IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JOHN F. LONG PROPERTIES, LLLP, AN ARIZONA LIMITED LIABILITY LIMITED PARTNERSHIP,
Plaintiff/Counterdefendant/Appellee,

v.

DRURY SOUTHWEST, INC., A MISSOURI CORPORATION,
Defendant/Counterclaimant/Appellant.

No. 2 CA-CV 2022-0079
Filed October 7, 2022

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NOT FOR PUBLICATION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 Maricopa County
No. CV2019012834
The Honorable Margaret R. Mahoney, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Appellant Drury Southwest Inc. ("Drury") appeals following a bench trial from the trial court's judgment on the enforceability of certain deed restrictions affecting lots within a commercial office park. Drury also appeals the court's award of attorney fees to appellee John F. Long Properties LLLP ("JFLP"). For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We . . . view the facts on appeal from a bench trial in the light most favorable to upholding the judgment." *Town of Florence v. Florence Copper Inc.*, 251 Ariz. 464, ¶ 20 (App. 2021). JFLP planned and developed the Algodon Center medical office park ("Algodon Center"). Drury purchased a lot within Algodon Center—Lot 16—from JFLP in April 2008. Before that purchase, JFLP had recorded a Master Declaration of Covenants, Conditions, Restrictions, and Easements ("Master Declaration") governing the development. The Master Declaration runs with the land in the development and binds all the lot owners.

¶3 The Master Declaration restricts the allowable uses of both Lot 16 and all other lots in Algodon Center. During the specified "Restricted Use Period" Section 3.6 provides: "No portion of Lot 16, . . . shall be used for any purpose other than Hotel Use . . . ." Then, during the "Medical Office Park Restricted Use Period," Section 3.8 provides: "In consideration of Drury's purchase of Lot 16, . . . no portion of [Algodon Center] Lots (other than Lot 16) shall be used for Temporary Lodging . . .."[1]

¶4 Lot 16's Restricted Use Period lasts "[f]or a period of ten (10) years from the Effective Date." The "Effective Date" is defined as the date the Master Declaration was recorded. Thereafter, Lot 16 may be used for

[1]"Temporary Lodging" is then defined as, essentially, any hotel-type use.

any lawful purpose, not otherwise prohibited by other agreements. The Medical Office Park Restricted Use Period also runs from the "Effective Date" and expires on "the earlier of: (a) the date that Lot 16 first ceases to be Actively Operated for Hotel Use . . . or (b) the fortieth (40th) anniversary of the Effective Date."

¶5 With regard to the expiration of the Medical Office Park Restricted Use Period, the phrase "Actively Operated for Hotel Use" is defined in the Master Declaration to include:

> the period of time from the Effective Date through the date Drury or its affiliate purchases Lot 16 and means that any and all of the Improvements on Lot 16 are being constructed on Lot 16 in accordance with the Tract Declarations for Lot 16 and, once the same are constructed and initially opened to the public, are being used for Hotel Use.

Similarly, upon the expiration of the Medical Office Park Restricted Use Period, the other lots in Algodon Center may be used for any lawful purpose, not otherwise prohibited, including, ostensibly, hotel use.

¶6 The day that Drury purchased Lot 16, Drury and JFLP signed a Supplemental Declaration that restated the restrictions discussed above (now to be found in §§ 2.2 and 2.4 of the Supplemental Declaration), but reworded the phrase "Actively Operated for Hotel Use" to read:

> "Actively Operated for Hotel Use" means that any and all of the improvements on Lot 16 are being constructed on Lot 16 in accordance with Section 3.3 and, once the same are constructed and initially opened to the public, are being used for Hotel Use . . . .[2]

¶7 The Supplemental Declaration required JFLP to complete certain identified site improvements by November 15, 2008, with Drury to pay 50% of the cost of landscaping site improvements. Drury also became

[2] The phrase "Section 3.3" refers to a specific provision of the Supplemental Declaration replacing the phrase "Tract Declarations" in the Master Declaration, which referred to the (anticipated) Supplemental Declaration as a whole.

obligated under the Supplemental Declaration to commence construction on or before May 31, 2009, and, within fifteen months of commencing construction, to "achieve Substantial Completion . . . of . . . a minimum 160-room Drury Inn & Suites Hotel."

¶8 In the event Drury did not begin construction of the hotel by May 31, 2009—and if no extension of the deadline were agreed to—JFLP was granted "an option (but not an obligation) to repurchase Lot 16 for the original Purchase Price." And further, if "Drury fail[ed] to achieve Substantial Completion by the Completion Deadline" it would pay JFLP $100,000 in liquidated damages upon demand. Apart from those two express remedies, the parties reserved other legal and equitable remedies.

¶9 In April 2008, Drury advised JFLP that its construction crew was about to start construction at another Arizona location, after which it would start construction in Algodon Center. In May 2008, Drury told JFLP that it was scheduled to submit plans to the city "around Sept[ember] 1." Two months later, Drury advised JFLP that it would be storing wall forms on Lot 16 for use in construction that was expected to start "within 5-6 months."

¶10 In mid-2009, Drury and JFLP executed a First Amendment to the Supplemental Declaration. That amendment acknowledged that JFLP had completed its required site improvements to Lot 16. The amendment then extended the deadline for Drury to begin construction—originally May 31, 2009—to October 28, 2010, and Drury's deadline for achieving substantial completion of the hotel—originally fifteen months from the start of construction—to December 28, 2011. In mid-2010, the parties executed a Second Amendment to the Supplemental Declaration, extending the commencement date to June 30, 2011 and the completion date to September 30, 2012. Neither the first nor second amendment changed any other terms relevant to this matter.

¶11 Drury did not construct a hotel on Lot 16 by the September 30, 2012 deadline, and, in October 2012, JFLP demanded payment of the $100,000 liquidated damages for the failure to timely achieve substantial completion. Drury paid that amount to JFLP in December 2012.

¶12 Ultimately, in November 2014, Drury informed JFLP that it no longer intended to build a hotel on Lot 16 and would instead be listing the property for sale. In 2018, and again in 2019, JFLP sought Drury's acknowledgement that, because Drury did not actively operate a hotel on Lot 16 and did not intend to, the use restrictions relative to Lot 16 had

expired. Drury disagreed and claimed that neither the Master Declaration nor the Supplemental Declarations provided for termination of the restricted use periods as a remedy for its failure to timely build the hotel. It asserted that JFLP's remedies of the reversionary option and the liquidated damages penalty were fair compensation for its default.

¶13 In September 2019, JFLP filed a complaint against Drury seeking to quiet title. JFLP alleged that due to Drury's "failure to meet the conditions of the Lot 16 Tract Declaration and [its] acknowledgment that it will not meet those requirements, any restrictions under the lot 16 Tract Declaration have been terminated." JFLP prayed for "a declaration that [Drury] is barred and forever estopped from having or claiming any right to enforce any limitation in the Lot 16 Tract Declaration," and "[f]or judgment quieting title to [JFLP's] property free and clear of any restrictions that may previously have limited" its use. Drury counterclaimed seeking declaratory judgment, claiming that, because hotel operations never *began* on Lot 16, the lot could not "cease to be Actively Operated for Hotel Use" and thus the remaining lots in Algodon Center remain bound by the hotel-use restriction. The parties stipulated to try the matter to the court.

¶14 At the outset of trial, Drury filed a motion in limine regarding parole evidence, requesting that the trial court preclude "evidence that varies or contradicts the plain language of the agreements at issue in this case." The court denied the motion without prejudice, stating that it could not determine whether the evidence violated the parole evidence rule until it heard the testimony.

¶15 Following a two-day bench trial, the trial court issued its ruling in favor of JFLP. It concluded that the hotel-use restriction was conditional upon Drury completing construction of a hotel, and then opening and operating it. Thus, "[b]ecause Drury did not build, open and operate a hotel on Lot 16, the lot ceased to be 'Actively Operated for Hotel Use' within the meaning of the Master Declaration and the Lot 16 Supplemental Declaration." And it declared

> Accordingly, the provisions in § 3.8 of the Master Declaration . . . and in § 2.4 of the Supplemental Declaration . . . providing that no portion of Algodon Center other than Lot 16 could be used for Temporary Lodging . . . are no longer in force or effect.

¶16 The trial court also awarded JFLP its attorney fees and costs. The court thereafter entered final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Analysis

¶17 On appeal, Drury argues the trial court erred in concluding that its failure to build and operate a hotel on Lot 16 had caused a cessation of "active hotel operations" barring it from enforcing the hotel-use restriction against the other lots in Algodon Center. It claims that "the parties expressly bargained for specific remedies in the event of non-construction," and those remedies did not include termination of the hotel-use restriction. Further, it argues that the court improperly considered parole evidence that contradicted "the plain language of the declarations" as to the parties' intent. Lastly, it argues that the court abused its discretion in awarding JFLP its attorney fees. We agree with the court's judgment, but not entirely with its reasoning. *See Glaze v. Marcus*, 151 Ariz. 538, 540 (App. 1986) ("We will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court.").

