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STATE OF WASHINGTON
BY C. Cain No. 41586-1-II
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THE COURT OF APPEALS, DIVISION II

State of Washington

PATRICIA MILLS, PLAINTIFF/ APPELLANT

v.

ELIZABETH BUDIL, DEFENDANT/ APPELLEE

APPELLANT'S OPENING BRIEF

John Cain
WSBA# 16164
Attorney For Appellant

802 N 2nd St
Tacoma, WA 98403-1929
(253) 572-8338
jcainjd11@comcast.net

ORIGINAL

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ASSIGNMENTS OF ERROR

The Superior Court erred in summarily dismissing plaintiff's case.

The Superior Court erred in denying the Motion for Reconsideration.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Is a payment to secure release of a lien on real property made in order to mitigate damages a "settlement" payment?

STATEMENT OF THE CASE

Standard of Review

This is an appeal of a ruling by the trial court granting summary judgment. Such decisions are reviewed de novo. *McKee v. Washington State Department of Corrections*, 39713-7-II (WACA, March 8, 2011) (citing *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

Summary judgment is appropriate only where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones, supra*, 146 Wn.2d at 300-01; CR 56(c).

Important Facts

In 1979 Patricia Mills purchased a parcel of real property in Pierce County from Betty Budil. The general plan was to divide the property and then build and sell homes for profit. CP 24.

Ms. Mills paid \$175,000 for the parcel. She paid \$50,000 in cash to Ms. Budil who carried back a note at 8% for the \$125,000 balance. CP 22, and 28.

The note was due one year from the date of the sale, but that time came and went without incident with Ms. Mills continuing to make the principal and 8% interest. CP 22. Then, about five years later, Ms. Budil called the note and it was refinanced through Washington Mutual. CP 22.

At the time of the refinance, a dispute arose as to the interest rate. Ms. Budil asserted that because the note was not paid on its due date (one year after the sale) interest was due at the 12% default rate. Ms. Mills asserted that the due date was waived by the repeated monthly acceptance of principal and interest payments at the 8% rate. CP 22-23.

This dispute was settled with a written agreement that says:

SETTLEMENT AGREEMENT

This document expresses the terms of a settlement agreement between Betty Buddi and Baldwin-Hall Building and Land.

Nature of Dispute. The parties to this agreement previously agreed to a purchase and sale respecting a parcel of land located between Sunset and Laurel Lanes on Tacoma's West Slope. Mrs. Buddi was the seller. She sold the property for \$175,000; \$50,000 down and the balance carried at 8%. The note was not paid when due, but rather payments were made accepted for long after the original due date. Seller (Mrs. Buddi) contends that the default interest rate of 12% applies. Buyer contends that by deciding not to declare the note in default, and instead accepting payments past the due date without objection, Ms. Buddi has waived her claim to the default interest rate.

Settlement. Rather than litigate the question of what interest rate applies, the parties agree as follows:

1. Mrs. Buddi will accept \$118,000 as soon as refinancing can be closed (no longer than 10 days after acceptance of this settlement agreement). The parties acknowledge that refinancing has been applied for and approved, but disbursement has been held up because the amount due on the Buddi note was uncertain.
2. The parties acknowledge that Patricia Mills holds the beneficial interest in the property, which was titled in a corporate name only for liability purposes. Ms. Mills put up the \$50,000 down payment, and has provided the money to make all payments on the Buddi note. The parties acknowledge that a condition of current refinancing seems to be the issuance of a quit-claim deed from Baldwin-Hall to Patricia Mills, which no party deems significant to this settlement agreement.
3. The parties acknowledge that it is the intent of everyone to expeditiously dispose of the property so long as it can be accomplished in a commercially reasonable manner. The current impediment to sale is the discovery of wetlands on site, which has held up subdivision and sale.
4. Mrs. Buddi will receive as part of the settlement a Deed of Trust securing her right to participate in the division of profits when the property is developed and sold. In the event that the property is ultimately divided, sold, refinanced again, or otherwise developed such that Patricia Mills is repaid all or most of her investment in the property then Mrs. Buddi will receive an additional payment. This payment will be the lesser of:
 - *1/3 of the net proceeds*
 - *1/3 of the net proceeds*

B. B.

B. B.

B. B.
A. B.

- ~~a. The gross sale price for the property, less only 1. all principle payments made to Mrs. Budil under the note (assuming interest at 8%) and 2. less payments made to the State of Washington for taxes, or~~
- b. \$20,000, *accruing interest to the payment as of the day of October 2003.*
- ~~c. If, in the sale, there is more than \$20,000 profit, then that additional profit belongs to Patricia Mills.~~

5. Smith Alling Lane (Mrs. Budil's lawyers) will be paid \$3,500 in the closing of the refinancing that has already been approved.
6. All outstanding property tax liabilities will be paid out of the closing of the refinancing that has already been approved.
7. If the parties have a dispute arising under this agreement, then all parties consent to jurisdiction by the Pierce County Superior Court and all parties agree that a party who substantially prevails is entitled to recover reasonable attorney fees and costs in addition to whatever additional relief may be granted.
8. There are no other agreements verbal or written between the parties which significantly affect this settlement and this two-page writing comprises the entirety of the agreement and any prior discussions or tentative agreements merge in this writing.

As evidence of their consent to the terms and conditions of settlement expressed above, the parties affix their signatures below.

Baldwin-Hall Building and Land



 By: John Mills, its President

Betty Budil

 Betty Budil, on behalf of the marital community

CP 23, 32-33.

Interlineations were made by Ms. Budil, but never approved by Baldwin-Hall. CP 23.

The essential agreement resolving issues is contained in paragraphs 1 and 4, indicating that Ms. Budil received \$118,000 (balance owed on the note calculated at 8%) plus, pursuant to paragraph 4, the “right to participate in the division of profits when the property was sold.

If the property could be developed for a profit, then Ms. Budil would essentially get her 12%, but if not, she would get only the \$118,000 representing the balance due at 8%.

Ms. Budil recorded a lien notice to assure that on sale she would be notified and given her share of any profits.

However, as everyone knows, the real estate market has not been particularly robust for a long time. In addition, a wetlands area was discovered on the property, all of which had the effect of preventing a division of the property. Long efforts to do anything with the property were unsuccessful, but in 2007 a buyer was eventually found willing to pay \$160,000. CP 24-25.

At the time of the closing, Ms. Budil insisted on getting paid \$25,033.12 before her lien would be released.

Her attorney, Mr. Michaels sent the following instructions to
the escrow agent:

**Smith
Alling
Lane**

A Professional Services Corporation

Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 827-1081
Seattle: (425) 251-5938
Facsimile: (253) 827-0123

Douglas V. Alling
Grant B. Anderson
Mark B. Anderson, Of Counsel
(Also admitted in Alaska)
Joseph R. Cloero (1957-2001)
Barbara A. Henderson
Edward G. Hudson
Edward H. Lane (1928-2006)
Joseph R.D. Loescher, Of Counsel
(Also admitted in Alaska)
Michael E. McNeenan
Robert L. Michaels
Daniel C. Smith (1916-2005)
Brien L. Dolman
(Also admitted in Oregon)

February 23, 2007

Ms. Pam Peterson
Chicago Title
3304 Rosedale St., #100
Gig Harbor, WA 98335

Re: Our Client: Elwood and Elizabeth Budil
Your Escrow No. 4331724

Dear Ms. Peterson:

Pursuant to Debbie's call of February 23, 2007, I am enclosing a Full Reconveyance for that instrument recorded on April 15, 2005 entitled Notice of Deed of Trust Interest. I am also enclosing a Promissory Note in the amount of \$20,000.00 by and between Baldwin-Hill Building & Land Co. and our clients. The payoff balance on this note is \$25,033.12 through Monday, February 26, 2007, and accruing at the rate of \$5.44. You are authorized to record the Full Reconveyance when you have the sum of \$25,033.12 ready to be mailed to Elwood and Elizabeth Budil, 2120 Mountainview Avenue West, University Place, WA 98466. Please mail the check directly to Mr. and Mrs. Budil.

Thank you. Should there be any questions and/or comments, please do not hesitate to contact me.

Very truly yours,

SMITH ALLING LANE, P.S.


Robert L. Michaels

RLM:cjs
Enclosure
cc: Mr. and Mrs. Elwood Budil

CP 161-62, 169.

In order to assure that the sale would not be lost and very substantial damages incurred, the escrow agent was directed to just close the transaction. CP 25. Thereafter, negotiations proceeded with the objective of recovering the \$25,033.16 paid to close the sale. CP 175-81.

When efforts to recover the money voluntarily failed, this lawsuit was commenced – again seeking return of the \$25,033.16 that Ms. Budil was not entitled to receive because the property could not be sold for a profit. Indeed, there is little question that, after counting interest, land taxes and other miscellaneous costs, Ms. Mills actually incurred a significant loss. Ignoring all that and comparing simply the purchase price of \$175,000 paid to Ms. Budil with the purchase price paid by Mr. Wagner of \$160,000, there is a \$15,000 loss. So, again, there simply was no profit to divide up.

The trial court granted a summary judgment dismissing this case and this timely appeal followed. CP 211-12, CP 213-16.

LAW and ARGUMENT

1. *There is a material dispute of fact about whether the parties intended Mrs. Budil to receive an unconditional payment on sale of the property.*

All parties agree that there was a dispute and a settlement in 2005. What's in dispute is the 2007 payment of \$25,033.16 and whether that payment was required by the 2005 agreement. Ms. Budil claims that it was; Ms. Mills claims it was not. This fundamental dispute precludes summary judgment.

A settlement agreement is merely a contract. Its construction is governed by legal principals applicable to contracts. *See Riley Pleas, Inc. v. State*, 88 Wash.2d 933, 938, 568 P.2d 780 (1977) (cited with approval in *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn.App. 401, 54 P.3d 687 (Wash.App. Div. 1 2002).

When interpreting a contract, the court's primary goal is to discern the intent of the parties. *Black v. National Merit Ins. Co.*, 62979-4-I (WACA, March 1, 2010). The parties in this case dispute whether the payment due Ms. Budil on sale of the property was intended to be an unconditional payment, or one conditioned on there being a profit to divide. That dispute precludes summary judgment because if the payment was not intended to be unconditionally due, and if there was no profit to divide, Ms. Budil is not entitled to the money she received and must return it.

Provisions in any contract should be harmonized if at all possible; a contract is considered as a whole so that the court can give effect to every clause in the contract. *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 877, 854 P.2d 622 (1993).

Here, paragraph 4 of the contract says “Mrs. Budil will receive as part of the settlement agreement a Deed of Trust securing her right to participate in the division of profits. When the property is developed and sold.” Thus, looking at the whole agreement, Ms. Budil was to receive an amount unconditionally – the \$118,000¹ – plus a *conditional* payment; a payment that depended on their being “profits when the property is developed and sold.”

If the amount due on sale of the property was unconditional, the language talking about division of profits would be superfluous.

The contract also says “In the event that the property is ultimately divided, sold, refinanced again, or otherwise developed such that Patricia Mills is repaid all or most of her investment in the property then Mrs. Budil will receive an additional payment.” Implied by the “in the event” language is that no additional payment would be due *unless* those conditions in fact occurred.

¹ The original note is at CP 28. It called for 8% interest and payments of \$918.00 beginning July 1, 1996. Running out the mathematics, the \$118,000 is essentially (just slightly more than) the principal due at 8% as of October of 2003 (the date of settlement).

Reading the contract language in a light most favorable to Mrs. Mills, and accepting her version of what the parties intended, Mrs. Budil was to receive a payment only if there was a profit to divide.

2. Taking all facts and inferences in a light most favorable to Mrs. Mills, Ms. Budil is not entitled to judgment as a matter of law.

The property was purchased from Mrs. Budil for \$175,000. Ms. Budil was paid \$50,000 at closing, then received all the payments made pursuant to the note and the balloon payment of \$118,000 in October of 2003 in the settlement. CP 22 -23.

The property was eventually sold for \$160,000 to Mr. Wagner. CP 24-25.

There are other costs, including annual land taxes paid by Patricia Mills. But, even setting aside these additional costs, and simply comparing the price paid Mrs. Budil with the price received from Mr. Wagner, there just wasn't any profit. There was (again ignoring land taxes and other costs) a \$15,000 **loss**.

If Mrs. Budil's right to any payment beyond the \$118,000 results from a "right to participate in the division of profits" and if it depends on Patricia Mills being repaid all or most of her investment," and if instead of there being any profits, there was a **loss** on the sale of the property, then Mrs. Budil isn't entitled to the

\$25,033.16 she demanded and received when the sale to Wagner was closed.

At this juncture, the sole question is whether the evidence or any or inferences from the evidence would support that analysis. To reach the conclusion rendered by the trial court would have required a determination that Ms. Budil was unconditionally entitled to a payment on sale of the property. Taking the facts and reasonable inferences in favor of Mrs. Mills, however, as the court must do, she is not entitled to an unconditional payment and therefore not entitled to the payment she demanded and received from escrow.

3. Mrs. Mills payment in 2007 does not alone create an accord and satisfaction.

First of all, the doctrine of accord and satisfaction doesn't apply to situations where there is alleged overpayment of a sum demanded. Accord and satisfaction requires a dispute over the total amount due and a settlement by some performance other than that which is due. See *Snap-On Tools Corp. v. Roberts*, 35 Wn.App. 32, 665 P.2d 417 (Wash.App. Div. 3 1983) (citing to *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wash.2d 523, 526, 439 P.2d 416 (1968)); *Department of Fisheries v. J-Z Sales Corp.*, 25 Wash.App. 671, 676,

610 P.2d 390 (1980); *Plywood Mktg. Assocs. v. Astoria Plywood Corp.*, 16 Wash.App. 566, 574, 558 P.2d 283 (1976)).

In this case there is a dispute as to whether the payment in 2007 constitutes an accord and satisfaction or simply the payment of a sum demanded to obtain a lien release to permit closing of a sale. Mrs. Mills asserts that the payment was made only to mitigate damages. Ms. Budil asserts that the payment itself constituted an accord and satisfaction

A party who sustains damage has a duty to minimize loss and is not entitled to recover for any part of the loss that could have avoided with reasonable efforts. *See* WPIC 303.06. Once the escrow agent received instructions from Ms. Budil allowing the recording of her lien release only upon receipt of the \$25,033.16 the choices available to Mrs. Mills were to either 1) make the payment demanded, or 2) not permit closing. Very clearly, the latter choice would have exacerbated damages, and the parties would have been arguing about loss of the entire sale, so it's not surprising that the payment was made to at least assure the sale; everyone could argue about whether Ms. Budil was entitled to the money later.

An accord requires a "meeting of minds," an intention on the part of both parties to create an accord and satisfaction as a matter of law. *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn.2d 523, 439

P.2d 416 (Wash. 1968). Here, there is no evidence of any negotiations for settlement or any “meeting of the minds” in 2007 designed to settle a dispute. There was simply capitulation to the amount demanded by Ms. Budil to release her lien. Considering Ms. Budil’s lien, her demand for payment as a condition of release, the need to close to prevent exacerbating damages, the full payment of the amount demanded, and the absence of any negotiations; and drawing all reasonable inferences from those facts in a light most favorable to Mrs. Mills, there is simply not an accord, but just the payment of an amount demanded to prevent additional damages.

By 2007, the dispute was not about the precise sum due, but whether Ms. Budil was owed anything further at all; there being no profit to divide. She demanded \$25,033.16 as a condition for release of her lien. That’s what she received. Thus, the payment hardly “settles” anything; it merely capitulates to a demand. So, it’s not a case where accord and satisfaction even applies. *Snap-on, supra* 35 Wn. App. at 36, n. 1.

Again, Ms. Budil is entitled to summary judgment only if on undisputed facts she is entitled to judgment as a matter of law. Taking the facts and inferences from facts in a light most favorable to Mrs. Mills, the payment was made to mitigate damages without

an *intent* to create an accord and satisfaction. Accordingly, summary judgment was improper.

Conclusion:

If the court gives effect to every clause in the settlement agreement, as it must, then some significance has to be ascribed to the language indicating that – beyond the \$118,000 she received – any additional payment depended on Mrs. Budil’s “right to participate in the division of profits.” Because there never were any profits, there is a fact question at least about whether Mrs. Budil is entitled to the \$25,033.16 she demanded and received in the closing of the sale to Mr. Wagner. It might be that Ms. Budil is entitled to the money, but on this record, there is not a showing that she is entitled to judgment as a matter of law.

Mere payment alone of the amount demanded by Ms. Budil as a condition for release of her lien, does not alone create an accord and satisfaction. That would require a meeting of the minds and a payment with the intent to settle a disputed debt. Taking all facts and inferences in a light most favorable to Mrs. Mills, the payment simply capitulated to Ms. Budil’s demand to secure a release of her lien and mitigate damages.

Accordingly, the Superior Court erred and the summary judgment should be reversed.

DATED this 21st day of March, 2011.



John Cain
WSBA# 16164
Attorney for Mrs. Mills