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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARANA 670 HOLDINGS, LLC, an Arizona limited liability company, Appellant, v. SPIRIT UNDERGROUND, LLC, a Nevada limited liability company, Appellee.	2 CA-CV 2011-0136 2 CA-CV 2012-0026 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20081383, C20082605, C20083133, and C20085285 (Consolidated)

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 This case, in the words of the appellant, involves "complex construction litigation" stemming from a "failed residential subdivision project." Appellant Marana 670 Holdings, LLC (hereafter "Marana"), which is the assignee of the developer Saguaro Reserve, LLC ("Saguaro"), challenges the trial court's partial grant of summary judgment to the contractor/appellee Spirit Underground, LLC ("Spirit"), on its claims arising under the Prompt Pay Act (PPA), A.R.S. §§ 32-1129 through 32-1129.07. On appeal, Marana argues the court erred in interpreting and applying the PPA, specifically § 32-1129.01.[1] We review these issues de novo. *See Ariz. Dep't of Admin. v. Cox*, 222 Ariz. 270, ¶ 5, 213 P.3d 707, 709 (App. 2009). Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts relevant to this appeal in the light most favorable to Marana, the party against whom summary judgment was entered. *See Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, ¶ 2, 263 P.3d 683, 685-86 (App. 2011). In 2005 and 2006, Saguaro entered into several construction contracts with Spirit to develop land owned by Saguaro. In late 2007 through early 2008, Spirit sent Saguaro several written "payment applications," which also are known as "billings" under the PPA, seeking compensation for the work Spirit had performed under the contracts. Saguaro neither paid nor responded to Spirit's billings.

¶3 In the litigation that followed, Spirit sought summary judgment on its claims against Saguaro under the PPA. In Spirit's motion, it alleged that because

[1]Throughout our decision, we cite the version of § 32-1129.01 found in 2000 Ariz. Sess. Laws, ch. 233, § 4.

Saguaro had failed to object timely to the billings, they were "deemed approved and certified" by operation of § 32-1129.01(D). Saguaro filed a response and a cross-motion for summary judgment in which it separated Spirit's billings into different groups. Saguaro claimed, *inter alia*, that because the billings in one group did not conform to the "billing procedures" specified in the parties' contracts, they required no objection and were not deemed approved under the statute. Saguaro also argued that a second group of billings seeking "retention amounts"—that is, funds that had been withheld "to ensure work [wa]s completed in accordance with the terms of th[e] agreement[s]"—was not governed by § 32-1129.01(D). Instead, Saguaro maintained this second group of billings was properly disregarded because Spirit had not completed all work under the contracts.

¶4 The trial court determined that § 32-1129.01(D) applied to both groups of billings. It found Saguaro had failed to respond to or pay the billings as required by law. The court therefore concluded Spirit was entitled to partial summary judgment on its claims under the PPA.[2] Marana subsequently obtained Saguaro's rights and was substituted for Saguaro on the claims relevant to this appeal. The court then entered a final judgment in favor of Spirit pursuant to Rule 54(b), Ariz. R. Civ. P. Marana's timely appeal followed.

[2]The trial court denied Spirit relief and granted partial summary judgment in favor of Saguaro as to a third group of billings that the court determined never had been submitted to Saguaro. This aspect of the court's ruling is not before us on appeal.

Prompt Pay Act

Billing Procedures

¶5 As noted above, the trial court granted partial summary judgment to Spirit because Saguaro did not respond to any of Spirit's billings within the fourteen-day period specified in § 32-1129.01(D). Marana contends Saguaro was not required to respond to the billings because they were not signed by a job superintendent and were submitted without approved change orders. These defects, according to Marana, made the billings noncompliant with the parties' construction contracts and ineffective under § 32-1129.01(I). That subsection provides: "Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties." *Id.*

¶6 Spirit counters that even if we assume *arguendo* the parties' contracts required a payment application to include an attached change order or a signature, a billing does not need to comply strictly with every term and condition of a contract before an owner is obligated to respond to a request for payment. The trial court implicitly accepted this argument. It concluded that "when an owner receives a billing that does not conform to the billing requirements of the contract between the parties, the owner cannot simply ignore the submitted billing, but must still issue a written objection to the billing . . . if it intends to withhold payment."

¶7 For construction projects lasting at least sixty days, the PPA requires that owners make periodic progress payments to contractors. § 32-1129.01(A). The process

for obtaining these payments begins with a contractor submitting a "billing or estimate" to an owner. *Id.* The owner who receives the billing then has an obligation either to approve and pay it, *see id.*, or to respond in writing specifying why the billing was disapproved. § 32-1129.01(D). A billing to which no timely response is made is "deemed approved and certified" under the statute. *Id.*

¶8 Section 32-1129.01(D) specifies the grounds upon which an owner may disapprove a billing. It provides, in relevant part:

> An owner may decline to approve and certify a billing or estimate or portion of a billing or estimate for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed or reasonable evidence that a claim will be filed, failure of the contractor or a subcontractor to make timely payments for labor, equipment and materials, damage to the owner, reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum or a reasonable amount for retention.

Id. "[T]he primary purpose of the [PPA] is to require an owner to identify and disapprove those items that need to be corrected early in the process so that contractors, subcontractors, and suppliers receive prompt payment for their work." *Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, ¶ 20, 162 P.3d 675, 679 (App. 2007). In this way, the PPA creates "a framework for ensuring timely payments from the owner to the contractor." *Id.* ¶ 16. And the PPA expressly provides that "[a] construction contract shall not alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely progress payments as provided under" the act. § 32-1129.01(J).

¶9 Under that statutory scheme, to the extent Saguaro believed Spirit's billings were defective because they were unsigned or otherwise were not made in accordance with the parties' contracts, such concerns involved a "failure to comply with [a] material provision[] of the construction contract" and necessitated a written response by Saguaro under § 32-1129.01(D). Saguaro's failure to take any action in response to the billings therefore violated the payment protocol set forth in the PPA, as the trial court correctly concluded. Notably, any other interpretation of § 32-1129.01(D) would undermine the framework of requiring owners to pay upon request or state their objections to so doing in a timely fashion.

¶10 Marana insists this interpretation of § 32-1129.01(D) is flawed because it renders § 32-1129.01(I), a provision specifying when an owner need not pay for work under the PPA, meaningless or redundant. But subsection (I) merely clarifies that an owner is not required to make any payments "unless the contractor provides the owner with a billing or estimate," thus enforcing the requirement that contractors must make an adequately detailed request for payment to trigger the PPA's provisions.

¶11 Furthermore, Marana's reading would directly contradict § 32-1129.01(D), which specifically requires the owner to respond on penalty of having the request be deemed "approved and certified." Because we are confident the legislature did not intend to contradict one subsection with another, and thereby render the PPA a nullity, we instead read the various clauses of subsection (I) as merely explaining the type of work and material for which a "billing or estimate" must be rendered before a request for payment may trigger the statutory scheme. *See In re Maricopa Cnty. Juv. Action No. JS-*

5894, 145 Ariz. 405, 410, 701 P.2d 1213, 1218 (App. 1985) (part of statute must be interpreted in light of entire statutory scheme to carry out legislative intent manifested therein).

¶12 Marana suggests, however, that we can read the two subsections of § 32-1129.01 in harmony if we view subsection (D) as addressing the billing protocol when a contractor has failed to comply with a material provision of the parties' contract, and we read subsection (I) as requiring compliance with any contractual billing procedures, "however ministerial they might be" and regardless of whether "courts or parties . . . view [them] as . . . material." But we are skeptical the legislature intended to relieve an owner of any duty to pay only when the grievance with the bill was comparatively trivial—yet enforce payment upon nonresponse when the dispute was substantial.

¶13 Moreover, any noncompliance with a contractual term that might serve as a defense to a claim under the PPA would be "material" under § 32-1129.01(D). In general, "an issue is material if the facts alleged are such as to constitute a legal defense." *Northen v. Elledge*, 72 Ariz. 166, 170, 232 P.2d 111, 113-14 (1951). A "material term[]" of a contract is any provision dealing with a "significant issue[]" such as "payment terms." *Black's Law Dictionary* 991-92 (7th ed. 1999). Thus, if an owner believes that a contractor's failure to comply with a contractual billing procedure has relieved the owner of his or her statutory obligation either to respond to or to pay a billing, this failure by the contractor concerns a "material provision[]" of a contract under § 32-1129.01(D), and it requires a response by the owner. Thus, the "materiality" distinction Marana posits

between billing requirements and workmanship finds no support in either logic or the language of the respective subsections.

¶14 Marana also raises a slippery-slope objection to the trial court's interpretation of the PPA: "[T]o hold that *any* payment application—however incomplete, inaccurate, or non-conforming—will be automatically deemed approved merely by an owner's failure to act within fourteen days offends principles of fundamental fairness and the spirit of the PPA." But this argument overlooks that under the PPA the owner need only articulate any objections to a payment application in a timely fashion to avoid any unfairness, and compelling some such response is the very thrust and spirit of the PPA. Although we can imagine extreme cases in which a request for payment is so deficient it cannot be characterized as a "billing or estimate" under subsection (I), we are not presented with such a scenario here. *Cf. Delmastro*, 228 Ariz. 134, ¶ 17, 263 P.3d at 690 (recognizing insufficiency of notice, as opposed to inaccuracy, would affect owner's disclosure obligations under mechanic's lien statute). We thus find no error in the trial court's ruling.

Retention

¶15 Marana next argues the trial court erred in granting summary judgment on the billings that requested the release of retention funds. As Saguaro argued below, Marana claims the release of retention is governed exclusively by § 32-1129.01(H); thus, Marana contends the court erred in awarding retention payments based on Saguaro's failure to respond under subsection (D) of the statute.

¶16 At the time the billings were made, § 32-1129.01(H) provided:[3]

> When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full on the construction contract within seven days. When a contractor completes and an owner approves and certifies all work under a portion of a construction contract for which the contract states a separate price, the owner shall make payment in full on that portion of the construction contract within seven days. On projects that require a federal agency's final approval or certification, the owner shall make payment in full on the construction contract within seven days of the federal agency's final approval or certification.

¶17 Under Marana's interpretation of this subsection, all work must be completed, approved, and certified by an owner before the owner is required to pay a retention amount. And under Marana's view—at least for cases such as this one, where federal agency approval is not required—the statute fails to specify a mechanism by which a contractor may both signal that work has been completed and prompt an owner to approve and certify the work at the end of a project. Marana suggests this might be a shortcoming of the statute, but it argues that we are required nonetheless to follow the text of the statute as it is written. We find no reason to read subsection (H) in isolation, as Marana insists we must.

¶18 To the contrary, all parts of a statute relating to the same subject must be construed together, *Stuart v. Winslow Elementary Sch. Dist. No. 1*, 100 Ariz. 375, 383, 414 P.2d 976, 981 (1966), and courts strive to interpret the various subsections of a

[3]The version of the statute applicable to this case took effect in 2000. 2000 Ariz. Sess. Laws, ch. 233, § 4. The parties correctly note the legislature since has amended the PPA to define "retention" and specify procedures for final billings and the release of retained funds. 2010 Ariz. Sess. Laws, ch. 337, §§ 1-3.

statute "'as a consistent and harmonious whole.'" *Excell Agent Servs., L.L.C. v. Ariz. Dep't of Revenue*, 221 Ariz. 56, ¶ 9, 209 P.3d 1052, 1053 (App. 2008), *quoting State v. Wagstaff*, 164 Ariz. 485, 491, 794 P.2d 118, 124 (1990). "The provision in question," therefore, "must be interpreted in light of the entire statute and consideration must be given to all of the statute's provisions so as to arrive at the legislative intent manifested by the entire act." *Maricopa Cnty. No. JS-5894*, 145 Ariz. at 410, 701 P.2d at 1218.

¶19 As the trial court correctly observed here, nothing in the text of the PPA defines a "billing" so as to exclude a request for the release of a retention amount. Thus, a billing submitted at the end of a project, just like a billing submitted at the beginning of or during a project, may seek approval and payment for "work performed" and "materials supplied." § 32-1129.01(A). Furthermore, no other process is specified in subsection (H) for the "approv[al] and certifi[cation]" of work apart from the billing process set forth in subsection (D). Accordingly, we find the court correctly read these provisions in harmony.

¶20 As the trial court observed, Marana's proposed interpretation "would allow an owner to withhold final payment on a project indefinitely without any basis." A plain reading of the statute's related provisions reveals that if an owner is dissatisfied with the work at the end of a project, he or she is not without a remedy. The owner may refuse to release the "reasonable retention" amounts expressly referred to in § 32-1129.01(D) by "declin[ing] to approve and certify" the contractor's billing in a timely fashion, citing grounds of "defective construction work or materials . . . , disputed work or materials, [or] failure to comply with other material provisions of the construction contract." Thus,

the problem in this case results not from the language of the statute or the trial court's interpretation of the law, but rather from Saguaro's failure to comply with it.

Contract Cancellation

¶21 Finally, Marana argues that disputed issues of material fact regarding the cancellation of the parties' contracts precluded the trial court from entering summary judgment. We find this argument waived by Marana's failure to comply with Rule 13(a)(6), Ariz. R. Civ. App. P. Under the rule, an appellant's opening brief must "concisely and clearly set forth under the appropriate heading[] . . . [a]n argument . . . contain[ing] the contentions of the appellant . . . with citations to the authorities, statutes and parts of the record relied on." *Id.*

¶22 In lieu of proper citations to the record as it is numbered pursuant to Rule 11(a)(2), Ariz. R. Civ. App. P., Marana has supported nearly all the factual assertions within this section of its opening brief with citations to its own appendix. As we explained in *Delmastro*, this practice is not permitted. 228 Ariz. 134, n.2, 263 P.3d at 686 n.2. We retain the discretion to entertain a deficient brief on its merits. *Id.*; *accord Lederman v. Phelps Dodge Corp.*, 19 Ariz. App. 107, 108, 505 P.2d 275, 276 (1973). But "[w]e are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984). In the exercise of our discretion, we decline to do so here.

¶23 As Marana acknowledges, this case is "complex," and its complexity is only compounded by the irregular citation practices exhibited in Marana's briefs. There

are over 550 items in the record on appeal. Furthermore, each party has characterized the other as distorting the record before us as to the precise issues now presented on appeal. It is not our role to sift through the lengthy record here to evaluate the fact-dependent claim advanced by Marana. *See Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 119, 412 P.2d 47, 55 (1966).

¶24 A trial court's ruling enjoys a presumption of correctness on appeal, and the burden rests with an appellant to demonstrate a judgment is erroneous. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992). Given Marana's failure to provide proper record citations required by our procedural rules, it has not discharged its burden here "to show that the trial court was in error." *Guirey, Srnka & Arnold, Architects v. City of Phx.*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969).

Disposition

¶25 For the foregoing reasons, the trial court's judgment is affirmed. Both parties have requested an award of attorney fees and costs incurred in this appeal pursuant to A.R.S. §§ 12-341, 12-341.01(A), 32-1129.01(M), and 32-1129.02(F).[4] Spirit's request is granted, subject to its compliance with Rule 21, Ariz. R. Civ. App. P. Marana's request is denied.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

[4]2001 Ariz. Sess. Laws, ch. 117, § 18.

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge