DIVISION ONE
FILED: 7/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EAST VALLEY DISASTER SERVICES, INC.,	1 CA-CV 12-0565
Plaintiff/Counterdefendant/ Appellee,	DEPARTMENT A
v.	MEMORANDUM DECISION (Not for Publication Rule 111, Rules of the Arizona Supreme Court)
OLEG AWSIENKO,	
Defendant/Counterclaimant/ Appellant.	

Appeal from the Superior Court of Maricopa County

Cause No. CV2010-090265

The Honorable Karen Potts, Judge

AFFIRMED

Knapp & Roberts, P.C. Scottsdale
By David L. Abney
Attorneys for Defendant/Counterclaimant/Appellant

Law Offices of Kevin Jensen, PLLC Mesa
By Kevin Jensen
Attorneys for Plaintiff/Appellee

T H O M P S O N, Presiding Judge

¶1 Oleg Awsienko (Awsienko) appeals the trial court's judgment after a jury trial in favor of East Valley Disaster Services, Inc. (East Valley). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUD

¶2 In September 2009, while Awsienko was travelling in Europe, a toilet leak caused water damage to his Phoenix home. The home sustained considerable damage to the structure and there was damage to his personal property. Awsienko insured his home with State Farm. East Valley was hired by Awsienko to do remediation and repair pursuant to State Farm's Premier Service Program (Program), a voluntary State Farm service which listed participating independent contractors. Under the Program, State Farm typically agreed to pay for repairs to the property damage covered under the insured's home owner's policy.

¶3 Awsienko entered into a "Work Order and Authorization Agreement" with East Valley that included emergency services, structural repairs and home-content processing related to the water damage. The Agreement authorized and directed that State Farm would pay East Valley directly on Awsienko's claim. The Agreement also contained language that payment in full was due "upon work completion and receipt of invoice" with interest to accrue at eighteen percent annually and the cost of collections in the event of non-payment.

¶4 Awsienko dismissed East Valley prior to the completion of the job on or around December 2009. Thereafter, East Valley filed suit claiming breach of contract and unjust enrichment.

Awsienko answered and filed a counterclaim for breach of contract with consequential damages.

¶5 East Valley made an offer of judgment in September 2010 pursuant to Arizona Rule of Civil Procedure 68. The matter went to mandatory arbitration and the arbitrator found for Awsienko in the amount of $22,208.57. East Valley appealed the award to the superior court and the parties began to prepare for trial. In February 2012, East Valley disclosed the revised measure of its damages as $56,900.

¶6 Awsienko filed a motion for sanctions pursuant to Rule 72(e) alleging East Valley should have amended their arbitration certificate to show damages exceeding $50,000 before arbitration, a motion in limine to preclude evidence of insurance, and a motion for summary judgment on the issues of breach and unjust enrichment, claiming East Valley's increased damages were precluded. East Valley answered the motions. After briefing, the trial court granted Awsienko's motion for summary judgment as to East Valley's unjust enrichment claim only. The trial court denied Awsienko's remaining claims under the motion for summary judgment, the motion in limine as to insurance, and declined to award sanctions under Rule 72(e) finding both parties "equally shared" in the prejudice of engaging in arbitration.

¶7 Awsienko filed a motion for reconsideration of the motion in limine as to insurance and the trial court held argument prior to trial. During the hearing on this contract matter, the trial court clarified that although Awsienko kept arguing insurance was irrelevant and prejudicial he, himself, intended to call two State Farm adjusters as fact witnesses as to whether East Valley did the work in a workman-like manner and regarding the payments made to East Valley. On reconsideration, the trial court found some exhibits being offered should be redacted and stated that it was open to hearing further objections as the testimony progressed. The trial court, finally, said:

> But I don't think you can eliminate the existence of insurance from this case, because it's in the first work order [and] it is tangled into the issue between the parties as to how payments could be made and how invoices could be received. So I don't think we can take that out, and I don't think the issue of insurance prejudices them as long as we don't tell them what the insurance [as a third party to the contract] thought or didn't think about the claim and as long as we don't tell them what the insurance company paid regarding the claim or didn't pay. And then we can give them the standard instruction on how insurance is not to be considered.

¶8 A four day jury trial was held wherein the jury awarded East Valley $57,500. A judgment was entered that included $41,965 for attorneys' fees under Arizona Revised Statutes (A.R.S.) § 12-341.01 (2012), costs in the amount of

$3,565.55, Rule 68 sanctions in the amount of $3,095.55 and jury fees. Awsienko timely appealed.

ISSUES PRESENTED

¶9 Awsienko makes three assertions on appeal:

(1) It was reversible error for the trial court to allow evidence of insurance in this case;

(2) East Valley failed to participate in pretrial arbitration in good faith and, therefore, should have lost its right to appeal the award to the superior court; and

(3) East Valley's contract claims were barred because Awsienko did not receive invoices for East Valley's work prior to East Valley filing suit, thus creating the failure of a condition precedent.

DISCUSSION

A. Evidence of Insurance

¶10 Awsienko claims on appeal that the jury trial was tainted by "irrelevant and poisonously prejudicial" evidence of insurance that he tried "valiantly" to keep out. To this end, Awsienko cites *Swick v. White*, 18 Ariz. App. 519, 520, 504 P.2d 50, 51 (1972) (car pedestrian accident), *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 949 P.2d 56 (App. 1997) (two car accident) and *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 93 Ariz. 60, 378 P.2d 741 (1963) (ambulance ran into car) for the principle that the deliberate introduction of insurance creates

prejudice and is reversible error.

¶11 We review the grant or denial of a motion in limine under an abuse of discretion standard. *Warner v. Southwest Desert Images, LLC,* 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008). As to evidence admitted at trial, "we will not disturb a trial court's rulings on the admission or exclusion of evidence unless a clear abuse of discretion appears, or the court misapplied the law, and prejudice results." *Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 202, ¶ 12, 221 P.3d 390, 393 (App. 2009). Preliminarily we note, because this is a contract matter, we find unpersuasive the tort cases cited by Awsienko for the proposition that the deliberate introduction of insurance into a jury trial causes prejudice and requires reversal. Nor, as pointed out by the trial court, does Arizona Rule of Evidence 411, which prohibits the introduction of insurance, apply. This is a case in which both parties--prior to trial--intended to and later did introduce fact evidence through State Farm and stipulated to the introduction of documents from State Farm.

¶12 The issue of insurance was first raised with the trial court as a motion in limine which was denied pursuant to a Rule 403 analysis. The trial court found that in this contract case, where insurance agents were being listed by Awsienko himself "to

testify to the result of their inspections of the damage and work performed" and where legal claims and defenses hinged on the payments made to East Valley by State Farm and on invoices submitted to State Farm which Awsienko claimed not to have received, the probative value of this necessary evidence was not outweighed by the prejudice.

¶13 On reconsideration, the trial court held extensive discussion trying to clarify exactly what concerns Awsienko had as regards to evidence of insurance. The trial court stated that one of the reasons the original motion was denied was because it was vague as to what specific testimony or exhibits he was trying to have excluded as insurance was tangled into both parties' claims. Counsel for Awsienko stated:

> the Court's correct, we do have witnesses as far as the insurance adjusters and everything else listed as factual witnesses only. And the reason why they're factual witnesses that we plan on using is because they can talk about the events that took place prior to and at that December 10th meeting, which are in dispute as far as we're concerned.

After the trial court clarified that Awsienko was primarily worried about the jury hearing about checks coming from State Farm, it ordered redacted the amounts of any payments issued by State Farm as probably unduly prejudicial and not relevant to what amount Awsienko actually owed because the construction contract was between the parties. The trial court further found

the insurance company's opinions as to whether a bill was legitimate or not to be irrelevant. The trial court advised the parties that if during the course of trial it appeared that the fact of insurance may be causing prejudice "Defendant shall so inform the Court" and the court would take further action. No such objection occurred.

¶14 We turn first to the trial court's Rule 403 analysis. In conducting a Rule 403 analysis, the trial court should first "assess the probative value of the evidence on the issue for which it is offered." *State v. Gibson*, 202 Ariz. 321, 324, ¶ 17, 44 P.3d 1001, 1004 (2002). This assessment is weighed against potential prejudice to the opposing party. *Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, 129, ¶ 11, 158 P.3d 255, 258 (App. 2007). "Because this is a weighing of factors that cannot easily be quantified, substantial discretion is accorded the trial judge." *Gibson*, 202 Ariz. at 324, ¶ 17, 44 P.3d at 1004 (internal quotations omitted). On the record before us, we cannot say that the trial court abused its discretion in denying Awsienko's motion in limine.

¶15 As to the presentation of argument and evidence at trial related to State Farm, we also find no error. Awsienko asserts that his own numerous references to insurance or State Farm in the trial were made in "self defense." He states that he did

not need to object at trial because the issue was preserved by his motion in limine. We are not persuaded. The trial court explicitly stated in the hearing on reconsideration that it was open to hearing objections. Failure to object at trial waives the issue on appeal. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 304-05 n. 2, ¶¶ 16, 18, 995 P.2d 735, 740-41 n. 2 (App. 1999). Further, even had evidence been admitted in error, the jury was instructed not to give weight to the matter of insurance and we must presume that jurors followed the trial court's instructions.[1] *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). For the above stated reasons, we find no error in the admission of evidence related to insurance in this contract matter.

B. Arbitration

¶16 Awsienko next claims that East Valley failed to participate in pretrial arbitration in good faith and therefore should have lost its right to appeal the arbitration award to the trial court. To this end, Awsienko brought a motion to the trial court for sanctions pursuant to Rule 72(e) alleging East Valley should have amended their arbitration certificate to show

[1] Because of our resolution of this matter we need not decide if this was also invited error. *See, e.g., Schlect v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953) ("One who deliberately leads the court to take certain action may not upon appeal assign that action as error.").

damages exceeding $50,000 before arbitration. In its answer, East Valley explained that when the complaint was filed in 2010, damages were approximately $35,000 but over the nearly two years before arbitration significant interest and late fees had accrued. East Valley further enumerated that several of the more lengthy extensions were requested by Awsienko, for example, to travel out of the country. The trial court denied sanctions, finding "the Court declines to find that Plaintiff failed to participate in the arbitration in good faith. Indeed, the prejudice of engaging in arbitration was/is equally shared."

¶17 The award or denial of sanctions is reviewed under an abuse of discretion standard. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 15, ¶ 31, 261 P.3d 784, 790 (App. 2011). A trial court abuses its discretion when its ruling is "clearly untenable, legally incorrect, or amount[s] to a denial of justice." *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 6, 210 P.3d 1283, 1285 (App. 2009). This is not that case. The trial court did not abuse its discretion in determining either that East Valley participated in arbitration in good faith or that the parties shared the blame equally in proceeding to arbitration as they did.

C. Invoices

¶18 Awsienko next asserts that East Valley's contract

claims were barred as a failure of a condition precedent because Awsienko never received invoices for East Valley's work prior to East Valley filing suit. This was the focus of one of Awsienko's motions for summary judgment. The trial court denied that motion finding genuine issues of fact as to whether or not Awsienko received East Valley's invoices. Whether Awsienko received invoices was a hotly contested issue at trial and Awsienko's primary defense.

¶19 We agree with the trial court that whether Awsienko received the invoices was a question of fact for the jury to resolve, not a question of law. We will not re-weigh the evidence; the credibility of witnesses and weight of the evidence are within the province of the finder of fact. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000). On appeal, we view the facts and evidence in the light most favorable to sustaining the jury's verdict. *See Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

¶20 After four days of trial, including testimony by Awsienko that he did not receive the invoices and conflicting letters from State Farm to Awsienko with attachments of worksheets or invoices, the jury in this matter found for East Valley. Evidence exists to support the jury's verdict,

therefore the verdict for East Valley is affirmed.

FEES

¶21 Both parties seek attorneys' fees pursuant to A.R.S. § 12-341.01. Reasonable attorneys' fees in an amount to be determined will be awarded to East Valley, as the successful party, upon compliance with Rule 21, A.R.C.A.P.

CONCLUSION

¶22 For the foregoing reasons, the trial court is affirmed.

/s/

_____
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
_____
PHILIP HALL, Judge*

/s/
_____
KENT E. CATTANI, Judge

*Judge Philip Hall was a sitting member of this court when the matter was assigned to this panel of the court. He retired effective May 31, 2013. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Hall as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during his term in office.