No. 2—10—0264
Order filed February 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LINDSEY FOGT-DONAT and LISA FOGT,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 08—CH—1985
	)	
MADELAINE POZEN-FRIDDLE,	)	Honorable
	)	Michael J. Colwell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court's judgment that defendant failed to show a mutual intent, and thus failed to show an accord and satisfaction, was not against the manifest weight of the evidence; although defendant gave plaintiffs jewelry with the intent to settle a debt, and although she thought that plaintiffs accepted it with the same intent, plaintiffs did not evince such intent by word or deed.

The defendant, Madelaine Pozen-Friddle (Pozen), appeals the trial court's judgment in favor of her twin daughters, plaintiffs Lindsey Fogt-Donat and Lisa Fogt (the Fogts), in connection with Pozen's failure to pay the Fogts funds from a trust that Pozen oversaw as the trustee. Pozen contends that jewelry that she sent to the Fogts and that they retained until after trial constituted an accord and satisfaction, making the trial court's award improper. Because there was a lack of evidence that

there was a shared and mutual intent to compromise and settle the matter through payment with the jewelry, the trial court's finding that there was not an accord and satisfaction was not against the manifest weight of the evidence. Accordingly, we affirm.

I. BACKGROUND

In December 2005, Pozen, acting as trustee, established two trust accounts benefitting the Fogts, in the amount of $50,000 each, in accordance with a trust established by Pozen's deceased father. Under the trust, the Fogts were to receive an initial distribution of $25,000 each, with the balance of the funds distributed to them when they reached age 30 on October 20, 2007. Soon after the accounts were established, Pozen distributed $25,000 to Lindsey. She also distributed funds to Lisa, but the amount is disputed. The record indicates that Lisa received an initial amount of $5,000, but Pozen contends that she received the full $25,000. Then, between December 13, 2005, and October 10, 2006, Pozen distributed approximately $16,200 to Lisa over a series of 10 different transactions. The record indicates that there may have been additional transactions.

In November 2007, the Fogts sent a demand for payment of $25,000 each as the amount remaining due to them under the trust accounts. Pozen did not pay the money but, in April 2008, she sent the Fogts jewelry in an attempt to settle the matter. In June 2008, the Fogts filed a complaint against Pozen, and Pozen filed an answer that alleged the affirmative defense of accord and satisfaction. Pozen also alleged that she had distributed the funds due to the Fogts through loans and purchases that she made from the trust for their benefit. On January 28, 2010, a bench trial was held.

At trial, the parties testified about the money that was initially distributed and funds that Pozen later provided to the Fogts. Pozen contended that amounts given to Lisa were loans advanced

from the trust funds that were not paid back. She also contended that she purchased wedding items for Lindsey using advances from the trust. The Fogts generally contended that amounts provided after the initial distribution were gifts unrelated to the trust. Records of the transactions were incomplete.

In regard to the jewelry, it is undisputed that Pozen sent multiple items to the Fogts, and that the Fogts had them appraised at a value of $25,400. The Fogts did not sell the jewelry and they did not provide any statement that they accepted it as a settlement. Instead, they filed suit and they brought the jewelry with them to trial. In an answer to interrogatories, Lindsey stated that "[j]ewelry was provided as a settlement proposal from [Pozen] and in an attempt to compensate Lindsey and Lisa for the money taken from their trust accounts by [Pozen]."

In a July 8, 2008, e-mail regarding the jewelry, Pozen wrote to the Fogts that she was surprised when she received the court papers. She further stated:

> "I understand how you feel because of what has happened. Your anger and hatred toward me is justified. What I don't understand is, I thought we had an agreement that the jewelry that I sent was to be held as collateral until such time as the malpractice suit is settled or that you would sell the jewelry and forgive the monetary debt. Until the court papers came, I heard nothing from either of you or your attorney. I thought that I would be getting a letter stating that you received the jewelry shortly after it was sent, but all I received is the signed receipt from your attorney's office that the jewelry was received there. Your attorney told me that you both agreed to send an acceptance letter for receiving the jewelry. Apparently, this was not true. Before I reply to your court papers, could you tell me, What [*sic*] changed? Or what happened to the jewelry? Was it not enough, or what?"

Lindsey testified that the jewelry was provided as a settlement proposal, but she never saw a written proposal, it was not her intent to accept the jewelry as a settlement, and she never agreed to send an acceptance letter. She said that she understood that the jewelry could be either held as collateral until after trial or sold to forgive the debt. Lisa testified that she thought the jewelry was sent as a partial payment for what was owed and that it was not adequate to satisfy the debt. She stated that, although the jewelry was appraised at around $25,000, it would actually sell for a lot less.

Pozen testified that, by sending the jewelry, she hoped to compensate the Fogts for "some of the monies that was owed to them." She also said that she felt that the Fogts were going to get the jewelry sooner or later, but by getting it at that time, they could use it toward what they felt they were owed, even though Pozen did not believe that she owed them anything. Pozen believed that the jewelry was worth over $50,000.

The trial court expressed concern about family members suing each other and observed that the parties did not keep track of the funds very well. The court then found that Pozen acknowledged that she owed money to the Fogts in her July 8, 2008, e-mail. The court did not find an accord and satisfaction and instead ordered the jewelry returned to Pozen. It then awarded $25,000 to Lindsey and $27,000 to Lisa with interest. Pozen appeals.

II. ANALYSIS

Pozen's sole argument on appeal is that the judgment was in error because her tender of the jewelry and the Fogts' retention of it was an accord and satisfaction.

The Fogts did not submit a brief. However, their failure to file a brief does not preclude us from considering the matter on review. *Levy v. Skilling*, 136 Ill. App. 3d 727, 730 (1985) (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976)). "A

considered judgment of the trial court should not be set aside without some consideration of the merits of the appeal." *Talandis Construction Corp.*, 63 Ill. 2d at 131. If the record is simple and the claimed errors are such that they may be decided without the aid of an appellee's brief, the reviewing court should decide the merits of the appeal. *Id.* at 133. Here, the matter can be reviewed without the aid of a brief from the Fogts.

"An accord and satisfaction is a contractual method of discharging a debt or claim. To constitute an accord and satisfaction there must be: (1) a *bona fide* dispute, (2) an unliquidated sum, (3) consideration, (4) a shared and mutual intent to compromise the claim, and (5) execution of the agreement." *Saichek v. Lupa*, 204 Ill. 2d 127, 135 (2003) (citing *Solomon v. American National Bank & Trust Co.*, 243 Ill. App.3d 132, 134 (1993)). "The 'accord' itself is the actual agreement between the parties while the 'satisfaction' is its execution or performance." *Id*. (citing *Fremarek v. John Hancock Mutual Life Insurance Co.*, 272 Ill. App. 3d 1067, 1071 (1995)). "It is grounded in contract law." *Id.* "Because of this contractual nature, the intent of the parties is of central importance." *Id.* (citing *Solomon*, 243 Ill. App. 3d at 134-35). "There must be consideration, a meeting of the minds with the intent to compromise which may be inferred from the parties' words and actions, and, finally, execution of the agreement." *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 911 (1993). The burden is on the party asserting the defense of accord and satisfaction to show a meeting of the minds. *Ferguson v. Ferguson*, 144 Ill. App. 3d 1053, 1055 (1986).

Pozen asserts that the facts are not in dispute and that our review is *de novo*. Where there is substantially no dispute as to the facts upon which the claim of accord and satisfaction is based, the matter is one of law to be determined by the court. *A.F.P. Enterprises, Inc.*, 243 Ill. App. 3d at

912. Otherwise, it is the function of the trier of fact to resolve conflicts in testimony. *Ferguson*, 144 Ill. App. 3d at 1056. "As a result, the judgment of the trial court sitting as trier of fact—which observed the witnesses, heard the testimony, viewed the exhibits and made careful and complete findings of fact—will not be disturbed by the reviewing court unless its findings are manifestly against the evidence." *Id*.

Here, there was a factual dispute regarding a meeting of the minds as to the purpose of the jewelry. Although Pozen argues that she believed it was provided to settle the entire claim and that the Fogts accepted it as a settlement, she stated at trial that she believed it could be used to satisfy "some" of the debt and she stated in her July 28, 2008, e-mail that it could either be sold and used as a settlement or held as collateral. Further, other than Pozen's personal belief that the Fogts intended to accept the jewelry as a settlement of the claim, there was little evidence that the Fogts retained the jewelry with such an intent. Instead, the evidence was most consistent with the view that the Fogts held the jewelry as collateral pending trial in accordance with the statements made by Pozen in her e-mail. The Fogts acknowledged that the jewelry was provided as an "attempt" to settle, but they never sent an acceptance, did not sell the jewelry, and proceeded to trial, bringing the jewelry with them. Accordingly, the trial court's determination that there was no meeting of the minds in regard to the purpose of the jewelry, and thus no accord and satisfaction, was not against the manifest weight of the evidence.

III. CONCLUSION

Pozen did not show a meeting of the minds so as to prove an accord and satisfaction. Accordingly, the judgment of the circuit court of Kane County is affirmed.

Affirmed.