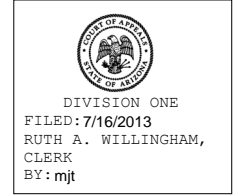


THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RSP ARCHITECTS, LTD.,)	No. 1 CA-CV 12-0545
a Minnesota corporation,)	
)	
Plaintiff/Appellant,)	
)	
v.)	DEPARTMENT C
)	
FIVE STAR DEVELOPMENT RESORT)	
COMMUNITIES, LLC, an Arizona)	
Limited liability company;)	MEMORANDUM DECISION
FIVE STAR DEVELOPMENT PROPERTIES,)	(Not for Publication -
LLC, an Arizona limited liability)	Rule 28, Arizona Rules of
company; FIVE STAR DEVELOPMENT)	Civil Appellate Procedure)
GROUP, INC., an Arizona)	
corporation; FIVE STAR)	
DEVELOPMENT COMMUNITIES, LLC, an)	
Arizona limited liability company,)	
)	
Defendants/Appellees.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-038240

The Honorable J. Richard Gama, Judge

AFFIRMED

Gammage & Burnham, P.L.C.	Phoenix
By James A. Craft	
Carolyn V. Williams	
Christopher L. Hering	
Attorneys for Plaintiff/Appellant	

Dickinson Wright/Mariscal Weeks PLLC	Phoenix
By Scott A. Holcomb	

J O H N S E N, Judge

¶1 RSP Architects, Ltd. ("RSP") appeals the superior court's judgment in favor of Five Star Development Resort Communities, LLC ("Five Star"), on Five Star's claim for breach of contract. We affirm.¹

FACTS AND PROCEDURAL HISTORY

¶2 RSP and Five Star executed a contract in June 2008 in which RSP agreed to provide a variety of architectural services for a development known as "The Palmeraie." The contract charged RSP with "overall coordination" of the project and "conceptual design, schematic design, design documents, construction documents and construction administration services." Services described as "Basic Services" were set out in Article 2 of the contract; other tasks described as "Additional Services" were provided for in Article 3.

¶3 The contract provided that Five Star would pay RSP progress payments totaling \$1,520,000 for performance of "Basic Services" in various phases of the project. Specifically, the contract stated that

¹ In a separate opinion, we hold the Arizona Prompt Payment Act, Arizona Revised Statutes ("A.R.S.") section 32-1129 *et seq.*, does not apply to the contract.

progress payments for Basic Services in each phase shall total the following percentages of the total Basic Compensation payable:

Schematic Design Phase:	fifteen percent (15%)
Design Development Phase:	twenty percent(20%)
Construction Documents Phase:	forty-five percent (45%)
Bidding or Negotiation Phase:	one percent (1%)
Construction Phase:	nineteen percent (19%)

Total Basic Compensation one hundred percent (100.00%)

Separately, the contract provided that Five Star would pay RSP a negotiated lump sum for "Additional Services." The contract further provided that payments would be "due and payable thirty (30) days from the date of the Architect's invoice."

¶4 In August 2008, RSP and Five Star executed a contract amendment known as "PA 1," in which RSP agreed to provide "Tenant-Related Efforts" billed on an hourly basis. A week later the parties agreed to a second amendment, "PA 2," which increased the scope of the contract and correspondingly increased the total fixed fee from \$1,520,000 to \$3,072,074.

¶5 In December 2009, RSP sued, alleging Five Star failed to pay \$591,554.67 billed between December 2008 and May 2009. RSP alleged seven causes of action: violation of the Uniform Trade Secrets Act, conversion, injunctive relief, breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and violation of Arizona's Prompt Payment Act. RSP answered, denying liability, and counterclaimed, alleging

RSP submitted more than \$700,000 in invoices that did not conform to the parties' agreed-upon billing process.

