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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARIZONA MEDICAL BUILDINGS, LLC, an Arizona limited liability company; JESSE P. TRUITT, an individual, Plaintiffs/Appellees/Cross-Appellants, v. CHASM INVESTMENTS, LLC, an Arizona limited liability company; JOHN S. TRUITT, M.D., and SHIREEN TRUITT, husband and wife, Defendants/Appellants/Cross-Appellees.	2 CA-CV 2012-0093 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20071914

Honorable Scott Rash, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Appellants Chasm Investments, LLC, Dr. John Truitt, and Shireen Truitt (collectively "John") appeal from the trial court's judgment in favor of appellees and cross-appellants Arizona Medical Buildings, LLC and Jesse Truitt (collectively "Jesse") in litigation arising from the business relationship between the parties. On appeal, John argues the trial court erred in admitting and evaluating certain evidence, instructing the jury, and fashioning remedies. Jesse cross-appeals from the court's denial of his request for attorney fees. Because we find no reversible error, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the trial court's judgment." *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). In August 2003, John sold ninety-nine percent of his approximately thirty-nine percent interest in the Sierra Vista Medical Center Partnership (SVMCP) to Jesse, vesting Jesse with a 38.7966 percent interest and leaving John with a .3919 percent interest. After other related litigation in another case involving that transfer, the trial court ruled that the transfer was effective and personal to Jesse as of August 26, 2003. In 2006, the parties entered negotiations concerning some personal property, a number of parcels of real property located in Arizona and New Mexico ("Subject Properties"), and John's remaining interest in SVMCP and the balance of his medical practice. In May 2006, Jesse executed quitclaim deeds to the Subject Properties in favor of John. Jesse believed the deeds were executed solely to allow John to obtain

financing rather than constituting unconditional transfers. He further believed the negotiations did not result in a final, enforceable contract.

¶3 In 2007, Jesse sued John seeking declaratory, injunctive, and substantive relief in claims sounding in contract, tort, and equity. John filed counterclaims seeking similar relief and damages for the wrongful recording of a lien. After a fifteen-day trial, both parties filed motions for judgment as a matter of law, which the trial court denied. The court submitted both parties' business tort claims and special interrogatories on their quiet title claims to the jury, which rejected the tort claims and gave advisory answers to the special interrogatories. The court ruled Jesse had transferred one of the Subject Properties, the "Corporate Building"[1] to John, but could not quiet title in him because the building had been foreclosed on in 2009. The court quieted title to the relevant remaining Subject Properties in Jesse, finding he had no intent to deliver the quitclaim deeds to John and concluding no contract involving John's medical practice had been finalized between the parties. After a hearing on both parties' requests for attorney fees, the court granted costs to Jesse as the prevailing party but denied both parties attorney fees. John appealed and Jesse cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Quitclaim Deeds

Sufficiency of the Evidence

¶4 John first argues the trial court erred in determining that Jesse had transferred to John only one of the eight Subject Properties—the Corporate Building—

[1]Identified below as property located in Sierra Vista, Arizona.

because no evidence supported treating the properties separately. He reasons that because the court concluded the transfer of the Corporate Building was effective, it should have concluded the transfer of the other Subject Properties also was effective. We defer to the court's factual findings where they are supported by the record and not clearly erroneous. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004).

¶5 John alleged that under the terms of the agreement to sell his medical practice to Jesse and another doctor, Jesse was to pay $2.5 million in cash and transfer to him the Subject Properties, including the Corporate Building, and personal property consisting primarily of vehicles. He alleged this agreement was made at a Starbucks in April 2006 (hereafter the "Starbucks deal").[2] In support of his claim, John produced an unsigned contract dated November 2006 and pointed to the fact Jesse had given him quitclaim deeds to the Subject Properties. Jesse countered such an agreement never occurred, alleging John had wanted to purchase the Subject Properties from him and he had given John the quitclaim deeds only because John had told him he needed them in order to secure financing.

[2] John alleged his medical practice consisted of the .3919 percent interest in SVMCP, his accounts receivable, equipment owned by several other companies he held a stake in ("Related Entities"), goodwill, and a covenant not to compete. The trial court had ruled in another case that John held a forty-nine percent stake in the Related Entities, and John contended in this case transferring that stake had been part of the sale of the medical practice. But the legal status of that interest is unclear due to John's personal and business bankruptcies, which preceded the alleged sale, and no mention of that stake appears in the unsigned contract John used to support his claim.

¶6 The trial court found the transfer of the Corporate Building was not a part of the alleged Starbucks deal and instead was separate and distinct from that of the other Subject Properties. To reach this finding, it in part relied on the real estate purchase and sale agreement for the Corporate Building signed by Jesse on June 26, 2006, and by John on July 12, 2006. It reasoned that if, as John asserted, the parties had entered into a contract regarding all the Subject Properties in April 2006, the parties would not have needed the subsequent, separate contract regarding the Corporate Building, and concluded the Corporate Building was part of a separate transaction. Furthermore, Jesse and two other witnesses testified that the sale of the Corporate Building was a separate transaction. Based on this evidence, we cannot find clearly erroneous the court's conclusion that the Corporate Building was the subject of a separate transaction.

¶7 Furthermore, as to the other properties, Jesse and others testified the deeds to them had been given to John for his use in obtaining financing. And John sent an email to Jesse reassuring him as of July 11, 2006, that the "properties are not transferred" and the deeds to the Subject Properties "d[id] not exist for all practical purposes" until John recorded them. Again, the evidence supports the trial court's ruling that the other deeds were ineffective. *See Health Corp.*, 208 Ariz. 532, ¶ 10, 96 P.3d at 535.

Parol Evidence

¶8 John next argues the parol evidence rule should have precluded Jesse from testifying about any oral conditions to the quitclaim deeds. Jesse counters that the evidence was admissible to show the deeds were not delivered. We review de novo

whether testimony is admissible under the parol evidence rule. *See Terry v. Gaslight Square Assocs.*, 182 Ariz. 365, 368, 897 P.2d 667, 670 (App. 1994).

¶9 In general, when two parties have a written agreement, neither party may present "parol evidence," or extrinsic evidence, that would contradict or vary the terms of the writing. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). But conveyance of real property is not effective unless the grantor delivers the deed to the grantee. A.R.S. § 33-401(A). Effective delivery of a deed requires that the grantor have a present intention that title should pass to the grantee. *Robinson v. Herring*, 75 Ariz. 166, 169-70, 253 P.2d 347, 349-50 (1953). Even if a grantor physically hands a deed to a grantee, the deed has not been legally delivered and title to the property does not pass unless the grantor intended to relinquish ownership of the property. *Morelos v. Morelos*, 129 Ariz. 354, 356, 631 P.2d 136, 138 (App. 1981). Therefore, in the context of deeds, parol evidence is admissible to show "the intention of the parties was that [a deed] was not to become operative immediately." *Parker v. Gentry*, 62 Ariz. 115, 120, 154 P.2d 517, 519 (1944), *approved of by Robinson*, 75 Ariz. at 170, 253 P.2d at 349-50; *cf. Miller v. Stringfield*, 45 Ariz. 458, 462, 45 P.2d 666, 667 (1935) (parol evidence admissible to show deed absolute in form actually intended as equitable mortgage).

¶10 In this case, Jesse testified he had executed the quitclaim deeds to assist John in obtaining financing to purchase the Subject Properties and he had "made it perfectly clear" he did not intend to transfer ownership of the properties. This testimony did not concern how to interpret a written provision of the deed, but instead went to

whether Jesse had a present intent to relinquish ownership of the property. Its consideration by the trial court, therefore, did not violate the parol evidence rule. *See Robinson*, 75 Ariz. at 170, 253 P.2d at 349-50.

¶11 John relies on *Schornick v. Schornick* for the proposition that parol evidence may not be used to establish a grantor's lack of intent to transfer a property. 25 Ariz. 563, 575, 220 P. 397, 401 (1923). But we do not read that case so broadly. In *Schornick*, the court held only that parol evidence may not be used to interpret the meaning of an unambiguous provision within the deed; it did not address delivery because in that case the "manual delivery of the deed to [the] grantee was actual and unconditional." *Id.* Here, the question pertains not to the writing within the deed but to what is necessary to effectively deliver it. Accordingly, the court did not err in permitting parol evidence on the issue of delivery.

Statute of Frauds

¶12 John also argues the statute of frauds bars introduction of Jesse's testimony that he did not intend to deliver the deeds. Whether the statute of frauds applies is a legal conclusion we review de novo. *Turley v. Ethington*, 213 Ariz. 640, ¶ 6, 146 P.3d 1282, 1285 (App. 2006). The statute of frauds bars enforcement of certain oral contracts, A.R.S. § 44-101, but Jesse does not seek to enforce an oral contract, and therefore the statute of frauds does not apply.

Contract for the Sale of John's Medical Practice

¶13 John argues the trial court's determination that the parties did not enter into a contract for the sale of his medical practice was contrary to the jury's answer to one of

the special interrogatories. The jury found that Jesse had engaged in acts of partial performance that could be explained only by the existence of a contract, and John contends this finding means a contract existed between him and Jesse. The "ultimate element of contract formation" is "whether the parties manifested assent or intent to be bound." *Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d 133, 135 (App. 1991). Whether parties intended to be bound by a contract is a question of fact, *Althaus v. Cornelio*, 203 Ariz. 597, ¶¶ 15-16, 58 P.3d 973, 977 (App. 2002), and we defer to the court's findings unless clearly erroneous, *Combs v. DuBois*, 135 Ariz. 465, 468, 662 P.2d 140, 143 (App. 1982).

¶14 Even if the trial court's conclusion conflicted with the jury's finding, in equitable quiet title actions the findings of the jury are advisory only and do not bind the court, and here the court reached its own conclusions based on the evidence. *See Combs*, 135 Ariz. at 468, 662 P.2d at 143. The court found "there was no intent to transfer the Subject Properties . . . except for the Corporate Building" and the parties signed neither of the two proposed written agreements. The court further found that the two payments Jesse made to John might have been based on purchasing John's remaining .3919 percent interest in SVMCP alone and did not necessarily support John's alleged contract, and that John never tendered the interest in SVMCP or his forty-nine percent interest in the Related Entities to Jesse. The evidence adequately supported these findings. We therefore cannot say the court erred in concluding the parties had not manifested an intent to be bound and that Jesse and John had not entered into a contract for the sale of John's medical practice.

Lis Pendens

¶15 John next argues the trial court erred by not granting either his Rule 50, Ariz. R. Civ. P., motion for judgment as a matter of law or his Rule 59(a)(8), Ariz. R. Civ. P., motion to vacate the verdict as not supported by the evidence on his claim that Jesse had wrongfully filed a lis pendens on the Corporate Building, entitling him to damages under A.R.S. § 33-420. We review de novo the denial of a motion for judgment as a matter of law. *See A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 225 Ariz. 515, ¶ 14, 217 P.3d 1220, 1229 (App. 2009). We will not disturb the court's decision on a motion for a new trial under Rule 59(a)(8) "unless the probative force of the evidence clearly demonstrates that the decision of the trial judge is a manifest abuse of discretion." *See Carlton v. Emhardt*, 138 Ariz. 353, 357, 674 P.2d 907, 911 (App. 1983).

¶16 Judgment as a matter of law is appropriate "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review "the evidence in a light most favorable to upholding the jury verdict" and will affirm "if any substantial evidence exists permitting reasonable persons to reach such a result." *See Hutcherson v. City of Phx.*, 192 Ariz. 51, ¶ 13, 961 P.2d 449, 451 (1998).

¶17 Under § 33-420(C), a person named in a recorded document that purports to affect a real property interest, who knows the document is "forged, groundless,

contains a material misstatement or false claim," and refuses to correct the error is liable for damages and attorney fees. A filing pursuant to the statute is groundless "'only where [it] . . . has no arguable basis or is not supported by any credible evidence," and is therefore "'totally and completely without merit'" and "'futile.'" *SWC Baseline & Crimson Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, ¶ 31, 265 P.3d 1070, 1080 (App. 2011), *quoting Evergreen West, Inc. v. Boyd*, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App. 1991).

¶18 John contends that because the trial court found Jesse had transferred title to the Corporate Building prior to filing the lis pendens, and because the jury found Jesse knew he had transferred the building at the time of the execution of the deed in a special interrogatory, it must follow that Jesse knew he did not possess an interest in the Corporate Building when he filed the lis pendens. And he maintains the jury therefore could not have rendered a verdict for Jesse on this claim. However, the court found conflicting evidence as to what the parties knew and when they knew it. The lis pendens was recorded on April 10, 2007. But the court noted that even after the Corporate Building supposedly had been sold to Chasm in July 2006, John nonetheless included the Corporate Building as an asset that would be transferred to Chasm through his alleged contract to sell his medical practice in November 2006. If its ownership were without question, the court reasoned, "there would be no need for its inclusion in" the contract John prepared. It concluded ownership of the Corporate Building was sufficiently murky that filing a lis pendens would not have been "'groundless'" at the time and the jury's verdict and answer to the special interrogatory were not "inherently inconsistent." *See*

§ 33-420(C); *SWC Baseline*, 228 Ariz. 271, ¶ 31, 265 P.3d at 1080. Substantial evidence therefore supported the jury's verdict, and we find no error in the court rejecting the motions for judgment as a matter of law or to vacate the verdict.

¶19 John further argues the trial court's jury instruction on the lis pendens claim misstated the law and harmed him because it did not contain the phrase "or should have known" and did not include an instruction on treble damages. Although John submitted a jury instruction different than the one the court finally gave, he neither objected to the court's omission of this language nor argued that doing so would misstate the law. In *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 67 & n.20, 163 P.3d 1034, 1056 & n.20 (App. 2007), we concluded that submitting a proposed jury instruction did not preserve the issue for appeal absent an objection to the omission in the instructions given. John therefore has waived this argument on appeal, and we do not address it. *See* Ariz. R. Civ. P. 51(a) ("No party may assign as error . . . the failure to give an instruction unless that party objects . . . stating distinctly the matter objected to and the grounds of the objection.").

Attorney Fees for the Corporate Building Claim

¶20 John argues that as the successful party on the Corporate Building quiet title claim he is entitled to an award of attorney fees because the Corporate Building purchase and sale agreement called for recovery of attorney fees by the prevailing party. We review a denial of attorney fees based on a contractual provision for an abuse of discretion and will not disturb that decision if any reasonable basis supports it. *See Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (App. 1985).

¶21 Ordinarily, when the parties have provided a fee-shifting provision in their contract, a court must honor that provision, and the court has discretion only to reduce fees to a reasonable level. *See Geller v. Lesk*, 230 Ariz. 624, ¶ 9, 285 P.3d 972, 975 (App. 2012). But in order for that rule to apply, the party seeking attorney fees pursuant to contract must refer to the contract in question in the prayer section of its pleading seeking attorney fees. *Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, ¶ 12, 60 P.3d 708, 712 (App. 2003). If a pleading only contains a general reference to attorney fees, a party waives the contractual basis for an award. *Id.* Although the parties did not bring this authority to our attention, "we are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992).

¶22 John provided only a general request for attorney fees in his combined response and counterclaim, vaguely referring to "other applicable provisions of contract" as an alternative basis for an award. His pre-trial statement did not include a request for attorney fees as contract damages. Accordingly, he waived the contractual basis for an award by failing to plead it with the required specificity. *See Liebert Corp.*, 204 Ariz. 129, ¶ 12, 60 P.3d at 712.

¶23 He also claims he is entitled to fees under A.R.S. § 12-341.01, allowing the prevailing party to recover attorney fees in an action arising out of contract, and A.R.S. § 12-1103(B), allowing a prevailing party in a quitclaim case who follows certain

procedures to recover attorney fees.[3] When § 12-341.01 does apply, the trial court "possesses discretion to determine who is the successful party . . . where there are multiple-parties as well as multiple-claims" brought "with varied success," based on either a "totality of the litigation" test or a "percentage of success factor" test. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990). We review a denial of attorney fees under § 12-341.01 for an abuse of discretion and will not disturb that decision if any reasonable basis supports it. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). Similarly, the court has discretion under § 12-1103 to award attorney fees to a party that prevails in a quiet title action. *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990).

¶24 The trial court concluded any success John had on the Corporate Building quiet title claim was "[mooted] by the fact the property was foreclosed in 2009" and therefore title could not "be quieted in [John's] name." This factor alone justifies the trial court's exercise of discretion in finding that John was not the successful party. *See* § 12-341.01 (attorney fees award to successful party discretionary); *Scottsdale Mem'l Health Sys., Inc.*, 164 Ariz. at 215, 791 P.2d at 1098 (attorney fee award under § 12-1103 discretionary). The court further noted John was unsuccessful on all remaining claims and concluded based on the "totality of the litigation," and the fact the claims in the case

[3]John also argues that he should have been awarded attorney fees under A.R.S. § 33-420(C). However, he did not present this argument to the trial court and therefore has waived it on appeal. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991).

were not "practicably severable," that Jesse was the successful party. The record supports this conclusion. Therefore John cannot prevail under § 12-341.01 or § 12-1103 because he was not a prevailing party. *See Schwartz*, 166 Ariz. at 38, 800 P.2d at 25. Accordingly, the court did not abuse its discretion in declining to award attorney fees and costs to John on this claim.

Affidavits of Alice Truitt

¶25 John asserts the trial court erred in refusing to admit Alice Truitt's affidavits, which provided an alternative description of events related to satisfying the payment obligations for the transfer of John's .3919 percent interest in the SVMCP. Specifically, John contends the affidavits were admissible because they were not offered to prove the truth of the matter asserted, but to impeach Jesse's testimony. We review a court's evidentiary rulings for an abuse of discretion, and we will not reverse unless unfair prejudice resulted or the court incorrectly applied the law. *See Larsen v. Decker*, 196 Ariz. 239, ¶ 6, 995 P.2d 281, 283 (App. 2000).

¶26 Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Ariz. R. Evid. 801(c).[4] Statements offered for some purpose other than to prove the truth of the assertion are not hearsay. *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995). One example of a non-hearsay purpose is to impeach the testimony of a

[4]The Arizona Rules of Evidence were amended effective January 1, 2012, but the only changes potentially relevant here were purely stylistic and were not meant to change any ruling on the admissibility of evidence. *See* Ariz. R. Evid. 801 cmt.

declarant/witness with a prior inconsistent statement. *See Starkins v. Bateman*, 150 Ariz. 537, 545, 724 P.2d 1206, 1214 (App. 1986); Ariz. R. Evid. 801(d)(1)(A).

¶27 At trial, John attempted to admit the affidavits of Alice Truitt to contradict testimony given by Jesse. The trial court ruled the statements inadmissible hearsay. The affidavits in question stated that Jesse had not made any payments on an installment note to Alice Truitt and that payments Jesse had made to her were for a separate loan rather than the installment note—precisely the facts John sought to prove through the use of these statements. If these affidavits were not offered for the truth of the matter asserted, they would have been irrelevant. These affidavits were textbook examples of hearsay.

¶28 John however argues these statements were admissible to impeach Jesse's testimony. He appears to be attempting to apply Rule 801(d)(1) regarding a prior inconsistent statement. But that rule does not apply to a non-testifying witness's out-of-court statements. *Starkins*, 150 Ariz. at 545, 724 P.2d at 1214. Moreover, if the rule were as John asserts, all out-of-court statements would be admissible so long as they contradicted the testimony of some testifying witness.[5] The trial court therefore did not

[5]We have examined the cases on which John relies for admission of the affidavits; they deal with special circumstances not present here and do not support his position. *See Brown v. LaCreek Elec. Ass'n, Inc.*, 939 F.2d 623, 625 (8th Cir. 1991) (testimony of unavailable witness taken at deposition); *Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 324-25, 656 P.2d 600, 613-14 (1982) (testifying witness impeached with his own affidavits); *State v. Hendricks*, 66 Ariz. 235, 244-45, 186 P.2d 943, 949 (1947) (impeaching letter admissible to show knowledge); *Wilkinson v. Phx Ry. Co.*, 28 Ariz. 216, 226-28, 236 P. 704, 707-08 (1925) (evidence admitted as substantive evidence under business records rule); *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, ¶ 14, 212 P.3d 810, 819 (App. 2009) (FAA letter admissible to show notice, not to impeach); *Mobil Oil Co. v. Frisbie*, 14 Ariz. App. 557, 563, 485 P.2d 280, 286 (1971) (documentary evidence not disclosed in pretrial statement admissible for impeachment).

abuse its discretion in excluding Alice Truitt's affidavits. *See Larsen*, 196 Ariz. 239, ¶ 6, 995 P.2d at 283.

¶29 John also asserts that by not objecting to the admission of the affidavits when they were listed as an exhibit in John's pretrial statement, Jesse waived any objection. However, the trial court noted that Jesse stated he had not objected because he thought she might be a witness. Also, as Jesse notes, Rule 16(d)(2)(E), Ariz. R. Civ. P., regarding pretrial disclosures, states that exhibits which the parties stipulate can be admitted into evidence nonetheless are subject to court approval. *See State v. Molina*, 117 Ariz. 454, 456, 573 P.2d 528, 530 (App. 1977). Therefore the court had discretion to exclude Alice Truitt's affidavits regardless of Jesse's purported waiver.

Award of Damages in Quiet Title Claims

¶30 John next asserts that the trial court erroneously awarded damages under the quiet title actions and quieted title to personal property, essentially depriving him of a jury trial on Jesse's conversion claims. However, John never made this argument to the trial court, and he therefore has waived it. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 7, 119 P.3d 467, 471 (App. 2005) (failure to present argument to trial court waives it on appeal).

Offsets in the Equitable Remedy

¶31 John next contends the trial court erred by not offsetting the costs he incurred while he retained control of the real and personal properties at issue against the amount of damages awarded to Jesse. We review the award of an equitable remedy for

an abuse of discretion. *See Loiselle v. Cosas Mgmt. Group, LLC*, 224 Ariz. 207, ¶ 8, 228 P.3d 943, 946 (App. 2010).

¶32 John did not raise the issue of offsets in his pleadings or produce evidence during trial supporting the amount of the offset for most of the properties or the value of his use of the property. Rather, in November 2011, in the midst of trial, the parties stipulated to what the damages for the personal property, the Roswell property, and the Apache Junction property would be in the event the trial court awarded these properties to Jesse. John did not raise the issue of offsets in discussing or entering these stipulations. These stipulations bind the parties, and therefore have removed the issue of damages as to these properties from this litigation. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) (judicial admissions bind party).

¶33 In his objection to the form of judgment, John first raised the issue of an offset, but he failed to provide the trial court with any documentation as to what costs would be appropriate to offset for the remaining properties—his filing requesting an offset had only blank lines as placeholders for where values for the proposed offsets would go. He did not correct this deficiency. Furthermore, the court took into consideration that any losses John incurred during his possession would have been offset by the value of having use of the properties. Under these circumstances, we cannot say the court abused its discretion in declining to offset any costs John may have incurred during his possession of the properties the court ultimately awarded to Jesse.

Attorney Fees Under the Partnership Agreement

¶34 In the cross-appeal, Jesse argues the trial court erred by declining to award him mandatory attorney fees under the Sierra Vista Medical Center Partnership Agreement ("Partnership Agreement") or under the unsigned November 2006 agreement. We review a denial of attorney fees based on a contract provision for an abuse of discretion and will not disturb that decision if the record reasonably supports it. *See Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (App. 1985).

¶35 Generally, when the parties have provided a fee-shifting term in their contract, a court must honor that provision according to its terms. *See Geller v. Lesk*, 230 Ariz. 624, ¶ 9, 285 P.3d 972, 975 (App. 2012). But in order to recover attorney fees based on a contract, the party seeking them must refer to the contract in its pleading, showing how the contract provides for them; general requests are insufficient. *Berry v. 352 E. Va., L.L.C.*, 228 Ariz. 9, ¶ 17, 261 P.3d 784, 788 (App. 2011). The failure to comply with this rule waives the claim for attorney fees based on the contract but does not divest the court of "'broad discretion to award attorneys' fees under A.R.S. § 12-341.01.'" *Id.*, *quoting Robert E. Mann Constr. Co. v. Liebert Corp.*, 204 Ariz. 129, ¶ 13, 60 P.3d 708, 712 (App. 2003). "A fee request based upon a contractual provision requires pleading and proof," *id.*, and "[u]nlike a claim for attorneys' fees under A.R.S. § 12-341.01 . . . a claim for contractually authorized fees may need to be advanced as part of the case in chief in the absence of contractual language authorizing the court . . . to determine fees based upon evidence submitted by the parties," Bruce E. Meyerson & Patricia K. Norris, *Arizona Attorneys' Fees Manual* § 3.8 (5th ed. 2010).

¶36 Jesse did not rely as a basis for an attorney fees award on either the Partnership Agreement or the unsigned November 2006 agreement John produced in support of the Starbucks deal in his pleadings or proof at trial.[6] And neither of these documents specifically authorized the trial court to determine fees based on evidence submitted by the parties after trial had concluded.[7] The only basis Jesse alleged for attorney fees in his answer to John's counterclaim, an appropriate time to claim contract damages under the unsigned November 2006 agreement, was pursuant to §§ 12-341 and 12-341.01. He therefore waived any award of attorney fees as contract damages. *See Berry*, 228 Ariz. 9, ¶ 17, 261 P.3d at 788.

¶37 In his sur-reply brief after oral argument, Jesse argues that, although this issue was not raised in the pleadings, it was tried with the implied consent of the parties within the meaning of Rule 15(b), Ariz. R. Civ. P., which requires that it "shall be treated in all respects as if [it] had been raised in the pleadings." But even were we to agree that provision could cure the omission in the pleading, it would not cure the omission in the proof. Therefore, we cannot accept this argument.

¶38 Jesse further argues that Rule 54(g) allows for the procedure utilized here. Rule 54(g)(2)-(3) provides that "the determination as to the claimed attorneys' fees shall

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[6] We note that Jesse in his opening brief on cross appeal has improperly characterized the trial court's proposed course of action during the hearing on this issue as its actual finding.

[7] If the second amended complaint contained a specific request for contract-based fees, it is not part of our record, and therefore we may presume it did not offer a basis to reverse the trial court. *See Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, n.3, 83 P.3d 1114, 1118 n.3 (App. 2004) (obligation to provide complete record rests with appellant).

be made after a decision on the merits" and allows the motions requesting fees to be supported by affidavits and exhibits. However, Rule 54(g)(4) exempts the above procedures for cases "in which the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." Rule 54(g) therefore does not support Jesse's claim.

¶39 Nevertheless, we acknowledge that the procedures and general practice for the award of contract attorney fees may not be entirely clear. Rule 54 could lead attorneys to conclude that properly pled requests for attorney fees need not be advanced as part of the case-in-chief—a conclusion that would be consistent with how federal courts handle this issue. *See, e.g., Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004-06 (9th Cir. 2009) (proper for prevailing party to request attorney fees by motion and present evidence in separate hearing); *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 626-27 (7th Cir. 2000) (Posner, J.) (where contract provision awards fees to prevailing party, attorney fees is "an issue to be resolved after trial on the basis of the judgment entered at the trial"). This approach has merit. Therefore, we will review Jesse's request for attorney fees on the merits.

¶40 At the hearing the trial court characterized the litigation in this case as fundamentally not about the Partnership Agreement, but about "whether there was an agreement as a subpart of an agreement between two supposed partners as to who owned the particular partnership interest." The record supports that characterization. Jesse did not seek to introduce the Partnership Agreement into evidence at trial—he offered it for

the first time in his post-trial request for an award of fees.[8] Therefore the Partnership Agreement could not have served as a basis for the litigation. And because he successfully argued that the November 2006 agreement was void, he could not seek the benefit of the attorney fees provision within that contract. *See Golden Pisces, Inc. v. Fred Wahl Marine Constr. Co.*, 495 F.3d 1078, 1083 (9th Cir. 2007); Meyerson & Norris, *Arizona Attorneys' Fees Manual* § 3.3.

¶41 Jesse argues in the alternative that the trial court abused its discretion in declining to award him attorney fees under § 12-341.01. We review a denial of attorney fees pursuant to § 12-341.01 for an abuse of discretion and will not disturb that decision if the record reasonably supports it. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). "Because of the trial court's proximity to the matter and its better familiarity with the parties, the suit, and the issues, an appellate court is usually reluctant to overturn its ruling on attorney's fees." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194, 877 P.2d 284, 293 (App. 1994). A trial court has discretion to award fees when "a successful claim is intertwined with one for which fees are not awardable." *Id.* When claims ineligible for an award of fees overlap with claims that are eligible for fees to such a degree that quantitative apportionment is impracticable, a court may properly deny attorney fees entirely. *See Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 69, 574 P.2d 856, 862 (App. 1977).

[8]Jesse notes the Sixth Amendment to the Partnership Agreement is located at exhibit 7. However, it is located at exhibit 67. It does not contain an attorney fees provision, but does refer to and incorporate the original Partnership Agreement. But as noted above, the Partnership Agreement itself never was introduced into evidence.

¶42 The trial court found "[a]ll claims and counterclaims arose out of contract, whether actual or alleged, or the claims are so interwoven as to not be practicably severable," and declined to award any attorney fees. The court noted that neither party was entirely successful and that they had structured the transactions that gave rise to the litigation "in a complex and convoluted manner to serve their own purposes at the time." And as the court noted, it could not award fees for any of Jesse's seven successful quiet title claims involving real property because Jesse had failed to follow the statutory procedure under A.R.S. § 12-1103(B), the "exclusive basis for attorney's fees in quiet title actions." *See Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986). The only remaining, non-moot claim was for the declaratory judgment regarding Jesse's ownership of the SVMCP interest. But the court found that this claim was "so interwoven as to not be practicably severable" from the other claims on which Jesse was successful, but ineligible for attorney fees. The court did not abuse its discretion in declining to award fees where the only fee-eligible claim was inextricably interwoven with claims for which fees were unavailable, and the court otherwise had found attorney fees were inappropriate under the broad discretion granted to it by § 12-341.01. *See James L. Fann Contracting, Inc.*, 179 Ariz. at 194, 877 P.2d at 293; *Circle K Corp.*, 118 Ariz. at 69, 574 P.2d at 862.

Attorney Fees on Appeal

¶43 John requests attorney fees on appeal pursuant to Rule 21(c), Ariz. R. Civ. App. P., the mandatory provision of the contract, or A.R.S. §§ 12-341.01, 12-1103, or 33-420. Because John did not prevail in this appeal, in our discretion we decline his request.

Jesse also requests attorney fees on appeal pursuant to Rule 21 and either the "underlying contract documents" or § 12-341.01. For the reasons stated above, and in our discretion, we deny his request.

Conclusion

¶44 For the foregoing reasons, we affirm the trial court's judgment.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.