

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41586-1-II

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

PATRICIA MILLS

Appellant

vs.

ELIZABETH BUDIL

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

The controversy that is the subject of this appeal was settled in 2007. It stems from the sale of real property from Respondent Elizabeth Budil to Appellant Patricia Mills. A dispute arose over the amount due. The parties entered into a Settlement Agreement, and in 2007 Ms. Mills made the final payment as required by the Settlement Agreement.

Ms. Mills waited almost two years after performance of the Settlement Agreement to bring a Complaint in this matter seeking the return of her settlement payment. This case was subject to Mandatory Arbitration, and the Arbitrator dismissed Ms. Mills' Complaint awarding attorney fees to Ms. Budil pursuant to the contract between the parties. Ms. Mills sought a trial de novo. After cross motions for summary judgment, Judge Buckner of the Pierce County Superior Court dismissed Ms. Mills' Complaint and awarded attorney fees to Ms. Budil. Ms. Mills sought a motion for reconsideration, which was denied by Judge Buckner.

Ms. Mills now seeks review in Division II of the Court of Appeals. Ms. Budil respectfully requests this Court affirm the decision of the trial court and grant Ms. Budil her attorney fees incurred in the appeal.

II. STATEMENT OF THE CASE

The Respondent accepts Appellant's statement of facts.

III. ARGUMENT

A. Standard of Review.

Summary judgment orders are reviewed by this court de novo. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is properly granted when in the light most favorable to the nonmoving party, "the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." CR 56(c).

The court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Right-Price Recreation, LLC v. Connells Prairie Com. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Only where this court finds that the trial court erred in determining that the moving party is entitled to a judgment as a matter of law should summary judgment be disturbed. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

B. The Funds Ms. Budil Received From Ms. Mills At The Closing Of A Real Estate Transaction Were Paid In Accord And Satisfaction Of A Dispute.

1. The Undisputed Facts Meet Every Element Of The Accord And Satisfaction Affirmative Defense.

Accord and satisfaction requires the parties have a bona fide dispute, an agreement to settle that dispute, and performance of the agreement. An accord and satisfaction is a new contract — a contract complete in itself. Its enforceability does not depend on the antecedent agreement.

Paopao v. State, Dept. of Social and Health Servs., 145 Wn. App. 40, 46, 185 P.3d 640 (2008)

A strong presumption attaches that the parties have considered and settled every existing difference. To overcome this strong presumption requires testimony so clear and convincing that the court can free the transaction from all doubt as to the intent of the parties.

Id. 47 (citing *1 Am.Jur.2d 812, Actions, § 24 (2005); Teel v. Cascade-Olympic Constr. Co.*, 68 Wn.2d 718, 720, 415 P.2d 73 (1966)) (emphasis added).

The facts of this case are not in dispute. It is undisputed that Ms. Budil sold real property to John Mills on an installment sales contract secured by a Promissory Note and Deed of Trust. CP 50, CP 53. Shortly thereafter the property was transferred into an entity, Baldwin-Hall Building and Land, owned by Plaintiff/Appellant Patricia Mills. Ms. Mills provided the funds for the down payment and installment payments.

CP 61. John Mills acted as the President, so his name in that capacity appears on some instruments. CP 62.

The \$125,000.00 carried on the Promissory Note at 8% interest per annum provided for installment payments of \$918.00 per month for one year, with a balloon payment due one year after the sale. CP 53. The Appellant defaulted on the Promissory Note by not making the balloon payment when it became due. CP 46. A Notice of Default was issued. CP 55. The Promissory Note provides a default interest rate of 12% applied “without notice” in the event of default. CP 53. At the time, Ms. Mills argued that the default provision was waived because installment payments continued to be accepted by Ms. Budil. Ms. Budil maintained that interest was due at 12% per annum in accordance with the agreement, and a dispute arose. CP 46. The parties agreed to settle that dispute and reduced the agreement to writing. CP 64. The Settlement Agreement provided that Ms. Budil would receive \$118,000.00 at the time the parties entered into the Agreement, and an additional payment when Ms. Mills sold the property. The Settlement Agreement stated, in relevant part, “in the event 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. Mills will receive an additional payment.” CP 64. The property was sold in March 2007 and Ms. Mills

authorized payment to Ms. Budil in the amount specified in the Settlement Agreement. CP 107.

Declarations provided by the Plaintiff/Appellant make the elements of accord and satisfaction clear:

Statement of Plaintiff/Appellant	Cite
“We had a dispute about whether Ms. Budil was entitled to 12% interest or 8% interest.”	CP 135
“We settled that dispute by agreeing that when the property was sold, or somehow refinanced or developed in such a way that Patricia was making some kind of profit, then Ms. Budil would get the first \$20,000 of the profit (plus 8% because it was uncertain when, if ever, there would be a deal creating profit).”	CP 135
Ms. Mills sold the property. On the HUD-1, Ms. Mills authorized the line item “Total payoff to Elwood T. and Elizabeth Budil 25,272.48.” (\$20,000 plus 8% per annum.)	CP 109

These three undisputed facts meet the requirements of an accord and satisfaction — a bona fide dispute, an agreement to settle that dispute, and performance of the agreement. Accordingly, the funds Ms. Mills paid Ms. Budil were paid in accord and satisfaction of a dispute, and Ms. Mills cannot now ask for a return of those funds.

2. **Ms. Mills Does Not Offer Any Valid Reason Why Accord And Satisfaction Should Not Apply.**

Ms. Mills does not dispute any of the facts which form the basis of the accord and satisfaction defense. Instead, she argues she was forced to

make the settlement payment. At the time the property was sold, Ms. Budil, through her attorney's letter to escrow, requested the payoff required by the Settlement Agreement. The Appellant argues that at this point "the choices available to Mrs. Mills were to either 1) make the payment demanded, or 2) not permit closing." (Appellant's Brief, p. 12)

There are a number of problems with this argument. There is no evidence whatsoever in the record that suggests that at or before closing Ms. Mills did not think the settlement payment was due. The payment was clearly identified in the HUD-1, which Ms. Mills authorized. CP 109. It is also identified in March 5, 2007 correspondence to Chicago Title. CP 113. And, on March 12, 2007, John Mills advised Chicago Title to "expedite closing." CP 115.

If Ms. Mills disputed that the payment was due, the funds could have been paid into the registry of the court, held by a third party or even held by Chicago Title, who already had the funds pending resolution of any dispute. They were not. Instead, Ms. Mills authorized the release of the funds in writing, satisfying her final obligation under the Settlement Agreement. Ms. Mills waited almost two years to file a Complaint in this matter which now seeks the return of the payment she made.

Ms. Mills argues she was compelled to make the settlement payment or suffer a potential business loss by losing a buyer of the

property. While not specifically identified, Ms. Mills is making a business compulsion argument. Under the defense of business compulsion, if a party to a contract is deprived of its free will in entering into the contract, the contract is void. *Culinary Workers and Bartenders Union No. 596 v. Gateway Café, Inc.*, 91 Wn.2d 353, 588 P.2d 1334 (1979). Importantly, business compulsion requires a showing of “wrongful and oppressive conduct or acts ... Mere financial pressure which worked to bring about an agreement is insufficient to establish economic duress or business compulsion.” *Id.* at 363, emphasis added.

In the facts at issue in this case, even if financial pressure was a reason Ms. Mills decided to make the settlement payment to Ms. Budil, she still did so on her own free will. Ms. Mills alone made the calculated decision that it was cheaper to pay in accordance with the Settlement Agreement than to lose a buyer for her property. It is undisputed that there was no wrongful or oppressive act on the part of any party to force Ms. Mills to make the settlement payment in satisfaction of her debt.

3. The Settlement Payment Ms. Mills Made Was Not An Overpayment.

Ms. Mills argues in her opening brief that “the doctrine of accord and satisfaction doesn’t apply to situations where there is alleged overpayment of a sum demanded,” citing *Snap on Tools Corp. v. Roberts*,

35 Wn. App. 32 (1983). (Appellant's Brief, p. 12) However, Ms. Mills did not overpay a sum demanded.

In the case cited by Ms. Mills, Snap on Tools and one of its dealers executed a mutual termination agreement which provided that Snap on Tools would buy back the dealer's entire inventory at dealer cost. *Snap on Tools Corp. v. Roberts*, 35 Wn. App. 32 (1983). Snap on Tools mistakenly overpaid for the inventory. There was no dispute about the amount due, nor was there an agreement to settle the dispute. Snap on Tools made a unilateral mistake in calculating payment and overpaid. *Id.* at 32. Although the trial court applied the affirmative defense of accord and satisfaction, on appeal, both parties agreed that accord and satisfaction did not apply. *Id.* at 33. The Court of Appeals did not analyze the case as an accord and satisfaction case, but noted in a footnote, "The doctrine of accord and satisfaction requires a dispute over the total amount due and a settlement by some performance other than that which is due." *Id.* at fn. 1.

In the case at hand, Ms. Mills is now attempting to characterize the settlement payment as an overpayment, however, her Complaint makes clear that her claim is that none of the \$25,272.48 payment should have been made. There is no claim that the \$25,272.48 was calculated incorrectly. It is undisputed that the \$25,272.48 payment represents

\$20,000.00 plus 8% interest per annum as required by the Settlement Agreement. Therefore, this case does not involve an overpayment and is distinguished from *Snap on Tools Corp. v. Roberts*.

C. **Even If The Affirmative Defense Of Accord And Satisfaction Is Rejected On Appeal, The Settlement Agreement Should Still Be Enforced, Entitling Ms. Budil To The Funds She Was Paid.**

Ms. Mills argues that she was not repaid all of her investment when she sold the property in 2007, and therefore was not required to make the settlement payment she authorized to be sent to Ms. Budil. However, Ms. Mills' opening brief completely ignores critical language of the Settlement Agreement, which provides, "In the event 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. Mills will receive an additional payment." (emphasis added) CP 64.

The language "or most of" expands conditions under which Ms. Mills must make an additional payment. The word "most" is not defined in the Settlement Agreement, so it should be given its normal meaning. "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Universal/Land Constr. Co. v. City of*

Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). “We do not interpret what was intended to be written but what was written.” *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944). “Undefined terms are given their ordinary, popular meaning as provided in a standard English language dictionary.” *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 537, 150 P.3d 589 (2007).

The 2010 Miriam-Webster definition of *most* is “1: greatest in quantity, extent, or degree <the most ability>, 2: the majority of <most people>.” Viewing the facts in the light most favorable to Ms. Mills and using the amounts Ms. Mills presents in her opening brief, if she purchased the property for \$175,000.00 and sold it for \$160,000.00, she sold it for 91.4% of her investment, a loss of just 8.6 percent. Ms. Mills has not produced any authority to suggest the word *most*, even in the context of “all or most of” is intended to mean anything other than its regular meaning. A 91.4% repayment fits the normal definition of “most of”. The fact that Ms. Mills authorized payment to Ms. Budil is evidence she believed she had an obligation to pay. Ms. Mills was in the best position to determine whether or not she had been repaid most of her investment because Ms. Budil was not a party to the 2007 sale. Because Ms. Mills was repaid all or most of her investment in the property, she had

an obligation to perform in accordance with the Settlement Agreement and it should be enforced.

Importantly, the parties did not appear in the trial court in 2007 to ask whether or not the Settlement Agreement should be enforced. Ms. Mills and Ms. Budil answered that question by performing in accordance with the terms of the Settlement Agreement. Ms. Mills made the payment and Ms. Budil accepted the payment in full satisfaction of the agreement, releasing her lien on the property. There is no evidence whatsoever, at or before closing, that Ms. Mills disputed the fact that she owed the funds she paid. Ms. Mills paid in accordance with the Settlement Agreement and has not demonstrated by a clear and convincing standard that she did not intend the payment to be an accord and satisfaction of the debt.

D. Ms. Budil Is Entitled To An Award Of Attorney Fees.

The Settlement Agreement at paragraph 7 provides that, “If the parties have a dispute arising under this agreement ... a party who substantially prevails is entitled to recover reasonable attorney fees and costs...” CP 62. “A party may be awarded attorney fees based on a contractual fee provision.” *Renfro v. Kaur*, 156 Wn. App. 655, 666-67, 235 P.3d 800 (2010). Pursuant to the contract between the parties and

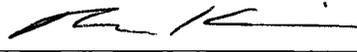
RAP 14.1, Ms. Budil asks this Court to make an award of attorney fees and costs incurred in this appeal in an amount to be proven by a Cost Bill submitted to this Court within 10 days of issuance of its decision.

IV. CONCLUSION

This matter was well settled in 2007 when Ms. Mills paid Ms. Budil out of the closing of a real estate transaction in accord and satisfaction of a dispute between the parties. The doctrine of accord and satisfaction prevents Ms. Mills from now claiming she did not intend to pay Ms. Budil in satisfaction of her debt. In addition, the terms of the Settlement Agreement required the payment of \$25,272.48 to Ms. Budil. That payment was made and the matter was closed. The trial court correctly granted summary judgment in favor of Ms. Budil and she respectfully asks this Court to affirm the decision and award additional attorney fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 21 day of April, 2011.

SMITH ALLING, P.S.

By 

Russell A. Knight, WSBA #40614
Attorney for Respondent

COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

11 APR 21 PM 2:29

I hereby certify that I have this 21st day of April, 2011, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

STATE OF WASHINGTON
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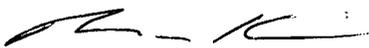
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of April, 2011, at Tacoma, Washington.



Russell A. Knight