IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PAYSON WATER COMPANY, A PUBLIC SERVICE CORPORATION,
Plaintiff/Counterdefendant/Appellee,

v.

STEVEN PRAHIN, AN INDIVIDUAL,
Defendant/Counterclaimant/Appellant.

No. 2 CA-CV 2014-0095
Filed April 15, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Gila County
No. CV201100389
The Honorable Peter J. Cahill, Judge

AFFIRMED

COUNSEL

Fennemore Craig, P.C., Phoenix
By Todd Kartchner
Counsel for Plaintiff /Counterdefendant/Appellee

Walker & Harper, P.C., Payson
By Michael J. Harper
Counsel for Defendant/Counterclaimant/Appellant

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Judge Espinosa and Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Steven Prahin challenges the grant of summary judgment in favor of Payson Water Company in this water well dispute. Finding no error, we affirm.

Factual and Procedural Background

¶2 This case concerns the ownership of a well and related well equipment (collectively the "System") that serve the Elusive Acres and Geronimo Estates subdivisions near Payson, Arizona. Prahin owns the land on which the System is located and Payson Water operates the System. Given the nature of the transactions at issue, a detailed review of the relevant, undisputed factual background is necessary. We view the facts in the light most favorable to Prahin. *Acosta v. Phoenix Indem. Ins. Co.*, 214 Ariz. 380, ¶ 2, 153 P.3d 401, 402 (App. 2007).

¶3 In 1985, Mark and Judith Boroski purchased and began to develop the thirty acres of real property that would eventually become Elusive Acres. Two sections of the Elusive Acres property, labeled Tracts A and B, were used to house the water well and a storage facility. A third section, Tract C, consisted of the roadway used to service the equipment and to distribute the water. The water system was intended to provide water to the residents of Elusive Acres.

¶4 In May 1989, Mark Boroski entered into a "Water Facilities Extension Agreement" (hereinafter Agreement) with United Utilities, an Arizona corporation authorized to operate water services in the area encompassing Elusive Acres. The Agreement provided that United would construct an extension to the water

distribution facilities located adjacent to Elusive Acres "as a continuation of its present facilities." Boroski agreed to transfer ownership to United of "[a]ll pipe lines, valves, fittings, wells, meters, tanks or other facilities installed under this Agreement . . . and the person making advances in aid of construction, whether refundable or not, shall have no right, title or interest in any such facilities." On the same day as the Agreement, Boroski and United also entered into a "Supplement to Agreement Relating to Extension of Water Distribution Facilities" (hereinafter Supplement) in which the parties agreed to transfer ownership of the System to United "free and clear of any encumbrances." Sometime after the execution of the Agreement and Supplement, United constructed an extension of the System, connecting it with an existing water system that serviced the Geronimo Estates subdivision.

¶5 One month before the Agreement and Supplement were executed, in April 1989, an easement for Tracts A and B of Elusive Acres was recorded, allowing United "to locate and install water tanks, wells and pumping equipment, and other water facilities upon, across, over and under the surface of [Tracts A and B] together with the right of ingress and egress to repair, replace, maintain and remove said water facilities and equipment from the said property." A second recorded easement concerning Tract C granted United a "perpetual nonexclusive easement to construct, operate and maintain water mains upon, across, over and under the surface of the property hereinbefore described, together with the rights to repair, replace, maintain and remove said mains from said property."

¶6 United operated the water system from the beginning. Boroski stated at his deposition that he did not believe the Agreement conveyed ownership of the water system to United, but he did not contest United's operation because the real estate permit did not allow him to sell lots in a development without a functioning water system. Moreover, he never brought suit, filed a regulatory action with the Arizona Corporation Commission (ACC), or attempted to bar United from the property.

¶7 In 1998, Payson Water Company purchased United. In 2009, Prahin and several other individuals acquired title to Tracts A,

B, and C from Boroski, subject to "all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations, and liabilities as may appear of record." In June 2011, Tracts A and B were transferred to Prahin as the sole owner. As noted, these tracts contain the System that services Elusive Acres, including a well on Tract B, a water storage tank on Tract A, and a subterranean water delivery system on Tract C.

¶8 In October 2011, Prahin prevented employees of Payson Water from disconnecting his personal water meter due to his nonpayment. Prahin informed a law enforcement officer responding to the dispute that he owned the Tracts, including the System. Prahin also claimed the Payson Water employees did not have a valid easement to be on the property, and the responding officer refused to grant the employees access to Prahin's property to remove the water meter.[1] In November 2011, Prahin telephoned the ACC and threatened to disrupt the well and water supply if an interim operator was not appointed. After a hearing, the ACC appointed Payson Water as the interim operator of the System and suggested the parties seek a judicial resolution to the dispute over ownership.

¶9 Payson Water filed a complaint in the Gila County Superior Court seeking injunctive relief against Prahin and a declaration that it is the sole owner of the System.[2] Prahin filed a counterclaim seeking declaratory relief and alleging unjust enrichment, conversion, and trespass. Both parties moved for summary judgment and the trial court granted summary judgment for Payson Water. Specifically, the court found the Agreement conveyed the System to Payson Water. The court also found that Prahin's challenge to the validity of the Agreement was barred by the statute of limitations. Further, evidence of Boroski's subjective

---

[1]Payson Water employees, accompanied by a law enforcement officer, subsequently removed the water meter.

[2]Payson Water also sought damages against Prahin, based on A.R.S. § 40-492(A)(3), due to his alleged tampering with utility property.

intent and oral negotiations was precluded as inadmissible parol evidence. The parties stipulated to the dismissal without prejudice of all claims not resolved in the court's May 10, 2013 Orders Granting and Denying Summary Relief, and the court signed the stipulated form of judgment. This timely appeal followed, but we must first examine whether the stipulation to dismiss the remaining claims deprives us of jurisdiction.

Jurisdiction

¶10 We requested supplemental briefing to address whether the parties' separate agreement to arbitrate Counts 1 and 2 of Payson Water's complaint and Counts 2, 3, and 4 of Prahin's counterclaim was sufficient to avoid the public policy "'against deciding cases piecemeal.'" *Grand v. Nacchio*, 214 Ariz. 9, ¶ 16, 147 P.3d 763, 770 (App. 2006), *quoting Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). In that case we held that "an order granting a voluntary dismissal of an action without prejudice to its being refiled is not an appealable, final judgment." *Grand*, 214 Ariz. 9, ¶ 12, 147 P.3d at 769; *see also Osuna v. Wal-Mart Stores, Inc.*, 214 Ariz. 286, ¶ 9, 151 P.3d 1267, 1270 (App. 2007).

¶11 In a joint supplemental brief, the parties argue that the facts of the instant case are distinguishable from those in *Grand*. Specifically, they contend their agreement to arbitrate the dismissed claims avoids the public policy concerns stated in *Grand* related to piecemeal litigation. We agree.

¶12 Here, unlike in *Grand*, the parties' binding arbitration agreement prevents the dismissed claims from being refiled later. *See* A.R.S. §§ 12-1501 ("A written agreement to submit any existing controversy to arbitration . . . is valid, enforceable and irrevocable."), 12-1502(A) (upon showing of valid arbitration agreement, trial court shall order parties to proceed with arbitration); c*f. Grand*, 214 Ariz. 9, ¶ 16, 147 P.3d at 770. Because the dismissed claims cannot be refiled, this appeal cannot be characterized as interlocutory in nature. Thus, we conclude the parties' voluntary dismissal of claims pursuant to a binding agreement to arbitrate those claims renders the judgment in this case final and appealable. Accordingly, we have jurisdiction pursuant to § 12-2101(A).

Plain Language of Agreement

¶13 Prahin first argues the trial court erred in determining that Payson Water owned the System because it had been largely built six months prior to execution of the Agreement and Supplement. Relying on this undisputed fact, he contends that although the documents specifically describe the System, the Agreement and Supplement can only govern construction after the date of signing. We review a court's grant of summary judgment de novo for both factual and legal determinations. *La Paz Cnty. v. Upton*, 195 Ariz. 219, ¶ 4, 986 P.2d 252, 254 (App. 1999). In addition, the interpretation of a contract is a question of law, which we review de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). We will affirm the trial court's ruling if correct for any reason, *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986), and if the facts produced in support of Prahin's claims "have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion [he] advanced," *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶14 We first review generally the scope and purpose of the Agreement. A general contract principle is that "when parties bind themselves by a lawful contract the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). The purpose of contract interpretation is to determine the parties' intent and to enforce the agreement accordingly. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). In order to determine what the parties intended, we examine "the plain meaning of the words in the context of the contract as a whole." *Grosvenor Holdings, L.C.*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050; *see also United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983). Furthermore, as a question of law, we review de novo whether a contract is reasonably susceptible to more than one interpretation. *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005); *see also Liberty Ins. Underwriters, Inc. v. Weitz Co., L.L.C.*, 215 Ariz. 80, ¶ 8, 158 P.3d 209, 212 (App. 2007) ("If the contractual

language is clear, we will afford it its plain and ordinary meaning and apply it as written."). Here, we agree with the trial court's implicit determination that the purpose of the Agreement and Supplement was to provide for the ownership and operation of the System. Specifically, in its May 13, 2013 orders, the court concluded that "[t]he well is currently the primary water source for two subdivisions, Elusive Acres and Geronimo Estates. Payson Water is the operator of the System. Prahin owns the Tracts."

¶15 Prahin's central argument in challenging the trial court's ruling is that the word "under" in the phrase "installed under this Agreement" operates to limit the conveyance of property only to water distribution facilities installed after the Agreement's effective date. Because the System was installed before the Agreement was effectuated, Prahin contends the System could not have been conveyed under the Agreement. He cites no authority to support this position.

¶16 The disputed phrase appears in a section of the Agreement that echoes Ariz. Admin. Code R14-2-406(I)—a regulation outlining requirements for the approval of main extension agreements. Section I of the regulation states:

> All pipelines, valves, fittings, wells, tanks or other facilities installed under this rule shall be the sole property of the Company, and parties making advances in aid of construction under this rule shall have no right, title or interest in any such facilities.

¶17 The Agreement was drafted to comply with the provisions of R14-2-406 and was approved by the ACC as being in conformance therewith. Although the phrase "installed under the Agreement" is inartful, the word "under" in this context is not used in its literal sense of "beneath and covered by" or "at a point or position lower or further down than," but rather in the sense of "in accordance with." *See Webster's Encyclopedic Unabridged Dictionary of the English Language* 1543 (1989); *see also Garner's Dictionary of Legal Usage* 910 (3d ed. 2011) ("*Under law* ordinarily means 'in accordance with the law.'"). The word "under is preferable to *pursuant to* when

the noun that follows refers to a rule, statute, contractual provision, or the like." *Garner's Dictionary of Legal Usage* at 910. Thus, in this context, the phrase "installed under the Agreement" should be read as "in accordance with" or "pursuant to" the Agreement. *See id.*

¶18 Accordingly, when viewed in the context of the contract as a whole, it is clear the intent of the phrase "installed under the Agreement" was to transfer ownership of the System described in the Agreement to United as required by R14-2-406(I). *See Liberty Ins. Underwriters*, 215 Ariz. 80, ¶ 8, 158 P.3d at 212. This conclusion is further supported by the plain language of the Supplement, which provided that "[t]he Delivery Facilities described in Exhibit 'A' shall be conveyed to [United] free and clear of any encumbrances." Exhibit A, in turn, listed the same System components described in the Agreement, including a well, pump houses and pumps, 3,000 feet of three-inch PVC, 560 feet of two-inch PVC, a 15,000 gallon storage tank, and one-inch PVC as well as miscellaneous hardware. The System components enumerated in the Agreement and Supplement also match those outlined in the engineer's certificate of completion, which certified that work on the System had been substantially completed.

¶19 Prahin also argues that the Supplement, in stating the System "shall be conveyed to [United] free and clear of any encumbrances," did not convey ownership but merely "contemplated a future, formal conveyance of ownership of the system." We disagree. Prahin's sole support for this position is a February 1989 letter to Boroski in which United requested deeds conveying the real property upon which the well and storage tank are located. No deed was executed or delivered transferring the underlying property to United. It is clear, however, that the letter did not concern ownership of the System itself, but rather the land upon which the System was located. Consequently, we find Prahin's argument unavailing. The Supplement—as well as the Agreement—conveyed the System to United.

Void Ab Initio

¶20 Prahin also relies on Boroski's construction of the System to argue the Agreement was void ab initio. Payson Water

acknowledges that Boroski constructed the System, but also points out that Boroski did so to avoid paying United $23,169.92 to construct it, which also was a term of the Agreement.

¶21 We first address whether a contract that anticipates future specific construction by one party for valid consideration is void ab initio because the other party undertook much of the construction beforehand so as to avoid having to pay the consideration after execution of the agreement. Prahin's contention is compelling because a contract that is void ab initio is unenforceable. *Smith v. Pinnamaneni*, 227 Ariz. 170, ¶ 9, 254 P.3d 409, 412 (App. 2011). Examples of unenforceable contracts are those that violate a statute or public policy. *See, e.g.*, *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, ¶ 6, 341 P.3d 452, 453 (2014) (contract provisions enforceable unless prohibited by law or contrary to identifiable public policy); *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, ¶ 7, 196 P.3d 222, 224 (2008) (same); *Gaertner v. Sommer*, 148 Ariz. 421, 423, 714 P.2d 1316, 1318 (App. 1986) ("[I]f the acts to be performed under the contract are themselves illegal or contrary to public policy, or if the legislature has clearly demonstrated its intent to prohibit maintenance of a cause of action, then recovery should be denied."). Prahin contends that main extension agreements are governed by Rule R14-2-406 and are limited to future construction only. We do not find such a limitation within that regulation.

¶22 The language of Rule R14-2-406 contemplates the more typical circumstance where a utility performs construction at the applicant's expense. *See, e.g.*, Ariz. Admin. Code R14-2-406(B) ("An applicant for the extension of mains may be required to pay to the [utility], as a refundable advance in aid of construction, before construction is commenced, the estimated reasonable cost of all mains, including all valves and fittings."), (H) ("The [utility] may install main extensions of any diameter meeting the requirements of the Commission or any other public agencies having authority over the construction and operation of the water systems and mains . . . ."). Indeed, this is the very process described in the Agreement. But nothing in Rule R14-2-406 prohibits the applicant, in this case Boroski, from constructing the System beforehand in lieu of compensating the utility to do the same in the future. In fact, Rule

R14-2-406(B)(2) appears to acknowledge a scenario where the utility does not complete construction when it states: "Where the applicant accepts utility construction of the extension, the deposit shall be credited to the cost of construction; otherwise the deposit shall be nonrefundable." In other words, there may be circumstances other than the applicant accepting utility construction of the extension. Equally important, nothing in Rule R14-2-406 prohibited Boroski from constructing the facilities himself and Prahin cites to no other statute or rule that would bar such activity. Accordingly, the Agreement is not illegal or in violation of public policy; therefore, it is not void ab initio.

Failure or Breach of the Agreement

¶23 Prahin also seems to argue that a contract involving future performance is unenforceable if it is inadvisable as a practical matter[3] for a party to undertake the action because the performance occurred in the recent past. He characterizes this situation as a lack of consideration, relying on general contract formation principles. *See Schade v. Diethrich*, 158 Ariz. 1, 8, 760 P.2d 1050, 1057 (1988) (contract formed based on bargain, consisting of promises exchanged, and consideration). It is arguable whether the Agreement lacked consideration because United essentially traded the obligation to construct the System for the benefit of receiving a cash payment from Boroski. At most, United did not perform under the contract,[4] which could have resulted in an action for damages or rescission by Boroski. *See Hall v. Read Dev., Inc.*, 229 Ariz. 277, ¶ 30, 274 P.3d 1211, 1219 (App. 2012) (failure of consideration of essential

---

[3] Neither party suggests that Boroski's construction of the System was illegal or violated engineering principles. To the contrary, it appears to have been built according to specifications provided by United. Therefore, although United conceivably could have built another system directly next to the existing system, it would have been an economically absurd action.

[4] Again, it is important to note that performance under the contract to build a second system would have been economically nonsensical and of no benefit to anyone.

part of contract justifies rescission); *Seitz v. Indus. Comm'n*, 184 Ariz. 599, 603, 911 P.2d 605, 609 (App. 1995) (rescission as remedy available after substantial breach of contract). We need not resolve whether there was a failure of consideration or a significant breach, however, because the course of conduct between the parties for the next twenty-two years ratified the principal Agreement.[5] Although neither Payson nor the trial court raised this tenet below, we may uphold the trial court's ruling for any appropriate reason evidenced in the record. *State v. Robinson,* 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (appellate court may affirm on any basis supported by record).

¶24 Rescission is an equitable remedy for contracts that are voidable because of a complete or substantial failure of consideration. *Mahurin v. Schmeck*, 95 Ariz. 333, 340, 390 P.2d 576, 580 (1964) (rescission available where third party removed equipment and records valued at two-thirds of the entire contract). But as an equitable remedy to avoid a contract, the proponent "must act promptly in stating an intent to rescind." *See Princess Plaza Partners v. State*, 187 Ariz. 214, 222, 928 P.2d 638, 646 (App. 1995). Here, Boroski failed to act at all, let alone promptly. To the contrary, United and Payson Water operated the System for the benefit of Boroski and homeowners in Elusive Acres for more than two decades. Thus, even if United arguably breached the agreement by allowing Boroski to have constructed the System, Prahin cannot now seek to avoid the contract by rescission or any general theory that it is unenforceable.

---

[5] Whether the party seeking rescission did so in a reasonable time is a question of fact "unless the facts are such that only one inference could be derived therefrom in which case it . . . become[s] a question of law." *Mahurin v. Schmeck*, 95 Ariz. 333, 340, 390 P.2d 576, 580 (1964). Here, it is undisputed both parties operated under the Agreement beginning in 1989, with United managing the System and Boroski allowing United to do so.

Parol Evidence

¶25 Prahin also contends the trial court erred when it concluded his "attempt to introduce evidence of Boroski's subjective intent when signing the Agreement and evidence regarding the oral negotiations are inadmissible parol evidence." Our supreme court has recognized that even though a contract may be susceptible to multiple interpretations, extrinsic evidence is rightly excluded when the interpretation advanced by the proponent of such evidence is clearly contradicting and wholly unpersuasive. *See Taylor v. State Farm Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993).

¶26 Prahin acknowledges the parol evidence rule prohibits the consideration of extraneous circumstances when interpreting a clear and unambiguous contract. *See Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. He also concedes the contractual language of the Agreement is unambiguous. He further maintains that his arguments regarding the validity of the contract "do not rely upon or consider Boroski's subjective intent when executing the Agreement." In view of these concessions, Prahin has failed to demonstrate how the court's ruling disallowing extraneous information from Boroski was in error.

Statute of Limitations

¶27 Finally, Prahin maintains the trial court erred in determining his arguments were barred by the statute of limitations. He reasons that the statute of limitations does not apply to his claims because it does not bar actions related to a contract void from the outset. We do not address this contention, however, because it is obviated by our earlier conclusion that the Agreement was not void ab initio nor vitiated by Boroski's construction of the System in return for avoiding the payment to United.

Conclusion

¶28 For the reasons stated above, we affirm the trial court's grant of summary judgment in favor of Payson Water. Both parties request an award of costs and attorney fees on appeal pursuant to A.R.S. §§ 12-341 and 12-341.01. We deny Prahin's request but grant

Payson Water's request, subject to its compliance with Rule 21, Ariz. R. Civ. App. P.