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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05-04-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL MCGONIGAL dba ON-SITE) 1 CA-CV 09-0219
BUILDERS,)
) DEPARTMENT B
)
Plaintiff/Appellee-)
Cross Appellant,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
TROY A. FULLWOOD and JULIE A.) Appellate Procedure)
FULLWOOD, husband and wife,)
)
)
Defendants/Appellants-)
Cross Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-015393

The Honorable Richard J. Trujillo, Judge

AFFIRMED

Dohn M. Rosenthal, P.C. Scottsdale
By Dohn M. Rosenthal
Attorneys for Plaintiff/Appellee-Cross Appellant

Troy A. Fullwood, *In Propria Persona* Chandler

Julie C. Fullwood, *In Propria Persona* Chandler

N O R R I S, Judge

¶1 This appeal arises out of the superior court's judgment in favor of plaintiff/appellee Michael McGonigal on a

breach of contract claim against Troy and Julie Fullwood. The Fullwoods appeal the superior court's judgment on the merits; McGonigal cross-appeals its determination he was not an employee for purposes of Arizona Revised Statutes ("A.R.S.") section 23-355 (Supp. 2009),¹ which would have made him eligible for an award of treble damages; and both parties appeal the partial award of attorneys' fees in favor of McGonigal. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 McGonigal, doing business as On-Site Builders, entered into a one-page agreement with the Fullwoods in which he promised to "supply building consultation" on the construction of a new home. McGonigal agreed to "help with subcontractors, and help to obtain [the] final inspection certificate." The Fullwoods agreed to "take all responsibilities of construction [of the] property" and agreed McGonigal would not be responsible for "any debt, to any subcontractor or held liable in any way." The agreement called for a total contract price of \$30,000, with payment after various stages of project completion.

¹Although certain statutes cited in this decision were amended after the date the Fullwoods breached the contract, the revisions are immaterial. Thus, we cite to the current versions of these statutes.

¶13 The Fullwoods withheld the final \$19,000 payment to McGonigal, alleging they had fired him for poor performance prior to completion of the house. McGonigal sued the Fullwoods to collect the final payment; he also argued he was entitled to treble damages under A.R.S. § 23-355 because he was an employee of the Fullwoods. The Fullwoods counterclaimed for damages they allegedly incurred because of McGonigal's poor performance.

¶14 After a three-day bench trial, the superior court found McGonigal had "[c]learly" met his burden of proving the Fullwoods had breached the contract; it also found McGonigal was not an employee under A.R.S. § 23-350 (1995), and thus not entitled to treble damages under A.R.S. § 23-355. The superior court awarded McGonigal his final \$19,000 payment plus interest, costs, and roughly one-half of his attorneys' fees. The Fullwoods appealed; McGonigal cross-appealed.

DISCUSSION

¶15 We are bound by the superior court's findings of fact unless clearly erroneous, but review conclusions of law de novo. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007). We view the evidence and all reasonable inferences in the light most favorable to sustaining the superior court's ruling. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). We do not reweigh

conflicting evidence or redetermine the preponderance of the evidence. *Hurd v. Hurd*, 223 Ariz. 48, ___, ¶ 16, 219 P.3d 258, 262 (App. 2009). “Even though conflicting evidence may exist, we affirm the trial court’s ruling if substantial evidence supports it.” *Id.*

I. The Fullwoods’ Appeal

A. Sufficiency of the Evidence

¶16 The Fullwoods first contend the evidence failed to support the superior court’s factual findings McGonigal had sufficiently performed the contract and was, thus, entitled to the final \$19,000 installment. We disagree.

¶17 The parties’ differing interpretations of the nonspecific requirement in the contract requiring McGonigal to “help with subcontractors, and help to obtain [the] final inspection certificate” are at the center of this issue. The Fullwoods contend the contract required McGonigal to “oversee and manage” “all of the sub-contractors” (emphasis added) throughout the construction of their house. McGonigal testified he was to “consult, help the subs and to help obtain a final inspection”; but his duties were limited because he “wasn’t acting as the general contractor, [and] wasn’t getting full price for the home.” Supporting McGonigal’s vision of a highly limited role was Troy Fullwood’s testimony he sought McGonigal’s

help to build the house because he had "[a]bout 85% of it figured out," and thus, needed assistance with the remaining 15%. Implicit in the superior court's finding McGonigal fully performed is a finding the definition of "help" comported with his interpretation. Thus, the issue becomes whether he provided this "help."

¶18 The superior court found McGonigal helped the Fullwoods as required under the contract, and thus explicitly rejected their argument they "canceled" McGonigal's contract in February 2006 and any work he did afterwards was merely remedial. In its ruling, the superior court cited nine e-mails, stipulated into evidence, demonstrating the Fullwoods relied upon McGonigal beyond the alleged termination in February 2006 until almost October 2006, "even though the Certificate of Occupancy" -- the end of McGonigal's responsibility -- "was issued in August, 2006." Numerous other e-mails over the same period in which McGonigal updated the Fullwoods on construction progress supported the superior court's conclusion. As an example of the Fullwoods' continuing reliance, testimony at trial revealed Troy Fullwood asked McGonigal to "stop by [the construction site] every now and again to just make sure everything was okay" while he and his family were out of town on vacation, nearly four months after the Fullwoods allegedly

"fired" him. During one of these visits, McGonigal spotted a problem with installation of kitchen cabinets, photographed it and e-mailed it to Troy Fullwood, who instructed McGonigal to "[h]ave the cabinents [sic] guys hold off on the Crown Molding [sic] until I get back." Thus, ample evidence supported the superior court's finding McGonigal helped the Fullwoods through the completion of the house, and even beyond.

B. Trial Scheduling

¶9 The Fullwoods next contend the superior court improperly managed the trial scheduling, allowing McGonigal to use up "90%" of the time, and thus deprived them of a fair trial. We disagree.

¶10 A superior court has broad discretion over the management of a trial, and may place limitations on trial proceedings that are reasonable under the circumstances. *Gamboa v. Metzler*, 223 Ariz. 399, __, ¶ 13, 224 P.3d 215, 218 (App. 2010). We will not disturb the superior court's discretionary imposition of time limits absent an abuse of discretion and a showing of prejudice. *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91, ¶ 30, 977 P.2d 807, 813 (App. 1998).

¶11 The superior court noted McGonigal's counsel "wasted" a lot of time, but took measures throughout trial to rein him in, including reminding him of time limits, ending a lengthy

examination, and questioning witnesses sua sponte. The Fullwoods' counsel thoroughly examined witnesses called during McGonigal's case-in-chief, including both McGonigal and Troy Fullwood.² Moreover, the Fullwoods' counsel raised no objection that he was precluded from calling additional witnesses. Thus, we see no abuse of discretion.

C. Attorneys' Fees and Costs

¶12 The Fullwoods argue the superior court should not have awarded attorneys' fees and costs to McGonigal, but should have instead awarded them fees and costs. The Fullwoods have failed to develop this argument as to how the superior court abused its discretion, and we therefore deem it waived. See *A Tumbling-T Ranch v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 540-41, ¶ 85, 217 P.3d 1220, 1245-46 (App. 2009).

D. Counterclaim

¶13 Finally, the Fullwoods argue, in a passing reference, the superior court improperly denied their counterclaim for breach of contract. This argument, too, is completely undeveloped, and we therefore deem it waived. See *id.*

²Approximately 201 pages of the trial transcript is devoted to the Fullwoods' counsel's examination of witnesses, opening statement, and closing argument; approximately 219 pages is devoted to McGonigal's presentation of his case.

II. McGonigal's Cross-Appeal

A. Treble Damage Claim

¶14 McGonigal argues the superior court mistakenly ruled A.R.S. § 23-350 did not apply to the employment relationship between himself and the Fullwoods, and thus he was entitled to treble damages under A.R.S. § 23-355. We disagree.

¶15 McGonigal first challenges the superior court's finding he was an independent contractor under the analysis set forth in *Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 794 P.2d 138 (1990). Under *Santiago*, the fact-finder must evaluate several criteria to determine if an employer-employee relationship exists. *Id.* at 509, 794 P.2d at 142. Here, McGonigal exercised great control over the details of his own work, showing up onsite at his discretion. He also maintained other jobs in addition to the Fullwoods'; he promoted his independent enterprise while working for the Fullwoods;³ the Fullwoods hired him only for this discrete project; and the evidence supports an inference the parties did not contemplate an employer-employee relationship at the time they entered the contract. *See id.* Thus, ample evidence supports the superior

³McGonigal testified he had placed a sign, identifying himself as a general contractor, in the Fullwoods' yard during construction "to try to get some perspective [sic] clients."

court's factual finding McGonigal was an independent contractor and not an employee.

¶16 McGonigal also contends that even if he was an independent contractor under *Santiago*, a personal injury case, *Santiago* does not apply to the wage-payment statutes. McGonigal argues that under the plain language of A.R.S. § 23-350(2), an "[e]mployee' means any person who performs services for an employer under a contract of employment . . . made in this state," and thus, he was entitled to treble damages under A.R.S. § 23-355. We reject this argument.

¶17 Statutory interpretation is a question of law we review de novo. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, ___ Ariz. ___, ___, ¶ 17, 226 P.3d 411, 416 (App. 2010). Under McGonigal's interpretation, conceivably doctors, lawyers, barbers, auto mechanics, and most service providers would be eligible to recover treble damages from their customers who unreasonably withhold payment. When read in context with the other wage-payment statutes, the employer-employee relationship under A.R.S. § 23-350 is consistent with the *Santiago* analysis whereby the employer has, *inter alia*, great control over the details of an employee's work. See A.R.S. §§ 23-350 to -361; *Santiago*, 164 Ariz. at 508-09, 794 P.2d at 141-42. As discussed *supra* ¶ 15, the evidence supports the superior court's finding

no such relationship existed here. Moreover, the Arizona legislature originally enacted A.R.S. § 23-355 in conjunction with various amendments to Arizona's workers' compensation law, supporting our interpretation this statute applies to the traditional employer-employee relationship. House Fact Sheet for H.B. 2098, 31st Leg., 1st Reg. Sess. (1973). Thus, McGonigal was not an employee and the Fullwoods were not employers for purposes of A.R.S. §§ 23-350 and -355.⁴

B. Fees

¶18 McGonigal also argues the superior court abused its discretion when it awarded him less than one-half of his attorneys' fees. We disagree.

¶19 We review the award of attorneys' fees for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 351, ¶ 32, 972 P.2d 676, 684 (App. 1998). Here, McGonigal originally requested nearly \$37,000 in attorneys' fees on a \$19,000 dispute. The superior court noted this case was "highly contentious (from the litigators' perspective)," and, as

⁴Even if the Fullwoods' contract with McGonigal created an employer-employee relationship under A.R.S. § 23-350, the nonspecific terms of the contract and the evidence at trial demonstrated they had a good faith dispute with McGonigal over his work, and should not have been subjected to a discretionary imposition of treble damages. See A.R.S. § 23-352(3) (1995); *Apache East, Inc. v. Wiegand*, 119 Ariz. 308, 312-13, 580 P.2d 769, 773-74 (App. 1978).

discussed *supra* ¶ 11, McGonigal's counsel "wasted" a lot of time during trial. Thus, we see no abuse of discretion.

III. Fees and Costs on Appeal

¶20 Both parties request attorneys' fees and costs on appeal. Because the Fullwoods represented themselves in this appeal, they are not entitled to an award of attorneys' fees. See *Connor v. Cal-Az Properties, Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983). McGonigal cites to A.R.S. §§ 12-341.01 (2003), and 32-1129.01(M) (2008), which permit a fee award to the successful party.⁵ Because neither McGonigal nor the Fullwoods -- even if the Fullwoods had been entitled to a fee award -- improved their respective positions on appeal by obtaining greater or different relief, neither party is the successful party for an award of fees and costs. See *Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, 158, ¶ 37, 171 P.3d 599, 609 (App. 2007). Thus, we direct the parties to bear their own fees and costs on appeal.

⁵McGonigal also cites to A.R.S. § 12-349(A) (2003), which permits the award of attorneys' fees for "[u]njustified actions." Although the Fullwoods did not prevail in this appeal, we cannot say their actions were unjustified as defined under A.R.S. § 12-349(A).

CONCLUSION

¶21 For the foregoing reasons, we affirm the superior court's judgment.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge