondent

v.

MARLENA HIMES,

Appellant

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal is the attempt of appellant Marlena Himes to collaterally attack an agreement she entered into to settle previous litigation with respondent ISIB, LLC (ISIB). In the previous litigation, ISIB, as the holder of a promissory note secured by Ms. Himes' manufactured home, brought an action for default of the note and replevin of the home. To settle the litigation, ISIB agreed to pay off Ms. Himes' delinquent lot rent and enter into a new promissory note in order to dismiss the litigation. Ms. Himes agreed, signed the new promissory note, and ISIB dismissed the litigation.

When Ms. Himes went into default on the new promissory note, ISIB initiated a new action seeking to enforce the promissory note. Ms. Himes appeared and defended arguing that the settlement was void because the originator of the promissory note from the previous litigation allegedly did not use the proper format for a retail installment contract. Ms. Himes put no evidence before the court and moved for summary judgment. The court properly denied Ms. Himes' motion for summary judgment and granted summary judgment to ISIB.

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II. STATEMENT OF THE CASE

Factual History

On July 19, 2013, respondent ISIB, LLC initiated a lawsuit against appellant Marlena Himes for failure to make payments on a promissory note. *CP 51; 55-58*. The promissory note was purchased from Sun Pacific Homes, LLC by the Isaacson Living Trust and thereafter assigned by the Trust to ISIB. *CP 51; 53*. The promissory note was secured by a perfected security interest in Ms. Himes' manufactured home. *CP 62*. Concurrent to the litigation, Ms. Himes' mobile home park (The Hills) was threatening eviction due to Ms. Himes' failure to pay rent for her lot. *CP 51*.

ISIB and Ms. Himes agreed to a settlement in the matter. *Id*. Under the terms of the agreement, ISIB agreed to pay the lot rent owed by Ms. Himes to The Hills and dismiss the court action. *Id*. In exchange, Ms. Himes entered into a new promissory note which included monies paid by ISIB to bring Ms. Himes current on her lot rent. *Id; CP 64-68*. As part of the settlement and included in the new promissory note, Ms. Himes agreed as follows:

This contract shall constitute a novation of the June 12, 2007, contract for the purchase of a 1999 Fleetwood Manufactured Home, 27 x 66, Serial #ORFLX34A26263GH13, and all subsequent contracts regarding the same with the undersigned.

CP 64. After a short period of time, Ms. Himes went into default under the promissory note for failure to make payments. *CP 51.*

Procedural History

On January 30, 2014, ISIB initiated an action for breach of contract and replevin against Ms. Himes due to her failure to make timely payments on the 2013 promissory note. *CP 1-4.* Ms. Himes appeared through counsel and filed a verified answer, asserting affirmative defenses and counterclaims. *CP 11-21.* Ms. Himes thereafter substituted an unverified amended answer with defenses and counterclaims. *CP 258-270.* The nature of the defense/counterclaim was that non-party Sun Pacific Homes, LLC failed to include the required warnings in the retail installment contract in which Ms. Himes purchased her manufactured home. *CP 260.*

ISIB moved for summary judgment and Ms. Himes cross-moved for partial summary judgment. *CP 39; 204.* Ms. Himes did not support her motion with any supporting declaration or other admissible evidence. *CP 207; RP 5.* As argued at the hearing:

[B]oth in opposition to our motion for summary judgment and in their own motion for partial summary judgment there are no facts put by Ms. Himes in front of this Court to support their request of relief. There is no declaration, there are no affidavits, they refer to the pleadings, they referred to an answer and some counterclaims but they

haven't put any sworn facts before the Court for this Court to make any determinations about there being material facts to not have summary judgment entered in favor of plaintiff today.

RP 5-6. The court denied Ms. Himes' motion for partial summary judgment and granted summary judgment to ISIB. *CP 295-96.* This appeal followed.

III. COUNTER-STATEMENT OF THE ISSUES

1. Whether Ms. Himes Failed To Present Any Evidence In Support Of Her Motion For Partial Summary Judgment And In Opposition To ISIB's Motion For Summary Judgment.
2. Whether The Trial Court Properly Granted Summary Judgment Because The Settlement Agreement Novated All Prior Agreements Between The Parties.
3. Whether The Court Should Award ISIB Its Attorney Fees On Appeal.

IV. ARGUMENT

The Court should affirm the grant of summary judgment to ISIB because the 2013 settlement between the parties expressly novated any and all prior contracts and agreements between the parties. Ms. Himes put no evidence before the trial court to establish any facts, let alone facts that would support any outcome other than the court granting summary judgment in favor of ISIB. Therefore, this Court should affirm the trial

court's decision granting judgment in favor of ISIB and dismissing Ms. Himes' counterclaims.

A. This Court Should Affirm The Granting Of Summary Judgment In Favor Of ISIB Because While The Standard Of Review Is De Novo, Ms. Himes Failed To Put Forth Any Facts In Support Of Her Position Or In Opposition Of ISIB's Position As Required By CR 56(e).

The Court should affirm the judgment of the trial court because Ms. Himes failed to put forth evidence in support of her position or in opposition to ISIB's motion for summary judgment. The Court reviews summary judgment de novo. *Hanson Indus. Inc. v. Kutschkau*, 158 Wn. App. 278, 286, 239 P.3d 367, 371 (2010), *as amended* (Nov. 18, 2010). At a summary judgment hearing, it is incumbent on the opposing party to specifically "set forth such facts as would be admissible in evidence" to avoid summary judgment. CR 56(e); *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466, 468 (1974). A party cannot avoid summary judgment by relying on allegations made in its initial pleading. *Johnson v. Safeway Stores, Inc.*, 67 Wn. App. 10, 13, 833 P.2d 388, 389 (1992).

In response to ISIB's motion for summary judgment and in her own motion for partial summary judgment, Ms. Himes improperly relied "on the pleadings and other filings on record in this matter, together with

verified exhibits” without setting forth any facts by affidavit as required by CR 56(e). *CP 207*. While there is an unpublished opinion addressing the use of a verified pleading in the context of summary judgment, Respondent was unable to locate authority addressing this direct issue.

Regardless:

CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on personal knowledge and set forth such facts as would be admissible in evidence. The affiant must affirmatively show competence to testify to the matters stated. It is not enough that the affiant be ‘aware of’ or be ‘familiar with’ the matter; personal knowledge is required.

Marks v. Benson, 62 Wn. App. 178, 182, 813 P.2d 180, 182 (1991). Here, the verified answer asserts the facts “to the best of my knowledge and belief.” *CP 21*. There is no indication as to which facts are asserted upon belief or any indication that Ms. Himes is competent to testify to the asserted facts. *See CP 11-21; Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash. 2d 874, 880, 431 P.2d 216, 220 (1967) (pleadings made upon information and belief cannot be considered upon summary judgment).

The impropriety of relying on the verified answer was compounded by the fact that three months prior to moving for summary judgment, Ms. Himes substituted her verified answer for an amended and unverified answer. *CP 258-269*. The filing “of an amended complaint constitute[s] an abandonment of the original complaint, and the action

rests on the amended complaint.” *Skidmore v. Pac. Creditors*, 18 Wn.2d 157, 160, 138 P.2d 664, 666 (1943). When this matter came to hearing before the trial court on November 7, 2014, there was nothing before the court to support Ms. Himes’ motion or her opposition to ISIB’s motion. *See RP 5-6*. So while this Court must view disputed facts in favor of Ms. Himes, in this case Ms. Himes put forth no admissible evidence in support of her position and consequently the facts are undisputed. *See also* RAP 9.12 (“order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court”); *CP 256-57* (neither the answer nor the amended answer are listed in the order granting summary judgment). Therefore, the Court should affirm the granting of summary judgment in favor of ISIB.

B. The Court Should Affirm The Granting Of Summary Judgment To ISIB Because Any Defenses Related To The Promissory Note Subject To Previous Litigation Were Novated When Ms. Himes Settled The Previous Litigation By Entering A New Promissory Note.

The Court should affirm the trial court’s grant of summary judgment to ISIB because Ms. Himes is seeking to collaterally attack the settlement she agreed to in order to resolve previous litigation between the parties. Courts interpret unambiguous contracts by affording them their plain meaning. *Dice v. City of Montesano*, 131 Wn. App. 675, 685, 128

P.3d 1253, 1258 (2006). “[T]he law favors the private settlement of disputes and is inclined to view them with finality.” *Stottlemire v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383, 1386 (1983) (citing *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978); see also *Gill v. Waggoner*, 65 Wn. App. 272, 275–76, 828 P.2d 55 (1992) (even when a party made a mistake in an offer of settlement, if the offer is accepted it is binding on the parties).

In *Waggoner*, Roy Gill was injured in an automobile accident by a driver insured by CSAA. *Waggoner*, 65 Wn. App. at 274. Mr. Gill retained an attorney who made a settlement demand of \$37,156.00. *Id.* Joseph Waggoner, an independent insurance adjuster, was authorized by CSAA to make a settlement offer of \$3,500. *Id.* However, when CSAA conveyed this to Mr. Waggoner, he understood CSAA’s authorization to offer \$35,000.00. *Id.* at 275. Mr. Gill accepted the offer. *Id.* After accepting the offer, Mr. Waggoner and CSAA sought to withdraw the offer and Mr. Gill in turn brought an action to enforce the settlement. *Id.* The trial court granted Mr. Gill summary judgment. *Id.* On appeal, the court affirmed and rejected the argument that one party’s mistaken understanding prevented a binding settlement from occurring. *Id.* at 277. Notably, a short period of turn-around does not leave a previous settlement

open to collateral attack in a subsequent proceeding. *See In re Marriage of Burkey*, 36 Wn. App. 487, 488, 675 P.2d 619, 620 (1984).

Here, ISIB and Ms. Himes had previously engaged in litigation regarding the 2007 promissory note. *CP 51; 55-58*. In settling the previous litigation, ISIB agreed to dismiss the lawsuit and pay the back-rent Ms. Himes owed to The Hills Mobile Home Park so that she would not be evicted. *CP 51*. In exchange, Ms. Himes executed a new promissory note, which included an express novation provision:

This contract shall constitute a novation of the June 12, 2007, contract for the purchase of a 1999 Fleetwood Manufactured Home, 27 x 66, Serial #ORFLX34A26263GH13, and all subsequent contracts regarding the same with the undersigned.

CP 64. Ms. Himes' argument that this language is ambiguous is without merit. Ms. Himes has put nothing forth to dispute the evidence that ISIB purchased the promissory note from Sun Pacific, not the underlying contract. *CP 60; see also Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 399, 317 P.3d 1103, 1106 (2014) (a promissory note and the underlying contract are separate instruments).

A novation is an agreement between two contracting parties in which the parties agree to supersede all previous contracts between the parties.

The doctrine of novation is so well understood that it hardly seems necessary to cite authorities to define it. Novation means substitution. It may be either the substitution of a new obligation for an old one between the same parties with intent to displace the old obligation with the new...

Sutter v. Moore Inv. Co., 30 Wash. 333, 336, 70 P. 746, 747 (1902) (emphasis added). In a novation “[t]he subsequent contract becomes a substitute for the earlier contract, and is the only agreement between the parties upon that subject.” 25 Wash. Prac., Contract Law And Practice § 11:3 (2d ed.) (citing *Higgins v. Stafford*, 123 Wn.2d 160, 866 P.2d 31 (1994)). In the event of a breach, any action would have to be brought on the substituted agreement. *Id* (citing Restatement (Second) of Contracts, § 279(2) (1981)).

The terms of a binding agreement between parties are evidenced by their objective manifestation of mutual intent. A fundamental principle of Washington contract law is that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. Where a party has an opportunity to examine the contract prior to his agreement, and where such agreement is not induced through fraud or coercion, he may not claim ignorance of the contract's terms. The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.

Washington Fed. Sav. & Loan Ass'n v. Alsager, 165 Wn. App. 10, 14, 266 P.3d 905, 907 (2011) (internal quotations omitted).

Ms. Himes' focus on RCW 63.14 and whether ISIB could be a holder in due course is understandable considering the remedies and because it is low-hanging fruit. However, this is ultimately nothing more than a red herring. Ms. Himes is correct that the holder of a promissory note arising from a retail installment contract is not a holder in due course. This arose at the trial court in part because Ms. Himes failed to distinguish between a promissory note and an underlying contract, (*see Alpacas of Am*, 179 Wn. App. at 399) and because Ms. Himes did not raise RCW § 63.14.020 until oral argument. *Compare RP 7 with CP 70-75 and CP 204-15; see also White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4, 8 (1991) (a party cannot raise new issues in rebuttal during a summary judgment proceeding).

Aside from her attempt to rebut the holder in due course argument, Ms. Himes' position quickly falls apart. First, RCW § 63.14.160 makes it clear in what circumstances remedies under the chapter cannot be waived: (1) before the time of the purchase; (2) at the time of the purchase; or (3) as part of a future purchase. The 2013 settlement and promissory note do not fall into any of these three categories. Next, RCW § 63.14.158 does not define what constitutes a refinancing agreement, but the provision applies only to the holder of a retail installment contract which is defined as "a contract [...] entered into or performed in this state for a retail

installment transaction.” RCW § 63.14.010(11). The 2013 promissory note was not related to a retail sale. It was entered into to settle litigation and included sums advanced by ISIB to discontinue her eviction from the mobile home park. *CP 51*.

Finally, the remedy under RCW § 63.14.180 for a contract that does not comply with the chapter is that the party is unable to collect interest on the principal debt obligation. RCW § 63.14.180. Under the 2013 promissory note, the principal balance set forth in the note is \$17,503.04 and Ms. Himes defaulted almost immediately on this obligation. This means that she paid little, if any, interest which she could recoup under the statute.

Essentially, Ms. Himes is asking this Court to: (1) ignore the fact that retail installment contract was never properly put forth before the trial court for summary judgment; (2) ignore the fact that Ms. Himes agreed to novate all previous agreements as part of a settlement; and (3) ignore the fact that the remedy under RCW § 63.14.180 is limited to disallowing the collection of interest when Ms. Himes made little to no payments on interest for the 2013 promissory note. Whether Ms. Himes could have asserted RCW 63.14 as a defense in the previous litigation is simply not a question that is before this Court. Therefore, the Court should affirm the granting of summary judgment in favor of ISIB because Ms. Himes cannot

collaterally attack the settlement resulting from the previous litigation in this action.

C. The Court Should Award ISIB Its Costs And Attorney Fees On Appeal.

Pursuant to RAP 18.1, ISIB is requesting reasonable attorney fees and expenses related to the appeal. Under RAP 18.1, the court may award attorney fees as allowed by applicable law. *See* RAP 18.1. Attorney fees provisions contained in contracts are generally enforceable. *See* RCW § 4.84.330. At the trial court level, ISIB initiated this action as plaintiff regarding Ms. Himes' default under a promissory note. *CP 1-4*. The terms of the promissory note provide for the collection of costs and reasonable attorney fees. *CP 64*. Therefore, the Court should award ISIB its costs and attorney fees on appeal.

V. CONCLUSION

The Court should affirm the granting of summary judgment in favor of ISIB and denying Ms. Himes' motion for partial summary judgment. Ms. Himes did not support her motion with *any* evidence, let alone admissible evidence to establish the underlying facts as required by CR 56(e). Further, Ms. Himes voluntarily novated all prior agreements between the parties in settling previous litigation and she cannot now

collaterally attack the settlement because she failed to make payments on the promissory note. Therefore, the trial court decision should be affirmed.

DATED this 17th day of April, 2015

WALKER HEYE MEEHAN & EISINGER, PLLC
Attorneys for Respondent

By: _____

ERIC B. EISINGER, WSBA #34293

On the 17th day of April, 2015, I served a true copy of:

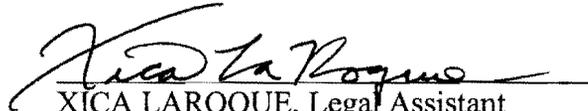
Respondent's Brief

By US First Class Mail and E-mail to:

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I certify the foregoing to be true and correct under the penalty of
perjury under the laws of the State of Washington.

Executed this 17th day of April, 2015, at Richland, Washington.


XICA LAROQUE, Legal Assistant