IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WOOD BROS., INC., *Plaintiff/Appellant*,

v.

WESTERN TECHNOLOGIES, INC., *Defendant/Appellee*.

No. 1 CA-CV 19-0014
FILED 12-24-2019

Appeal from the Superior Court in Coconino County
No. S0300CV201600244
The Honorable Cathleen Brown Nichols, Judge

AFFIRMED

COUNSEL

Sacks Tierney PA, Scottsdale
By Steven R. Beeghley, David C. Tierney, Brian M. Flaherty
Counsel for Plaintiff/Appellant

Green & Baker Ltd, Scottsdale
By Katherine E. Baker
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Maria Elena Cruz delivered the decision of the Court, in which Judge Kent E. Cattani and Judge David D. Weinzweig joined.

C R U Z, Judge:

¶1 Appellant Wood Bros., Inc. ("Wood Bros.") challenges the superior court's entry of summary judgment in favor of Western Technologies, Inc. ("WTI"). Wood Bros. argues in particular that the court (1) incorrectly interpreted nonparty Alpine Diversified, Inc.'s ("Alpine") assignment of claims to Wood Bros., and (2) erred by finding Wood Bros.' claims to be barred on statute of limitations grounds. We conclude Wood Bros. had standing to bring its claims against WTI. Nonetheless, for the reasons that follow, we affirm entry of summary judgment as to Wood Bros.' express warranty, implied warranty, and indemnification claims.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Army Corps of Engineers retained Alpine in 2007 to construct the Clay Avenue Wash Detention Basin, a part of the Rio de Flag Flood Control Project. Wood Bros. provided earthmoving equipment, operators, and supervisory personnel for the project. Alpine retained WTI to perform soils testing and on-call compaction testing.

¶3 The project reached substantial completion in July 2009. Approximately one year later, the Arizona Department of Water Resources discovered excessive settlement and cracking and issued a Notice of Safety Deficiency. Alpine performed remedial work, and Wood Bros. again provided equipment and personnel. Alpine and Wood Bros. entered into a settlement agreement in May 2014 (the "Settlement Agreement"), which provided in relevant part:

> In consideration for the promises made by [Wood Bros.] herein, [Alpine] assigns all rights, claims, causes of action, and reservations it has as against [WTI] and Woodson Engineering and Surveying, Inc. with respect to the Project to [Wood Bros.], and will execute the Assignment of Cause of Action against [WTI] attached hereto as Exhibit A . . . .

The referenced "Assignment of Cause of Action" (the "Assignment") stated as follows:

> In consideration of repair work performed, Alpine Diversified, Inc. ("Assignor") transfers and assigns to Wood Bros., Inc. ("Assignee") all of Assignor's rights, title, and interest in and to certain causes of action against Western Technologies, Inc. ("Western") for equitable and/or implied contractual indemnity. The cause of action arises from Western's failure to adequately perform its contractual obligations to provide Quality Control Field and Laboratory Sampling and Testing Services to Assignor . . . .
>
> This assignment is intended to convey to Assignee all of Assignor's right, title, and interest in the assigned cause of action.

¶4 Wood Bros. sued WTI in May 2016 alleging (1) breach of contract/breach of express warranty, (2) breach of implied warranty, (3) express indemnification, and (4) negligence. WTI moved for summary judgment, contending (1) the express warranty and express indemnity claims failed because WTI did not have a written agreement with Alpine, (2) the express and implied warranty claims were time-barred under the three-year limitations period for claims based on an oral agreement, and (3) the negligence claim was time-barred under the applicable two-year limitations period. Wood Bros. conceded its negligence claim was time-barred but argued its other claims were timely under the six-year limitations period for claims based on a written contract. Specifically, Wood Bros. contended that "Alpine provided WTI a written subcontract on or about October 2, 2007" (the "Alpine Subcontract"), which WTI "placed . . . in its Project File" but did not sign.

¶5 The superior court granted WTI's motion, finding the three-year limitations period applied to Wood Bros.' express warranty, implied warranty, and indemnification claims. It also concluded that Wood Bros. failed to show "a mutual assent or a meeting of the minds" between Alpine and WTI regarding warranties or indemnification and that "the Statute of Frauds does apply to the subject contract, as well." Finally, the court concluded that Wood Bros. lacked standing to assert its claims because the Assignment only conveyed claims for equitable or implied contractual indemnity, which Wood Bros. did not plead.

¶6 Wood Bros. timely appealed. We have jurisdiction following the entry of final judgment pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶7 On review of a grant of summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the superior court properly applied the law. *Sign Here Petitions L.L.C. v. Chavez*, 243 Ariz. 99, 104, ¶ 13 (App. 2017). We view the facts and reasonable inferences in the light most favorable to Wood Bros. as the non-prevailing party. *Rasor v. Nw. Hosp., L.L.C.*, 243 Ariz. 160, 163, ¶ 11 (2017). Summary judgment should be granted only "if the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

I. The Superior Court Erred in Finding that Wood Bros. Lacked Standing to Bring its Claims Against WTI

¶8 Wood Bros. first challenges the court's ruling that the Settlement Agreement and Assignment only conveyed equitable or implied contractual indemnity claims. We review the superior court's interpretation of the Settlement Agreement and Assignment *de novo*. *Dunn v. FastMed Urgent Care P.C.*, 245 Ariz. 35, 38, ¶ 10 (App. 2018). We construe these contracts to determine and enforce the parties' intent. *Id.* "In determining the parties' intent, we 'look to the plain meaning of the words as viewed in the context of the contract as a whole.'" *Earle Invs., L.L.C. v. S. Desert Med. Ctr. Partners*, 242 Ariz. 252, 255, ¶ 14 (App. 2017) (quoting *United Cal. Bank v. Prudential Ins.*, 140 Ariz. 238, 259 (App. 1983)).

¶9 Wood Bros. contends the Settlement Agreement "clearly demonstrates the parties intended to assign all Alpine's possible causes of action against WTI," notwithstanding the fact that the Settlement Agreement also expressly references the Assignment, which only assigned "certain causes of action . . . for equitable and/or implied contractual indemnity."

¶10 "Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions must be reconciled, rather than nullify any, if reconciliation can be effected by any reasonable interpretation, it being necessary for this purpose to

consider the entire instrument and the surrounding circumstances." *Hamberlin v. Townsend*, 76 Ariz. 191, 196 (1953) (citations omitted); *see also Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52, 54, ¶ 13 (App. 1998) ("We will, if possible, interpret a contract in such a way as to reconcile and give meaning to all of its terms, if reconciliation can be accomplished by any reasonable interpretation.").

¶11 Wood Bros. offered undisputed declaration testimony from Alpine's president, Lonnie Minor, to resolve this inconsistency. Minor—who signed both documents on behalf of Alpine—testified that Alpine intended to assign all claims against WTI to Wood Bros. When extrinsic evidence is offered to prove a proffered interpretation, "the judge [should] first consider[] the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 22 (App. 2005) (quoting *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 155 (1993)). The testimony is admissible only if the contract language is reasonably susceptible to its proponent's interpretation. *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, 367, ¶ 40 (App. 2015).

¶12 The Settlement Agreement's language is reasonably susceptible to Minor's interpretation, as it purports to assign "all rights, claims, causes of action, and reservations . . . as against [WTI]." WTI did not provide any competing evidence that Alpine did not intend to assign all claims, nor did it dispute Minor's testimony. Construing the contract in a way that enforces the parties' intent, Alpine did assign all rights, claims, causes of action, and reservations as against WTI to Wood Bros. Accordingly, the superior court erred by finding that Wood Bros. did not have standing to bring its claims against WTI.

II. Summary Judgment Was Proper on Wood Bros.' Breach of Express Warranty and Indemnification Claims

¶13 We next consider the court's determination that Wood Bros.' claims were subject to the three-year limitations period for claims based on an oral agreement. A.R.S. § 12-543(1). We review *de novo* the application of a statute of limitations, considering the nature of the cause of action and not the form. *Broadband Dynamics, L.L.C. v. SatCom Mktg., Inc.*, 244 Ariz. 282, 285, ¶ 5 (App. 2018) (citation omitted). A statute of limitations defense is not favored; if two constructions are possible, we generally will prefer the longer limitations period. *Id.* (quoting *Woodward v. Chirco Constr. Co.*, 141 Ariz. 520, 524 (App. 1984)).

¶14 Wood Bros. contends its claims are subject to the six-year limitations period for claims because they are based on the Alpine Subcontract. A.R.S. § 12-548(A)(1). Wood Bros. cites Minor's testimony that Alpine sent the Alpine Subcontract to WTI "on or about October 2, 2007" and that WTI started work a few days later. On that basis, Wood Bros. contends the Alpine Subcontract—which contains an indemnity provision—was "the controlling contract" for the Alpine/WTI relationship even though WTI did not sign it.

¶15 WTI's work on the project certainly suggests it reached some agreement with Alpine. *Cf. Schade v. Diethrich*, 158 Ariz. 1, 10 (1988) ("The fact that one of [the parties], with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consummated and intend to be bound thereby.") (internal emphasis and citation omitted). But it does not establish that the parties agreed to the specific terms of the Alpine Subcontract. *See Lerner v. Brettschneider*, 123 Ariz. 152, 155 (App. 1979) ("Under ordinary principles of contract law, a term is included in a contract only when the parties assent to that term."). Indeed, the summary judgment record shows WTI did not agree to the Alpine Subcontract or the indemnification and warranty terms therein.

¶16 Because Alpine and WTI never entered into a written contract, Alpine and Wood Bros., its assignee, were required to assert any contract claims against WTI within the three-year limitations period for oral contracts. We thus conclude summary judgment was proper on Wood Bros.' express warranty and indemnification claims.

III. Summary Judgment Was Proper on Wood Bros.' Breach of Implied Warranty Claim

¶17 Wood Bros.' remaining claim does not depend on the Alpine Subcontract but rather on the implied warranty of workmanship. We thus consider whether the court correctly determined that it was time-barred.

¶18 "A claim for breach of the implied warranty sounds in contract." *Lofts at Fillmore Condo. Ass'n v. Reliance Commercial Constr., Inc.*, 218 Ariz. 574, 575, ¶ 5 (2008). When the claim arises out of a written contract, the six-year limitations period of § 12-548(A)(1) applies. *Woodward*, 141 Ariz. at 516; *Desert Mountain Props. Ltd. v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 207, ¶ 46 (App. 2010). Although Arizona appellate courts have not addressed what limitations period applies to a breach of implied warranty claim arising from an oral agreement, based on

Woodward, we conclude that claims based on an oral agreement would be subject to the three-year limitations period of § 12-543(1*). See Ins. Co. of N. Am. v. Super. Ct. In & For Cty. of Santa Cruz*, 166 Ariz. 82, 84 (1990) ("[W]e applied the six-year statute of limitations [in *Woodward*] because the cause of action ultimately was *based on the contract* between the two parties.") (emphasis in original). Thus, in the absence of a written agreement, the three-year statute of limitations for oral agreements applies to implied warranty claims.

¶19 Wood Bros. contends that the Alpine Subcontract served as a sufficient writing to subject its implied warranty claim to the six-year statute of limitations. "Whether [a] writing is a sufficient writing for purposes of applying the six year statute of limitations is a question of law." *Kersten v. Cont'l Bank*, 129 Ariz. 44, 46 (App. 1981). As previously stated, Wood Bros. has not proven the existence of an enforceable written agreement. The Alpine Subcontract was never signed by WTI, it was extensively modified by WTI, and there is no evidence to suggest it was mutually agreed upon by the parties. *See Gifford v. Makaus*, 112 Ariz. 232, 236 (1975) (finding that a writing must manifest mutual consent to the terms in order to constitute a contract).

¶20 Wood Bros. was required to assert its implied warranty claim arising out of its oral agreement with WTI within the three-year statute of limitations period. The court thus did not err in granting summary judgment on Wood Bros.' breach of implied warranty claim on statute of limitations grounds.

IV. The Record Does Not Indicate Whether the Statute of Frauds May Apply to Any Oral Agreement at Issue

¶21 Wood Bros. also contends the court erred in granting summary judgment based on the statute of frauds because WTI did not raise the issue in its motion. WTI contends Wood Bros. placed the statute of frauds squarely at issue in its response, but Wood Bros. only mentioned the statute of frauds in passing in a footnote, distinguishing a case cited by WTI on the grounds that it "dealt solely with the statute of frauds." The statute of frauds requires that certain important types of contracts be reduced to writing to ensure there is lasting evidence of an agreement between the parties. A.R.S. § 44-101. In any event, WTI presented no evidence to show the statute of frauds would bar enforcement of any possible oral agreement at issue. And the apparent completion of the project within one year suggests it would not apply. *See, e.g., Long v. City of Glendale*, 208 Ariz. 319, 329, ¶ 35 (App. 2004) ("Arizona recognizes . . . that

an agreement is removed from the statute of frauds when one party fully performs.").

V. Attorneys' Fees and Taxable Costs on Appeal

¶22 Both parties request their attorneys' fees and costs incurred in this appeal pursuant to A.R.S. § 12-341.01(A), which permits a discretionary award to the successful party in an action arising out of a contract. In the exercise of our discretion we decline to award WTI its attorneys' fees. As the prevailing party, WTI is entitled to its taxable costs on compliance with ARCAP 21.

CONCLUSION

¶23 Although the court erred in finding that Wood Bros. lacked standing, we affirm summary judgment on Wood Bros.' breach of express warranty claim, express indemnification claim, and implied warranty claim.

AMY M. WOOD • Clerk of the Court
FILED: AA