IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JOHN L. KAVANAGH AND MICHAEL D. WHITE,
Plaintiffs/Appellants,

v.

WALBRO ENGINE, LLC,
Defendant/Appellee.

No. 2 CA-CV 2016-0100

Appeal from the Superior Court in Pima County
No. C20155188
The Honorable Leslie Miller, Judge

REVERSED AND REMANDED

COUNSEL

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and

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 The parties in this commercial lease case simultaneously moved for summary judgment on whether tenant-appellee Walbro Engine, LLC had the right to early termination upon payment of six months of additional rent. The integrated agreement spanned approximately twenty years, was extended several times, and included various amendments. We conclude the trial court erred in holding a 2003 amendment stating that Walbro could not terminate the lease "prior to the expiration date of August 31, 2008" modified, rather than replaced, an early termination clause. Therefore, we reverse judgment for Walbro, direct that judgment be entered in favor of landlord-appellants, John L. Kavanagh and Michael D. White, and remand for consideration of trial attorney fees.

Factual and Procedural Background

¶2 To expedite consideration of their cross-motions for summary judgment, the parties presented stipulated facts that we also accept. In December 1999, Kavanagh and White leased office space to Walbro for a five-year term. A simultaneously signed addendum to the lease, Addendum F, contained this early termination clause:

> As long as Tenant is not in default under the terms and conditions of this lease agreement, **Tenant may terminate this lease at any time after the 24th month of**

> **the lease term with a written notice to Landlord.** Said notice shall be 120 days prior to the last day of Tenant vacating the Premises. Tenant shall pay to Landlord the unamortized portion of all costs associated with said lease including tenant improvements, commissions, any concessions given to Tenant and any other fees connected to said lease agreement. In addition, upon vacating the premises, Tenant shall pay to Landlord an additional six (6) months of rent as a penalty to terminate this lease.

(Emphasis added). The addendum also stated, "In the event there is a conflict between the original Lease and this Addendum, the addendum shall prevail. EXCEPT AS MODIFIED HEREIN, all terms, covenants, and conditions contained in said Lease shall remain in full force and effect." This clause was mirrored in the main lease: "If any provision contained in an addendum to this lease is inconsistent with any other provision herein, the provision contained in the addendum shall control, unless otherwise provided in the addendum."

¶3 In June 2003, the parties extended the lease to August 31, 2008 and increased the square footage with Kavanagh and White undertaking about $60,000 in tenant improvements, for which Walbro would reimburse half. The lease extension included the following language: "Termination of Lease: Tenant shall no longer have the right to terminate this lease prior to the expiration date of August 31, 2008." Like Addendum F, the lease extension stated, "In the event there is a conflict between the original Lease and this Addendum, the addendum shall prevail. EXCEPT AS MODIFIED HEREIN, all terms, covenants, and conditions contained in said Lease shall remain in full force and effect."

¶4 The parties signed two more lease extensions, first for a term from September 1, 2008 through August 31, 2013, and finally for a term from August 31, 2013 through August 30, 2019. Neither

addendum included a right to terminate early that would be applicable here.[1]

¶5 On October 9, 2015, Walbro delivered a letter to Kavanagh and White stating that it intended to vacate the premise in 120 days, "[p]ursuant to the Addendum to the Lease ('Exhibit F')." The following month, Kavanagh and White filed a declaratory judgment action, seeking a declaration that Walbro could not terminate the lease before its expiration date in 2019 because there was no early termination provision in effect.[2]

¶6 After oral argument on the motions for summary judgment, the trial court issued an under-advisement ruling. The court concluded the 2003 lease extension "added a termination provision that the Lease could not be terminated prior to August 31, 2008," but did not delete or replace the provision in the earlier Addendum F. Relying on the language of the provisions themselves, in addition to the modification language in all addenda that "the terms, covenants and conditions of the Lease continue to remain in full force and effect," the court found there was no "actual repudiation of the termination provision in Addendum F"; therefore, Walbro could terminate the lease early. Kavanagh and White filed a motion for reconsideration, which the trial court denied.

¶7 The parties stipulated to the amount of attorney fees and costs to be awarded to Walbro under the attorney fee provision of the contract, and the trial court signed a final judgment granting judgment in favor of Walbro and awarding attorney fees and costs.

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[1]The 2008 addendum allowed the right to terminate early if Kavanagh and White sought to relocate Walbro and Walbro did not "accept the new premises as comparable."

[2]Kavanagh and White also sought an injunction to prevent Walbro from removing its personal property, on which Kavanagh and White alleged they had a lien. The parties filed a stipulated motion to dismiss that count with prejudice, which the trial court granted.

Kavanagh and White timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶8 The only issue on appeal is whether the trial court erred by granting summary judgment in favor of Walbro, finding it was permitted to terminate the lease early. Kavanagh and White argue the 2003 extension, which provided, "Tenant shall no longer have the right to terminate this lease prior to the expiration date of August 31, 2008," effectively "remove[d] the termination right provided" in Addendum F to the original contract. Walbro argues the language "merely change[d] the date from which Walbro could terminate that iteration of the Lease from the '24th month of the lease term,' as stated in Addendum F, to 'the expiration date of August 31, 2008.'" Walbro essentially contends that Addendum F was available and effective for it at any time after August 31, 2008.

¶9 On appeal from summary judgment, we review de novo whether the trial court erred in applying the law; we also review de novo issues of contract interpretation. *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005). "When 'the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.'" *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, ¶ 16, 263 P.3d 69, 74-75 (App. 2011), *quoting Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518 (2008). We must attempt to "discover and enforce the parties' intent *at the time the contract was made*." *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, ¶ 9, 362 P.3d 1037, 1042 (App. 2015) (emphasis added).

¶10 To support their argument that the 2003 lease extension eliminated the right to early termination, Kavanagh and White rely on the parol evidence rule in the Restatement (Second) of Contracts, which states, "A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them." Restatement (Second) of Contracts § 213(1) (1981); *see Swiss Prop.*

Mgmt. Co. v. S. Cal. IBEW-NECA Pension Plan, 70 Cal. Rptr. 2d 587, 591 (Ct. App. 1997) (citing Restatement (Second) of Contracts § 213 as "well-established principle[] of contract interpretation" to give effect to most recent of several signed agreements); *cf. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393, 682 P.2d 388, 398 (1984) (citing Restatement (Second) of Contracts § 213 as general rule in Arizona).[3] Inconsistent terms are those which cannot be read together. *See Snyder v. Herbert Greenbaum & Assocs.*, 380 A.2d 618, 623 (Md. Ct. Spec. App. 1977) ("inconsistency" in parol evidence rule an "absence of reasonable harmony in terms of the language and respective obligations of the parties"); *Inconsistent*, Black's Law Dictionary (10th ed. 2014) ("Lacking agreement among parts; not compatible with another fact . . ."); 11 Richard A. Lord, *Williston on Contracts* § 33:18, at 650 (4th ed. 1999) (for parol evidence rule, oral condition cannot be "repugnant to the conditions or terms actually stated in writing"); *cf. Ariz.-Parral Mining Co. v. Forbes*, 16 Ariz. 395, 406, 146 P. 504, 508 (1915) (In interpreting two separate contracts with same subject matter, inconsistency "renders the performance of both impossible, so that the two cannot stand together."). At the time the 2003 extension was made, the new termination clause was plainly inconsistent with the previous early termination clause. The extension set a new expiration date of August 31, 2008, and at the same time provided Walbro would "no longer have the right to terminate . . . prior to" that date. Because a binding integrated agreement discharges prior inconsistent agreements, Restatement (Second) of Contracts § 213(1) (1981), no early termination clause existed in the lease after the 2003 extension was signed.

¶11 Walbro relies on *McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194 (9th Cir. 1984), to argue that a lease extension does not alter other clauses in the original lease, such as the early termination option. We find *McLane* inapposite because the contract

[3] The parol evidence rule, though frequently referenced regarding oral agreements, "renders inoperative prior written agreements as well as prior oral agreements." Restatement (Second) of Contracts § 213 cmt. a (1981).

in that case was fundamentally different. In that case, a five-year lease gave the tenant the option to renew for another five years. *Id.* at 1194. The tenant exercised the renewal option, but the parties signed an amended lease rather than "executing a separate renewal letter." *Id.* at 1196. The amended lease altered significant terms, made no mention of any change to the renewal option, and kept the rest of the lease "in full force and effect." *Id.* at 1195. When the tenant attempted to exercise its renewal option the landlord refused, contending that the tenant was limited to a single renewal. *Id.* In reversing judgment for the landlord and directing entry of judgment for the tenant, the court determined that the lease extension "amended the lease, instead of simply renewing it," therefore the renewal clause—unmentioned in the amendment—remained intact.[4] *Id.* at 1194, 1196. Although the 2003 extension here similarly amended the original lease, it directly contradicted—and therefore eliminated—the early termination clause.

¶12 Walbro also argues "of August 31, 2008" becomes superfluous if the lower-case phrase "expiration date" is to have the same meaning as the upper-case phrase "Expiration Date" as defined in the lease extension. This formatting argument is unavailing. The same argument could be made regarding Walbro's interpretation—if the 2003 lease extension only modifies the date after which Walbro could terminate the lease, the words "expiration date" in that phrase are superfluous.[5]

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[4]Additionally, one party in that case argued a plain reading would result in a perpetual lease, which would be invalid under Arizona law. *See McLane*, 735 F.2d at 1196, *citing Tucker v. Byler*, 27 Ariz. App. 704, 558 P.2d 732 (1976). The court distinguished *Tucker*, noting that the contract in that case allowed perpetual renewal of the renewal clause as well. *See id.*

[5]At oral argument, Walbro also argued that the 2003 extension included an option to renew for another three years, indicating that the expiration date listed in the termination clause was not contemplated to mean the same thing as the defined term "Expiration Date." The option to renew was never quoted, highlighted, or discussed in Walbro's filings before the trial court or

¶13 Finally, Walbro argues the context of the 2003 lease extension, read together with subsequent addenda, indicate that the cancellation of the early termination clause was temporary to recoup approximately $30,000 Kavanagh and White invested in improvements to obtain a lease extension. But the 2008 and 2011 addenda also included improvements paid for by the landlord—paint, carpet, and a kitchen remodel. Under Walbro's interpretation of the termination clause, it could have terminated almost immediately—any time after August 31, 2008—despite the improvements. Walbro's contextual arguments are unavailing. Under the plain language of the lease, the extension eliminated Walbro's right to terminate early. Accordingly, the trial court erred by granting summary judgment in Walbro's favor.

Disposition

¶14 For the foregoing reasons, we reverse the trial court's judgment and direct that judgment be entered for Kavanagh and White. Although Kavanagh and White request in their opening brief that we remand for trial on remaining issues, and in their reply brief that we remand "for further proceedings on the issue of damages," the complaint involved only two claims—one for a declaration of rights under the lease, and one requesting injunctive relief—both of which included requests for attorney fees. The first claim was the topic of the summary judgment motions, and the second was dismissed with prejudice. The record does not show any claim for monetary damages. We do, however, remand for reconsideration of Kavanagh and White's request for attorney fees made before the trial court. [6]

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in the briefs on appeal. We will not consider arguments raised for the first time at oral argument. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, n.1, 144 P.3d 519, 525 n.1 (App. 2006).

[6]Kavanagh and White have not requested appellate attorney fees. Walbro did request contractual attorney fees, but because the contract requires an award of attorney fees to the "prevailing party," and Walbro is not the prevailing party on appeal, we deny the award.