

**NOTICE: 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.

FILED BY CLERK

DEC 27 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CCSAM FAMILY LIMITED)
PARTNERSHIP and ALBERT MOUSSA,)
a married man,)
)
Plaintiffs/Appellants,)
)
v.)
)
N. JUDGE KING and KRISTIN KING,)
individually and as husband and wife; and)
JOHN SILER and JANE DOE SILER,)
individually and as husband and wife,)
)
Defendants/Appellees.)
_____)

2 CA-CV 2011-0061
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20087882

Honorable Ted B. Borek, Judge

AFFIRMED

Walid A. Zarifi

Tucson
Attorney for Plaintiffs/Appellants

Curl & Abraham, P.L.C.
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Tucson
Attorneys for Defendants/Appellees
N. Judge King and Kristin King

and

V Á S Q U E Z, Presiding Judge.

¶1 Appellants CCSAM Family Limited Partnership and Albert Moussa (“Moussa”) appeal from the judgment entered by the trial court after jury verdicts were rendered in favor of appellees N. Judge King and Kristin King (“King”) on Moussa’s breach-of-contract claim and in favor of appellee John Siler on Moussa’s claim of tortious interference with contract.¹ On appeal, Moussa contends there was insufficient evidence to support the jury verdicts and the court erred in denying his motion for a new trial on the same ground. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 “We view the facts and all inferences in the light most favorable to sustaining the jury verdict and resulting judgment.” *Hyatt Regency Phx. Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 123, 907 P.2d 506, 509 (App. 1995). Moussa and King own homes in the Miramist at Ventana subdivision located in Tucson. In 2007 they entered into a series of written agreements drafted by Moussa culminating in a June 10, 2007 Contract and Agreement (“the Contract”) to purchase Lot 6, a 2.5-acre parcel with a

¹As Moussa acknowledges in his reply brief, in his opening brief he did not challenge the verdict and judgment in favor of Siler. Thus, his appeal as to those issues is deemed abandoned and we do not address them further. *See Torres v. Knowlton*, 205 Ariz. 550, n.1, 73 P.3d 1285, 1287 n.1 (App. 2003) (issues not raised and argued on appeal deemed abandoned).

house and detached structure containing a carport and storage area, located adjacent to King's property. The parties agreed that each would pay one-half the purchase price and that the parcel would be "split" with the west portion deeded to King and the east portion deeded to Moussa. The dividing line for the lot-split crossed through the carport, resulting in 83 percent of the carport being located on King's property and 17 percent on Moussa's. The house was located entirely on Moussa's portion of the property. The parties further agreed that the house and carport would be demolished and that each party would pay one-half the cost of demolishing both structures.

¶3 A few months after the parties purchased the property, Moussa decided he no longer wanted to demolish the structures and by mid-summer 2008 had placed the house for rent under a long-term lease. In October 2008, when King hired a demolition company and started demolition of the carport as part of a landscape project, Moussa called the Pima County Sheriff's Office in an effort to stop the demolition. However, Siler, the chairman of the Committee for Landscape and Architectural Review (CLAR) for the homeowners' association, met with deputies at the demolition site and told them the committee had approved King's landscape project, which included demolition of the carport.

¶4 Moussa subsequently filed this lawsuit. He asserted a number of claims against King, including that he had breached the Contract by failing and refusing "to leave the carport and storage building under Moussa's complete control."² The

²Moussa also asserted claims against King for quiet title on theories of express or implied easement; breach of the implied covenant of good faith and fair dealing; and, for

complaint further alleged Siler had committed tortious interference with contract by authoring a letter approving the demolition of the carport in his capacity as chairman of the CLAR, purportedly on behalf of the committee, and by informing sheriff's deputies that the demolition had been approved by the homeowners' association.

¶5 After a six-day trial, the jury returned verdicts in favor of King and Siler on all claims. Moussa filed a motion for a new trial pursuant to Rule 59, Ariz. R. Civ. P. The trial court denied the motion, and this appeal followed.

Discussion

¶6 Moussa contends there was insufficient evidence to support the jury verdict on his breach-of-contract claim against King. He asserts the Contract “granted [him] absolute control over the timing of the demolition of the house and carport” and there was “no evidence whatsoever” from which the jury reasonably could conclude otherwise.

¶7 On review, we must affirm the judgment entered on the verdict if, “after resolving all conflicts in the evidence as well as drawing all reasonable inferences therefrom in favor of the prevailing party, we find any substantial evidence from which reasonable [jurors] could have found ultimate facts that will sustain the verdict.” *Singleton v. Valianos*, 84 Ariz. 51, 53, 323 P.2d 697, 699 (1958). “We will ‘uphold a general verdict if evidence on any one count, issue or theory sustains the verdict.’” *Mullin v. Brown*, 210 Ariz. 545, ¶ 24, 115 P.3d 139, 145 (App. 2005), *quoting Murcott v.*

preliminary and permanent injunctions. The trial court apparently dismissed Moussa's express-easement claim. Because Moussa does not raise any issues on appeal relating to these claims, we do not address them further. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (issues not raised and argued on appeal are waived).

Best Western Int'l, Inc., 198 Ariz. 349, ¶ 64, 9 P.3d 1088, 1100 (App. 2000). Similarly, it is for the trial court to determine, in the exercise of its discretion, whether to grant a motion for a new trial on the ground that the verdict is against the weight of the evidence. *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, ¶ 15, 31 P.3d 806, 810 (App. 2001). Absent an abuse of discretion, we will not disturb the court's ruling. *Id.*

¶8 To prevail on his breach-of-contract claim, Moussa was required to prove the existence of a contract between the parties, King breached the contract, and Moussa suffered damages as a result. *See Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975), *citing Clark v. Compania Ganadera de Cananea, S.A.*, 95 Ariz. 90, 94, 387 P.2d 235, 238 (1963). The parties do not dispute that a contract existed. Rather, Moussa maintains the evidence supported only his interpretation of the Contract. He claims King's interpretation is "nonsensical" and he presented no evidence to support it. The interpretation of a contract is a question of law we review de novo. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). Our purpose in interpreting a contract is to discover and enforce the parties' intent. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). We accomplish this by looking "to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983).

¶9 The parties' dispute centers primarily around paragraph two of the Contract, which provides as follows:

Both parties agree to pay 50/50 each for the demolition cost of the existing house on the property at a later date and out of escrow. A bid of \$32,000.00 from Kinne Demolition is an approximate cost for the demolition. Both King and Moussa agree to pay 50/50 of this bid or any competitive bid when the house is actually demolished. The timing of the house demolition shall be decided by Moussa only and Moussa warrants this cost not to be increased and he will pay the difference in the event the cost increased.

¶10 Moussa testified at trial that the parties had intended the term “house” to include both the house and carport. He maintained, as he does on appeal, that the language in paragraph two supports his position that the parties intended he would have control over the timing of the demolition of all of the structures on the property. But King testified the term “house” meant different things under the Contract depending upon the context in which it was being used—sometimes it referred to the house alone and at other times it referred both to the house and the carport. King further testified that he never agreed to give Moussa control over the timing of the demolition of the carport and certainly not the portion of the carport located on his property.

¶11 It is the jury’s function, as the trier of fact, to resolve conflicts in the evidence. *Logerquist v. McVey*, 196 Ariz. 470, ¶ 52, 1 P.3d 113, 131 (2000). “‘The credibility of a witness’ testimony and the weight it should be given are issues particularly within the province of the jury.’” *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000), quoting *Kuhnke v. Textron, Inc.*, 140 Ariz. 587, 591, 684 P.2d 159, 163 (App. 1984). Contrary to Moussa’s position, the jury was not bound to accept the testimony of a particular witness, much less that of an interested witness like Moussa. *See id.* This court will not “reweigh the evidence and

set aside the jury verdict merely because the jury could have drawn different inferences or conclusions.’” *Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 27, 961 P.2d 449, 454 (1998), quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

¶12 The plain language of the Contract does not support Moussa’s interpretation. The terms “house” and “existing house” are not defined in the Contract, and paragraph two clearly does not include the term “carport” in describing the structures to be demolished or the timing and control of such demolition. Significantly, the term “carport” does not appear in the Contract. And consistent with King’s interpretation of the Contract, Moussa acknowledged at trial that in at least one paragraph where the terms “house” and “existing house” are used, the parties had intended them to mean the house only and not both the house and carport. Paragraph five of the Contract states: “The remaining parcel which contains the exist[ing] house shall be deeded to Moussa as his sole property.” The same paragraph further provides, “King has no responsibility or liability for any mat[t]er related to the existing house except to pay 50 [percent] of the demolition expenses.” But Moussa also testified that paragraph two of the Contract, which states the parties “agree to pay 50/50 each for the demolition cost of the existing house on the property,” refers both to the house and the carport.

¶13 In light of this evidence, the trial court determined correctly that the Contract was ambiguous because it was susceptible to both parties’ interpretation. Moussa does not challenge that determination on appeal. But, in addition to his insufficient-evidence argument, he contends, as he did in support of his motion for a new trial, that “the standard rule” requires the court to interpret the contract “after submitting

any necessary factual determinations to the jury.” We disagree. “When the terms of a contract are plain and unambiguous, its interpretation is a question of law for the court.” *Elm Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 15, 246 P.3d 938, 942 (App. 2010). But when a contract’s language is reasonably susceptible to more than one meaning, extrinsic evidence may be admitted and the interpretation of the contract is resolved by the jury. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158-59, 854 P.2d 1134, 1144-45 (1993).

¶14 Moussa nevertheless contends the language in paragraph two that expressly gives him control over the timing of the demolition of the “existing house” could only be interpreted to include the carport as well. He reasons that because the house was deeded to him separately and was located entirely on his portion of the parcel, there was no need for any language in the contract giving him control over the demolition of the house alone. But Moussa ignores the fact that the parties agreed to demolish all of the structures—the house and the carport—and that they each would bear one-half of the total demolition cost. The jury reasonably could infer from the parties’ agreement to demolish both structures that they further expressly agreed, at least with respect to the house, that Moussa would have control over when that structure would be demolished.

¶15 As we noted above, “[d]eciding questions of credibility, weighing of the evidence, and the drawing of reasonable inferences are functions of the jury.” *McReynolds v. Am. Commerce Ins. Co.*, 225 Ariz. 125, ¶ 8, 235 P.3d 278, 280 (App. 2010), *citing Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 19, 153 P.3d 1069, 1073 (App. 2007). And, “[t]he jury was entitled to consider the circumstances surrounding the

[Contract] and the parties' conduct in determining the intent of the parties with regard" to whether Moussa had control over the demolition of the carport. *Leo Eisenberg & Co. v. Payson*, 162 Ariz. 529, 533, 785 P.2d 49, 53 (1989); *see also State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, ¶ 13, 75 P.3d 1075, 1078 (App. 2003) (words construed in context used and considering purposes of the agreement).

¶16 In response to Verdict Interrogatory #2, the jury expressly found that under the Contract, Moussa had no right to use the carport and storage building. Implicit in that finding was that Moussa did not have control over the timing of the carport's demolition. Both conclusions are supported by the evidence. The parties testified that 83 percent of the carport was located on King's portion of the property. The jury reasonably could have inferred that King therefore had control over issues relating to the demolition of the carport. Additionally, Moussa acknowledged that on May 18, 2007, he executed an assignment relinquishing any interest he may have had in the west portion of the parcel to King. Although the Contract includes an integration clause that provides, "This contract clarifies and supersedes all the previous agreement[s] dated May 6 and May 14, 2007," it does not mention the May 18 assignment. Nor does the Contract include language that reasonably could be interpreted to cancel or modify the provisions of the assignment.

¶17 As we noted above, the Contract only refers to "house" or "existing house"; it does not contain any reference to "carport." The jury was entitled to construe the parties' agreement consistently with King's interpretation and against Moussa's. A secondary rule of construction requires that if the meaning of a contract provision remains uncertain after consideration of the parties' intentions, the provision should be

construed against the drafter. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, ¶ 8, 187 P.3d 1107, 1110 (2008); *Taylor*, 175 Ariz. at 158 n.9, 854 P.2d at 1144 n.9; Restatement (Second) of Contracts (Interpretation Against the Draftsman) § 206 (1981) (“In choosing among the reasonable meanings of a[n] . . . agreement or a term thereof, that meaning is generally preferred which operates against the party who supplied the words . . .”).

¶18 We conclude there was sufficient evidence to support the jury’s verdict and that the trial court did not err in denying Moussa’s motion for a new trial.

Attorney Fees

¶19 King and Siler both have requested attorney fees on appeal. In our discretion, we grant King’s request upon his compliance with Rule 21, Ariz. R. Civ. App. P. Siler’s request pursuant to Rule 25, Ariz. R. Civ. App. P., and A.R.S. § 12-349(A), is denied.

Disposition

¶20 For the reasons set forth above, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge