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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALICE PAPALIOLIOS, a single woman, Plaintiff/Appellant, v. MILLARD M. DAVIDSON and LINDA J. DAVIDSON, as trustees of the Millard M. and Linda J. Davidson Revocable Trust Agreement Dated August 9, 2003, Defendants/Appellees.	2 CA-CV 2010-0191 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20092670

Honorable Carmine Cornelio, Judge

AFFIRMED

Weeks Law Firm PLLC
By Stephen M. Weeks
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E C K E R S T R O M, Judge.

¶1 Following a bench trial, the court entered judgment allowing defendants/appellees Millard Davidson and Linda Davidson, trustees for the Millard M. and Linda J. Davidson Revocable Trust Agreement Dated August 9, 2003 (collectively "the Davidsons"), to continue using an easement passing over land owned by the plaintiff/appellant, Alice Papaliolios. On appeal, Papaliolios contends the easement should have terminated when the Davidsons refused to pay certain real property taxes or, alternatively, the easement was abandoned when the Davidsons "combined the benefited parcel with land prohibited from using the Easement in any way." She also challenges the trial court's denial of her request for attorney fees. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 "When reviewing issues decided following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010). Since 1988, Papaliolios has owned a parcel of land that contains a driveway and is encumbered by an appurtenant easement. The easement grants the dominant estate, parcel 9C, a non-exclusive right to utility access and ingress and egress over the driveway. The grant specifies that "th[e] easement shall be restricted to not more than two residences constructed or which may be constructed on" parcel 9C.

¶3 The grant requires, in § 1, that the dominant estate holder pay a proportionate share of the real estate taxes on the easement property.[1] A termination clause in § 2 serves to enforce this provision. By its terms, the easement will terminate if the servient estate holder makes a demand for reimbursement that is not satisfied within sixty days.[2] The grant similarly provides, in § 3, that the easement will terminate if the dominant estate holder refuses the servient estate holder's demand for reimbursement "for a reasonable proportionate share of road repair expenses."

¶4 The Davidsons acquired the property benefiting from the easement in 2005, along with two other contiguous parcels of land prohibited from using the easement. In

[1]The grant, which was originally executed by John and Patsy Haynes to Anson and Ruth Lisk, specifically provides:

> 1) All those entitled to use this easement shall reimburse [the Hayneses], their Personal representatives, successors and assigns, for the taxes paid each year on the above described parcel, known as Common Area D, in proportion to the number of ownerships entitled to use the same under this grant of easement. While [the Lisks] are the sole owners of the easement hereby granted, they shall reimburse [the Hayneses] for one-half of the taxes paid by Haynes, and thereafter, the first grantee of an easement from Lisk shall pay one-third of the annual real property taxes, along with Lisk and Haynes. The second (last) grantee of this easement from Lisk shall pay one-third of said taxes each year, along with Haynes and the said first grantee.

[2]The provision provides, in relevant part, as follows:

> 2) Should any owner entitled to use said easement fail to pay Haynes, their Personal representatives, successors or assigns, the proportionate share of said taxes within sixty (60) days after demand by Haynes, their Personal representatives[,] successors or assigns, the rights of such particular owner, and of those claiming under or through such owner, shall forthwith terminate . . . .

2007, the Davidsons combined these parcels for tax purposes then split them back into their original configurations.

¶5 Before 2009, Papaliolios had never sought reimbursement for taxes paid on the easement property or for road-related expenses, either from the Davidsons or their predecessors. On May 19 of that year, she sent a letter to the Davidsons demanding they pay half of all taxes she had paid on the driveway property from 2003 to 2008, along with approximately $14,000 for what she described as roadway maintenance and "court-related costs" during roughly the same period. The Davidsons calculated and paid half of the taxes on the easement property from and after 2005, the year they acquired parcel 9C, but not before. Thus, their $15.52 payment was $7.75 less than the $23.27 requested for taxes.

¶6 Papaliolios subsequently filed a complaint against the Davidsons seeking declaratory relief on a number of issues. Among the arguments in her complaint, she asserted the easement terminated due to the Davidsons' refusal to pay in full the money she had demanded in May 2009. She also maintained the easement was terminated by abandonment when the Davidsons combined their properties for tax purposes in 2007.

¶7 Because the parties did not timely request that the trial court make express factual findings and conclusions of law, it declined to provide a "complete and exhaustive" explanation for its ruling. The court found, however, that Papaliolios had waived her right to reimbursement by her delayed request and that she had demanded repayment in bad faith. The court also ruled that "the Easement is not terminated by virtue of the legal doctrines of abandonment or merger as a result of [the Davidson]s'

application for and approval by the Pima County Tax Assessor to 'combine' three contiguous parcels, including the Dominant Tenement, for tax purposes." The court denied Papaliolios's request for attorney fees and entered judgment declaring the easement still in effect. Although the judgment addressed other issues, Papaliolios challenges it on appeal only to the extent it denied her fee request and found no termination based on an abandonment theory or the failure to reimburse her for taxes.

Discussion

Taxes

¶8 Papaliolios first contends "[t]he Easement terminated when the Davidsons refused to pay all real property taxes owing on the easement within 60 days of [her] demand." Although she claims this argument presents a "straightforward legal issue that can dispose of this case," we disagree with her interpretation of the grant and the conclusions she draws from it.

¶9 "On appeal from a judgment of a court sitting without a jury and not required to make findings of fact and conclusions of law, all reasonable inferences must be taken in favor of appellee, and if there is any evidence to support the judgment it must be affirmed." *Balon v. Hotel & Rest. Supplies, Inc.*, 103 Ariz. 474, 477, 445 P.2d 833, 836 (1968). An easement grant, like a contract, is interpreted so as to discern and effectuate the intent of the parties executing it. *See Powell v. Washburn*, 211 Ariz. 553, ¶ 13, 125 P.3d 373, 376-77 (2006); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). A court ascertains this intent by examining "'the language used in the instrument, or the circumstances surrounding creation of the

servitude,'" and interprets the servitude "'to carry out the purpose for which it was created.'" *Powell*, 211 Ariz. 553, ¶ 13, 125 P.3d at 377, *quoting* Restatement (Third) of Property (Servitudes) § 4.1(1) (2000). The interpretation of an instrument creating an easement is generally a matter of law subject to de novo review. *Id.* ¶ 8; *Freeman v. Sorchych*, 226 Ariz. 242, n.7, 245 P.3d 927, 930 n.7 (App. 2011). If the instrument is reasonably susceptible to multiple interpretations, however, the parties' intended meaning is a question to be resolved by the trier of fact. *See State v. Mabery Ranch Co.*, 216 Ariz. 233, ¶ 28, 165 P.3d 211, 219 (App. 2007).

¶10 Here, § 1 of the easement grant provides that its beneficiaries "shall reimburse" the servient estate holder for a portion of "the taxes paid each year," and it further provides that certain future beneficiaries "shall pay . . . said taxes each year." Contrary to Papaliolios's interpretation of the grant, it does not create a liability for easement beneficiaries that is entirely contingent upon her making a demand. Rather, the grant creates an annual obligation to pay and leaves unspecified a definite date on which repayment is due. Enforcement of this right to reimbursement, of course, is discretionary pursuant to § 2 of the grant. Termination of the easement likewise depends on a demand for reimbursement being made and unmet. But the contingent nature of the easement's termination clause does not alter the mandatory language of the reimbursement clause.

¶11 "Implied terms of a contract are just as much a part thereof as express ones," *Ariz. Land Title & Trust Co. v. Safeway Stores, Inc.*, 6 Ariz. App. 52, 59, 429 P.2d 686, 693 (1967), and "[i]t is a fundamental principle of contract law that where no time is specified for performance, a reasonable time is implied." *Dutch Inns of Am., Inc. v.*

Horizon Corp., 18 Ariz. App. 116, 119, 500 P.2d 901, 904 (1972); *see also* 17A Am. Jur. 2d *Contracts* § 481 (2011) (absent definite term in contract, money owed must be paid immediately or within reasonable period of time). "What constitutes a reasonable time is ordinarily a question of fact." *Dutch Inns of Am.*, 18 Ariz. App. at 119, 500 P.2d at 904. A contractual right is waived if a party intentionally relinquishes it. *Ariz. Land Title & Trust Co.*, 6 Ariz. App. at 59, 429 P.2d at 693. "In the absence of an express waiver, the intent to relinquish a right may be implied from the circumstances." *College Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, ¶ 22, 241 P.3d 897, 903 (App. 2010).

¶12 Here, the taxes incurred on the easement property were "nominal" or "just a few dollars that everybody knew would only be a few dollars," as Papaliolios described them. For over two decades, she never requested reimbursement for the taxes she paid on the property, either from the Davidsons or their predecessors, until she sent the Davidsons her demand letter in May 2009. The trial court found Papaliolios "never intended on collecting or demanding the amounts for taxes . . . until a dispute with the D[avidsons] arose unrelated to taxes." Under the circumstances, therefore, the court reasonably could have concluded Papaliolios had waived her right to reimbursement for the "trivial[]" amounts owed for the years 2003 and 2004 by not requesting reimbursement either when these taxes were paid or within a reasonable time thereafter. And this conclusion, in turn, would support the court's determination that the easement did not terminate due to the Davidsons' refusal to pay the amount requested.

¶13 Papaliolios nevertheless argues "[w]aiver is inapplicable." In her opening brief, she presumes that the grant implicitly incorporated A.R.S. § 12-548, Arizona's statute of limitations for debts based on written contracts.[3] She also presumes that "the Easement requires the benefited parcel and the servient parcel to proportionately split the real property taxes for the underlying servient land, if, and only if, the owner of the servient p[rope]rty makes a demand for the taxes." From these premises she concludes there could be no waiver because she could exercise her right to reimbursement "as she saw fit" "for the full statutory timeframe."

¶14 As discussed above, however, the requirement to pay was not conditioned upon a demand for repayment. While it is true, as Papaliolios asserts, that nothing in the easement grant required her to request payment on an annual basis, the requirement that any demand for repayment be timely was nonetheless an implied term of the grant. Furthermore, her reliance on § 12-548 is misplaced because that statute did not define the meaning of the grant.

¶15 Section 12-548 provides a six-year limitations period on an action for a debt that is based on a written contract. We have long recognized that a statute of limitations "affects the remedy and not the right." *Provident Mut. Bldg.-Loan Ass'n v. Schwertner*, 15 Ariz. 517, 518, 140 P. 495, 496 (1914). With the lapse of the statutory period, a "debt is not extinguished; rather, the remedy for an action on the debt is merely barred." *De Anza Land & Leisure Corp. v. Raineri*, 137 Ariz. 262, 266, 669 P.2d 1339,

[3]Although Papaliolios cited and referred to § 12-548 several times in her opening brief, she neglected to list the statute in her table of citations as required by Rule 13(a)(2), Ariz. R. Civ. App. P.

1343 (App. 1983). Accordingly, our statute of limitations did not define, modify, or limit the debts that easement beneficiaries owed pursuant to the grant; it simply barred a person such as Papaliolios from bringing an action based on any debt created by this instrument after the statutory period had run. The mere existence of the statute of limitations, in other words, did not mean that a demand for payment within six years after the debt was incurred was timely or reasonable. *Cf. In re Estate of Musgrove*, 144 Ariz. 168, 170, 171, 696 P.2d 720, 722, 723 (App. 1985) (refusing to interpret oral contract as one for long-term repayment of debt when "[t]here was no evidence that at the time the agreement was made . . . the parties agreed to postpone repayment until long into the future").

¶16 Papaliolios's arguments emphasizing the appurtenant, defeasible nature of the easement and the fact that the reimbursement obligation "run[s] with the land" likewise fail to establish that the trial court erred in its ruling. As demonstrated by § 1 of the grant, the burden running with the land that is placed upon dominant estate holders is not an obligation to provide reimbursement for all taxes unpaid by their predecessors. Instead, it is a burden to annually pay a share of the taxes on the easement property.

