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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/01/11
RUTH WILLINGHAM,
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BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AZ-TECH MANUFACTURING, INC., an) 1 CA-CV 10-0330
Arizona corporation; REED BJORKLUND)
and PEGGY BJORKLUND, husband and wife,) DEPARTMENT D
)
Plaintiffs/Appellees,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
ARIZONA ESCROW AND FINANCIAL) Appellate Procedure)
CORPORATION, an Arizona corporation;)
HELEN O. WESTBROOK,)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 2006-005469
CV 2007-001720
CV 2007-003788
CV 2007-015694
(Consolidated)

The Honorable Jeanne M. Garcia, Judge

REVERSED AND REMANDED

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N O R R I S, Judge

¶1 This appeal arises from the superior court's denial of attorneys' fees under an indemnity provision to appellants Arizona Escrow and Financial Corporation and its employee, Helen O. Westbrook (collectively, "Escrow Defendants"). Because the indemnity provision authorized payment of attorneys' fees, we reverse the judgment of the superior court and remand for the superior court to determine the amount of fees Escrow Defendants should be awarded.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellees AZ-Tech Manufacturing, Inc., Reed Bjorklund, and Peggy Bjorklund (collectively, "Plaintiffs") sued a number of defendants, including Escrow Defendants, for claims stemming from Plaintiffs' assertion they did not receive the full agreed-upon price when they sold their machine shop to Advanced Technology Manufacturing, Inc. Escrow Defendants moved for summary judgment asserting, *inter alia*, the Plaintiffs' complaint was time-barred. The superior court granted the motion, finding Plaintiffs' claims were based on negligence and thus time-barred by the two-year statute of limitations.

¶3 Escrow Defendants sought reimbursement of their attorneys' fees by Plaintiffs pursuant to an indemnity provision

included in the escrow instructions. The indemnity provision, as relevant, stated,

Seller and Buyer^[1]:

. . . .

d) Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions of the escrow or any court action arising therefrom and will pay same upon demand.

The superior court denied Escrow Defendants' request for attorneys' fees, reasoning that "[g]iven the court's conclusion that the claims against [Escrow] Defendants are based on negligence, not on contract, the indemnification language in the escrow instructions cannot be a basis for an award of attorney fees."

¶4 After Escrow Defendants unsuccessfully moved for reconsideration of the order denying fees, Escrow Defendants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶5 Escrow Defendants argue the indemnity provision required the superior court to award them fees whether

¹The escrow instructions listed AZ-Tech Manufacturing, Inc., as the "Seller" and Advanced Technology Manufacturing, Inc., as the "Buyer."

Plaintiffs' claims were in tort or contract. We agree.² As an initial matter, we note the parties dispute the basis for the claims in this case, but we do not need to decide the issue because the "in connection with" language of the indemnity provision, on its face, is sufficiently broad to indemnify attorneys' fees for defending against the claims here, whether they sounded in tort, contract,³ or some other legal theory.

¶6 A contractual provision awarding attorneys' fees is enforced according to its terms, and a superior court has no discretion to refuse to award fees under such a provision. *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994). To enforce the indemnity provision here, we must interpret the breadth of the phrase "in connection with."

¶7 Courts have consistently held the phrase "in connection with" should be broadly construed. *Key Air, Inc. v. Comm'r of Revenue Servs.*, 983 A.2d 1, 8 n.11 (Conn. 2009) (listing cases). We have interpreted "in connection with" to

²Because this appeal involves interpretation of a contract, we review de novo. *Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007).

³On appeal, as they did in the superior court, the parties dispute whether A.R.S. § 12-341.01 (2003) authorized reimbursement of fees in this case. This statute, which allows a court to award fees in "any contested action arising out of a contract, express or implied," is not pertinent here, and, instead, the language of the contract controls.

represent "a relationship or association in thought." *State v. Bews*, 177 Ariz. 334, 336, 868 P.2d 347, 349 (App. 1993) (quoting Webster's Third New International Dictionary 481 (1971)) (pretrial interview was conducted "in connection with" an official proceeding -- a criminal trial -- for purposes of false-statement statute). Similarly, the Third Circuit Court of Appeals held use of "in connection with" required an interpretation "covering a wide range of relationships." *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000) (quoting varied uses of "in connection with" to hold defendant possessed a firearm "in connection with" his drug offense).

¶18 Case law shows the use of "in connection with" serves to broaden the reach of a provision, so we construe the term in that manner. Here, the indemnity provision covered all costs "in connection with these instructions of^[4] the escrow," which means any costs related to, associated with, or in some way linked to the escrow instructions would be indemnified. Plaintiffs sued Escrow Defendants for allegedly inserting incorrect figures in the escrow instructions which caused them

⁴On appeal, Escrow Defendants argue the word "of" in the indemnity provision is a typographical error and "of" should be "or." Plaintiffs argue Escrow Defendants' attempt to change the word is actually an attempt to seek reformation of the contract that should not be allowed on these facts. We do not need to address this issue and simply read the indemnity provision as written.

to receive less money from the sale than they expected. Because these allegedly erroneous figures were actually included in the escrow instructions, the resulting costs of litigating the dispute over these figures is related to, associated with, or in some way linked to those instructions.⁵

¶19 Additionally, Plaintiffs' claims for breach of fiduciary duties and breach of contract would not have existed without the escrow relationship created by the escrow instructions. See *Maganas v. Northrup*, 135 Ariz. 573, 576, 663 P.2d 565, 568 (1983) ("relationship of the escrow agent to the parties to the escrow is one of trust and confidence" and "escrow relationship gives rise to two distinct fiduciary duties" (emphasis added)). Because the escrow instructions created the contractual relationship and fiduciary duties at the center of the dispute, the attorneys' fees Escrow Defendants paid to litigate the dispute were "in connection with" the escrow instructions.

¶10 Therefore, we hold the attorneys' fees paid by Escrow Defendants to defend against Plaintiffs' suit were incurred "in connection with these instructions of the escrow" and thus subject to the indemnity provision.

⁵On appeal, Plaintiffs argue enforcing the indemnity provision to cover attorneys' fees goes "beyond [their] reasonable expectations." Plaintiffs did not raise this argument in the trial court, and thus it is waived.

¶11 Although not identified as a cross-issue on appeal, Plaintiffs argue the indemnity provision does not apply to individuals Peggy Bjorklund, Reed Bjorklund, and Westbrook because the escrow instructions only bind the corporations listed as Buyer and Seller.⁶ See *supra* note 1. We disagree. In their pleadings and motion papers, the Bjorklunds treated the escrow instructions as binding on them individually, and thus they cannot now assert the instructions do not apply to them.

¶12 The Bjorklunds, in their individual capacities, sued Escrow Defendants for breach of fiduciary duties and breach of contract, and, as shown above, these duties only arose because the parties had a contractual relationship through the escrow instructions. After basing their claims on being individual parties to a contract that included the indemnity provision, the Bjorklunds are estopped from denying they are subject to the

⁶Peggy Bjorklund signed the escrow instructions as "President" of AZ-Tech Manufacturing, Inc. Reed Bjorklund did not sign the escrow instructions.

In their response to Escrow Defendants' application for attorneys' fees, Plaintiffs argued that because Reed Bjorklund did not sign the escrow instructions, he could not be liable for fees. Additionally, Plaintiffs asserted the escrow instructions did not apply to Westbrook. Plaintiffs repeated these arguments in their response to the motion for reconsideration.

Although Plaintiffs did not argue in the superior court that the indemnity provision did not apply to Peggy Bjorklund, we consider the argument on appeal nonetheless because we prefer to decide cases on the merits. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984).

indemnity provision. See *Armer v. Armer*, 105 Ariz. 284, 288, 463 P.2d 818, 822 (1970) ("Parties are bound by their pleadings and evidence may not be introduced to contradict or disprove what has been admitted or asserted as fact in their pleadings, and a party may not introduce evidence in contradiction of express allegations of his complaint."); cf. *Spurlock v. Santa Fe Pac. R.R.*, 143 Ariz. 469, 484, 694 P.2d 299, 314 (App. 1984) (parties who contract with an entity as a corporation are estopped from denying its corporate existence in a later lawsuit).

¶13 The indemnity provision also covers Westbrook because the escrow instructions listed her as the escrow officer, and she signed the escrow instructions on behalf of Arizona Escrow and Financial Corporation as an "Authorized Employee." Additionally, Plaintiffs' complaint alleged that "[a]t all times herein mentioned, Westbrook acted within the scope and authority of her employment with Arizona Escrows and within the power granted to her as an officer of Arizona Escrows."

¶14 Escrow Defendants request attorneys' fees on appeal, asserting they are entitled to them under the indemnity provision. We award them their fees and costs on appeal because such fees and costs are "in connection with" the escrow

instructions, contingent on their timely compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶15 For the foregoing reasons, we reverse the order denying attorneys' fees to Escrow Defendants and remand for further proceedings consistent with this decision.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Judge

/s/

PATRICIA A. OROZCO, Judge