IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MINING INVESTMENT GROUP, LLC, a limited liability company,
Plaintiff/Appellant/Cross-Appellee,

v.

KAY LYNN PRICE, *Defendant/Appellee/Cross-Appellant*.

No. 1 CA-CV 14-0776
FILED 3-29-16

Appeal from the Superior Court in Yavapai County
No. P1300CV20081541
The Honorable Patricia A. Trebesch, Judge

AFFIRMED

COUNSEL

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And

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MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Margaret H. Downie and Judge John C. Gemmill joined.

G O U L D, Judge:

¶1 Appellant Mining Investment Group, Inc. ("MIG") appeals the trial court's ruling vacating judgment in MIG's favor and granting a new trial to Appellee Kay Lynn Price ("Price"). For the reasons set forth below, we affirm the decision to grant a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Price and her husband[1] entered into an option and easement agreement with Otay Land, LLC to sell a large parcel of land located in Yavapai County. Otay exercised its option, then transferred its interest to MIG. MIG then executed a $2,494,500 promissory note that called for the release of 36-acre minimum portions of the property "with a release price of 125% of the proportional amount of the balance owed at the time of release."

¶3 MIG made its initial $464,000 payment and requested a first release, which the Prices granted. MIG made its second principal payment on or about January 2, 2006 and requested a second release. The Prices acknowledged the payment was timely but refused to issue the second release. The Prices instead demanded an additional payment of $71,127 in October 2006; the demand was increased to $85,172.41 in December 2006.

¶4 The Prices later withdrew their $85,172.41 demand, at which point MIG tendered the original demand of $71,127 to the title company. The title company returned the funds, however, because the Prices never provided instructions authorizing the release.

¶5 The Prices never granted the second release. They asserted, among other things, that MIG breached the promissory note by failing to

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[1] Mr. Price passed away in 2011. His estate was substituted in as a plaintiff.

provide ingress and egress easements to the unreleased land. As a result, instead of releasing the property, the Prices noticed a trustee's sale and obtained a trustee's deed for the unreleased property.

¶6 MIG filed suit alleging the Prices breached the promissory note by refusing to issue the second release.[2] MIG sought declaratory relief and compensatory and punitive damages.

¶7 As the case moved towards trial, Mrs. Price, who represented herself *in propria persona*, filed numerous motions and other papers. Included in these filings was a request for findings of fact and conclusions of law pursuant to Ariz. R. Civ. P. 52(a) and two sets of proposed findings. The trial court denied Price's request as it pertained to MIG's then-pending motion for summary judgment, but granted the motion "[t]o the extent [Price] wishes to have findings of fact and conclusions of law made at the conclusion of the trial of this matter."

¶8 The court held a three day bench trial. At the close of trial, the trial court ruled as follows:

> IN CONSIDERATION of the foregoing, the Court finds that both Parties to this Agreement were sophisticated in regard to the sale and purchase of real estate; [MIG] having previously engaged in such transactions and [Price] being a licensed real estate professional. The Court finds no ambiguity in the terms of the note as, through his October 10, 2006 correspondence, [Price's] attorney asserted the same calculus, on behalf of his clients … as [MIG] has insisted is correct throughout these matters.
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> However, as of May 25, 2007, with the tendering of the necessary documents and monies asserted by [Price] as appropriate toward the next proportional property release, [Price] materially breached the commercial real estate sales agreement entered into between the Parties, frustrated [MIG's] ability to develop and market the property and, in so doing, ultimately caused [MIG] the loss of not only those

[2] MIG also alleged the Prices breached the covenant of good faith and fair dealing by refusing to issue the second release. MIG waived this claim at the close of trial.

> monies tendered but also the property already paid for and released to them.

The trial court awarded MIG compensatory damages, pre- and post-judgment interest, reasonable attorneys' fees and costs.

¶9 MIG submitted two proposed forms of judgment; each form of judgment contained proposed findings. Price objected, claiming there should be no findings in the judgment, and that MIG's proposed findings did not accurately reflect the court's ruling. The trial court overruled Price's objections, and entered judgment for MIG on February 25, 2013, "except" as to MIG's claim for attorneys' fees, which was "to be determined and awarded by separate application."

¶10 Price filed for Chapter 11 bankruptcy protection on March 12, 2013, which stayed the case pursuant to 11 U.S.C. § 362(a). *See Miller v. Nat'l Franchise Servs', Inc*., 167 Ariz. 403, 406 (App. 1991) (automatic stay goes into effect "the *moment* that the petition is filed" in bankruptcy court). While the case was stayed, the court released the trial exhibits. Price did not pick up her exhibits, and the trial court destroyed them in July 2013.

¶11 Price obtained a lift stay order from the bankruptcy court on October 15, 2013. However, by that time the original trial judge had left the superior court bench, and the case was assigned to a new judge.

¶12 On November 14, 2013, Price moved to vacate the judgment or, alternatively, for a new trial. She argued, in relevant part, that the original judge had failed to issue "detailed Findings of Fact and Conclusions of Law despite [her] request that it do so."

¶13 In considering Price's motion, the court ruled the findings of fact were insufficient. In addition, the court determined that the original judge was not available to enter additional findings. As a result, the court granted Price a new trial. The court certified its ruling as a final judgment under Rule 54(b); MIG timely appealed, and Price cross-appealed.

DISCUSSION

I. MIG's Appeal.

A. Price's Motion for New Trial Was Timely.

¶14 MIG first contends Price's motion for new trial was untimely. A party has 15 days from the entry of judgment to move for a

new trial. Ariz. R. Civ. P. 59(d). This time limit is strictly enforced, but does not begin to run until there is a final, appealable judgment in place. *Jaynes v. McConnell*, 238 Ariz. 211, 214, ¶ 8 (App. 2015).

¶15 We conclude that Price's motion for new trial was timely. The judgment entered by the court on February 25, 2013, immediately before the bankruptcy stay, did not contain Rule 54(b) language. It thus was not final or appealable, and the Rule 59(d) time limit did not begin to run upon its entry. Ariz. R. Civ. P. 58(g); *Fields v. Oates*, 230 Ariz. 411, 414, ¶ 10 (App. 2012). In addition, no ruling had been made on MIG's fee application at the time Price filed her motion for new trial. As a result, Price's motion for new trial was timely.[3] *See Farmers Ins. Co. of Ariz. v. Vagnozzi*, 132 Ariz. 219, 221 (1982) ("A motion for new trial required to be filed 'not later than' 15 days after entry of judgment . . . may be effectively filed prior to the entry of judgment.") (internal citation omitted).

B. The Court Did Not Abuse Its Discretion in Granting a New Trial.

¶16 We review a trial court's decision to grant a new trial for an abuse of discretion. *McBride v. Kieckhefer Assocs., Inc.*, 228 Ariz. 262, 266, ¶ 16 (App. 2011).

¶17 The court granted Price a new trial because it found the original trial judge's findings were insufficient. Our review is limited to that issue. *Santanello v. Cooper*, 106 Ariz. 262, 263-64 (1970). On appeal, MIG bears the burden to show a new trial was not justified. *Id.* at 264.

1. Price Did Not Waive Her Request for Findings of Fact.

¶18 MIG contends Price waived her request for findings of fact. Specifically, MIG argues that while Price objected to MIG's proposed forms of judgment, she never argued the court failed to make sufficient findings of fact. As a result, MIG argues Price has not preserved this issue for appeal. We disagree.

¶19 Price was required to object to the sufficiency of the trial court's finding prior to the entry of a judgment. *John C. Lincoln Hosp. and*

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[3] Based on this conclusion, we need not resolve the parties' dispute regarding the time-extending provisions of 11 U.S.C. § 108 following entry of the lift-stay order.

Health Corp. v. Maricopa Cty., 208 Ariz. 532, 538, ¶ 23 (App. 2004); *Elliott v. Elliott*, 165 Ariz. 128, 133 (App. 1990); *See* Ariz. R. Civ. Proc. 52(b). The record shows Price objected to the sufficiency of the court's findings in her motion for new trial, prior to the entry of judgment. Thus, we find no waiver.

2. The Findings Were Insufficient.

¶20 Findings of fact are sufficient "if they are pertinent to the issues and comprehensive enough to provide a basis for the decision." *Miller v. Board of Supervisors of Pinal Cty.*, 175 Ariz. 296, 299 (1993) (citation omitted). Findings also must encompass the "ultimate facts" at issue, which are those essential and determinative to the conclusions reached. *In re $26,980.00 U.S. Currency,* 199 Ariz. 291, 294, ¶ 7 (App. 2000). We review the sufficiency of findings of fact *de novo* as a mixed question of fact and law. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 128, ¶ 13 (App. 2012).