¶18 The interpretation of a contract is a question of law that we review de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9 (App. 2009). The purpose of contract interpretation is to determine and enforce the parties' intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152 (1993). To determine the parties' intent, we "first consider the plain meaning of the words" the parties used "in the context of their contract as a whole." *Grosvenor Holdings, L.C.*, 222 Ariz. 588, ¶ 9. "A general principle of contract law 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." *Id*. (quoting *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12 (App. 2006)). "Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto." *Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, ¶ 16 (App. 2008) (quoting *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966)). Our examination here bears on what constitutes "active hotel operations" under the parties' agreement, if such operations ever began, and then, if they began, whether they ceased such as to bar enforcement of the Medical Office Park Hotel Use Restriction.

Active Hotel Operations under the Hotel-Use Restriction

¶19 The parties' agreements, specifically the Master Declaration and the Supplemental Declaration, identify the events that terminate the Medical Office Park Restricted Use Period. It terminates when Lot 16 ceases to be actively operated for hotel use or forty years after the recording of the Master Declaration (that is, the "Effective Date"), whichever is earlier. It is undisputed that forty years have not passed since the Master Declaration was recorded in 2008. Consequently, we must determine whether and when active hotel operations ceased on Lot 16.

¶20 The trial court found that JFLP "agreed to the 'Office Park Hotel Restriction' in consideration of Drury's commitment to build, open and operate a hotel on Lot 16." And that Drury's "Hotel Improvements" were to "be constructed in a diligent, good and workmanlike manner." The intent of the parties in terminating the hotel-use restrictions when active hotel operations ceased was, as the court found, "to pave the way for a replacement hotel to be operated . . . and thus provide the lodging benefit that was originally the objective of the [restriction]." The court concluded then, as a matter of law, that "[i]n order for Lot 16 to be 'Actively Operated for Hotel Use' Drury needed to build, open and operate a hotel on Lot 16" and "[u]nless Drury first built a hotel on Lot 16, it could not be 'Actively Operated for Hotel Use.'" It is undisputed that Drury did not comply with its obligations under the parties' contract to begin and then to substantially complete hotel construction—by June 30, 2011 and September 30, 2012, respectively. Consequently, the court determined that "the lot ceased to be 'Actively Operated for Hotel Use' within the meaning" of the relevant agreements "[b]ecause Drury did not build, open and operate a hotel on Lot 16." As a result, it declared that the use restriction on the lots within Algodon Center had "expired."

¶21 Drury argues that the trial court erred in interpreting the enforceability of the hotel-use restriction to be conditioned on the construction and operation of a hotel. Drury argues now, as it did below, that "Lot 16 cannot cease to be Actively Operated for Hotel Use unless a hotel has been built, opened, and is in use." Consequently, because it never began and *then* ceased hotel operations, the Medical Office Park Restricted Use Period did not expire according to its terms. JFLP argues that, as the court concluded, because the parties' intent was to have a hotel built, the only interpretation that makes logical sense is that the hotel-use restriction terminated because Drury failed to build, open, and operate a hotel at all.

¶22 In typical contexts, as Drury argues, for one to "cease" to do something, one must first begin to do it. *See Cease*, The American Heritage Dictionary (5th ed. 2011) ("cease" defined as "[t]o put an end to; discontinue" or "stop performing an activity or action"). Drury's position—that it did not cease hotel operations because it never began them—comports with such a definition. But Drury is incorrect that active hotel operations as defined in the parties' agreements begins only once a hotel is open to the public.

¶23 In the Master Declaration and the Supplemental Declaration, the phrase "Actively Operated for Hotel Use" is a term of art, defined by those agreements. As a term of art, the phrase does not carry the meaning that the words alone in ordinary parlance would carry. *See Doles v. Indus. Comm'n*, 167 Ariz. 604, 607 (App. 1990) ("To call something a 'term of art' is to accord oneself the freedom to redefine it in more congenial terms."); *cf. DBT Yuma, L.L.C. v. Yuma Cnty. Airport Auth.*, 238 Ariz. 394, ¶ 10 (2015) (in statutory interpretation, dictionary definitions do not help interpret terms of art). As stated above, with the "Effective Date" being the date of the recording of the Master Declaration, Section 3.8 of the Master Declaration states:

> "Actively Operated for Hotel Use" ***includes the period of time from the Effective Date through the date Drury or its affiliate purchases Lot 16*** and means that any and all of the Improvements on Lot 16 are being constructed on Lot 16 in accordance with the Tract Declarations for Lot 16 and, once the same are constructed and initially opened to the public, are being used for Hotel Use . . . .

(Emphasis added.) The Supplemental Declaration rephrases that definition, to read only that

> "Actively Operated for Hotel Use" means that any and all of the Improvements on Lot 16 are being constructed on Lot 16 in accordance with Section 3.3 and, once the same are constructed and initially opened to the public, are being used for Hotel Use . . . .

These definitions mean that Lot 16 was actively operated for hotel use beginning as early as the date of the recording of the Master Declaration in

2008, through Drury's purchase of Lot 16 and continuing through construction of lot improvements—which began no later than JFLP's 2009 undertaking of the site improvements—up to and during the anticipated public use of the hotel.

¶24 Consequently, and contrary to Drury's assertion (and the trial court's conclusion), Drury's completion and opening of the hotel was not necessary for the lot to be first "actively operated for hotel use." Rather, Lot 16 was, at all times during Drury's ownership of the lot, actively operated for hotel use as defined in the agreements, notwithstanding Drury's failure to complete and open a hotel.

Cessation of Active Hotel Operations

¶25 Because active hotel operations began on Lot 16, the questions remain whether such operations ceased and when. The trial court correctly concluded that the restriction had expired "when Drury failed to achieve substantial completion of a hotel by September 30, 2012, or at all."

¶26 Under the Supplemental Declaration, for Lot 16 to be "Actively Operated for Hotel Use," all the improvements on Lot 16 were to be constructed in accordance with Section 3.3. As the trial court found, Drury was obligated under Section 3.3 to make its hotel improvements "in a diligent, good and workmanlike manner." Drury's failure to meet its deadline for substantial completion breached that obligation. *See Diligence*, The American Heritage Dictionary (5th ed. 2011) ("Earnest and persistent application to an undertaking; steady effort"). That breach—confirmed by its later letter to JFLP on November 3, 2014, announcing its intent to no longer build a hotel—meant that the hotel improvements on Lot 16 were no longer "being constructed on Lot 16 in accordance with Section 3.3," thus causing a cessation of active hotel operations. The court correctly concluded therefore that the contractual restriction barring the lots in Algodon Center other than Lot 16 from engaging in hotel use, by its terms, expired and is no longer enforceable.[3]

[3]Drury also claims that "Section 3.3 of the Supplemental Declaration is further proof that the viability of the hotel-use restriction is not contingent on the construction and operation of a hotel on Lot 16." It asserts that "[t]he parties expressly bargained for specific remedies in the event of non-construction," and "[i]f the parties intended for the hotel-use restriction to terminate if construction had not commenced or completed by a certain date, they would have said so in Section 3.3." However, because the hotel-

Parole Evidence

¶27 Drury also argues on appeal that James Miller's testimony as to JFLP's intentions in entering into the relevant restrictions was inadmissible parole evidence and that the trial court erred in admitting it. JFLP claims that this argument is waived on appeal because Drury did not, at any point during the trial, object to Miller's testimony.

¶28 Although Drury filed a motion in limine to object generally to JFLP's use of parole evidence, the motion did not object to, or even mention, Miller's (expected) testimony. At the hearing on the motion, the trial court explained—given that the matter was being tried to the court—it needed to hear what is "being objected to" and then "hear both sides' explanations for why it's objectionable or why it's not." The court explained that during closing arguments each party would have the opportunity to argue about the admissibility of any parole evidence. It then denied the motion "without prejudice to either side [] making . . . any appropriate objection to evidence being offered at trial."

¶29 Drury thereafter did not object to Miller's testimony when it was given or complain about it in closing argument. Indeed, when, at the end of the trial, the court asked the parties' positions on the motion in limine in light of the testimony at trial, Drury did not object to Miller's testimony. In fact, Drury arguably agreed with JFLP's counsel's statement that JFLP had properly offered the testimony in light of the parole evidence rule. At a minimum, Drury did not ask the court to disregard Miller's testimony in whole or in part. Drury needed to clearly seek preclusion of Miller's testimony to provide the court the opportunity to address the issue on the merits. *See Woyton v. Ward*, 247 Ariz. 529, ¶ 16 (App. 2019) ("Failure to raise an issue before the trial court constitutes a waiver on appeal."); *see also Wescott v. Glowenski*, 12 Ariz. App. 393, 397 (1970) ("Defendants, having failed to object to the receiving of this testimony, waived any error in admission.").

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use restriction expired as a contractual consequence of Drury's abandonment of the project, the restriction was not terminated as a remedy, but its expiration was rather a bargained-for term. *See Remedy*, Black's Law Dictionary (11th ed. 2019) (remedy is the "means of enforcing a right or preventing or redressing a wrong"); *see also John Munic Enters., Inc. v. Laos*, 235 Ariz. 12, ¶ 10 (App. 2014) ("Contract remedies are designed to redress loss of the benefit of the bargain . . . .").

¶30 Because Drury did not ask the trial court to disregard the testimony, and therefore failed to give the court the opportunity to address the matter in the first instance, it has waived the issue on appeal. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17 (App. 2007) (arguments are waived on appeal if not argued at trial court level and trial court had no opportunity to consider argument); *see also Sobol v. Marsh*, 212 Ariz. 301, ¶ 7 (App. 2006) ("[A] party cannot argue on appeal legal issues and arguments that have not been specifically presented to the trial court."). Nonetheless, even were we to conclude Drury had not waived this issue on appeal, our decision is based on the plain meaning of contract terms. Consequently, even were the parole evidence improperly admitted, its admission does not amount to reversible error. *See Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 36 (App. 1990) (even if the trial court erred, it is not reversible error if the result would have remained the same).

Attorney Fees Below

¶31 In its application for fees following trial, JFLP sought fees under the Master Declaration or, alternatively, under A.R.S. § 12-341.01(A).[4] Drury opposed JFLP's fee application arguing for a denial or reduction solely as a matter of the court's discretion. The trial court ordered that JFLP was "the prevailing party and entitled to an award of its reasonable attorneys' fees and costs, in accordance with § 8.4 of the Master Declaration, and A.R.S. §§ 12-341.01 and 12-341."

¶32 Drury argues on appeal that the trial court abused its discretion in awarding JFLP its attorney fees under § 12-341.01 because JFLP could have avoided this litigation. It correctly notes that we review an award of attorney fees under § 12-341.01 for an abuse of discretion. *Kuehn v. Stanley*, 208 Ariz. 124, ¶ 32 (App. 2004). Nonetheless, Drury does not address at all the court's non-discretionary award of fees under the Master Declaration.

¶33 Section 8.4 of the Master Declaration provides that the "losing party shall pay to the prevailing party the prevailing party's reasonable attorneys' fees, costs and expenses." Such a fee provision in a contract renders a fee award mandatory. *See McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 14 (App. 2007) ("Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees

[4]JFLP cites to A.R.S. § 12-341(A), however, the statutory language quoted is from A.R.S. § 12-341.01(A). We presume JFLP intended to cite the latter statute.

under a contractual provision." (quoting *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994))); *see also Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 13 (2017) (§ 12-341.01 inapplicable when parties have provided conditions under which attorney fees can be recovered in their contract because § 12-341.01 does not alter, prohibit, or restrict contracts). That is, whether to award fees is no longer a discretionary matter for the court.

¶34 What is left to the court under such a provision is solely its determination of a reasonable amount of fees to award. *See McDowell Mountain Ranch Cmty. Ass'n, Inc.*, 216 Ariz. 266, ¶¶ 16-18 ("Notwithstanding the general rule that attorneys' fees are enforced in accordance with the terms of a contract, a contractual provision providing for an award of unreasonable attorneys' fees will not be enforced."). In examining the reasonableness of a court's award under a mandatory fee provision, we consider whether the amount awarded is "obviously excessive." *Id.*, ¶¶ 18-19; *see also Elson Dev. Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 223 (1965). Drury has failed to argue that the fees sought by JFLP, or those awarded by the court, were excessive. Consequently, Drury has waived such an objection to the court's award. *See Nelson v. Rice*, 198 Ariz. 563, n.3 (App. 2000) (failure to raise argument in opening brief waives it on appeal). Because we will uphold an award of fees if there is any reasonable basis for it, *see Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18 (App. 2004), we affirm the amount of fees and costs awarded to JFLP below.

Attorney Fees and Costs on Appeal

¶35 JFLP requests attorney fees and costs on appeal pursuant to "the terms of the Master Declaration or, alternatively, A.R.S. § 12-341.01." Drury requests fees and costs pursuant to §§ 12-341 and 12-341.01. Because Drury is not the prevailing party, we deny its request. However, JFLP, as the prevailing party, is entitled to reasonable fees and costs under the Master Declaration and, alternatively, under §§ 12-341 and 12-341.01, *see McDowell Mountain Ranch Cmty. Ass'n*, 216 Ariz. 266, ¶ 23, upon its compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶36 For the foregoing reasons, we affirm.