IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TLC/TRANSITIONAL LIVING COMMUNITIES, *Plaintiff/Appellee*,

v.

TOTAL EVENTS AND MORE, LLC, *Defendant/Appellant*.

No. 1 CA-CV 21-0564
FILED 11-1-2022

Appeal from the Superior Court in Maricopa County
No. CV2019-095348
The Honorable Janice K. Crawford, Judge

AFFIRMED

COUNSEL

Brooks & Affiliates PLC, Mesa
By David P. Brooks
Counsel for Plaintiff/Appellee

Fletcher Barnes Law PLC, Phoenix
By Timothy H. Barnes
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the court, in which Presiding Judge David D. Weinzweig and Judge D. Steven Williams joined.

H O W E, Judge:

¶1 Total Events and More, L.L.C. ("T.E.A.M.") appeals from the superior court's judgment finding that it breached an oral agreement with TLC/Transitional Living Communities ("TLC"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 TLC is a 90-day drug and alcohol treatment program. It operates a labor group that helps residents find work through day labor and events. T.E.A.M. is a licensed security agency owned by Mickey Hirko. All T.E.A.M. employees are licensed security guards. Because T.E.A.M. provided other event staffing as well, Hirko later formed Make Parties Happen, Inc. ("MPH") to employ its workers who are not licensed security guards. T.E.A.M. and MPH frequently worked the same events, where T.E.A.M. provided licensed security guard services and MPH provided other services such as parking cars, taking tickets, and line control.

¶3 TLC contacted T.E.A.M. looking for work opportunities for its residents, which led to an initial meeting on September 11, 2018. The parties vigorously dispute what was discussed at that meeting but agree that TLC provided workers for T.E.A.M.-staffed events, including the Arizona State Fair, shortly thereafter. The parties did not, however, enter into a written agreement.

¶4 During the last week of the State Fair, the Arizona Department of Public Safety ("DPS") conducted an audit of T.E.A.M.'s personnel. As part of that audit, DPS identified three TLC workers who were "performing bag and personal item searches on patrons entering the fair." DPS determined these services must be performed by licensed security guards, which the TLC workers were not. On that and other bases, DPS placed Hirko's and T.E.A.M.'s licenses on probation.

¶5 Hirko learned from DPS's report that some TLC workers had "serious criminal records," some of which included violent felony

convictions. Hirko contacted TLC and demanded that it provide workers going forward who did not have felony or theft convictions. Hirko then refused to pay TLC's State Fair invoices.

¶6 TLC sued T.E.A.M. and MPH for breach of contract and unjust enrichment.[1] The matter proceeded to compulsory arbitration, and the arbitrator entered an award in TLC's favor against MPH, but not against T.E.A.M. MPH appealed from the award. Following a bench trial, the superior court found that (1) TLC and T.E.A.M. entered into an oral agreement and (2) T.E.A.M. breached the agreement by not paying the outstanding invoices. It also found that (1) no credible evidence existed that T.E.A.M. told TLC what it considered a "significant criminal background"; (2) TLC considered significant criminal backgrounds to be "convicted sex offenders, murderers, and arsonists"; and (3) MPH's human resources manager knew or should have known that workers "coming from TLC had criminal backgrounds or, at a minimum, was put on notice that additional inquiry was necessary." The court also ruled that TLC could have recovered from either T.E.A.M. or MPH "under the theory of unjust enrichment in the absence of an oral contract." Finally, the court awarded TLC attorneys' fees and costs.

¶7 MPH moved for a new trial and objected to TLC's proposed form of judgment, contending that it was entitled to recover attorneys' fees because TLC obtained no relief against it. The court denied the motion, stating that it "did not enter a separate damages award against [MPH] only to avoid the possibility of a double recovery." The court entered a final judgment against T.E.A.M. and awarded TLC attorneys' fees and costs.

¶8 T.E.A.M. appealed from the judgment. MPH appealed from the order denying its motion for new trial. MPH later chose not to pursue its appeal. We have jurisdiction over T.E.A.M.'s appeal under A.R.S. § 12–2101(A)(1).

DISCUSSION

I. T.E.A.M.'s Challenges to the Bench Trial Fact Findings

¶9 T.E.A.M. challenges several of the superior court's fact findings. We address each challenge below. Following a bench trial, we review the superior court's interpretation of the parties' contract de novo but defer to its fact findings unless they are clearly erroneous. *Town of Florence v. Florence Copper Co.*, 251 Ariz. 464, 468 ¶ 20 (App. 2021). A fact

[1] TLC also sued Hirko, but those claims were dismissed by consent.

finding is not clearly erroneous if supported by substantial evidence "even if substantial conflicting evidence exists." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52 ¶ 11 (App. 2009). We view the facts in the light most favorable to upholding the court's ruling. *Florence Copper Co.*, 251 Ariz. at 468 ¶ 20 (citing *Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, 148 ¶ 2 (App. 2007)).

A. Substantial Evidence Supports the Finding That Hirko Did Not Tell TLC What He Considered to Be a "Significant Criminal Background."

¶10 Citing the superior court's finding that the parties discussed at the initial meeting that T.E.A.M. did not want workers with "significant criminal backgrounds," T.E.A.M. contends that the court erred in concluding that no credible evidence existed that anyone from T.E.A.M. told TLC what T.E.A.M. considered to be a significant criminal background. T.E.A.M. relies on Hirko's testimony that he told TLC's labor group director, Becky McFarland, that he did not want anyone with "any major felony I think that had to do with theft, major crime, you know, assault, any kind of acts of violence," which he said was consistent with state guidelines for obtaining a security guard license. Hirko also testified that the parties discussed an exception for "minor offenses that would allow us to try to rehab those individuals," but he conceded that he used a "cavalier" expression in differentiating between "youthful errors, versus, you know, having a criminal record." McFarland denied, however, that Hirko told her that TLC could not provide workers that had been convicted of, or charged with, violent crimes or theft. She also testified that, had Hirko done so, she would have "thanked them for their time and let them know that we would not be able to help them." The court acted within its discretion in resolving this evidentiary conflict. *See Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 13 (2018) (appellate court will not disturb fact findings that are "based on a reasonable conflict of evidence.") (quoting *Moreno v. Jones*, 213 Ariz. 94, 98 ¶ 20 (2006)).

B. Substantial Evidence Supports the Finding That TLC Considered a "Significant Criminal Background" to Entail Sex Offenses, Murder, or Arson.

¶11 T.E.A.M. next challenges the superior court's finding that "TLC consider[ed] significant criminal backgrounds to be convicted sex offenders, murderers, and arsonists." McFarland testified that TLC screens for sex offenses and arson in its resident intake process. She also testified that she commented to Hirko at the initial meeting that she was "not

bringing you murders [sic], I'm not bringing you sex offenders, and I'm not bringing you arsonists. But my people have backgrounds."

¶12 T.E.A.M. also contends that McFarland "readily acknowledged that aggravated assault, aggravated domestic violence and theft constituted criminal offenses TLC's people should not have on their record," citing a transcribed telephone call between McFarland and Hirko that occurred after the DPS audit. In that call, Hirko cited a few TLC workers as examples of people with "violent crimes" in their backgrounds. While the transcript suggests that these workers attended a T.E.A.M. orientation session, whether any of them worked at the State Fair is unclear. The transcript also evinces that T.E.A.M. had a "different impression . . . as far as requirements go" than TLC did before the DPS audit. Thus, the superior court did not err in finding that TLC considered significant criminal backgrounds to be convicted sex offenders, murderers, and arsonists.

C. Substantial Evidence Supports the Finding That Mergener Had Sufficient Information to Know Some TLC Workers Had Criminal Backgrounds.

¶13 T.E.A.M. next challenges the superior court's finding that MPH's human resources manager, Josh Mergener, knew or had reason to know that workers "coming from TLC had criminal backgrounds or, at a minimum, was put on notice that additional inquiry was necessary." The court cited testimony from TLC's chief financial officer, Elbert Farmer, who made the initial contact with T.E.A.M. Farmer testified that when Mergener asked him if any of TLC's residents were licensed security guards, he joked that "the people we help aren't people that are guard-carded." He also testified that Mergener told him that the lack of licensed security guards would not pose a problem.

¶14 The court also cited McFarland's testimony that she told Mergener and Hirko that "most of TLC's people would not be able to obtain a security guard license." McFarland also testified that she told Mergener and Hirko at the end of the initial meeting that many of the TLC workers had criminal backgrounds. Substantial evidence therefore supports this finding.

D. Substantial Evidence Supports the Finding That TLC Was Told Its Agreement Was with MPH Only After the DPS Audit.

¶15 T.E.A.M. next challenges the superior court's finding that "[i]t was only after the D.P.S. incident that T.E.A.M. Security expressly told TLC that any contract was between TLC and [MPH]." T.E.A.M. again relies on Hirko's recollection of the initial meeting, as he testified that he explained T.E.A.M.'s and MPH's roles to McFarland. T.E.A.M. contends the court disregarded this testimony, but conflicting testimony exists in the record. For example, while McFarland acknowledged that T.E.A.M.'s and MPH's roles were explained at a later orientation session, she testified that she believed T.E.A.M. was hiring TLC and that she was not told that the TLC workers were working for MPH. And Mergener could not recall telling McFarland that MPH hired TLC.

¶16 McFarland also testified that TLC directed invoices to T.E.A.M. until after the DPS audit, at which point they were told to direct invoices to MPH. She also testified that TLC was not asked to provide a certificate of insurance for MPH until after the DPS audit. Moreover, Mergener's requests for TLC workers identified him as T.E.A.M.'s HR manager even though he testified that he was an MPH employee. Thus, substantial evidence supports the superior court's finding.

E. Substantial Evidence Supports the Finding That Attending T.E.A.M.'s Orientation Was Not Required Before Working at Events.

¶17 T.E.A.M. next contends that the superior court erred in finding "that TLC was not told that its people were required to go through 'orientation' or 'training' before going to State Fair or other special events." The parties agree that Mergener offered two orientation sessions that approximately 40 TLC workers attended. But McFarland testified that neither T.E.A.M. nor MPH barred TLC workers who had not attended either session from working events. In any event, T.E.A.M. does not challenge the court's finding that "there was no evidence presented that a person sent by TLC performed in a manner contrary to what was taught during the orientation session."

II. T.E.A.M.'s Challenges to the Bench Trial Conclusions of Law

¶18 T.E.A.M. also contends the superior court erred as a matter of law in three respects.

A. T.E.A.M.'s Mitigation Efforts Are Irrelevant.

¶19 T.E.A.M. first contends that the superior court erred in concluding that "[e]ven if T.E.A.M [] believed" that TLC was required to background screen its workers, upon learning of the criminal backgrounds that some of TLC workers had, T.E.A.M. "would, at most, have been entitled to terminate the oral contract and stop using any person from TLC at the special events." While T.E.A.M. concedes it continued to use TLC workers, it contends that it did so to mitigate damages. But T.E.A.M. did not assert any counterclaims. *See, e.g., Fid. & Deposit Co. of Maryland v. Bondwriter Sw., Inc.*, 228 Ariz. 84, 92 ¶ 45 (App. 2011) ("[O]ne who claims to have been injured by a breach of contract must use reasonable means to avoid or minimize the damages resulting from the breach."); *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 477 (App. 1984) ("The party injured by a breach of contract has a duty to take reasonable steps to avoid the consequences of known injuries."). Its mitigation efforts therefore are irrelevant.

B. The Court Did Not Err in Stating That T.E.A.M. Could Have Secured the Criminal Background Terms in Writing.

¶20 T.E.A.M. also contends that the superior court erred in finding that if it "had considered a background check or criminal limitations to be a material term in its agreement with TLC, T.E.A.M. . . . would have referred to it in some form of a writing." T.E.A.M. contends it did not have to get these terms in writing because "the oral contract the trial court found between the parties included the required criminal limitations." As discussed above, the court found the oral agreement included no such terms. Moreover, the court did not rule that such terms would only be enforceable if written; it instead determined based on the facts presented that, if they were material, T.E.A.M. likely would have taken steps to get them in writing.

¶21 T.E.A.M. also again contends that Hirko "laid out for McFarland what he deemed to be significant criminal behavior which was accepted by McFarland," but the superior court found his testimony on that issue not credible. The court also had discretion to consider and weigh McFarland's contrary testimony. *See Castro*, 222 Ariz. at 52 ¶ 11 ("We will not reweigh the evidence or substitute our evaluation of the facts."). We also reject T.E.A.M.'s contention that TLC breached the oral agreement first because it is based on essentially the same evidence: Hirko's testimony that he "explained to McFarland that MPH personnel are held to the same

standards as T.E.A.M. Security requires its security guard employees to meet, which includes no criminal background."

C. The Court Did Not Err in Finding the Oral Agreement Was Between TLC and T.E.A.M.

¶22 T.E.A.M. also contends that the superior court erred in concluding that the oral agreement was between itself and TLC rather than MPH and TLC. T.E.A.M. again relies on Hirko's recollection of the parties' initial meeting. As discussed above, substantial evidence, including contrary testimony from McFarland, supports the court's finding that T.E.A.M. did not contend that TLC's contract was with MPH until after the DPS audit.

CONCLUSION

¶23 For the reasons stated, we affirm. Both parties request their attorneys' fees incurred in this appeal under A.R.S. § 12–341.01(A). TLC is the successful party and may recover reasonable attorneys' fees and taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. *See Asphalt Engineers, Inc. v. Galusha*, 160 Ariz. 134, 138 (App. 1989) (affirming attorney fee award based on breach of an oral agreement).

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