DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PREMIER HOMES, INC., a Nevada corporation, Plaintiff/Appellee, v. THE NEW GRAND ISLAND RESORT, LLC, an Arizona limited liability company; A DIAMOND KEY MASTER PLANNED COMMUNITY, LLC, an Arizona limited liability company; JEROME P. SCHMITZ, an individual, Defendants/Appellants.	No. 1 CA-CV 10-0629 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause Nos. CV2007-2090, CV2007-7196, CV2008-0113, CV2008-0627, CV2008-1264 (Consolidated)

The Honorable Charles W. Gurtler, Jr., Judge

AFFIRMED

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-And-

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G O U L D, Judge

¶1 This case arises from a stop work order that terminated construction by Premier Homes, Inc. ("Premier") of a hotel in Lake Havasu City. A Diamond Key Master Planned Community, LLC ("Diamond Key"), and Jerome P. Schmitz ("Schmitz") appeal from the superior court's judgment finding them jointly and severally liable for breach of contract damages and violations of Arizona's Prompt Pay Act. Diamond Key and Schmitz, along with The New Grand Island Resort, LLC ("New Grand Island"), also appeal the court's order finding them jointly and severally liable as to Premier's mechanics' and materialmen's lien foreclosure. Diamond Key, Schmitz and New Grand Island (collectively, "Appellants") raise issues concerning the court's admission of evidence at trial and computation of monetary damages. Appellants also challenge the award of attorneys' fees to Premier and the court's failure to submit this matter to arbitration. As we explain below, we find that Appellants have either waived their arguments or that we disagree with their assertions of error.

BACKGROUND

¶2 On February 24, 2007, Premier entered into a contract (the "Contract") with Schmitz whereby Premier would serve as the general contractor in the construction of a Holiday Inn hotel (the "Project") on property Schmitz owned in Lake Havasu City.[1] The Contract was a standard AIA form agreement and required a $100,000 down payment from Schmitz to Premier, which Schmitz made. Schmitz agreed to ultimately pay Premier $8,300,000 for the Project. Premier subsequently contracted with several subcontractors to complete the Project, and construction activities commenced.

¶3 Schmitz experienced difficulties in obtaining sufficient financing to fund the Project. After Schmitz failed to pay Premier's progress payment applications, Schmitz informed Premier by telephone on or about June 25, 2007 to cease work on the Project. On July 9, 2007, Schmitz informed Premier formally in writing of the stop work order.[2] Schmitz did not rescind the

[1] At the time of the Contract, Diamond Key, an LLC for which Schmitz was the managing member, owned the subject property and then transferred ownership approximately one month later to New Grand Island, another LLC in which Schmitz had a controlling interest. According to Appellants' brief, Diamond Key filed for bankruptcy after jointly filing the notice of appeal in this case.

[2] Schmitz admitted at trial that the Contract required work stoppage requests to be in writing.

stop work order and the Project remained unfinished at the time of trial.

¶4 Meanwhile, before construction ceased, subcontractors began purchasing and receiving materials for the Project. For example, the framing subcontractor ("Two Amigos") purchased and received lumber and other materials at the Project site on June 22, 2007 and commenced work that day.[3] Upon learning of the stop work order on June 25, Two Amigos ceased framing activities and subsequently returned the unused lumber to the lumber supplier. Because some of the lumber was specially manufactured for the Project, Two Amigos only received a partial refund from the supplier. Also prior to the stop work order, another subcontractor, Esmay Electric Inc. ("Esmay"), purchased and stored off-site $159,000 worth of copper wire that was ultimately never used in the Project.

¶5 Premier subsequently recorded a mechanics' and materialmen's lien on the subject property (the "Lien") demanding the principal sum of $603,519.28, and a flurry of litigation ensued as between Appellants, Premier, various subcontractors and other parties affected by the incomplete construction of the Project. The matters were consolidated. Premier specifically sought as against Diamond Key and Schmitz

[3] Premier terminated its relationship with the Project's initial framing subcontractor and entered into a contract on June 19, 2007 with Two Amigos, a framing subcontractor Premier had used on another job.

the principal amount of $781,775.29 for breach of contract damages and violations of Arizona's Prompt Pay Act[4] after deducting appropriate credits and offsets as set forth in the Contract. As against Diamond Key, Schmitz, and New Grand Island, Premier sought to foreclose the Lien and be awarded the principal sum of $603,519.28.

¶6 Premier was awarded partial summary judgment against Appellants as to, among other things, Schmitz's and Diamond Key's liability under the Prompt Pay Act. Other parties in the consolidated actions settled their claims. Thus, as between Premier and Appellants, issues remaining for a bench trial included the appropriate amount of damages -- subject to applicable offsets and credits pursuant to the Contract -- to be awarded Premier regarding the work and materials provided by Two Amigos and Esmay, and whether the $100,000 down payment made by Schmitz to Premier should be applied to offset the damage award to Premier.

¶7 After trial, the court issued a detailed order on April 2, 2010 setting forth its findings and conclusions of law regarding its interpretation and application of the relevant

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[4] *See* A.R.S. §§ 32-1129 to -1129.07 (Westlaw 2012); *Stonecreek Bldg. Co., Inc., v. Shure*, 216 Ariz. 36, 39, ¶ 16, 162 P.3d 675, 678 (App. 2007) ("[T]he primary purpose of the [Prompt Pay] Act is to establish a framework for ensuring timely payments from the owner to the contractor and down the line to the subcontractors and suppliers whose work has been approved.").

Contract provisions to determine amounts of credits and offsets available to Appellants for calculating a principal sum owed to Premier. Before entering judgment, the court ordered the parties to submit "a statement or accounting concerning the application of the various credits and offsets . . . ." The parties did so and agreed that the principal sum due Premier was $158,185 but they posited different amounts of total interest then due on the different claims. Accordingly, the court entered judgment in the principal amount of $158,185 for all claims and adopted Appellants' computations of interest.[5] Over Appellants' objection, the court also awarded Premier its attorneys' fees in the amount of $103,500.[6] This appeal followed, and we have jurisdiction under Arizona Revised Statutes section 12-2101(A)(1) (West 2012).[7]

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[5] Actually, Premier calculated the principal amount to be $158,185.47 and Appellants calculated $158,185.41. Although the court entered judgment in the amount calculated by Premier, we find the six cent difference with Appellants' calculation to be *de minimus*. We accordingly refer to the principal amount in the judgment as the round figure of $158,185. We similarly find the court's interest award of $81,819.75 on the Prompt Pay Act claim to be a *de minimus* difference from the $81,819.44 calculated by Appellants, especially in light of the $93,218.13 of interest requested by Premier.

[6] Premier requested $136,169.53.

[7] We cite the statute's current version as it appears in Westlaw because changes material to our analysis have not since occurred.

DISCUSSION

I. Premier's Purported Violation of Duty to Disclose

¶8 Appellants first argue the court violated Arizona Rule of Civil Procedure ("Rule") 37(c) "in allowing Premier to use . . . at trial" documents supporting Premier's damages calculations because Premier did not disclose the documents in violation of Rule 26.1. We reject this argument.

¶9 The background to this issue is as follows: On the first day of trial, Two Amigos' representative Rivera testified that Two Amigos' "claim" amounted to $76,000 as the sum of labor expended before the construction stopped and the value of the non-refunded lumber. During a portion of Rivera's testimony, the court sustained Appellants' objection on the basis of the best evidence rule because no documentation was provided supporting Rivera's estimation of costs accrued by Two Amigos. The following morning, Premier's counsel disclosed to Appellants' counsel a FAX that Rivera received the previous evening specifying Two Amigos' damages. The court did not admit the document into evidence; but rather, allowed Rivera to refresh his recollection as to Two Amigos' unreimbursed labor and material expenditures. The court determined the reasonable value of labor, materials, equipment and services provided by Two Amigos was $75,123.18.

¶10 Rule 26.1 imposes an ongoing duty on parties to "seasonably" disclose "new or different information" after it is discovered. Ariz. R. Civ. P. 26.1. Absent leave of the court, Rule 37(c) prohibits a party that has failed to make a timely disclosure under Rule 26.1 to use the information or witness "as evidence" unless the Rule 26.1 violation was harmless. Ariz. R. Civ. P. 37(c)(1).

¶11 Here, Premier discovered the FAX during the evening recess, and disclosed it the following morning. Even assuming the court relied on the FAX as evidence, Appellants do not explain how they were prejudiced in light of other trial evidence regarding Two Amigos' damages -- including Rivera's other un-objected-to testimony on the first day of trial that the amount of damages was $76,000, which was almost $900 more than the amount of damages the court eventually found. Thus, any error in the evidentiary use of the FAX was harmless. Consequently, we cannot find an abuse of discretion mandating reversal. *SDR Associates v. ARG Enterprises, Inc.*, 170 Ariz. 1, 4, 821 P.2d 268, 271 (App. 1991) (court's ruling on admission of evidence reviewed for abuse of discretion).

II. Relief in Excess of Lien Amount

¶12 The court ruled that Appellants were entitled to a credit of $50,465.62 for the work on the Project performed by Two Amigos. The court arrived at this amount by deducting the

reasonable value of labor and material performed and provided by Two Amigos ($75,123.18) from the amount Two Amigos initially billed and apparently received ($125,588.80). Appellants contend that the court should have determined they were entitled to a credit of $94,975.04, which was the amount Premier noted in an attachment to its Notice of Lien as the amount of "Materials returned to Vendor."

¶13 Appellants, however, do not point out where in the record they made this argument to the trial court, and our review of the court's April 2, 2010 order indicates the court made no ruling on this issue. A litigant must present significant arguments, set forth his or her position on the issues raised, and include citations to relevant authorities, statutes, *and portions of the record*. *See* Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(6) (appellate briefs must present significant arguments, set forth positions on issues raised, and include citations to relevant authorities, statutes and portions of the record). Accordingly, we deem Appellants' argument waived. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) ("Generally, arguments raised for the first time on appeal are untimely and deemed waived."); *see also Modular Sys., Inc. v. Naisbitt*, 114 Ariz. 582, 587, 562 P.2d 1080, 1085 (App. 1977) (issues deemed abandoned when party "failed to state with any particularity why

or how the trial court erred in making these rulings and simply concludes that error was committed").

¶14 In addition, Appellants fail to explain why the $95,975.04 referenced in the amended lien should take precedence over the trial court's determination that the reasonable value of labor, materials, equipment, and services furnished by Two Amigos was $75,123.18.

III. Subcontractors' Authority to Purchase Materials and Court's Calculation of Credit for Unused Materials

¶15 Appellants raise a number of issues that challenge the court's preliminary findings and orders that resulted in the judgment. For example, Appellants assert Two Amigos and Esmay were not properly authorized under the Contract to purchase respectively the lumber and copper wire. Appellants also argue they were entitled to a greater amount of credit for those materials. We address these issues in turn.

A. Subcontractors' Authority

¶16 With respect to Esmay, Appellants argue the copper wire purchase and storage was in violation of § 5.1.9 of the Contract, which prohibited Premier from making "advance payments to suppliers for materials or equipment which have not been delivered and stored at the site [except with the Owner's prior approval]." Appellants, however, again do not point out where in the record they made this argument to the trial court, and our review of the court's April 2, 2010 order again indicates

the court made no ruling on this issue. For the reasons stated *supra* ¶ 13, we find this argument waived.

¶17 Regarding Two Amigos' authority to purchase lumber and materials and commence framing activities on the Project, Appellants argue Premier never submitted Two Amigos as a proposed subcontractor for Appellants' approval in violation of § 5.2 of the Contract's General Provisions. The court rejected this argument, finding the evidence at trial showed that Premier never submitted for Schmitz's approval of any of the various subcontractors used on the Project, and Schmitz never objected to a subcontractor on the basis of a violation of § 5.2. Thus, the court concluded that "[t]he course of conduct or dealing between the parties would not have lead Premier to submit Two Amigos, as a replacement . . ., for written approval to Schmitz." Appellants do not argue that the court's findings were unsupported by the record or otherwise erroneous. Consequently, we find no abuse of discretion. *See Ace Auto. Prods. Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party.").

¶18 Also regarding Two Amigos' authority, Appellants argue Two Amigos was in violation of its agreement with Premier because the former had not provided the latter with required documentation such as proof of insurance, proper licensing, etc.

Appellants imply this violation abrogated Two Amigos' authority to commence work on the project.

¶19 However, Appellants' assertions appear to be factually incorrect; based on the record, it appears that the absence of such papers would not affect Two Amigos' authority to commence work on the project. Premier's President testified at trial that the insurance certificates, license, and MSDS sheets were used by Premier for its internal purposes only and that the absence of such documents in the home office project files did not preclude Premier from billing for the work performed by the subcontractor. In addition, another witness testified that some of these documents (such as the material safety data sheets) were typically kept on the construction site in Two Amigos' foreman's truck.

¶20 Appellants also fail to indicate where in the record they raised this issue with the trial court, resulting in a waiver of this issue, given that the court's April 2, 2010 order did not address it.

