DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GINA K DITTMAR and MICHAEL T. DITTMAR, Plaintiffs/Appellants, v. PATRICIA PASSANTI; MARIE ELENA CARLSON; DANA MARIE and CHARLES CROY, husband and wife; SAMANTHA and JACOB LAUDERDALE, husband and wife, Defendants/Appellees.	1 CA-CV 08-0793 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Navajo County

Cause No. CV20070369

The Honorable Thomas L. Wing, Judge

AFFIRMED

Shaffery & Coronado, PC — Lakeside
By Eduardo H. Coronado
Attorneys for Plaintiffs/Appellants

Higgins Hitchcock & Hesse, PLLC — Pinetop
By George R. Hesse
Attorneys for Defendants/Appellees

H A L L, Judge

¶1 Appellants Gina and Michael Dittmar (the Dittmars) appeal from the superior court's denial of declaratory relief regarding their ownership interest in a mobile home and its associated parcel of land. For the following reasons, we affirm the judgment of the superior court.

I. FACTS AND PROCEDURAL HISTORY

¶2 The Dittmars claim to have entered an agreement in November 2001 to buy a mobile home and the land surrounding it from Patricia Passanti (Passanti), Gina Dittmar's mother, who lived in another mobile home on the same parcel of land.

¶3 In October 2006, Passanti recorded a joint tenancy deed conveying an interest in the property at issue to her other daughters and their husbands. She claims that although she and the Dittmars had discussed a possible sale, they had not settled on terms, and thus had not created an enforceable contract. In April 2007, the Dittmars recorded several documents with the county recorder in an attempt to show they held an interest in the subject property. On July 26, 2007, the Dittmars filed a complaint in propria persona seeking a declaratory judgment that an enforceable contract for the sale of the property existed between the Dittmars and Passanti. On the same day Passanti filed her answer to the complaint, she filed a separate action for forcible detainer to evict the Dittmars from the property.

¶4 On June 2, 2008, the court held a hearing to review settlement negotiations. At that hearing, the parties agreed that settlement was unlikely, and Passanti moved to set the case for trial on August 15. Gina Dittmar was present at the hearing and waived her jury trial right. Although Michael Dittmar was not present at the hearing due to incarceration, he was represented by counsel at the hearing. On June 12, Mr. Dittmar informed the Dittmars' counsel that he did not wish to waive a jury trial. After attempting to contact opposing counsel, the Dittmars filed a request for a jury trial On July 2. On August 7, the court denied the request because it came one month after the trial date was set, and was thus untimely under Arizona Rule of Civil Procedure 38(b). At the final pretrial conference on August 12, the parties ultimately agreed to a continuance postponing the trial to September 4.[1]

¶5 On August 22, 2008, the Dittmars sought leave to amend their complaint to add claims for breach of contract, unjust enrichment, and partition. The Dittmars' motion to amend came ten days after the pre-trial conference, over two months after the trial date was set, and twelve days before the trial date. The court denied leave to amend because of the amendment's late submission and the Dittmars' failure to refute Passanti's

[1] The Dittmars requested the continuance to allow Mr. Dittmar to appear by telephone and meet with counsel prior to trial.

contention that the amendment would "delay . . . the trial for a substantial period."

¶6 At trial, the Dittmars asserted that Passanti offered to sell them the property in December of 2000 and again in April of 2001 because of back taxes that she owed. They claimed that they moved into the mobile home in November 2001 after agreeing to buy the property from Passanti. The parties presented conflicting testimony on various terms of the sales agreement, including whether some terms had been discussed at all.

¶7 The terms of payment and price of the land were the first point of contention. The Dittmars claimed that they agreed to a purchase price of $40,000, including a $4,000 down payment and $450 payments each month. They described this agreement as a mortgage, but claim that interest was not mentioned. They also claimed that the agreement allowed them to count money spent on improvements to the property as payments toward the purchase price.

¶8 Conversely, Passanti described a different set of terms. She contended that the parties agreed on a down payment of $5,000, the full payment of which would prompt the parties to hire an appraiser and/or a surveyor to get an estimate of the property's value and how to divide it. Passanti claimed that the parties never agreed on an appraiser because the Dittmars only paid $4,000, never fully paying the down payment. Thus,

she claimed that the $450 monthly payments the Dittmars made to her were rent, rather than mortgage payments, and that the parties never agreed to a final purchase price.

¶9 The parties also disagreed about the description of the land the Dittmars sought to purchase. Passanti testified that the boundaries of the land to be sold were never specified because the parties never hired a surveyor. She claimed that there was no obvious way to divide the property for sale, because her mobile home and the home the Dittmars sought to buy were perpendicular to each other on the lot. But Gina Dittmar claimed that she and Passanti agreed to a dividing line "where the shed is and our trailer is to the right" during a walk together at the lot. Michael Dittmar admitted that he did not know where to divide the lot, but knew that their portion should be .49 acres, and asked the court to split the property evenly "in the wisdom of Solomon."

¶10 Passanti and the Dittmars presented conflicting evidence on who was responsible for taxes on the sale property. Both sides agreed that the Dittmars "bought"[2] Passanti's back property taxes at auction. But Michael Dittmar later admitted that Passanti had reimbursed him for the taxes with interest.

[2] *See* Ariz. Rev. Stat. (A.R.S.) § 42-18106(A)(2) (2006) (providing for county treasurer to "sell a tax lien" on tax-delinquent parcels of real property "at public auction for taxes, penalties, interest and charges on the real property").

Although the Dittmars claimed that they paid Passanti for taxes in monthly increments, Passanti contended that the Dittmars had never paid her for taxes aside from their purchase of her tax debt at auction.

¶11 The court admitted two writings, submitted by the Dittmars and signed by Passanti, regarding the agreement. Both were receipts for $450 payments, which both notes characterized as "mortgage" payments. One of the notes specified the address of the property, acknowledged that the Dittmars had paid $4,000 as a "down payment on the purchase of this property," and avowed that the Dittmars had made the $450 payments since November 2001. Passanti testified that she had written several such receipts for "rent," but that under mounting pressure from Michael Dittmar she began to write that they were for "mortgage" instead. She further testified that one of the receipts was partially written by Gina Dittmar, and that she had written another to stop a "horrible argument just before Christmas."

¶12 The superior court concluded that the Dittmars did not establish the existence of several essential contractual elements: the purchase price, who was responsible for property taxes, the duration of the contract, and the description of the property sold. Thus, the court held that the parties' agreement was "incomplete and uncertain." The court also found that family discord and emotional stress prevented Passanti from

"freely and voluntarily" assenting to the writing's terms. The Dittmars filed a timely notice of appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

II. DISCUSSION

¶13 The Dittmars raise the following arguments on appeal, which we have reordered for purposes of discussion: (1) whether the trial court erred by denying their request for a jury trial; (2) whether the trial court erred by denying their motion to amend the complaint; (3) whether the trial court based its verdict on the statute of frauds even though the defendants agreed that they were procedurally precluded from relying on the statute; and (4) whether the court's verdict was substantially supported by the evidence.

Demand for Jury Trial

¶14 The Dittmars argue that the superior court erred when it denied their demand for a jury trial. Rule 38(d) of the Arizona Rules of Civil Procedure provides "the failure of a party to serve a demand [in compliance with the Rules and their time limits] constitutes a waiver by the party of trial by jury." A party seeking a jury trial must demand it in writing "not later than the date of setting the case for trial." Rule 38(b). The Dittmars acknowledge that they did not make a timely demand for a jury trial and do not deny that they expressly

waived their right to a jury trial through counsel at the June 12 pretrial hearing, at which Mrs. Dittmar, but not Mr. Dittmar, was present, when the trial court scheduled the matter for trial on August 12. They nonetheless argue that the trial court abused its discretion by not permitting them to withdraw their waiver after they filed an untimely request for jury trial on July 2. Their request, which is unsupported by affidavit, states that Mr. Dittmar "conveyed to counsel [] that he was not waiving his right to a jury trial and that he was requesting a jury trial." On appeal, the Dittmars argue, without citing authority, that they should have been permitted to withdraw their waiver because Michael Dittmar did not personally appear at the hearing because he was incarcerated and that granting a jury trial would not have prejudiced Passanti. We disagree.

¶15 We will not interfere with a trial court's decision on whether to grant a party's motion to withdraw a jury trial waiver absent an abuse of discretion. *Hackin v. Pioneer Plumbing Supply Co.*, 10 Ariz.App. 150, 153, 457 P.2d 312, 316 (1969). When the record clearly shows that a party failed to timely request a jury trial, the party seeking relief from the resulting waiver bears the burden of showing the court the particular circumstances that require relief. *Id.* at 154, 457 P.2d at 317. In ruling on the request, the trial court must

consider "the rights of the litigants [and] the burden of shifting the trial to the jury docket." *See id*.

¶16 Federal courts have granted such motions only when the moving party presents "some exceptional circumstance, beyond mere inadvertence, to justify the original waiver." *Gelardi v. Transamerica Occidental Life Ins. Co.*, 163 F.R.D. 495, 496 (E.D.Va. 1995) (citing *McCray v. Burrell*, 516 F.2d 357, 371 (4th Cir. 1975)). Granting a waiver withdrawal without exceptional circumstances would be an "arbitrary act of the Court." *Krussman v. Omaha Woodmen Life Ins. Soc.*, 2 F.R.D. 3, 4 (D.Idaho 1941). Similarly, Pennsylvania requires "legal cause satisfactorily established" for withdrawal, and holds that a "mere change of heart" is not sufficient. *Rodney v. Wise*, 500 A.2d 1187, 1190 (Pa. Super. Ct. 1985). *See also Carolyn Schnurer, Inc. v. Stein*, 150 A.2d 490, 492 (N.J. 1959) (withdrawal of a waiver should not be permitted without a showing of "such cause as reasonably moves the discretion").

¶17 The only reason cited by the Dittmars to justify withdrawal of their waiver is Michael Dittmar's absence at the hearing setting the case for a bench trial. This is not controlling. Attorneys in civil cases generally have authority to control procedural matters, and their waivers ordinarily bind their clients. 7A C.J.S. *Attorney & Client* § 251 (2009). In a civil proceeding, unlike a criminal proceeding, counsel's waiver

of a jury trial on behalf of a client is binding. *Compare Long v. Arizona Portland Cement Co.*, 2 Ariz.App. 332, 333, 408 P.2d 852, 853 (1966) (holding that a party was bound by substitute counsel's agreement in open court to waive a civil jury trial) *with* Ariz. R. Crim. P. 18.1(b)(1) (requiring the court to "address the defendant *personally*, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent") (emphasis added). More importantly, however, the Dittmars' request for a jury trial is unsupported by any facts that would have justified the trial court in relieving the Dittmars of their previous waiver. *See Carolyn Schnurer, Inc.*, 150 A.2d at 493 (concluding that trial court did not abuse its discretion in declining to relieve party of jury waiver when "no reasons were presented by affidavit or other formal means to support it"). Under the circumstances presented here, we cannot conclude that the Dittmars satisfactorily established legal cause for withdrawal of their waiver such that the trial court abused its discretion in denying their request.[3]

Motion to Amend Complaint

¶18 The Dittmars contend that the trial court erred by denying their request for leave to amend their complaint filed

[3] Although their failure to do so is not determinative, we also note that the Dittmars apparently did not renew their request when the trial was rescheduled.

on August 21, 2008, less than two weeks before trial. They sought to add claims for breach of contract, unjust enrichment, and partition to their initial claim for declaratory relief. Opposing the motion, Passanti argued that delay unduly prejudiced her because she could not pursue a forcible detainer action to evict the Dittmars until resolution of this case, so the Dittmars were living rent-free in what she alleged was her mobile home.

¶19 In its ruling, the trial court found that the Dittmars did not "refute[] [Passanti's] position that amendment of the complaint [would] require delay of the trial for a substantial period." The court further found that the filing was "unduly delayed" and concluded that Passanti would be prejudiced by the delay caused by further pretrial proceedings and the need to postpone the trial.

¶20 We only overturn a trial court's denial of leave to amend for a clear abuse of discretion. *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). A party may only amend its pleading after a responsive pleading is served only by leave of court or written consent of the adverse party. Ariz. R. Civ. P. 15(a). "Leave to amend shall be freely given when justice requires." *Id.* Although leave to amend is discretionary, "amendments will be liberally allowed; trial on the merits of the claim is favored, and amendment will be

permitted unless there has been undue delay, dilatory action or undue prejudice." *Owen v. Superior Ct.*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). But denial of a motion to amend is "a proper exercise of the court's discretion when the amendment comes late and raises new issues requiring preparation for factual discovery which would not otherwise have been necessitated or expected, thus requiring delay in the decision of the case." *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 336, 909 P.2d 399, 403 (App. 1995) (citations omitted).

¶21 Here, as noted by the trial court, although the proposed amendments had been discussed by the parties months earlier during settlement negotiations, the Dittmars waited until close to trial before seeking to amend their complaint to add new theories. Under these circumstances, we cannot conclude that the trial court abused its discretion by denying the Dittmars leave to amend their complaint to include counts alleging breach of contract, unjust enrichment, and partition. *See Haynes*, 184 Ariz. at 339, 909 P.2d at 406 (affirming denial of a motion to amend the answer less than three weeks before trial after a sixteen-month delay because it had failed to exercise due diligence in discovering the basis for the amendment); *In re Estate of Torstenson*, 125 Ariz. 373, 376-77, 609 P.2d 1073, 1076-77 (App. 1980) (affirming denial of motion to amend because appellants had notice of the defects in their

petition long before moving to amend and gave no compelling reason for delay).

Statute of Frauds

¶22 The Dittmars argue that the trial court improperly based its decision on the statute of frauds, which the parties agreed was procedurally foreclosed as an affirmative defense in this case.[4] They maintain that the court's findings were "consistent with" the required elements of a memorandum required by the statute of frauds pursuant to A.R.S. § 44-101 (2003). In its trial decision, the court found that

> [t]he evidence [did] not establish by a preponderance therefore on the following essential elements of an enforceable contract: (a) the purchase price, including whether the down payment was to be $4,000.00 or $5,000.00; (b) whether seller or buyer was responsible to pay real property taxes during the contract period; (c) the duration of the contract, i.e. the legal consequences of failure to make the monthly payment of the "mortgage"; and (d) the description of the property sold and purchased.

Significantly, the court also concluded that "[t]he oral agreement lacked the necessary elements for the parties to be able to either reasonably rely upon the terms thereof or to enable the court to enforce the terms which later became disputed."

[4] The parties stipulated that Passanti could not use the statute of frauds as an affirmative defense because she failed to include it in a responsive pleading pursuant to Arizona Rule of Civil Procedure 8(c).

¶23 Based on this language, it is clear that the court did not premise its verdict on non-compliance with the statute of frauds. Rather, we conclude that the court was applying what is commonly referred to as the "reasonable certainty" doctrine. Although a party claims to accept an offer, the resulting contract is not binding if it is missing essential terms, or if its terms are not reasonably certain. *Savoca Masonry Co. v. Homes & Son Construction Co.*, 112 Ariz. 392, 395, 542 P.2d 817, 820 (1975). An agreement's terms are reasonably certain "if the agreement that was made simply provides 'a basis for determining the existence of a breach and for giving an appropriate remedy.'" *Schade v. Diethrich*, 158 Ariz. 1, 8-9, 760 P.2d 1050, 1057-58 (1988) (quoting Restatement (Second) of Contracts § 33(2) (1981)). Formation of a binding agreement without reasonably certain terms cannot occur because "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance." Restatement (Second) of Contracts § 33(3).

¶24 Conversely, the statute of frauds requires the terms of specific kinds of contracts (e.g. leases, sales of real property, sales of goods with a value of $500 or more) to be specified in a signed writing. *See* A.R.S. § 44-101. Unlike the statute of frauds, certainty analysis applies to contracts of

all types, because it is based on whether the parties' intent to bind themselves has occurred, resulting in contract formation. As our supreme court has noted, "[t]he more uncertainties in the terms of the contract, the stronger the indication that the parties do not intend to be bound; even where they do, if numerous terms are uncertain the uncertainty may be so great as to frustrate their intention." *Schade*, 158 Ariz. at 10 n.9, 760 P.2d at 1059 n.9. Although the alleged contract need not be complete, its terms must have some level of certainty for the court to enforce the agreement. *See AROK Const. Co. v. Indian Const. Serv.*, 174 Ariz. 291, 296-97, 848 P.2d 870, 875-76 (App. 1993).

¶25 Nothing in the court's decision identified absence of a signed writing as a factor in this case. Accordingly, the court did not improperly rely on the statute of frauds in reaching its decision.

Substantial Evidence to Support the Verdict

¶26 Finally, the Dittmars contend that the court's finding that no contract existed is contrary to the evidence. Specifically, they argue that the court acted arbitrarily by rejecting uncontradicted, corroborated testimony from interested witnesses and by entering a judgment unsupported by evidence on the record. We disagree.

¶27 We view the evidence in the light most favorable to upholding the court's decision, and we review issues of law de novo. *Double AA Builders, Ltd. v. Grand State Const. L.L.C.*, 210 Ariz. 503, 506, ¶ 9, 114 P.3d 835, 838 (App. 2005). We accept the trial court's findings of fact unless they are clearly erroneous. *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 245, ¶ 11, 141 P.3d 416, 420 (App. 2006). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51-52, ¶ 11, 213 P.3d 197, 201 (App. 2009). Evidence is substantial if it "would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999). Thus, we do not reweigh conflicting evidence; rather, we search the record "only to determine whether substantial evidence exists to support the trial court's action." *Id.*

¶28 The Dittmars' argument asks us to reweigh evidence under the guise of the arbitrary rejection of unrebutted testimony. In fact, Passanti rebutted the Dittmars' evidence on the pertinent issues with her own evidence and testimony. Passanti contradicted the Dittmars' description of the sales terms with her testimony that the agreed-upon down payment was $5,000, the Dittmars had only paid $4,000, and appraisal of the

land and finalizing the purchase price were contingent upon making the full down payment. Passanti also testified that the Dittmars had never given her money for property taxes, but that they had paid some taxes for her and had "bought" some at auction. On cross-examination, Michael Dittmar admitted that he was fully repaid with interest for the tax lien he purchased at auction. Finally, Passanti rebutted the Dittmars' documentary evidence—receipts signed by her describing the arrangement—by testifying that she had written them only under pressure from the Dittmars. In its ruling, the court expressly noted its belief that "family discord, emotional stress, and pressure[]" led to the writings. Accordingly, the court did not base its ruling on a rejection of unrebutted evidence.

¶29 Substantial evidence on the record supported the court's conclusion that the agreement was too incomplete and indefinite to be enforceable. *See supra* ¶¶ 23-24. Testimony and documentary evidence indicated that the purchase price was unresolved. *Supra* ¶¶ 7-8. The evidence included letters written in 2006 by Gina Dittmar that sought to "get[] things settled in regards to a purchase price" and complained to Passanti that she "still won't tell me how much we are buying [the property] for."

¶30 Further, the evidence indicated that there was no specific definition of the sales property. Michael Dittmar

admitted under cross-examination that he did not know where the boundary of the land to be purchased was, and asked the court to split it using "the wisdom of Solomon." Gina Dittmar testified that Passanti "showed her" the boundary during a walk between their homes. Passanti claimed that there was "no neat way" to divide the property, and that a surveyor would be necessary to do so. We believe a reasonable person could conclude from this evidence that the contract was "incomplete and uncertain," and we will not second-guess the trial court's weighing of the conflicting evidence. Thus, we conclude that substantial evidence supported the trial court's verdict.

Attorneys' Fees and Costs

¶31 Passanti asks that we award her attorneys' fees incurred in responding to this appeal under Arizona Rule of Civil Appellate Procedure 25. This rule allows us to sanction a party if an appeal "is frivolous or taken solely for the purpose of delay." *Id.* An argument on appeal is not frivolous "if the issues raised are supportable by any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ." *In re Levine*, 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993). On this record, we decline to impose sanctions against the Dittmars. However, as the prevailing party on appeal, Passanti is entitled to recover costs on appeal upon compliance with Rule 21.

III. CONCLUSION

¶32 For the foregoing reasons, we affirm the trial court's judgment.

/s/
PHILIP HALL, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PATRICIA A. OROZCO, Judge