¶21 Generally, when the trial court does not make specific findings of fact, "we presume that the trial court found every fact necessary to support its ruling and will affirm if any reasonable construction of the evidence supports the decision.") (internal citations omitted); *In the Matter of CVR 1997 Irrevocable Trust,* 202 Ariz. 174, 177, ¶ 16 (App. 2002). However, we cannot infer additional findings when a party requests specific findings of fact under Rule 52(a). *Elliott*, 165 Ariz. at 135; *Stein v. Stein*, 238 Ariz. 548, 551, ¶ 12 (App. 2015).

¶22 The original judge's findings of fact were, in total, (1) both parties were sophisticated in real estate transactions, (2) the promissory note was not ambiguous, and (3) MIG tendered "the necessary documents and monies as asserted by [Price]." From these three findings, the judge concluded Price "materially breached the commercial real estate sales agreement . . . [and] frustrated [MIG's] ability to develop and market the property . . . ."

¶23 We conclude the court's findings of fact were insufficient under Rule 52(a).[4] The findings do not state what the "necessary documents and monies" were, when or why Price asserted they were

[4] We recognize that, given the large number of filings by Price, the original trial judge may have understandably overlooked his order regarding findings of fact.

necessary, how Price breached the parties' agreement, or how she frustrated MIG's development and marketing efforts. *See Miller*, 175 Ariz. at 299 (stating that findings of fact must set forth how the trial court arrived at its conclusions). In particular, the findings do not address one of the primary disputes in the case: whether MIG satisfied the alleged requirement of the note, prior to release of the property, to provide Price with a legal description of the property to be released, including a description of the relevant ingress, egress and utility easements. *See Elliott*, 165 Ariz. at 135 ("Because wife requested findings of fact, we must be able to determine which evidence formed the bases of the awards before we can affirm them.").

3. The Findings of Fact Did Not Establish an Anticipatory Breach.

¶24 MIG argues the findings were sufficient to show Price anticipatorily breached the promissory note, rendering MIG's later performance, or lack thereof, irrelevant.

¶25 An anticipatory repudiation is "a positive and unequivocal manifestation on the part of the repudiating party that he will not render the required performance when it is due." *Kammert Bros. Enters., Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 306 (1967). An anticipatory breach occurs "before the time fixed for [the breaching party's] performance has arrived," *Esplendido Apartments v. Olsson*, 144 Ariz. 355, 360 (App. 1984), and excuses the non-breaching party from further performance. *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 95, ¶ 9 (2013).

¶26 Here, the court did not make the requisite findings to support an anticipatory breach. Specifically, the court did not find that Price refused to perform before her performance was due or that MIG's future performance was excused. We therefore reject MIG's anticipatory breach argument.

4. Granting a New Trial Was Appropriate Given the Specific Posture of This Case.

¶27 MIG next contends the court should have reviewed the trial record and issued additional findings of fact rather than grant a new trial.[5]

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[5] MIG also contends this court can imply additional findings of fact from the evidence presented at trial. As noted above, we cannot do so

See Sourant, 229 Ariz. at 129, ¶ 17 ("The appropriate remedy generally for a trial court's failure to make required findings and conclusions is to remand to permit the court to comply with Rule 52(a)."). While remand is generally a proper remedy for insufficient findings, the remedy must be tailored to each case. *Miller*, 175 Ariz. at 300.

¶28 Here, the original trial judge was no longer on the superior court bench when Price moved for a new trial. Moreover, the new judge did not have a complete trial record when she considered Price's motion because the trial exhibits already had been released. Granting a new trial was appropriate under these facts. *See Kazal v. Kazal*, 98 Ariz. 173, 179 (1965) (granting new trial based on trial judge's failure to provide adequate findings of fact "[b]ecause the trial judge who heard the evidence in the trial below is no longer a judge," meaning a remand for further findings "would serve no useful purpose.").

¶29 Accordingly, we conclude the court did not abuse its discretion in granting a new trial.[6]

CONCLUSION

¶30 Based on the foregoing, we affirm the ruling granting a new trial and deny Price's cross-appeal. Both parties request attorneys' fees and costs pursuant to A.R.S. § 12-341.01(A). In our discretion, we deny both fee requests, but do not preclude the trial court from awarding attorneys' fees incurred on appeal, if appropriate, following trial. However, because Price is the prevailing party, she is awarded her costs on appeal.

because Price requested specific findings of fact under Rule 52(a). *See supra*, ¶ 21; *Elliott*, 165 Ariz. at 135.

[6] Because we affirm the court's order granting a new trial, we do not reach the issues raised in Price's cross-appeal. These issues are more properly addressed by the trial court in the context of a new trial.