B. Amount of Credit for Unused Materials

¶21 The court ruled that Appellants were entitled to credit of $11,263.00, which constituted 5% "of the profit . . . for the return of the copper wire and lumber."[8] Appellants do

[8] As the court found, "The contract provisions upon termination entitles Premier to reasonable expenses incurred plus reasonable markup for overhead and profit."

not challenge the court's computation of the dollar amount of the credit, but contend they are entitled to a credit of 100% of the profit. One basis for the Appellants' argument is the purportedly unauthorized work conducted by Two Amigos and Esmay related to the lumber and copper wire. For the reasons already explained, arguments regarding the subcontractors' authority are not properly before us. The remaining basis for Appellants' argument is that the Contract provision apparently relied upon by the court in making its ruling is "ambiguous and should be construed against the drafter, Premier."[9] Once again, Appellants do not satisfy their burden to show that this argument was presented to, and considered by, the trial court. In any event, the contract clearly provides: "ALL CREDITS FOR WORK NOT PERFORMED WILL BE CREDITED AT 5% PROFIT ONLY."

IV. Attorneys' Fee Award to Premier

¶22 The court found Premier was the prevailing party for purposes of a fee award. Appellants challenge this finding and argue the court's award of attorneys' fees was error. *See* A.R.S. §§ 12-341.01(A) (West 2012) (in a contested action

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[9] Section 4.2 of the Contract states, in relevant part:

> ANY CHANGE ORDERS TO THE ORIGINAL SCOPE OF WORK THAT ARE GENERATED BY THE OWNER . . . THAT RAISES THE COST OF THE PROJECT SHALL BE CHARGED AT THE COST OF THE WORK PLUS 5% FOR OVERHEAD AND 10% FOR PROFIT. ALL CREDITS FOR WORK NOT PERFORMED WILL BE CREDITED AT 5% PROFIT ONLY.

arising out of contract, court may award successful party reasonable attorney fees), 33-998(B) (West 2012) (court has same discretion to award fees in action to enforce mechanics' and materialmen's lien). Specifically, Appellants point out that Premier "lost on several of the main issues in this case . . . ."

¶23 We defer to the trial court to determine which party was "successful" for the purpose of making a fee award because "that court is better able to evaluate the parties' positions during the litigation and to determine which has prevailed." *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 22, 261 P.3d 784, 789 (App. 2011).

¶24 In *Berry*, this court noted that a party may be deemed "successful" for purposes of a fee award even if the party does not recover the total amount of relief requested; instead, in cases such as this one "involving various competing claims . . . and setoffs all tried together, the successful party is the net winner." *Id.* (*quoting Ayala v. Olaiz,* 161 Ariz. 129, 131, 776 P.2d 807, 809 (App. 1989)). The *Berry* court concluded that although the fee award applicant in that case did not succeed on all claims, the party did receive a monetary judgment and was therefore entitled to a discretionary award of fees. *Id.* at ¶¶ 22-24. In reaching this conclusion, the court in *Berry* found it significant that the trial court reduced the amount of the fee

award "perhaps in light of [the award recipient's] failure to prevail on" one of its counterclaims. *Id.* at ¶ 23.

¶25 Here, Premier obtained a money judgment against Appellants on all three of its claims. Although the amount of the judgment was less than requested, Premier was the "net winner." As in *Berry*, the amount of the fee award was reduced by the trial court, apparently as a result of Premier's failure to completely succeed in obtaining all the relief requested. We find *Berry* dispositive and conclude that the court had a reasonable basis to find Premier was the prevailing party; accordingly, the court did not abuse its discretion in determining Premier was entitled to a fee award.

¶26 Appellants also argue that the court failed to correctly apply the factors listed in *Associated Indemnity Corp. v. Warner,* 143 Ariz. 567, 694 P.2d 1181 (1985). However, their argument essentially requests that we "substitute our own item-by-item analysis for that of the trial court." *See Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). Such an exercise is beyond the scope of our review. *Id.* Accordingly, we cannot reverse on this basis.

¶27 Alternatively, Appellants contend the amount of the fee award was unreasonable. The specific factors that Appellants argue result in an unreasonable amount include: 1) the $103,500.00 award is excessive in light of the judgment

obtained and the amount of work performed by Premier's counsel; 2) Premier's counsel sought fees for time spent traveling from Phoenix to Bullhead or Kingman; 3) Premier's counsel failed to substantiate his assertion that his fees were similar to those regularly charged in Phoenix; 4) Premier sought fees for work performed on issues Premier did not prevail upon; 5) Premier sought to recover fees relating to subcontractor claims that were dismissed and the parties were to bear their own fees and costs; 6) the amount of fees "written off" by Premier's counsel "should have been ignored by the Trial Court;" 7) tasks performed by Premier's lawyers could have been performed by less than the number whose time was charged; and, 8) several of Premier's counsel's time entries are vague.

¶28 Appellants provide us with no authority to support their argument, and they do not provide us with sufficient and appropriate references to the record. Thus, we will not vacate the amount of the fee award. Further, we note that the court had before it a detailed accounting of the time Premier's counsel spent on performing specific tasks related to this case, and that the amount awarded was 76% of what Premier requested. Absent authority to the contrary, we cannot find an abuse of discretion on this record.

V. Admissibility of Testimony in Purported Violation of Arizona Rule of Evidence 403

¶29 Over Appellants' objection on relevance grounds, the court permitted Schmitz's "50 percent partner" in Diamond Key, Jim Rohl, to testify that Schmitz once went to Las Vegas with the Project's superintendent, and Schmitz called Rohl in the middle of the night to explain he was "partying . . . with female companionship . . . at the expense of Diamond Key." Appellants argue the court violated Arizona Rule of Evidence 403 by admitting Rohl's testimony.

¶30 Whether the court violated Rule 403 in allowing Rohl's testimony is not an issue properly before us because Appellant did not object on the basis that the testimony was unfairly prejudicial relative to its probative value. *See* Ariz. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . ."); *State v. Montano*, 204 Ariz. 413, 425, ¶ 58, 65 P.3d 61, 73 *supplemented,* 206 Ariz. 296, 77 P.3d 1246 (2003) (failure to object on Rule 403 grounds waives issue on appeal). Instead, we interpret Appellants' Rule 403 argument as a challenge to the court's implicit ruling that the testimony was relevant. Assuming, without deciding, that the court erred in finding Rohl's testimony relevant, the error is harmless because this was a bench trial. "When evidence is erroneously admitted by a trial court sitting without a jury, the court is presumed

to have ignored such testimony." *In re Estate of Newman*, 219 Ariz. 260, 276, ¶ 66, 196 P.3d 863, 879 (App. 2008)(*quoting Norvell v. Lucas*, 3 Ariz.App. 464, 465, 415 P.2d 478, 479 (1966)). We apply this presumption here because nothing in the record suggests the trial court relied on Rohl's testimony. Accordingly, we do not find reversible error.

VI. Court's Refusal to Submit Matter to Arbitration

¶31 In response to Premier's motion for partial summary judgment, Appellants argued the motion should be denied because the Prompt Pay Act claim was subject to arbitration. In its ruling on July 17, 2008 granting in part Premier's motion, the court found Appellants waived their right to arbitration because they did not timely make a demand for it.

¶32 A party may waive the right to arbitration when it pursues litigation instead of arbitration. *See Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, 347, 464 P.2d 788, 789 (1970) (holding that plaintiff waived the right to arbitrate the controversy by filing a lawsuit that requested the same type of relief it could have gained in arbitration); *In re Estate of Cortez*, 226 Ariz. 207, 245 P.3d 892 (App. 2010) (discussing *Bolo* and extending this principle to mean that "filing an answer under the same circumstances without asserting the right to arbitrate also would result in waiver of the arbitration agreement").

¶33 Appellants contend the court erred in finding they waived their right to arbitration. Appellants claim they could not waive this right because they did not have the provision of the Contract that set forth the requirement that a demand for arbitration be made "within a reasonable time." Thus, Appellants argue they had no knowledge that they had the right to demand arbitration.

¶34 The trial court, however, expressly rejected this argument and found that Schmitz and Appellant's counsel could have "easily access[ed]" the Contract, even if they did not personally possess it. Further, the court found Appellants *did* make a timely demand for arbitration in another action related to this case. Appellants do not refer to an item of record that refutes these findings. We therefore cannot find reversible error.

CONCLUSION

¶35 The judgment is affirmed. Pursuant to A.R.S. § 12-341.01 (West 2012), Premier requests its reasonable attorneys' fees and costs incurred in this appeal. Because Premier is the prevailing party on appeal and this action arises out of contract, we exercise our discretion to grant Premier's request subject to compliance with ARCAP 21.[10]

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
DONN KESSLER, Judge

[10] During the pendency of this appeal, both Premier and Diamond Key filed for bankruptcy. They later arrived at a settlement, approved by both bankruptcy courts, whereby Diamond Key's estate purchased Premier's right to the lien and judgment in return for $335,000, paid to Premier's Chapter 7 Trustee. In addition, Premier's proof of claim against Diamond Key in Diamond Key's bankruptcy was deemed disallowed. Diamond Key has withdrawn its own notice of appeal as a defendant/appellant and now stands in the shoes of Premier with regard to its right to enforce this judgment against New Grand Island and Schmitz.