No. 97911-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 78847-7-1)

ALEKSEY KOZLOV and IRINA KOZLOV, husband and wife,

Petitioners,

v.

BROOKHILL LANDSCAPE AND CONSTRUCTION, LLC, a Washington limited liability company,

Respondent.

PETITION FOR REVIEW

R. Shawn Griggs, WSBA No. 30710
1818 Westlake Avenue North, Suite 423
Seattle, Washington 98109
Telephone: (206) 745-3805
Facsimile: (206) 745-3806

Attorney for Petitioners
Aleksey and Irina Kozlov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

This case raises the unique question of whether the return of a refundable construction deposit is sufficient consideration for accord and satisfaction. Superficially, the transaction between these parties – contractor Brookhill Landscape and Construction, LLC (hereinafter, "Brookhill"), on one hand, and homeowners Aleksey and Irina Kozlov (hereinafter, the "Kozlovs"), on the other – appears to fall within the established parameters of accord and satisfaction: dissatisfied with the work being performed by Brookhill, the Kozlovs terminated its services and requested the refund of their latest deposit amount; but instead of refunding the full deposit amount, Brookhill made deductions on a time and materials basis, returning just over twenty percent of the deposit amount with a notation that the refund was "[f]ull and final payment in complete satisfaction of all amounts due and owing." CP at 58. The dispute is plain, a check is written with a notation that it is tendered in satisfaction of debts owed, and the Kozlovs deposit the check. On that basis the trial court granted summary judgment and dismissed the case. RP at 30—31. And the Court of Appeals affirmed.

But there is more to this case. For while there is a substantial body of case law standing for the proposition that the payment of a lesser sum in settlement of a larger contested amount can effect an accord and satisfaction, none of that case law addresses the obvious twist of this case – the fact that the "payment" made by Brookhill was not in fact a payment

of its own funds, but instead the return of a refundable deposit paid by the Kozlovs and which Brookhill was independently compelled to return. This distinction is the basis for the Kozlovs' assertion that a mechanical application of the black letter law of accord and satisfaction fails in this instance. Instead, the legal and logical foundations on which the doctrine of accord and satisfaction is founded mandate a contrary result and distinguish this case from all others cited by both parties in the proceedings below. Specifically, because the sum tendered by Brookhill in attempted satisfaction of "all amounts due and owing" was a sum that Brookhill acknowledged it was independently obliged to return to the Kozlovs, consideration for the purported accord is lacking as a matter of law, and the order ruling below should be reversed. Accordingly, petitioner respectfully request that this Court accept discretionary review of the case under RAP 13.4.

II. IDENTITY OF THE PETITIONERS

The petitioners are Aleksey Kozlov and Irina Kozlov.

III. COURT OF APPEALS DECISION

On October 28, 2019, the Court of Appeals, Division I, issued a decision affirming the trial court's grant of summary judgment dismissing the Kozlovs' claims against Brookhill Landscape and Construction, LLC (App. 1—6).

IV. ISSUE PRESENTED FOR REVIEW

Whether the performance of an admitted obligation to return the unearned portion of a construction deposit can constitute consideration for an accord and satisfaction of larger unliquidated claims against a contractor.

V. STATEMENT OF THE CASE

A. Factual Background

On December 6, 2015, Aleksey and Irina Kozlov contracted with Brookhill Landscape and Construction, LLC (hereinafter "Brookhill") for substantial landscape renovations of their newly-purchased home in Clyde Hill, Washington. CP at 69, ¶2. The original estimate for the scope of work contemplated by the Kozlov-Brookhill contract was $343,000.00, not including applicable sales tax. *Id.*; *see also* CP at 41—42. At the time of signing, the Kozlovs paid an initial deposit of $137,200.00. CP at 69, ¶2. This deposit was specifically earmarked to "pay for the ordering of materials and supplies to get started." CP at 42.

By March 27, 2016, the scope of the project had expanded, pushing the budget to $420,000.00. CP at 70, ¶3; CP at 44. The revisions to the project were reflected in an amended quote dated March 27, 2016, and as reflected in this document, all work was supposed to be complete by July 16, 2016. *Id*.; *see also* CP at 73—74.

From the beginning of the project, and at Brookhill's request, the Kozlovs made periodic deposits against which future invoices were

drafted. CP at 70, ¶4. For example, on April 28, 2016, the Kozlovs deposited $100,000 with Brookhill, which was supposed to take the project to fifty-percent completion. *Id*. And on July 16, 2016, Brookhill's principal, Spencer Bowhay requested an additional progress deposit to "carry us to 75%." *Id*.; *see also* CP at 75—76. The Kozlovs made this additional $100,000 deposit per Brookhill's request on or about July 19, 2016. CP at 46—50. It was the Kozlovs' understanding that each of these deposits would be held by Brookhill and applied against future charges when they actually accrued. CP at 69—70, ¶¶ 2, 4.

On July 16, 2016, the project was not complete. CP at 70, ¶5. And in June and July of 2016, the Kozlovs had observed that Brookhill's crew was not regularly showing up on site, and that when they did show up on site, they were insufficiently staffed and/or underequipped to make substantial progress on the project. *Id*. Moreover, as July progressed, Mr. Bowhay refused Mr. Kozlov's requests to meet and discuss the status of the project, and was hostile and combative when pressed to explain the status of the project. *Id*. Ultimately, Mr. Bowhay's poor responsiveness and the lack of progress on site led the Kozlovs to conclude that Brookhill was not capable of completing the project in a timely and workmanlike manner. *Id*. At that point, they terminated the agreement. *Id*.

The Kozlovs sent Brookhill notice of termination on July 27, 2016. CP at 52. In that notice, the Kozlovs demanded the return of their last deposit (made roughly a week earlier) and requested that Brookhill withdraw its personnel and equipment from the Kozlovs' property. *Id*.

The notice also informed Brookhill that the state of the project as being assessed by a third party and that Brookhill would be contacted at a later point to "discuss the balance of funds owed to the Kozlovs." *Id*. Shortly thereafter, Brookhill returned $23,611.25 of the Kozlovs' deposit by check that bore the notation "[f]ull and final payment in complete satisfaction of all amounts due and owing." CP at 58. The check was deposited to the Kozlovs' account without endorsement on or about August 24, 2016. *Id*.

B. Procedural Background

In March of 2018, the Kozlovs filed a lawsuit against Brookhill, alleging damages resulting from Brookhill's failure to perform its obligations under the landscaping contract. CP at 8—14. Brookhill answered on April 11, 2018, and in its answer asserted accord and satisfaction as an affirmative defense. CP at 20, ¶32.

On June 29, 2018, Brookhill lodged a motion for summary judgment, seeking dismissal of the matter under CR 56(c). CP at 25—35. Brookhill's motion for summary judgment relied solely on the doctrine of accord and satisfaction. *Id*. The Kozlovs' opposition, filed on July 16, 2018 (CP at 59—67), similarly dealt exclusively with accord and satisfaction, and narrowed the scope of inquiry to whether or not the deposit refunded by Brookhill could establish satisfaction as a matter of law. CP at 65-66. Brookhill replied on July 23, 2018 (CP at 77—83), and oral argument was held on July 27, 2018.

Immediately following oral argument, the trial court granted Brookhill's motion for summary judgment. CP at 84—85. The basis for

this ruling was articulated in the trial court's oral ruling (RP at 30—31) and expressly incorporated by reference into the order granting summary judgment. CP at 85, li 3—4. Specifically, the trial court concluded that there was a *bona fide* dispute over what Brookhill owed the Kozlovs, rendering the claim unliquidated. RP at 30, li 22. The trial court then concluded that since the claim was unliquidated, Brookhill need not prove independent consideration for the accord, instead ruling that consideration would be inferred from the draft tendered in full payment. RP 30—31.

The Kozlovs appealed the trial court's decision to the Court of Appeals, Division I. On October 28, 2019, the Court of Appeals, Division I, issued a decision affirming the trial court's grant of summary judgment dismissing the Kozlovs' claims against Brookhill (App. 1—6). In affirming, the Court of Appeals decision relied heavily on language in *Field Lumber v. Petty*, 9 Wn. App. 378, 512 P.2d 764 (1973), concluding that payment of the whole undisputed portion of a larger sum owed (as opposed to an amount less than the undisputed portion) was sufficient consideration for an accord and satisfaction.

VI. ARGUMENT

A. Basic Tenants of Accord and Satisfaction.

Accord and satisfaction is premised in contract and occurs when an implied agreement to compromise a dispute is effected by the express tender and acceptance of performance which is different than that claimed to be due. *See Northwest Motors, Ltd. v. James*, 118 Wn.2d

294, 303, 822 P.2d 280 (1992); *Plywood Marketing Associates v. Astoria Plywood Corporation*, 16 Wn. App, 566, 574, 558 P.2d 283 (1976). When the substitute agreement is consummated, it supersedes the original contract. *Evans v. Columbia Int'l Corp.*, 3 Wn. App. 955, 957, 478 P.2d 785 (1970).

The three elements of accord and satisfaction are: (1) the existence of a bona fide dispute; (2) an agreement to settle the dispute; and (3) performance of the agreement." *Ward v. Richards & Rosano, Inc.*, 51 Wn. App. 423, 429, 754 P.2d 120 (1988); *compare* RCW § 62A.3-311(a)—(b) ("If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument … the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim").[1]

---

[1] RCW § 62A.3-311 does not expressly preempt or otherwise materially modify the long-standing common law in Washington regarding accord and satisfaction which are referenced herein. *See* RCW § 62A.1-103; *see also* RCW § 4.04.010. This is confirmed by the widespread and continued use of common law holdings regarding accord and satisfaction subsequent to the 1993 adoption of RCW § 62A.3-311. *E.g.*, *Jones v. Allstate Ins. Co.*, 146 Wn. 2d 291, 314—15, 45 P.3d 1068 (2002); *U.S. Bank Natl. Ass'n v. Whitney*, 119 Wn. App. 339, 350, 81 P.3d 135 (2003).

Because accord and satisfaction is founded in contract, payment of consideration is a necessary element of any settlement. *Dodd v. Polack, et al*., 63 Wn.2d 828, 830—31, 389 P.2d 289 (1964). (*citing Brear v. Klinker Sand & Gravel Co.*, 60 Wn.2d 443, 374 P.2d 370 (1962); *Trompeter v. United Ins. Co.*, 51 Wn. 2d 133, 316 P.2d 455 (1957); *Boyd-Conlee Co. v. Gillingham*, 44 Wn.2d 152, 266 P.2d 336 (1954); *Meyer v. Strom*, 37 Wn. 2d 818, 226 P.2d 218 (1951); *Plotkin v. Green*, 36 Wn.2d 253, 217 P.2d 610 (1950); *Graham v. New York Life Ins. Co*., 182 Wash. 612, 619, 47 P.2d 1029 (1935); Comment c, 2 RESTATEMENT, CONTRACTS § 417, p. 786; 1 AM. JUR. 2D, Accord and Satisfaction §§ 11-16, p. 309)). In the case of unliquidated disputes, payment of any amount meets this consideration requirement because the amount of indebtedness is contested and the debtor incurs some detriment (*i.e*., the payment of consideration) in conceding the validity of a portion of the debt and paying the same. *Perez, et al. v. Pappas, et al.*, 98 Wn.2d 825, 843—44, 659 P.2d 475 (1983). Where a debt is liquidated or certain, however, payment of that debt cannot serve as consideration because the debtor incurs no detriment in paying that which the debtor is admittedly already obliged to pay. *Kibler v. Frank L. Garrett & Sons, Inc*., 73 Wn.2d. 523, 526, 439 P.2d 416 (1968); *see also Field Lumber*, 9 Wn. App. at 380 (*citing Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 116 P. 289 (1911); *Seattle Investors Syndicate v. West Dependable*

Stores, 177 Wash. 125, 30 P.2d 956 (1934); *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.2d 1029 (1935)); *see also Meyer v. Strom*, 37 Wn.2d 818, 226 P.2d 218 (1951) (overruled, in part, on other grounds by *Rosellini v. Ranchero*, 83 Wn.2d 268, 517 P.2d 955, 957—58 (1974) ("It has long been the rule in this state that payment of an amount admitted to be due can furnish no consideration for an accord and satisfaction of the entire claim").

In recent years, Washington courts appear to have adopted a broader notion of what constitutes an unliquidated claim. For example, any *bona fide* dispute over the amount of a debt appears to renders that debt unliquidated. *See e.g.*, *Dep't of Fisheries v. JZ Sales Corp.*, 25 Wn. App. 671, 679—80, 610 P.2d 390 (1980) (genuine dispute over applicable fish egg prices rendered dispute unliquidated). Yet the fundamental requirement of consideration remains unchanged – even in the case of an unliquidated or disputed indebtedness, the tender of some sum in compromise of the legitimately contested amount must be made to establish consideration for the accord and satisfaction.

B. Brookhill's return of the unused portion of the Kozlovs' construction deposit cannot constitute consideration for an accord and satisfaction between the parties.

Brookhill claimed an accord and satisfaction that was paid for using the Kozlovs' own money. Specifically, Brookhill asserted that its refund of $23,611.25 in unused construction deposits served as consideration for the purported accord and satisfaction of any claims the

Kozlovs may have regarding Brookhill's work on the project. But Brookhill's obligation to return this amount was independent of any bargain to resolve the potential claims that the Kozlovs may have had. And Brookhill acknowledged its independent obligation to return these funds to the Kozlovs. Accordingly, the refund of $23,611.25 by Brookhill was payment if an amount admitted to be due and cannot be relied upon as consideration for an accord and satisfaction of the entire claim.

1. Brookhill was independently obliged to return unearned construction deposit amounts made by the Kozlovs.

Each deposit made by the Kozlovs was an unearned advance payment against time and materials charges that would accrue and be applied in the future. *See* CP at 69, ¶ 2 (documenting payment of initial $137,200.00 deposit); CP at 70, ¶ 4 (documenting payment of two subsequent deposits of $100,00); CP at 75—76 (correspondence from Brookhill requesting payment of deposit and invoice for "Progress Deposit"); CP at 69—70, ¶¶ 2, 4 (Mr. Kozlov's declaration detailing his understanding that deposit payments would be held by Brookhill and applied against future charges when they actually accrued). Accordingly, and until Brookhill actually incurred time and materials charges, the Kozlovs retained an ownership interest in the funds. *Id*. Insofar as Brookhill was concerned, then, the unearned portions of the Kozlovs' deposits were "property of another." *See State v. Joy*, 121 Wn.2d 333, 341, 851 P.2d 654 (1993) (convictions for theft upheld when contractor retained advances paid for unperformed remodeling projects because

"agreement between the owner and defendant restricted the use of the funds to a specific purpose" and such funds were therefore "property of another" under RCW 9A.56.020). Brookhill was therefore independently obliged to return these funds to the Kozlovs upon termination of the landscaping contract; to have done otherwise may have constituted conversion or theft. *See Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195, 1211 (1985). Accordingly the $23,611.25 deposit amount that Brookhill returned to the Kozlovs was a sum that Brookhill was legally bound to pay (indeed, it was a refund of their own money) and therefore does not constitute consideration under long-standing accord and satisfaction principles.

2. Brookhill admitted its pre-existing obligation to return $23,611.25 in unearned deposit funds to the Kozlovs.

Throughout their contractual relationship with Brookhill, the Kozlovs made periodic deposits against which future charges were to be drawn. On or about July 15, 2016, one of these deposits – in the amount of $100,000 – was made to Brookhill. CP at 52. Twelve days later – on July 27, 2016 – the Kozlovs terminated the contract, citing Brookhill's failure to meet deadlines and work in a timely manner. *Id*. At termination, the Kozlovs requested the return of their deposit. *Id*. Sometime later, Brookhill did so, refunding $23,611.25 and providing an accounting of how the deposit had been applied. CP at 46, 56 ("The contract with Alex and Irina Kozlova was on a time and materials basis, copy enclosed. Since they terminated the contract, we are refunding them

$23,611.25. Copies of our ledger showing $337,200 in total payments received, and our invoices totaling $313,588.75 are enclosed."). That accounting, along with Brookhill's affirmation that $23,611.25 of the Kozlovs' deposit was unearned, constitutes an admission of Brookhill's pre-existing obligation to return these funds. That payment therefore cannot constitute consideration for an accord and satisfaction of the larger dispute between Brookhill and the Kozlovs.

C. The Court of Appeals' reliance on the *Field Lumber* case conflicts with controlling case law and the logical foundation of the accord and satisfaction doctrine.

The opinion of the Court of Appeals affirming the trial court's grant of summary judgment relies heavily on the holding of *Field Lumber v. Petty*, 9 Wn. App. 378, 380, 512 P.2d 764 (1973). The *Field Lumber* case is correctly cited for the proposition that payment of a sum which is less than that admitted to be owed cannot serve as consideration for an accord and satisfaction. But the Court of Appeals has taken that premise a step too far, ruling that the payment of an entire sum admitted to be owed can constitute consideration for an accord and satisfaction when part of a larger unliquidated controversy. That ruling creates a conflict with controlling Washington case law and contradicts the logical underpinnings of both the *Field Lumber* case and the doctrine of accord and satisfaction.

The foundation of the *Field Lumber* case is the premise that performance of an admitted obligation cannot serve as consideration for

the accord and satisfaction of a larger unliquidated sum. *See e.g., Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 646 116 P. 289 (1911) ("where the creditor is absolutely and in any event entitled to receive a definite and fixed sum, but claims an additional sum to be his due, which additional sum only is disputed by the debtor, the payment by the debtor of the definite and fixed debt and its acceptance by the creditor, though tendered as payment in full, will not constitute an accord and satisfaction"); *Meyer*, 37 Wn. 2d at 823 ("It has long been the rule in this state that payment of an amount admitted to be due can furnish no consideration for an accord and satisfaction of the entire claim."). The logic of this result is the same whether or not some or all of an admitted debt is paid – performance of a pre-existing duty cannot be consideration for accord and satisfaction of a larger debt. *E.g.*, *Weinstein v. District of Columbia Housing Auth.*, 931 F.Supp.2d 178, 189 (D. D.C. 2013) (Tenant's offer of $65,082.44 was insufficient detriment to constitute consideration for accord and satisfaction because tenant admitted that it was contractually obligated to pay $65,082.44 in unpaid rent, taxes, water, and sewer charges and only disputed landlord's higher calculation of $77,762.97); *Pierola v. Moschonas*, 687 A.2d 942, 948 (D.C. 1997) ("Both at common law and today, part payment by a debtor of a total debt fixed in amount and presently and indisputably due is not considered sufficient detriment to support a promise by the creditor to discharge the entire amount due. This is because the debtor's part satisfaction of such a fixed debt cannot constitute consideration under the pre-existing duty

rule."). This is the case, regardless of whether the disputed debt is unliquidated, because the debtor incurs no detriment in making a payment which it has already admitted is owed. And when the basis of that payment arises from an independent obligation which is acknowledged by the debtor (such as the obligation to return funds in which another retains a property interest, as was the case here), it is not consideration for the compromise (either express or implied) of additional disputes. Accordingly, a debtor's performance of a pre-existing obligation which it acknowledges cannot serve as consideration for the accord and satisfaction of additional disputed amounts.

Case law and common sense dictate that the performance of a pre-existing and admitted obligation cannot serve as consideration for a new contract. Yet that is exactly the result of the holding below; Brookhill's refund of a construction deposit that it admittedly had no right to retain served as the sole consideration for a purported accord and satisfaction of a larger contract dispute between the parties. Under general principals of accord and satisfaction – as articulated in controlling Washington law – Brookhill's refund was plainly the payment of an amount admitted to be due. And under that same case law, such a payment cannot furnish consideration for an accord and satisfaction of a larger claim. The ruling is therefore in conflict with prior decisions of this Court and the Courts of Appeals, and petitioners therefore request review of their case in accordance with RAP 13.4.

VII. CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Supreme Court accept this petition for the purpose of reviewing the attached decision of the Washington Court of Appeals, Division I.

RESPECTFULLY SUBMITTED this 27th day of November, 2019

/s/ R. Shawn Griggs

R. Shawn Griggs, WSBA No. 30710
1818 Westlake Avenue North, Suite 423
Seattle, Washington 98109
Telephone: (206) 745-3805
Facsimile: (206) 745-3806
Attorney for petitioners Aleksey and Irina Kozlov

DECLARATION OF SERVICE

I, R. Shawn Griggs, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on November 27, 2019, I served a true and accurate copy of this Petition via the Washington State Court of Appeals E-Filing Portal application on the following:

T. Daniel Heffernan
Heffernan Law Group PLLC
1201 Market Street
Kirkland, WA 98033
dan@heffernanlawgroup.com

DATED this 27th day of November, 2019.

s/ R. Shawn Griggs
R. Shawn Griggs, WSBA #30710
Attorney for petitioners Aleksey and Irina Kozlov
1818 Westlake Avenue North, Suite 423
Seattle, Washington 98109
Telephone: (206) 745-3805
Facsimile: (206) 745-3806
E-mail: shawn@griggs-law.com

No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 78847-7-1)

ALEKSEY KOZLOV and IRINA KOZLOV, husband and wife,

Petitioners,

v.

BROOKHILL LANDSCAPE AND CONSTRUCTION, LLC, a Washington limited liability company,

Respondent.

APPENDIX

R. Shawn Griggs, WSBA No. 30710
1818 Westlake Avenue North, Suite 423
Seattle, Washington 98109
Telephone: (206) 745-3805
Facsimile: (206) 745-3806

Attorney for Petitioners
Aleksey and Irina Kozlov

TABLE OF CONTENTS

FILED
10/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALEKSEY KOZLOV and IRINA KOZLOV, husband and wife, Appellants, v. BROOKHILL LANDSCAPE AND CONSTRUCTION, LLC, a Washington limited liability company, Respondent IRONSHORE INDEMNITY INC., a corporation domiciled in the State of Minnesota, bond account number 100178180, Defendant.	No. 78847-7-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2019

APPELWICK, C.J. — Kozlov appeals from summary judgment dismissing his breach of contract claims on the basis of accord and satisfaction. Brookhill tendered a check in complete satisfaction of all amounts due and owing, and Kozlov negotiated the check. Kozlov argues the check could not be consideration for an accord and satisfaction, because it was merely a refund of Kozlov's own funds. We affirm.

FACTS

On December 6, 2015, Alexey and Irina Kozlov entered into a contract with Brookhill Landscape and Construction LLC (Brookhill) for landscaping work on their home. The contract included various projects to be completed at a cost of $65 per hour and a 20 percent markup on materials. The estimated cost was $343,000 plus tax. The Kozlovs paid an initial deposit of $137,200, and agreed to periodic payments while Brookhill completed work.

On April 16, 2016, the parties revised the contract to include additional projects, raising the estimated cost to $420,000. They also agreed the work would be completed before July 16, 2016. The Kozlovs paid Brookhill $137,200 in December, 2015, $100,000 in April 2016, and $100,000 in July 2016. The Kozlovs continued to request additional work until July 2016.

In July 2016, the relationship between the parties began to deteriorate. The work was not completed by July 16. The Kozlovs claimed that Brookhill's crew was not showing up regularly or with sufficient staff to make progress on the job. They further contended that Spencer Bowhay, the manager at Brookhill, was unresponsive and combative in response to inquiries about the project. On July 27, 2016, the Kozlovs' attorney sent Brookhill a letter indicating their desire to terminate the contract. The attorney demanded that Brookhill return the most recent $100,000 payment. The letter indicated that a third party would assess additional damages owed to the Kozlovs.

In response, Brookhill sent the Kozlovs' attorney a letter, enclosing a check and a copy of the accounting ledger of the contract. The check was for $23,611,

which, according to Brookhill and the accounting ledger, was the difference between the total payments received and the total invoices. The letter said, that the check was given "in full settlement of all amounts owing under the contract." And, the back of the check said, "Full and final payment in complete satisfaction of all amounts due and owing." The Kozlovs deposited the check on August 24, 2016.

The Kozlovs filed this lawsuit 19 months later, on March 18, 2019. They now seek almost $400,000 in damages they claim to have paid to another contractor to complete the projects and $217,000 in restitution to recover amounts paid to Brookhill. Brookhill asserted an accord and satisfaction as an affirmative defense, and moved for summary judgment on that basis. The trial court granted summary judgment to Brookhill. The Kozlovs appeal.

DISCUSSION

The Kozlovs contend that accord and satisfaction fails for want of consideration. Specifically, they claim that Brookhill's payment of $23,611 cannot serve as consideration because it was a refund of the Kozlovs' money.

Summary judgment is appropriate when no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We review summary judgment decisions de novo. Id.

The doctrine of accord and satisfaction allows parties to agree to discharge duties owed under a contract through a performance different than the one owed. See Nw. Motors, Ltd. v. James, 118 Wn.2d 294, 303, 822 P.2d 280 (1992). Accord and satisfaction requires that the parties have (1) a bona fide dispute; (2) an

agreement to settle that dispute; and (3) performance of that agreement. Paopao v. Dep't. of Soc. & Health Servs., 145 Wn. App. 40, 46, 185 P.3d 640 (2008).

In their termination letter, the Kozlovs requested a refund of their previous $100,000 deposit and indicated that they would have additional demands for damages. Brookhill responded with a different amount. It invoiced unbilled labor and material costs and deducted them from the $100,000 advance, and then offered the remaining $23,611 in full payment of all amounts due. There was, therefore, a bona fide dispute between the parties over what was owed to the Kozlovs.

The Kozlovs contend that this payment was in fact an independent obligation, separate of other potential debts under the contract. They claim this is so because Brookhill did not dispute that this money was owed to the Kozlovs. Therefore, they argue that to keep this amount would have constituted conversion or larceny. In their estimation, because Brookhill conceded that it owed the amount offered, it cannot serve as an accord and satisfaction but rather was the fulfilment of an independently owed obligation.

The Kozlovs point to Field Lumber v. Petty, 9 Wn. App. 378, 512 P.2d 764 (1973), to support this proposition. In that case Petty attempted an accord and satisfaction by tendering payment of $500 despite acknowledging that he owed $1,092 Id. at 379. Field Lumber asserted that Petty owed $1,752. Id. at 379-80. The court ruled that the $500 payment could not constitute an accord and satisfaction in spite of the bona fide dispute of the total amount due, because it was less than Petty himself acknowledged that he owed. See Id. at 380-81. It

stated that accord and satisfaction is not applicable "where a portion of the alleged debt in excess of the amount paid is acknowledged and not in dispute." Id. at 379 (emphasis added).

Field Lumber answers the question of when new consideration is required for an accord and satisfaction. Id. at 380. Under Field Lumber, new consideration is required when the debtor tenders any amount less than they acknowledge to the creditor that they owe. Id. Where, as here, the debtor and creditor disagree on the amount owed, new consideration is required only when the debtor attempts to settle by tendering an amount less than the debtor acknowledges is owed. See id. Where the debtor tenders what they acknowledge they owe in settlement of the dispute, no new consideration is required. Id. at 379.

Unlike Field Lumber, here Brookhill had not acknowledged a debt in excess of the amount it tendered. The Kozlovs contended they were owed $100,000 plus yet-to-be-determined damages. Brookhill contended the Kozlovs were owed $23,611, and tendered that amount. Therefore, Field Lumber does not apply and no new consideration is required.

An accord and satisfaction is implied when the amount due is disputed, the debtor tenders a check in full payment of the debt, and the creditor cashes the check. Evans v. Columbia Int'l Corp., 3 Wn. App. 955, 957, 478 P.2d 785 (1970). Brookhill indicated on the check that its payment of $23,611 was in "[f]ull and final payment in complete satisfaction of all amounts due and owing". Brookhill also included a letter with the check stating the payment was "in full settlement of all

amounts owed under the contract." The Kozlovs cashed the check. The elements of accord and satisfaction are met.

We affirm.

WE CONCUR:

R. SHAWN GRIGGS, ATTORNEY AT LAW

November 27, 2019 - 3:30 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78847-7
Appellate Court Case Title:	Aleksey Kizlov, Appellant v. Brookhill Landscape and Construction, LLC, Respondents

The following documents have been uploaded:

- 788477_Petition_for_Review_20191127152609D1051002_6461.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dan@heffernanlawgroup.com

Comments:

Sender Name: Robert Griggs - Email: shawn@griggs-law.com
Address:
1818 WESTLAKE AVE N STE 423
SEATTLE, WA, 98109-2707
Phone: 206-745-3805

Note: The Filing Id is 20191127152609D1051002