IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CEMEX CONSTRUCTION MATERIALS SOUTH, LLC,
A FOREIGN LIMITED LIABILITY COMPANY,
Plaintiff/Appellee,

v.

FALCONE BROTHERS & ASSOCIATES, INC.,
AN ARIZONA CORPORATION; AND THE GUARANTEE COMPANY OF NORTH AMERICA, USA, A MICHIGAN CORPORATION,
Defendants/Appellants.

No. 2 CA-CV 2017-0015
Filed November 3, 2017

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NOT FOR PUBLICATION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 Pima County
No. C20121949
The Honorable Richard E. Gordon, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Following a bench trial, Falcone Brothers & Associates, Inc. appeals from the trial court's judgment awarding damages to Cemex Construction Materials South, LLC for materials Cemex had provided for a construction project on which Falcone was the general contractor. On appeal, Falcone argues that the court erred by applying the "Mailbox Rule" and that insufficient evidence supported the court's finding that Falcone had actually received the notices sent by Cemex pursuant to A.R.S. § 34-223(A). Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010). In 2011, Cemex filed a complaint against J & S Commercial Concrete Contractors, Inc., Falcone, and The Guarantee Company of North America ("GCNA"), alleging it had not been paid for materials provided to J & S. Falcone had subcontracted with J & S for concrete work on the construction project. J & S, in turn, had subcontracted with Cemex for the materials. GCNA bonded and guaranteed the project. Cemex

asserted that it had, pursuant to § 34-223(A), sent four preliminary twenty-day notices to Falcone prior to filing suit.

¶3 Falcone filed a motion for summary judgment, arguing it had not received the notices and, in any event, the notices did not comply with the statutory mailing requirements.[1] The trial court denied the motion, finding that the notices had complied with the mailing requirements of the statute. It did not address whether Falcone had actually received the notices. Following a bench trial on damages, the court entered judgment in favor of Cemex.

¶4 Falcone appealed, raising the issue of whether Cemex's twenty-day notices satisfied the requirements of § 34-223(A).[2] This court concluded that the notices did not comply with the mailing requirements of the statute,[3] but also that "if a notice sent pursuant to [§ 34-223(A)] is actually received by a contractor, the fact that it was sent by a method other than [those dictated by the statute] will not

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[1] J & S did not file an answer to Cemex's complaint, which resulted in a default judgment against it.

[2] GCNA filed a notice of limited appearance below and "tendered its defense to Falcone." On appeal, this court granted GCNA's request to join Falcone's opening brief. We therefore refer only to Falcone throughout this decision.

[3] We determined the language of § 34-223(A) was ambiguous as to the method twenty-day notices had to be mailed, and, after considering the legislative intent and history of the statute, concluded that twenty-day notices must "be sent by registered or certified mail." *Cemex Constr. Materials S., LLC v. Falcone Bros. & Assocs.*, 237 Ariz. 236, ¶¶ 10, 14, 18, 29, 349 P.3d 210, 213-15, 217 (App. 2015). Cemex had, however, in accordance with the "apparently longstanding industry practice," sent the notices via first-class mail with a certificate of mailing. *Id.* ¶¶ 3, 30. Following our decision, the legislature amended the mailing requirements of § 34-223(A) to "clarify" that "the written preliminary twenty-day notice may be sent by first class mail with certificate of mailing, certified or registered mail." 2016 Ariz. Sess. Laws, ch. 237, §§ 1-2; *see* § 34-223(A).

preclude a materialman's action on the bond." *Cemex Constr. Materials S., LLC v. Falcone Bros. & Assocs.*, 237 Ariz. 236, ¶¶ 11, 14, 25, 33, 349 P.3d 210, 213-14, 216, 218 (App. 2015). We concluded there was a genuine issue of material fact whether Falcone had actually received Cemex's notices, and we therefore remanded the case for a new trial. *Id.* ¶¶ 34, 39.

¶5 On remand, following a three-day bench trial, the trial court found that "Cemex ha[d] proven by a preponderance of the evidence that Falcone . . . actually received the 20-day notices." It awarded Cemex $81,913.04 in damages and an additional $213,812.40 in attorney fees, costs, and sanctions. We have jurisdiction over Falcone's timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 Falcone argues the trial court erroneously relied on the Mailbox Rule to conclude that Falcone had actually received the twenty-day notices. Specifically, it maintains the court erred in applying the rule's presumption that "proof of the fact of mailing will, absent any contrary evidence, establish that delivery occurred." *Lee v. State*, 218 Ariz. 235, ¶ 8, 182 P.3d 1169, 1171 (2008). Falcone contends this contradicts *Maricopa Turf, Inc. v. Sunmaster, Inc.*, 173 Ariz. 357, 362, 842 P.2d 1370, 1375 (App. 1992), in which the court found the Mailbox Rule did not apply to claims brought pursuant to A.R.S. §§ 34-221 to 34-227, also known as the Little Miller Act.[4]

¶7 Falcone is correct that *Maricopa Turf* precludes the application of the presumption here. *Id.* Indeed, the trial court was clearly aware of this. In a pretrial ruling, it clarified that "the Mailbox

[4]The Little Miller Act, modeled after the federal Miller Act, "requires a general contractor on a public project to post a bond to ensure that all who supply labor or materials to the project are paid." *Cemex*, 237 Ariz. 236, ¶ 11 & n.4, 349 P.3d at 213 & n.4; *see* A.R.S. §§ 34-221 to 34-227; *see also* 40 U.S.C. §§ 3131–3134. As relevant here, it sets forth certain mailing requirements a claimant must meet in order to maintain an action on the bond. *See* § 34-223(A).

Rule does not have any application to the 20-day notice requirement as precluded by *Maricopa Turf*." But even without the presumption—which normally disappears when the addressee denies receipt, as Falcone did here—"the fact of mailing still has evidentiary force." *Lee*, 218 Ariz. 235, ¶ 8, 182 P.3d at 1171. Consequently, "even absent any presumption of receipt, mailing remains probative evidence that a letter was actually delivered to the designated recipient." *Id.* ¶ 11 (emphasis omitted). This is not based on any presumption but rather "the commonly recognized fact that the mail almost always works." *Id.*

¶8 Here, the trial court noted that evidence demonstrating the notices had been mailed "provide[d] compelling evidence that the notices were actually and timely received by Falcone." *See id.* ("[A] factfinder may still infer from the fact of mailing that the mail did reach its destination."). It then cited *Lee*, 218 Ariz. 235, ¶ 11, 182 P.3d at 1171-72, for the proposition that "even with no presumption, 'mailing remains probative evidence that a letter was actually delivered to the designated recipient.'" Thus, the court did not erroneously apply the Mailbox Rule. Instead, it correctly considered all the evidence presented to determine whether Falcone actually had received them, including evidence that the notices had been mailed, that Falcone denied receiving them, and that neither Falcone, J & S, nor the City of Tucson could produce the actual mailed notices. *See id.* ¶¶ 8, 11; *see also Andrews v. Blake*, 205 Ariz. 236, n.3, 69 P.3d 7, 13 n.3 (2003) (when addressee denies receipt, "issues surrounding the mailing and receipt of . . . letter[s] are questions of fact to be determined by the trier").

¶9 Falcone next argues that, "[s]etting aside the mailbox rule and its application to this case," the trial court erred in concluding that Cemex had shown by a preponderance of the evidence that Falcone had actually received the notices. Following a bench trial, we defer to that court's factual findings "unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses."[5] *Castro v. Ballesteros-Suarez*, 222 Ariz. 48,

[5]Falcone cites federal case law for the proposition that "[t]he sufficiency of notice under the [federal] Miller Act, to the extent based

¶ 11, 213 P.3d 197, 200 (App. 2009), *quoting In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). A finding is not clearly erroneous so long as substantial evidence, such that a "reasonable person [could] reach the trial court's result," exists. *Id.*, *quoting Davis v. Zlatos*, 211 Ariz. 519, ¶ 18, 123 P.3d 1156, 1161 (App. 2005). "We will not reweigh the evidence or substitute our evaluation of the facts." *Id.*

¶10 At trial, Cemex presented evidence that Caprenos, Inc.—the company with which Cemex had contracted to handle its mailing—had prepared and sent four separate twenty-day notices to Falcone's correct address on four different dates between September and December 2010. This evidence included copies of the notices sent to the City, which also showed that an identical copy was prepared for mailing to Falcone; time sheets of Caprenos's employees who delivered the notices to the post office on dates matching those in the notices; and logs that were signed and stamped by a United States Postal Service employee indicating that the notices had been delivered to and accepted by the post office for mailing, that the addresses listed in Caprenos's logs matched those on the envelopes, and that each notice had proper postage. Further, none of the notices was returned to Caprenos as undelivered.

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on undisputed facts, is commonly reviewed *de novo*." *United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co.*, 131 F.3d 28, 31 (1st Cir. 1997). Each of the cases cited by Falcone, however, addressed whether a notice complied with the statutory requirements. *See id.* at 29; *see also United States ex rel. Consol. Elec. Distribs., Inc. v. Altech, Inc.*, 929 F.2d 1089, 1092 (5th Cir. 1991); *United States ex rel. Moody v. Am. Ins. Co.*, 835 F.2d 745, 748 (10th Cir. 1987). At issue here is not whether Cemex's notices complied with the statute—that question was answered in *Cemex*, 237 Ariz. 236, ¶¶ 11, 29, 349 P.3d at 212, 217—but whether, based on the disputed facts, Falcone had actually received Cemex's notices. Indeed, this court previously noted that such a finding required a factual determination in the trial court, thus requiring a remand for a new trial on the issue. *Id.* ¶¶ 36-39. The standard of review cited by Falcone is therefore inapposite to the issue presented in this appeal.

¶11 Falcone, on the other hand, relied solely on the testimony of its owner, Gaetano Falcone, who stated he did not remember receiving any twenty-day notices from Cemex but did remember receiving such notices from other subcontractors and receiving Cemex's ninety-day notice. He also testified that he put every notice he received into the project file, but he could not produce that file because he had burned it in July or August of 2011. He also had no internal system for logging the notices he did receive, and he largely relied on the City to inform him if such a notice had been received and not yet acted upon.

¶12 The trial court was thus presented with, on the one hand, documentary evidence that the notices had been prepared and properly mailed and, on the other, Gaetano's testimony that he did not recall receiving those notices. Giving due regard to the court's role as arbiter of witness credibility, substantial evidence supports the court's finding that Falcone did actually receive the notices. *See Castro*, 222 Ariz. 48, ¶ 11, 213 P.3d at 200-01.

¶13 Falcone, however, points to the fact Cemex was not able to produce the actual twenty-day notices sent to Falcone, the City, or J & S. It contends that, based on that fact alone, "there simply was no way in which Cemex could prove by a preponderance of the evidence that Falcone actually received the notices."

¶14 The trial court, in its ruling, noted that although it was initially troubled by that fact, "the evidence presented at trial alleviated its concerns." As for the City, the evidence showed that City employees did not log the notices they received, did not acknowledge receiving the notices, and filed them in a "miscellaneous" folder in the project file. Additionally, Gaetano testified a City employee had informed him part of this specific project file appeared to have been thrown away. As for the notices sent to J & S, an employee who had worked on this specific project testified that many files were missing from the project file, including notices she distinctly remembered receiving and filing. The evidence also established, as the court noted, that around the time the notices were sent, J & S's "business was in shambles." The court's conclusion, which is supported by the evidence and not disputed by Falcone, was that "it [was] no surprise that the notices were not retrieved from J &

S, even assuming [J & S's owner] would have provided them had they been located given his unscrupulous business tactics."

¶15 Lastly, as noted above, Gaetano foreclosed the possibility of demonstrating whether Falcone did in fact receive the notices by burning the entire project file. We agree with the trial court that, under these circumstances, the failure to secure the actual mailed notices from any of the three entities is not fatal to Cemex's case. *See Lee*, 218 Ariz. 235, ¶ 16, 182 P.3d at 1172 (whether office's "inability to locate a notice . . . indicate[s] it was never received [or] . . . it was received and later misplaced . . . will depend on the circumstances of the initial mailing and the intended recipient's procedures, if any, for recording the receipt of mail").

¶16 Falcone, however, cites several cases he argues "underscore[] the fact that *actual* notice means actual, undisputed, admitted to, notice of a claim." In each of the cases he cites, however, receipt of the notices was not disputed, and the issue was whether the notices complied with the statutory requirements. *See W. Asbestos Co. v. TGK Constr. Co.*, 121 Ariz. 388, 390, 590 P.2d 927, 929 (1979); *see also Fleisher Eng'g & Constr. Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15, 16-17 (1940); *United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co.*, 131 F.3d 28, 32-33 (1st Cir. 1997); *United States ex rel. Moody v. Am. Ins. Co.*, 835 F.2d 745, 748 (10th Cir. 1987); *United States ex rel. Hillsdale Rock Co. v. Cortelyou & Cole, Inc.*, 581 F.2d 239, 242-43 (9th Cir. 1978). Those cases are not relevant here precisely *because* receipt was not an issue. Falcone has not cited any authority in which actual notice—a factual determination—was at issue and the court stated that "actual, undisputed, admitted to, notice" was required. Indeed, had that been the case, this court would not have remanded the issue for a new trial given that Falcone has consistently denied any memory of having received the notices. *Cemex*, 237 Ariz. 236, ¶¶ 36, 38-39, 349 P.3d at 219. We therefore reject Falcone's contention that undisputed receipt of the notices was required to support the trial court's finding in this case. *See Lee*, 218 Ariz. 235, ¶ 8, 182 P.3d at 1171; *see also Andrews*, 205 Ariz. 236, n.3, 69 P.3d at 13 n.3; *Cemex*, 237 Ariz. 236, ¶¶ 38-39, 349 P.3d at 219.

Attorney Fees and Costs

¶17 Both parties have requested their attorney fees pursuant to A.R.S. § 12-341.01. As this is a statutory action, however, an award under that provision is not appropriate. *See Cemex*, 237 Ariz. 236, n.11, 349 P.3d at 219 n.11. Cemex has also requested its attorney fees on appeal pursuant to the terms of the bond, which provide that "[t]he prevailing party or any party which recovers judgment on this bond shall be entitled to such reasonable attorney's fees as may be fixed by the court or a judge thereof." We therefore award Cemex, as the prevailing party, its reasonable attorney fees incurred on appeal, upon its compliance with Rule 21, Ariz. R. Civ. App. P. It is additionally entitled to its costs as the successful party pursuant to A.R.S. § 12-341.

Disposition

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