¶16 The parties filed cross-motions for partial summary judgment; the court granted judgment in favor of Five Star on all claims except breach of contract and breach of the duty of good faith. After a five-day trial, the court found RSP breached the contract and overcharged Five Star for work it had performed. The court granted judgment for Five Star in the amount of \$86,697 and awarded \$214,456.53 in attorney's fees and \$6,251.27 in costs.

¶17 We have jurisdiction of RSP's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

DISCUSSION

A. Legal Principles.

¶18 When reviewing a superior court's findings of fact after a bench trial, "[w]e will not set aside the [superior] court's findings of fact unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287,

289 (App. 2003). We review the record "in the light most favorable to sustaining the trial court's ruling." *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991).

B. RSP's Claim for Breach of Contract.

¶9 RSP alleged Five Star breached by failing to pay \$591,554.67 invoiced between December 2008 and May 2009. The court found, however, that RSP's claim failed because its "invoices were not in compliance with the terms of the parties' agreement" and "did not follow the fixed fee structure the parties[] agreed to in their agreement." The court found that rather than calculate the amount due for Basic Services by reference to the percentage of completion of each of the phases of work, as the contract required, RSP billed based on a "blended rate" based in part on the number of hours worked in each particular phase. The court found that the "blended rate" by which RSP invoiced Five Star was not an accurate measure of what Five Star owed under the contract.

¶10 More than sufficient evidence exists in the record supporting the court's finding that RSP's invoices did not comport with the contract requirements. RSP's expert, who testified RSP's invoices were "reasonable," admitted he did not review the full contract and he "did not look at whether or not RSP invoiced Five Star consistent with the contract." In fact, the expert testified that he "did not utilize the percentages

and the phases that were agreed to in the written contract
." Instead, the expert calculated a blended hourly rate represented by RSP's billings by dividing the total of those invoices, \$1,926,006, by the number of hours RSP claimed were worked. This yielded an average "blended" hourly billing rate that the expert testified was below industry average and reasonable.

¶11 RSP argues that PA 2 provided that the "Additional Services" added to the scope of the contract by that amendment were to "be negotiated . . . and paid as a lump sum." RSP contends this meant that the payment-by-phase structure set out in the contract for Basic Services did not apply. But RSP points to nothing in the record that supports its contention that PA 2 displaced the contract's allocation of the contract amount by phases; moreover, the managing partner of RSP testified that all the additional fees due under PA 2 were billed as "Basic Services" to Five Star. Sufficient evidence therefore exists in the record to support the superior court's finding that RSP did not prove Five Star breached by failing to pay sums due under the contract.

C. Five Star's Counterclaim.

¶12 In its counterclaim, Five Star alleged it overpaid RSP by paying invoices that, as discussed above, were not calculated pursuant to the contract. The superior court concluded that,

after considering the invoice deficiencies addressed above, Five Star overpaid under the contract by \$86,697. On appeal, RSP does not contest the court's findings of amounts properly due for tenant-related services or master planning/programming; it disputes only the court's valuation of its "Basic Services" work.

¶13 RSP invoiced Five Star \$1,262,969 for work falling within the category of "Basic Services," but the court determined that only \$752,943 was due under the contract for that work, based on the percentage of completion of each of the phases specified in the contract. The evidence supports the superior court's finding. In making that finding, the court relied on the testimony of Five Star's expert witness, who testified based on his review of the contract and all of RSP's invoices throughout RSP's work. The expert testified that the terms of PA 2 "state[] fairly clearly . . . those amounts are added to the master agreement and increases the total fixed fee to three-million-seventy-two-seventy-four dollars It's adding it to the basic service lump sum," thus making any work performed under PA 2 "Basic Services" subject to the percentage schedule of the contract.

¶14 The expert explained that RSP's bills were not calculated based on the percentage of work completed in each of the various phases of the project. Five Star's expert testified

that the "man-hour analysis" employed by RSP's expert witness was inappropriate. Five Star's expert testified that properly analyzed, RSP's bill represented 100 percent completion of the Schematic Design phase, 100 percent completion of the Design Development phase, and 23 percent completion of the Construction Document phase, but there was "nothing that reflects that [RSP was] into those phases as they expressed in their invoices. There [were] no construction documents and they were not 100 percent done with design development." The expert testified that if the work product RSP generated was measured according to the fee schedule set out in the contract and PA 2, RSP was entitled to no more than 100 percent of the Schematic Design phase fee and 13 percent of the Design Development phase fee. The expert also testified that an award of 52 percent, or \$260,000 of the \$500,000 zoning fee, was appropriate.²

¶15 RSP argues the superior court erred by concluding that it was owed only \$260,000 of the \$500,000 to be paid for "conceptual design and zoning" work. RSP asserts that it was owed the full \$500,000 because Five Star agreed to pay the full \$500,000 fee. It points to two letters Five Star sent to RSP

² The contract and PA 2 provided that a separate \$500,000 of the \$3,072,074 would be for "conceptual design and zoning efforts." This work was part of the "Basic Services" to be performed under the contract, meaning that RSP should have billed for the work based on the percentage of the phase completed, rather than based on man-hours expended.

after the billing dispute arose that state “[a]ll amounts due under the Contract for . . . zoning, totaling \$500,000, have been paid to you in full.”

¶16 We infer the superior court concluded the letters RSP cites did not constitute admissions by Five Star that it owed the full \$500,000 for zoning services; Five Star argued the letters were sent in settlement irrespective of whether any other portion of the fee was disputed. The Palmeraie’s project manager testified the first letter was written in follow up to a meeting in which Five Star had indicated it had a problem with RSP’s invoices. The project manager testified that the meeting was a “culmination of a lot of verbal . . . discussions and meetings we had in the past about . . . we feel like there’s a lot of out of control billing going on,” and that Five Star felt it had “been overbilled [and] overcharged.” Five Star explicitly notes in its second letter, in fact, that “RSP owes Five Star over \$100,000.” Thus, we cannot conclude the superior court abused its discretion in finding that Five Star had not conceded that RSP was owed the full \$500,000 for rezoning work and that only \$260,000 was due.

¶17 RSP also asserts it was owed a separate \$127,090 for its preliminary hotel residential and additional resources design. RSP argues it performed this work after the contract was executed, but before PA 2, and that the work did not fall

within the scope of the contract's "Basic Services," thereby making it "Additional Services" to be billed on an hourly basis. Additionally, RSP contends Five Star's manager specifically approved the invoice for this payment.

¶18 Five Star's expert testified, however, that the design work at issue "got rolled into the basic services contract, once PA Number 2 was signed." Five Star's project manager also testified that

At first, before PA2, [the conceptual designs] were just done an hourly basis [sic] and we didn't want that. We wanted to roll everything into PA2. And so we said, stop. Just roll all those monies into PA2 and give me an amount for a concept design on phase two so we can get through DRB, design review board.

RSP at no point disputed the manager's assertion, and its own expert admitted that the \$127,090 invoiced for the design work was included in PA 2's billing structure. Additionally, while Five Star's project manager approved the invoices, he testified that he "didn't go back and ask for backup on every single invoice" because he "trusted that [RSP was] billing according to the contract." The superior court's inclusion of the \$127,090 within the \$752,943 it found properly invoiced for "Basic Services" under the contract and PA 2 therefore was not clearly erroneous based upon the evidence.

D. RSP's "Acquiescence" Argument.

¶19 RSP argues Five Star “acquiesced to how and how much RSP had billed,” arguing Five Star was bound by the invoices. RSP bases this argument, however, on the notion that its invoices constituted an “account stated,” an argument that it raises for the first time on appeal. Because we generally do not consider arguments raised for the first time on appeal, we will not address it. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000).

CONCLUSION

¶20 For the foregoing reasons, and those stated in the opinion issued this day, we affirm the superior court’s judgment in favor of Five Star. As the prevailing party in this appeal, Five Star is entitled to its costs and reasonable attorney’s fees pursuant to A.R.S. § 12-341.01(A) (West 2013), conditioned on its compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge