FILED BY CLERK
SEP 11 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ATL, INC., an Arizona corporation, Plaintiff/Appellant, v. A & S PAVING, INC., an Arizona corporation; CONTRACTORS BONDING & INSURANCE COMPANY, a Washington corporation, Defendants/Appellees.	2 CA-CV 2009-0044 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C2007-0774

Honorable John E. Davis, Judge

AFFIRMED

Lewis and Roca LLP
By Frances J. Haynes, Kimberly A. Demarchi,
and Candida M. Ruesga
Phoenix
Attorneys for Plaintiff/Appellant

The Rabb Penny Law Firm, PLLC
By James B. Penny
Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 In this contract action, plaintiff/appellant ATL, Inc. (ATL) appeals from the trial court's summary judgment in favor of defendant/appellee A & S Paving, Inc. (A & S) on ATL's breach of contract and bond claims.[1] In the single issue raised on appeal, ATL argues the court erred by failing to consider parol evidence in interpreting the contract. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 17, 180 P.3d 977, 981 (App. 2008). In December 2005, A & S submitted a bid proposal to the City of Tucson for the construction of improvements to Stone Avenue, between First and Sixth Streets. Its bid included $2,850 for a quality control contractor. After delivering its bid to the City, A & S sought bids for performing the quality control work on the project. ATL submitted a proposal estimating the total cost at $5,810, based on unit prices for various testing services. A & S then sent ATL a subcontract agreement, which provided that A & S would pay to ATL a lump sum of $5,810 for the quality control work. ATL made changes to the subcontract, including modifying the payment type from lump sum to "U/P," or unit price. A & S accepted these changes, and the City ultimately accepted its bid. During the

[1]ATL did not oppose A & S's subsequent motion for summary judgment on ATL's unjust enrichment claim, which the trial court also granted. We therefore do not address this issue on appeal.

project, ATL billed A & S $26,756.20 according to the unit prices listed in its proposal, of which A & S stated it only paid $5,810.[2]

¶3 ATL filed a complaint in superior court for breach of contract and unjust enrichment, seeking $19,904 for the unpaid bills and interest. It also sought payment from the surety for A & S's bond. After A & S filed its answer, ATL moved for summary judgment, arguing it had modified the contract from a lump sum to unit pricing and A & S had accepted the modification. A & S opposed the motion and cross-moved for summary judgment on ATL's breach of contract claim, asserting ATL had failed to convert the terms of the contract to unit pricing or, alternatively, assuming it had done so successfully, ATL had failed to increase the quantity of units or change the single unit price from $5,810. Thus, it argued, ATL had modified the contract from a lump sum payment to a single unit cost of $5,810, and it had met its payment obligation under the contract.[3]

¶4 After oral argument, the trial court denied ATL's motion for summary judgment and granted A & S's motion, finding ATL had only modified the type of payment from lump sum to unit price, but had not modified the quantity or price per unit. ATL filed a motion for reconsideration, arguing the court should have considered extrinsic evidence

---

[2]ATL contends that A & S actually paid it $6,852.20. However, even assuming this were true, contrary to ATL's argument it would not constitute evidence that by modifying the contract from lump sum to unit pricing ATL had also incorporated the unit pricing schedule from its proposal into the contract.

[3]A & S also argued ATL was estopped from arguing it was owed additional money under the contract because it had failed to respond to A & S's billing inquiries during the pendency of the project.

under the parol evidence rule to aid its interpretation of the contract, which the court denied. The court granted judgment in favor of A & S and attorney fees. This timely appeal followed.

Standard of Review

¶5 "Summary judgment is appropriate when the record shows there is no real dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Phoenix Baptist Hosp. & Med. Ctr. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether the entry of summary judgment was proper. *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 17, 83 P.3d 56, 60 (App. 2004). However, as noted above, we view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Nat'l Bank of Ariz.*, 212 Ariz. 112, ¶ 17, 180 P.3d at 981.

Discussion

¶6 ATL contends the trial court erred in granting summary judgment because a material question of fact existed as to whether the subcontract limited its compensation to a single unit, priced at $5,810. In its original form, the subcontract provided that for item number 9240170, Contractor Quality Control, A & S agreed to pay ATL a lump sum of $5,810. Before signing the contract, ATL modified this provision by substituting the term "U/P," meaning unit price, for lump sum. And, in its complaint ATL claimed that by

changing the payment method from lump sum to unit price, it had incorporated the unit prices set forth in its original proposal to A & S.

¶7 In its motion for reconsideration below, ATL argued that its "Proposal and all other extrinsic evidence of the parties' intent should have been considered in order to determine if the subcontract was reasonably susceptible to ATL's interpretation." It contended the trial court should have considered (1) its proposal, which included the unit pricing schedule and was relevant to the parties' intent at the time they contracted, (2) evidence of conversations between ATL and A & S that occurred after the subcontract was signed, which would have tended to show the parties had not intended to limit compensation to $5,810, and (3) the fact that ATL's common practice is not to contract for a lump sum due to the "impossibility of predicting" how its services will be used. It also asserted that it would have had no reason to change the pricing term from lump sum to unit price if it had intended to limit the total payment to $5,810. In denying the motion, the court stated that even if it had considered the extrinsic evidence, it would have granted summary judgment in any event because the contract contained an integration clause that "canceled 'all previous understandings or agreements'" between ATL and A & S. Thus, the court declined to reconsider its prior ruling that "the [contract] called for unit pricing, the number 1 was the quantity of units contracted for and the total amount due was $5,810.00. The substitution of 'U/P' by plaintiff does not change these essential terms in plaintiff's favor."

¶8 On appeal, ATL contends the trial court erred in granting summary judgment to A & S, because by substituting unit price for lump sum, it had modified the contract to provide "that the total amount due would be based on unit pricing and was *estimated* at (but not limited to) $5,810." And, it argues, because the contract's language is reasonably susceptible to this interpretation, the court improperly failed to consider relevant parol evidence that had bearing on the meaning of the contract.

¶9 Our primary goal in interpreting the language of a contract is to ascertain and give effect to the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). We may consider parol evidence in determining the appropriate interpretation of a contract if it is relevant to the proponent's proffered interpretation and the contract's language is "reasonably susceptible" to that interpretation. *Long v. City of Glendale*, 208 Ariz. 319, ¶ 28, 93 P.3d 519, 528 (App. 2004). However, parol evidence is not admissible if it "would actually vary or contradict the meaning of the written words." *Id.* ¶ 29.

¶10 This is particularly true when the contract contains an integration clause that expressly provides the written document is the final and complete understanding of the parties' intent. *See Pinnacle Peak Developers v. TWR Inv. Corp.*, 129 Ariz. 385, 389, 631 P.2d 540, 544 (App. 1980); *see also* 3 Arthur L. Corbin, Corbin on Contracts § 578 (3d ed. 1960) ("If a written document . . . declares in express terms that . . . there are no antecedent or extrinsic representations, warranties, or collateral provisions . . . , this declaration is

conclusive . . . . It is just like a general release of all antecedent claims."). Here, as the trial court noted, the subcontract contained an integration clause, which provided: "It is agreed that the terms and conditions hereof supersede and cancel all previous understandings or agreements, whether written, verbal, or implied, and that the Subcontract Agreement Terms and Conditions are a part hereof." Thus, to the extent the parties had discussed, prior to signing the contract, that ATL would be compensated according to the unit pricing schedule included in its proposal, that agreement was cancelled by the terms of the contract, which put ATL on notice that it could not enforce any terms not contained within the four corners of the document. The content of those discussions and any evidence bearing on a prior understanding was therefore irrelevant to the court's determination of what the contract, as written, actually meant.[4]

¶11 Furthermore, the plain language of the contract calls for a single unit of an item, quality control testing, which has a set cost of $5,810. In contrast, the interpretation urged by ATL would provide for an undetermined amount of units for very specific subparts of the quality control testing, each of which has an individual cost not included in the

[4]Although ATL referred in its motion for reconsideration to discussions between it and A & S after the subcontract had been signed, ATL does not address or provide any argument about these specific discussions on appeal, except insofar as it generally notes that some of its parol evidence consisted of "testimony of individuals involved in negotiating and performing under the agreement regarding both the company's general pricing practices and their specific understanding of the subcontract." We thus find abandoned any argument that the trial court erred in failing to consider such evidence separately from the pre-signature evidence. *Schabel v. Deer Valley Unified Sch. Dist.*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

contract, and the total cost of which is *estimated* at, but not limited to, $5,810. This interpretation eviscerates the contract's plain meaning, and there is no evidence to support ATL's claim that the parties intended such a deviation from the plain language. Thus, ATL's interpretation does not "explain what the parties truly may have intended," but, instead, "contradicts or varies the meaning of the agreement" as it was written. *Taylor*, 175 Ariz. at 154, 854 P.2d at 1130.

¶12 "[O]ne cannot claim that one is 'interpreting' a written clause with extrinsic evidence if the resulting 'interpretation' unavoidably changes the meaning of the writing in the [document]." *Long*, 208 Ariz. 319, ¶ 34, 93 P.3d at 529; *see also Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) (words in contract given ordinary meaning unless circumstances show different meaning applies). The subcontract is thus not "reasonably susceptible" to ATL's interpretation,[5] and the trial court did not err in refusing to consider the parol evidence. Therefore, because there was no evidence before the court to support ATL's interpretation of the contract, there was

[5]ATL argues this interpretation renders its change to the contract "superfluous" and refers to what it calls a "cardinal rule of contract interpretation," that in interpreting a contract, a court must give all contract terms meaning. *Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, ¶ 11, 52 P.3d 786, 790 (App. 2002). But, even assuming this interpretation of the contract renders ATL's change to it superfluous, this "cardinal rule" is merely a "secondary rule of contract interpretation" and "is not a mandate to give . . . effect to a provision in a contract which clearly was not intended to have such an effect." *Kirkeby-Natus Corp. v. Kramlich*, 12 Ariz. App. 376, 382, 470 P.2d 696, 702 (1970).

no material question of fact as to the contract's meaning, and the court did not err in granting A & S's motion for summary judgment.

¶13 Each party has requested attorney fees pursuant to A.R.S. § 12-341.01, in the event it is the successful party on appeal. In our discretion, we grant A & S's request and award its reasonable attorney fees and costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 39, 119 P.3d 477, 485 (App. 2005).

Disposition

¶14 For the reasons set forth above, we affirm the trial court's summary judgment and award attorney fees and costs on appeal to A & S.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge