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

K.P. LIMITED PROPERTIES, INC., an Arizona corporation, Plaintiff/Counterdefendant/ Appellee/Cross-Appellant, v. BUILT-TO-LAST INDUSTRIAL, L.L.C., an Arizona limited Liability company; JACE JOHNSTON, Defendants/Counterclaimants/ Appellants/Cross-Appellees.	No. 1 CA-CV 09-0436 DEPARTMENT E **MEMORANDUM DECISION** Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-006600

The Honorable Jeanne M. Garcia, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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H A L L, Judge

¶1 Built-to-Last Industrial, L.L.C. (Seller) and Jace Johnston (collectively, Defendants) appeal the trial court's grant of summary judgment in favor of K.P. Limited Properties, Inc. (Buyer) on Buyer's breach of contract claim. Buyer cross-appeals the court's denial of its request for attorneys' fees. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 The facts are undisputed. On April 10, 2007, Seller and Buyer entered into a contract wherein Seller agreed to sell approximately twenty acres of vacant land to Buyer for $3,640,000. That same day, Buyer deposited $25,000 earnest money into escrow pursuant to the contract. The contract also required a second $25,000 earnest money deposit as follows:

> $25,000.00 Additional Earnest Money, upon the satisfaction of the Inspection Period, Buyer shall deposit an additional Twenty Five Thousand Dollars ($25,000.00) with Escrow Holder TSA Title Agency.

¶3 Regarding the "Inspection Period," the contract provided in relevant part:

> Buyer's obligation to purchase the Property is conditioned upon Buyer satisfaction, within thirty (30) calendar days from final acceptance of this Contract by all parties (the "Review Period"), in the exercise of it's [sic] sole and absolute discretion and exclusive judgment, with it's [sic] general inspection of the Property. If Buyer fails to deposit written disapproval with the

> Escrow Holder on or before the expiration of the Review Period, then all contingencies contained in this Contract and Escrow shall be considered to have been extinguished as of that time and date. This contingency/review period is solely for the benefit of the Buyer and may be waived in whole or in part at any time by the Buyer without waiving any other rights contained under this Contract. Buyer shall provide written notice to Seller of any items disapproved, within thirty (30) calendar days after acceptance of this Contract.

¶4 On May 7, the parties executed an addendum to the contract extending the inspection period to May 24. On May 8, the parties executed a second addendum reducing the purchase price to $3,500,000. Buyer deposited another $25,000 into escrow on May 11. On May 22, shortly after it received an unfavorable geological soil inspection of the property, Buyer delivered written notice of its disapproval of the property and canceled the contract.

¶5 The parties disputed rights to the $50,000 held in escrow. Buyer filed a complaint against Defendants alleging breach of contract, declaratory judgment, fraud, and unjust enrichment. Seller answered and counterclaimed for breach of contract and declaratory relief.

¶6 On cross-motions for summary judgment, Seller argued the second $25,000 deposit signaled Buyer’s satisfaction with the inspection of the property, and therefore, Buyer breached the contract by canceling it after such contingency was

fulfilled. Buyer argued the second $25,000 deposit was merely a "sign of good faith" for the price reduction and, in support of that argument, submitted an email Buyer sent Seller on May 8. The email states in pertinent part:

> The purchase price will then be $3,458,000. Upon your approval of this suggestion I will forward a check for another $25,000 to the title company today. From this point forward the only issue that could possibly disrupt this agreement would be the discovery of fissures which you said is not likely. . . . My Geotechnician said that he has advance[d] his work on the fissure study and may have something for us as early as next week.

Seller argued the email was inadmissible parol evidence.

¶7 The court granted Buyer's cross-motion for summary judgment on the contract claims, and granted Seller's motion for summary judgment on the fraud and unjust enrichment claims and declined to award attorneys' fees, finding neither party successful under the contract. The court also awarded Buyer $1,013.89 in costs. Seller timely appealed and Buyer filed a timely cross-appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

I. Appeal

A. Standard of Review

¶8 We review a grant of summary judgment de novo. *L. Harvey Concrete, Inc. v. Argo Constr. & Supply Co.,* 189 Ariz.

178, 180, 939 P.2d 811, 813 (App. 1997). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). We view the facts in the light most favorable to the party against whom summary judgment was entered. *Angus Med. Co. v. Digital Equip. Corp.,* 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992). Interpretation of a contract is a question of law we review de novo. *Rand v. Porsche Fin. Servs.,* 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007).

¶9 Buyer contends we should review the court's decision under a clearly erroneous standard because the fundamental issue is whether Buyer intended to waive its right to cancel the contract by making the second $25,000 deposit. *See Goglia v. Bodnar,* 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987) (a finding that no waiver occurred is binding unless clearly erroneous). Whether waiver may be inferred from particular conduct, however, is generally a question of fact. *See N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.,* 145 Ariz. 467, 476, 702 P.2d 696, 705 (App. 1984). We determine de novo whether a question of fact exists precluding summary judgment. *Andresano v. County of Pima,* 213 Ariz. 65, 66-67, ¶ 6, 138 P.3d 1192, 1193-94 (App. 2006). Accordingly, our standard of review is de novo.

B. Contract Interpretation

¶10 Seller argues Buyer signified its satisfaction with the inspection period by making the second $25,000 deposit. Seller bases this argument on the additional earnest money clause, which provides "upon satisfaction of the Inspection Period, Buyer shall deposit an additional Twenty Five Thousand Dollars ($25,000.00)." When interpreting a contract, our goal is to determine and enforce the intent of the contracting parties. *U.S. W. Communications, Inc. v. Ariz. Corp. Comm'n,* 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). To ascertain intent, we examine the plain meaning of the words in the context of the contract as a whole and in the context of the surrounding circumstances. *United Cal. Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983).

¶11 The clause does not mean that the Buyer waives its right to the benefits of the inspection by depositing the second $25,000 payment before the inspection period is complete. Nor does it mean that Buyer's deposit of the second payment terminates the inspection period. According to the contract, the inspection period can only be satisfied or terminated by the passage of time, written disapproval, or by Buyer's waiver of the period. Here, the inspection period was extended to May 24, Buyer made a second $25,000 deposit on May 11, and Buyer sent written notice of its disapproval and canceled the contract on

May 22. Thus, the only way the inspection period could have ended before Buyer gave its written disapproval is by waiver.

¶12 "Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.,* 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). Although waiver is generally a question of fact, where the facts are not in dispute, the trial court may decide waiver as a matter of law. *Jones v. Cochise County,* 218 Ariz. 372, 381, ¶ 29, 187 P.3d 97, 106 (App. 2008). Seller has not submitted any evidence showing Buyer expressly or intentionally waived the inspection period. *Patton v. Paradise Hills Shopping Ctr., Inc.*, 4 Ariz. App. 11, 14, 417 P.2d 382, 385 (App. 1966) (party opposing summary judgment must come forth with specific facts controverting the motion). Because the additional earnest money provision cannot be interpreted in the manner Seller asserts and there is no evidence Buyer otherwise waived the inspection period, as a matter of law, Buyer did not waive the inspection period by depositing $25,000.[1]

[1] Seller also argues Buyer "did not expressly indicate its intention to keep the inspection period open after the deposit." Under the contract, Buyer was not required to indicate its intent to keep the inspection period open as the inspection period was expressly extended to May 24. Moreover, contrary to Seller's argument, Buyer did expressly indicate its intent to keep the inspection period open in the email. *See supra* ¶ 6.

¶13 Next, Seller argues the court erred by considering the email because the email constitutes inadmissible parol evidence. The parol evidence rule prohibits the admission of extrinsic evidence to vary or contradict the terms of a written contract, but allows admission of such evidence to interpret a contract. *Taylor v. State Farm Mut. Auto. Ins. Co.,* 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993).

¶14 The parol evidence rule does not preclude consideration of the email. The email was not offered to interpret the contract; rather, Buyer offered it as evidence that it did not waive the inspection period. Moreover, the email does not contradict the terms of the contract. Indeed, the email is consistent with our interpretation and the trial court's interpretation of the additional earnest money provision. Finally, as the trial court noted, even without considering the email, an early deposit of the second $25,000 could not be considered a waiver of the explicitly extended inspection period. Thus, there was no error in considering the email.

¶15 Because the contract cannot be interpreted as Seller argues, there is no evidence Buyer waived the inspection period, and Buyer therefore canceled the contract within the inspection period and the trial court properly granted summary judgment in favor of Buyer.

II. Judgment

¶16 Seller argues the trial court erred in granting summary judgment against Johnston because Johnston is not personally liable for Seller's obligations under A.R.S. § 29-651 (1998). Section 29-651 provides "a member, [or] manager, . . . of a limited liability company is not liable, solely by reason of being a member, [or] manager, . . . for the debts, obligations and liabilities of the limited liability company whether arising in contract or tort under a judgment, decree or order of a court or otherwise."

¶17 The court awarded judgment in favor of Buyer and against "Defendant Built-to-Last Industrial, L.L.C., in the amount of $50,000, plus pre-judgment interest . . . plus taxable costs." The judgment provides "said $50,000 account proceeds are hereby ordered released and turned over to [Buyer] to apply against the amounts due under this Judgment, and Defendants are ordered to cooperate fully in releasing the funds to [Buyer]."

¶18 As clarified at oral argument, the $50,000 in escrow proceeds has been released to the Buyer. Therefore, to the extent the judgment could be construed as against Johnston personally, any obligation imposed upon him has been satisfied and we need not address the issue further.

III. Attorneys' Fees and Costs

A. Fees and Costs in the Trial Court

¶19 Seller's final argument is that the trial court erred in awarding Buyer its costs because the court found neither party successful under the contract. On cross-appeal, Buyer argues it was the successful party and should have been awarded attorneys' fees. We review the trial court's orders concerning attorneys' fees and costs for an abuse of discretion. *Maleki v. Desert Palms Prof'l Props., L.L.C.,* 222 Ariz. 327, 333-34, ¶ 32, 214 P.3d 415, 421-22 (App. 2009).

¶20 The contract provides that in any action arising out of the contract, "the prevailing party shall be entitled to reasonable attorneys' fees and costs." *See Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App. 1977) ("Contracts for payment of attorneys' fees are enforced in accordance with the terms of the contract.") (citations omitted); *see also Chase Bank of Ariz. v. Acosta,* 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994) ("[T]he court lacks discretion to refuse to award fees under [a] contractual provision."). At the conclusion of oral argument on the cross-motions, the trial court stated "[o]n the issue of attorney's fees, because I have found in favor of both parties, I find that neither party is a successful party under the contract, so

neither party is entitled to recover their attorney's fees." In the judgment, however, the court awarded costs to Buyer.

¶21 "In cases involving various competing claims, counterclaims and setoffs all tried together, the successful party is the net winner." *Ayala v. Olaiz,* 161 Ariz. 129, 131, 776 P.2d 807, 809 (App. 1989). Thus, a party is successful if he obtains a judgment in excess of the setoff or counterclaim allowed. *Trollope v. Koerner,* 21 Ariz.App. 43, 47, 515 P.2d 340, 344 (1973). Further, we have specifically rejected the notion that partial success warrants denial of a request for attorneys' fees and costs. *See Henry v. Cook,* 189 Ariz. 42, 44 n.1, 938 P.2d 91, 93 n.1 (App. 1996).

¶22 In its complaint, Buyer sought $50,000 in damages for breach of contract, $30,000 in damages for fraud, and unspecified punitive damages. Seller filed a counterclaim for breach of contract, seeking to keep the $50,000. Buyer was awarded $50,000 on its contract claims, and its remaining claims were dismissed. Seller did not prevail on its claim to keep the earnest money. Under the applicable net winner rule, Buyer is the successful party.

¶23 Citing *Sandborn v. Brooker & Wake Property Management, Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994), Seller notes that the trial court has discretion to determine the successful party, and argues that we cannot substitute our

discretion for that of the trial judge. *See also Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990). Although this principle is correct, *Sandborn* also states "a party is successful if he obtains judgment for an amount in excess of the setoff or counterclaim allowed." *Sandborn,* 178 Ariz. at 430, 874 P.2d at 987 (internal quotation omitted). Therefore, under *Sandborn,* Buyer is the successful party and the fee provision at issue mandates an award of fees to Buyer.

¶24 Seller also contends it was reasonable for the court to conclude neither party was successful. We disagree. Although Buyer's claims for fraud and unjust enrichment were dismissed, it prevailed on its breach of contract and declaratory relief claims, defeated Seller's counterclaim, and recovered $50,000. Although we are normally reluctant to overturn a trial court's ruling on attorneys' fees, *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194-95, 877 P.2d 284, 293-94 (App. 1994), a court abuses its discretion if it commits an error of law. *Grant v. Ariz. Pub. Serv. Co.,* 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). Based on the rule enunciated in *Ayala* and *Trollope* that the net winner is the successful party, Buyer is the successful party under the contract. Because the trial court was required to award the prevailing party reasonable attorneys' fees and costs under the contract, the court abused its discretion by failing

to award any attorneys' fees. Nonetheless, on remand the trial court may only award Buyer its reasonable attorneys' fees incurred in litigating the parties' competing contract claims. *See City of Cottonwood*, 179 Ariz. at 195, 877 P.2d at 294 ("Attorney's fees should not be allowed on unsuccessful separate and distinct claims that could have been litigated separately."). The award of costs is affirmed.

B. Fees and Costs on Appeal

¶25 Both parties request an award of attorneys' fees on appeal. Seller requests an award of fees pursuant to A.R.S. § 12-341.01 (2003), and Buyer requests fees pursuant to the terms of the contract. As the prevailing party on appeal, we award Buyer its reasonable attorneys' fees and costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. Both parties also request attorneys' fees and costs on cross-appeal pursuant to the terms of the contract. Because Buyer is the prevailing party on cross-appeal, we award Buyer its attorneys' fees and costs on cross-appeal.

CONCLUSION

¶26 For the foregoing reasons, we affirm the grant of summary judgment, reverse the denial of Buyer's attorneys' fees and remand for further proceedings consistent with this decision.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge