IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PATRICIA MILLS, Appellant, v. ELIZABETH BUDIL, Respondent.	No. 41586-1-II UNPUBLISHED OPINION

Worswick, A.C.J. — Patricia Mills sued Elizabeth Budil to recover $25,272.48 she paid to Budil under a settlement agreement and promissory note. The trial court granted summary judgment in Budil's favor. Mills appeals, arguing that there is a disputed issue of material fact regarding whether the parties intended the payment under the settlement agreement to apply unconditionally.[1] We affirm.

FACTS

John Mills purchased undeveloped view land in Tacoma from Budil in May 1996 on his mother, Patricia Mills's, behalf, intending to divide the parcel into two lots and develop them for

[1] Budil argues that Patricia's payment to her was in accord and satisfaction of an existing dispute. An accord is a contract to settle a dispute under a preexisting contract by some performance *other* than that which is due. *Dept. of Fisheries v. J-Z Sales Corp.*, 25 Wn. App. 671, 676, 610 P.2d 390 (1980). But, because Patricia's 2007 payment to Budil was identical to the performance due under their promissory note and settlement agreement, the doctrine of accord and satisfaction does not apply.

profit.[2, 3] John purchased the land for $175,000, putting $50,000 down and Budil seller-financed the remainder of the purchase price. For the seller-financing, John signed a deed of trust in favor of Budil that secured a $125,000 promissory note at eight percent interest with full payment due May 22, 1997. The note provided for 12 percent interest if John defaulted.

John then learned that he could not subdivide the land because of wetlands on the property. Then, for administrative convenience, John transferred the land to a corporation that Patricia owned, Baldwin-Hall Building and Land.[4] John was Baldwin-Hall's president, and he made the monthly note payments with Patricia's money. John did not pay the note in full by its May 1997 due date; instead, John continued to make the monthly note payments of principal at eight percent interest with Patricia's money, which Budil continued to accept into 2003.

On July 1, 2003, Budil sent a notice of default to John and Baldwin-Hall, citing John's failure to pay the note in full by its May 1997 due date. The notice of default stated that the interest had accrued at 12 percent since the date of default. John disputed the 12 percent interest rate and countered that interest continued to accrue at eight percent after default because Budil had continued to accept monthly payments at that level for six years. Nonetheless, John and Budil met and reached an understanding between Budil and Baldwin-Hall that Budil would accept

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[2] Because Mills appeals an order granting Budil's motion for summary judgment, we set out the facts in the light most favorable to Mills. *Jones v. Dep't of Health*, 170 Wn.2d 338, 342, n.1, 242 P.3d 825 (2010).

[3] Since John Mills and Patricia Mills have the same last name, hereafter we refer to them by first name. We intend no disrespect.

[4] The record contains no information on John's authority to act on Patricia's behalf in these transactions. But the parties do not challenge John's authority and implicitly agree that Patricia is bound by his actions.

$118,000 in repayment of the May 1996 promissory note. Baldwin-Hall then transferred the land to Patricia so that she could refinance the note with Washington Mutual Bank.

In October 2003, John drafted, signed, and sent a written settlement agreement to Budil memorializing Baldwin-Hall's understanding with Budil. This agreement stated:

> Mrs. Budil will receive as part of the settlement a [d]eed of [t]rust 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. Budil will receive an additional payment. The payment will be the lesser of:
> a. The gross sale price for the property, less only . . . all princip[al] payments made to Mrs. Budil under the note (assuming interest at [eight percent]) and . . . less payments made to the State of Washington for taxes, or
> b. $20,000,
> c. If, in the sale, there is more than $20,000 profit, then that additional profit belongs to Patricia Mills.

Clerk's Papers (CP) at 61-62 (emphasis added). But Budil did not sign the settlement agreement John drafted. Instead, Budil made handwritten changes to the typed agreement, which she initialed and signed. The settlement agreement Budil signed stated:

> Mrs. Budil will receive as part of the settlement *a promissory note in the amount of $20,000 at 8%* [interest] and a [d]eed of [t]rust 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. Budil will receive an additional payment. *The payment will be . . . $20,000*.

CP at 61-62, 64-65, 67 (emphasis added). Thus, Budil's version of the settlement agreement added the $20,000 promissory note requirement and fixed the amount of the additional payment at $20,000. Budil faxed the updated agreement to John, along with a letter summarizing the changes. John never signed or initialed the edited agreement.

John did, however, sign a December 2003 promissory note for $20,000 at eight percent interest that mirrored the language in Budil's edited settlement agreement. This December 2003 promissory note stated, "This Note shall be due and payable in the event the property securing this Note is refinanced, sold, transferred, or otherwise encumbered such that [Patricia Mills is] repaid *all or most* of her investment in the property. This Note will be secured by a [s]econd [d]eed of [t]rust . . . ." CP at 70 (emphasis added).

After Patricia refinanced and made the agreed $118,000 payoff to Budil for the purchase price, Budil marked the May 1996 promissory note as paid in full and recorded a full reconveyance of the deed of trust securing it. Thus, as of December 2003, Patricia held title to the land and the only outstanding promissory note on the property was the $20,000 note that was due when Patricia disposed of the property if she recouped all or most of her investment. To protect her interests, Budil recorded a document entitled "Notice of Deed of Trust Interest." CP at 102-03.

In 2007, John and Patricia found a buyer for the undeveloped land. Although they purchased the land for $175,000 in 1996, they sold it for only $160,000 in 2007. During escrow, Budil authorized the title company to record a full reconveyance of the recorded notice of deed of trust interest when it received Patricia's $20,000 plus interest payment for Budil. Both John and the new purchaser authorized the title company to pay off Budil. Specifically, John instructed the title company to pay Budil if necessary to get her to release her notice of deed of trust interest and not to delay closing over the Budil money under any circumstances. In the spring of 2007, the title company closed the sale, paid Budil $25,272.48, and recorded the full reconveyance of

Budil's notice of deed of trust interest.

In 2009, Patricia sued Budil, asking Budil to return the money Patricia paid her in 2007. Both Patricia and Budil brought motions for summary judgment. The trial court granted Budil's motion for summary judgment, denied Patricia's motion, and dismissed all of Patricia's claims. Patricia unsuccessfully moved the trial court to reconsider. Instead, the trial court entered judgment in favor of Budil for her attorney fees. Patricia appeals.

ANALYSIS

I. Standard of Review

We review orders for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). In reviewing a summary judgment order, courts consider all facts and inferences in the light most favorable to the nonmoving party. *Poulsbo Group, LLC v. Talon Dev., LLC*, 155 Wn. App. 339, 345, 229 P.3d 906 (2010). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

II. Promissory Note

Although the parties focus their arguments on whether the settlement agreement required Patricia to pay Budil, we conclude that the December 2003 promissory note created an independent contractual basis for that payment. We have inherent authority to consider issues not raised by the parties and to decide an appeal on that issue. *State v. Aho*, 137 Wn.2d 736, 740-41,

975 P.2d 512 (1999); *State v. Carter*, 138 Wn. App. 350, 368, 157 P.3d 420 (2007); RAP 12.1(b). Although we may request supplemental briefing on the issue, such briefing is not necessary if we can fully consider and decide the issue without it. *Aho*, 137 Wn.2d at 741. Here, the promissory note is included in the record, and we can fully interpret it based on the record before us without supplemental briefing.[5]

A promissory note is a contract to pay money. *Dept. of Revenue v. Sec. Pac. Bank of Wash.*, 109 Wn. App. 795, 808, n. 11, 38 P.3d 354 (2002); *Reid v. Cramer*, 24 Wn. App. 742, 744, 603 P.2d 851 (1979). Under Washington's objective manifestation test, parties must objectively manifest their mutual assent to sufficiently definite terms in order to form a contract. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). Parties generally manifest their mutual assent through an offer and its acceptance. *Keystone Land*, 152 Wn.2d at 178. Additionally, parties must support their contract with consideration for it to be enforceable. *Keystone Land*, 152 Wn.2d at 178. Where the parties make reciprocal promises, each party's promise is consideration supporting the other's promise. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 74, 199 P.3d 991 (2008).

Here, Patricia and Budil manifested their mutual assent because Budil drafted a promissory note and offered it to Patricia and John, which John accepted by signing. In consideration of their agreement, Budil promised to fully reconvey Patricia's 1996 promissory note and Patricia promised to pay Budil money. Thus, the 2003 promissory note is an enforceable

[5] Moreover, we engaged the parties in extensive dialogue regarding the promissory note during oral argument. Wash. Court of Appeals oral argument, *Mills v. Budil*, No. 41586-1-II (Nov. 28, 2011) at 3 min., 45 sec.—7 min., 29 sec.; 8 min., 55 sec.—11 min., 20 sec.; 16 min., 11 sec.—21 min., 48 sec. (on file with court).

contract.

Under the terms of this promissory note, Patricia agreed to pay Budil $20,000 plus interest when she "refinanced, sold, transferred, or otherwise encumbered" the land such that Patricia recovered "all or most of her investment in the property." CP at 70. When Patricia sold the land in 2007 for $160,000, she recovered 91 percent of her $175,000 purchase price. Because Patricia recovered 91 percent of her investment in the land, she recovered "all or most of her investment." Because Patricia recovered most of her investment in the land, she was contractually obligated to pay Budil $20,000 plus interest under the terms of the 2003 promissory note.

III. Settlement Agreement

Although we concluded that the 2003 promissory note created an independent contractual obligation for Patricia's payment to Budil, even without considering that promissory note, the parties entered a settlement agreement that stated Patricia would pay Budil $20,000 plus interest if Patricia recovered all or most of her investment in the property. Mills argues that there is a material question of fact on whether their 2003 settlement agreement created a conditional or unconditional obligation for Mills to pay Budil when she sold the land. We disagree.

A. *Contract Formation*

Because settlement agreements are contracts, contract law principles govern their formation and interpretation. *Trotzer v. Vig*, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009). Forming a contract requires an offer, its acceptance, and consideration. *Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 366, 183 P.3d 334 (2008). Acceptance is the offeree's manifestation of consent to be bound by the terms of the offer. *Veith*, 144 Wn. App. at 366. If the offeree

materially changes terms in the offer, that operates as a rejection and counteroffer. *Rorvig v. Douglas*, 123 Wn.2d 854, 858, 873 P.2d 492 (1994). A person may accept an offer or counteroffer by performance. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 769, 145 P.3d 1253 (2006).

Here, John made the initial offer to pay Budil an additional amount of up to $20,000 when Patricia disposed of the property if Patricia recovered all or most of her investment. Budil rejected John's offer and made a counteroffer when she changed the offer's material terms to require a promissory note and to fix her additional payment at $20,000. Because Budil's counteroffer inserted the promissory note requirement, John accepted her offer when he signed the $20,000 promissory note in favor of Budil that mirrored the terms of Budil's offered settlement agreement. Accordingly, Budil's version of the settlement agreement was a validly formed contract.

B. *Contract Interpretation*

In interpreting a contract, we give the utmost importance to the parties' intent. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 829, 214 P.3d 189 (2009). We look to the objective manifestations of the contract and not to the "unexpressed subjective intent of the parties" in determining intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). We also consider the contract as a whole and the parties' conduct in determining intent. *King v. Rice*, 146 Wn. App. 662, 670, 191 P.3d 946 (2008). Generally, courts interpret the language of the contract as written, giving each term its "ordinary, usual, and popular meaning unless" the entire contract demonstrates the parties had a contrary intent. *Hearst*, 154 Wn.2d at

504. We interpret contracts to give effect to each provision and harmonize contract terms that seem to conflict. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). In harmonizing contract terms, we give greater weight to specific terms than general terms. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004).

Here, Patricia argues that the trial court improperly granted summary judgment because there is a question of fact regarding whether she and Budil intended to condition Patricia's obligation to make the additional payment on Patricia making a profit on the land. Patricia bases this argument on the sentence in the settlement agreement that states, "Mrs. Budil will receive as part of the settlement *a promissory note in the amount of $20,000* . . . and a [d]eed of [t]rust securing her right to participate *in the division of profits* when the property is developed and sold." CP at 64 (emphasis added). But the agreement's next sentence states that if Patricia is "repaid *all or most* of her investment in the property, then Mrs. Budil will receive an additional payment. The payment will be . . . $20,000." CP at 64 (emphasis added).

John himself actually drafted the "all or most" language triggering Patricia's obligation to make the additional payment to Budil. CP at 61-62. If John intended to condition Patricia's obligation to make the additional payment to Budil on Patricia making a profit on the sale of the land, he could have—and should have—said so. The terms of the settlement agreement reference "profits" only once and, in the same sentence, the agreement states that Mrs. Budil will receive "a $20,000 promissory note." CP at 64. Because the $20,000 promissory note term is more specific than the undefined term "profits," we give greater weight to the promissory note term than the settlement agreement term in interpreting the contract. Moreover, because the next provision in

the contract states that Budil will receive an additional payment of $20,000 if Patricia "is repaid all or most of her investment," the agreement as a whole emphasizes the parties' intent for Patricia to make a $20,000 payment to Budil when she disposed of the land.

John's conduct further emphasizes the parties' intent for Patricia to pay Budil $20,000 when she sold the land because John signed a $20,000 promissory note that stated Patricia would pay Budil $20,000 if Patricia is "repaid all or most of her investment in the property." CP at 70. Thus, the agreement as a whole and the parties' conduct demonstrate that the parties intended for Patricia to make a $20,000 payment to Budil if Patricia recovered all or most of her investment. We hold that Patricia's obligation to make the additional payment to Budil was contingent on Patricia recovering "all or most of her investment," not on Patricia making profits.

Where the contract's terms are unambiguous, the parties' subjective intent is irrelevant. *Hearst*, 154 Wn.2d at 504. Contract terms are unambiguous unless they are uncertain or are capable of having more than one meaning. *Dice v. City of Montesano*, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006). A term is not ambiguous simply because the parties argue opposing meanings. *Dice*, 131 Wn. App. at 684. Interpreting an unambiguous contract is a matter of law, thus summary judgment may be appropriate. *Dice*, 131 Wn. App. at 684.

Here, the settlement agreement stated that Patricia would pay Budil $20,000 when she disposed of the land if she recovered all or most of her investment. Because this language fixes the payment at $20,000, that term is unambiguous. Moreover, because the agreement expressly states that Patricia will make the $20,000 payment to Budil if she recovers all or most of her investment, there is no ambiguity regarding when the payment provision applies. It

unconditionally applies if Patricia recovers all or most of her investment in the property. Budil correctly notes that "most" is not a defined term in the agreement and, thus, will have its ordinary meaning of "greatest in number, quantity, size, or degree." Webster's II New College Dictionary 714 (1999). Because Patricia purchased the property for $175,000 and sold it for $160,000, she recovered 91 percent of her investment. Because Patricia recovered "most" of her investment, the settlement agreement obligated her to make the additional payment of $20,000 plus interest to Budil.

Thus, the settlement agreement unambiguously required Patricia to make a $20,000 plus interest payment to Budil if she recovered all or most of her investment in the property. Because Patricia recovered 91 percent of her investment in the property, Patricia was contractually bound to pay Budil. Accordingly, the trial court properly dismissed Patricia's claim for reimbursement and properly granted summary judgment in favor of Budil. We affirm.

ATTORNEY FEES

Budil requests reasonable attorney fees as costs on appeal based on a contractual provision in her 2003 settlement agreement with Mills and RAP 14.1. We decline her request.

We may award reasonable attorney fees as costs based on a contract between the parties. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). However, the contract containing the attorney fee provision must be central to the dispute before we will grant a request for attorney fees. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140-41, 157 P.3d 415 (2007); RCW 4.84.330.

Here, the promissory note does not contain an attorney fee provision but the settlement

agreement does. The settlement agreement states, "If the parties have a dispute arising under this agreement . . . all parties agree that a party who substantially prevails is entitled to recover reasonable attorney fees and costs . . . ." CP at 65. Because we concluded that the promissory note provided an independent basis for Patricia's contractual obligation to pay Budil, we hold that the settlement agreement is not central to the dispute. Because the settlement agreement is not central to the dispute and the promissory note does not include an attorney fee provision, we decline to grant Budil's request for reasonable attorney fees on appeal.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.