¶17 Here, to the extent interpretation of the grant presented a factual question about the parties' intentions, the trial court reasonably rejected Papaliolios's theory that she could request reimbursement for all taxes paid within the past six years. Her demand was not, as a matter of law, timely under the terms of the grant, and the court's implicit determination that her demand for reimbursement was untimely and unreasonably delayed was supported by the record. We therefore have no basis to disturb the court's

ruling that the easement did not terminate by the Davidsons' refusal to pay a portion of the taxes requested.

Abandonment

¶18 Papaliolios next argues the trial court erred in determining the easement was not abandoned, because "[t]he Davidsons . . . merged Parcel 9(C) with two parcels prohibited from using the Easement." "Abandonment involves an intention to abandon, together with an act or an omission to act by which such intention is apparently carried into effect." *City of Tucson v. Koerber*, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957). In other words, "[a]bandonment is a matter of intention to be ascertained from the facts and circumstances which surround the transaction from which abandonment is claimed." *Kolberg v. McKean's Model Laundry & Dry Cleaning Co.*, 9 Ariz. App. 549, 550, 454 P.2d 867, 868 (1969). "Whether there has been an abandonment is a question of fact and what constitutes an abandonment is a question of law." *Id.*

¶19 At trial, Millard Davidson testified as follows:

> Q: Okay. So you learned at the beginning of January 2007 that you could reduce your tax burden by combining Parcels 9C, 11K and 10 into one parcel, correct?
>
> A: Yes.
>
> . . . .
>
> Q: By seeking combined tax treatment, did you in any way intend to abandon the easement?
>
> A: Absolutely not.

> Q: Did it have anything to do with the easement whatsoever?
>
> A: No.

¶20 During summation, the trial court inquired whether the document that was submitted to the tax assessor's office in order to combine the parcels was admitted as an exhibit. Papaliolios replied it had not been. The court then observed:

> . . . I'm very familiar with and have done documents for tax assessment purposes where we—where the lots have been combined. And it doesn't change the legal description, it doesn't change the ownership of the property, and it is something that owners will do and the tax assessor likes, simplicity of record keeping, lowering of taxes, et cetera. It doesn't create a new lot. It creates a new tax code parcel.

Although Papaliolios went on to argue that creating a new tax code parcel demonstrated an intention not to develop the dominant estate and to abandon the easement, the court rejected this argument, finding Davidson's action merely represented "[h]is intent . . . to lower his taxes."

¶21 To the extent the trial court's ruling on abandonment hinged on factual findings, we defer to those findings, as they are amply supported by the record. *See Inch v. McPherson*, 176 Ariz. 132, 135, 859 P.2d 755, 758 (App. 1992). And, to the extent Papaliolios claims the combination of parcels for tax purposes constituted abandonment of the easement as a matter of law, she has failed to legally support this argument and demonstrate she is entitled to relief on this ground. *See Guirey, Srnka & Arnold, Architects v. City of Phoenix*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969) (appellant

carries burden to show trial court erred). We therefore find no basis to disturb the court's ruling.

Attorney Fees

¶22 In her opening brief, Papaliolios states she "appeals from the denial of attorney's fees at the trial level" and "requests [that] this court enter an order requiring the trial court to determine and decree that [she] is the prevailing party entitled to attorney's fees at the trial level." It is unclear if this request depends upon her success on another issue raised in her appellate brief, or if instead, it represents an independent assignment of error. We think it more likely the former, given that the conclusory argument she offers is found only in the sections of her brief providing a statement of the case and a request for relief.

¶23 If Papaliolios intended to independently challenge the trial court's denial of her fee request, however, she has not properly identified this as an issue for review pursuant to Rule 13(a)(5), Ariz. R. Civ. App. P., and she has failed to develop and support an argument in the body of her opening brief challenging the court's ruling as required by Rule 13(a)(6). The issue is therefore waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶¶ 61-62, 211 P.3d 1272, 1289 (App. 2009); *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000). And because she has not otherwise prevailed on appeal, we deny her request.

Disposition

¶24 For the foregoing reasons, we affirm the trial court's judgment. We deny Papaliolios's request for attorney fees on appeal but grant the Davidsons' request for

appellate attorney fees and costs, subject to their compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge