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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

REA CONSTRUCTION, INC., an Arizona corporation, Appellant, v. J.W. FUNERAL SERVICES, L.L.C., an Arizona limited liability company, Appellee.	2 CA-CV 2010-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200401032

Honorable Peter J. Cahill, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

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B R A M M E R, Presiding Judge.

¶1 REA Construction, Inc. (REA) appeals from the portion of the judgment in favor of appellee, J.W. Funeral Services, L.L.C. (JWFS), in their contract dispute. REA argues the trial court erred by refusing its request for prejudgment interest on a portion of its damages award, by miscalculating the amount of prejudgment interest due on the remainder of the award, and by determining JWFS was the prevailing party entitled to its attorney fees pursuant to the parties' contract. REA additionally asserts the court erred by denying its motion for a new trial, in which it argued the evidence did not support the court's conclusion that a $22,000 check from JWFS to REA was partial payment of monies owed under the contract, and that one of JWFS's witnesses had given false testimony. We affirm the court's denial of REA's motion for a new trial, but vacate the judgment and remand the case to the trial court to award REA interest owed under the contract and to reconsider its attorney fees award.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). In May 2003, the parties entered into a contract for REA to construct a new mortuary and chapel for JWFS in Casa Grande. The work was completed in June 2004. REA performed additional work not called for in the original contract pursuant to changes allegedly requested by JWFS.

¶3 Around the time the project was completed, REA presented JWFS with invoices for work performed for which it had not yet been paid. REA sent a demand letter to JWFS in July 2004, but JWFS disputed many of the invoices, asserting there

were no signed change orders for the work performed. When the invoices remained unpaid, REA sued JWFS in September 2004, asserting claims of breach of contract and unjust enrichment, and requesting judgment for $113,810.34, together with interest "at the rate of 1 ½ % per month" from the date of the last invoice until the date of entry of judgment. JWFS counterclaimed, asserting REA had breached the contract by "fail[ing] to construct the improvements in a good and workmanlike manner." In 2007, JWFS paid REA $26,086.03 of the amount REA claimed.

¶4 After a four-day bench trial in 2009, the trial court determined JWFS owed REA for some or all of the amounts stated in twelve of the fourteen disputed invoices. The court found the remaining two invoices were "contrived by REA to justify its . . . inflated claims that [JWFS] owed a lot of money upon completion of the Casa Grande Mortuary," and that a $22,000 check JWFS had sent REA "should have been credited" to JWFS as a payment on the mortuary project, rather than a separate project REA had undertaken with JWFS. The court awarded REA $56,056.48 and prejudgment interest totaling $194.97 on the amount of one invoice, # 2857, for which JWFS had agreed it was liable. As to JWFS's defective workmanship claims, the court found REA was responsible for some, but not all, of the faulty construction and awarded JWFS $18,096.33. The court then determined JWFS was the prevailing party, and, pursuant to the parties' contract, awarded it seventy-five percent of its requested attorney fees, or $84,085.38. The court also denied REA's motion for a new trial regarding the $22,000 check. The court entered judgment in favor of JWFS for $45,930.26 and this appeal followed.

Discussion

Prejudgment Interest

¶5 REA first asserts that, pursuant to the parties' contract, it is entitled to prejudgment interest on the amount awarded it, as well as interest on sums paid by JWFS after REA made its demand for payment. We review the interpretation of a contract de novo. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, ¶ 17, 226 P.3d 411, 415 (App. 2010). The contract states that "Any sums not paid when due by [JWFS] to [REA] will bear interest at the rate of 1½ % per month until paid." The trial court rejected the bulk of REA's claim for prejudgment interest, stating that "the sum of invoices *owed* by [JWFS] was not calculable" and therefore "everything needed to be considered in context with all of the other facts before it could be decided what invoices were actually owed." The court noted, however, that because JWFS had agreed it was liable for the amount due under Invoice # 2857, it would award prejudgment interest on the amount owed under that invoice.

¶6 In Arizona, a party is entitled to prejudgment interest on liquidated damages but not unliquidated damages. *See Patterson v. Bianco*, 167 Ariz. 249, 253, 805 P.2d 1070, 1074 (App. 1991). "'A claim is liquidated if evidence furnishes the data which if believed makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.'" *Id.*, *quoting Ariz. Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 496, 484 P.2d 639, 649 (1971). The parties' contract, however, does not make that distinction. It states only that JWFS would owe interest on any sum not paid "when due." *See Mining Inv. Group, LLC v. Roberts*, 217

Ariz. 635, ¶ 16, 177 P.3d 1207, 1211 (App. 2008) (court will give effect to "clear and unambiguous" contract terms). Thus, the trial court's characterization of the amounts owed as unliquidated has no bearing on whether REA was entitled to interest on any sums found to be due and unpaid under the contract. *Cf. Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) (contract terms control over common law rule prejudgment interest not compounded).

¶7 JWFS asserts, however, that it owes no interest under the contract because REA materially had breached it. *See Zancanaro v. Cross*, 85 Ariz. 394, 399, 339 P.2d 746, 749 (1959) ("One of the remedies available at common law upon a material breach of contract is the right to cease performance and recover the profits which would have been made had the entire contract been performed."). But the trial court's ruling was not based on a finding that REA's defective workmanship constituted a material breach of the contract, nor can any part of the court's ruling reasonably be interpreted as making that finding. Whether a breach of a contract is material is typically a question of fact. *See Found. Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990) (describing factors to be considered by trier of fact in "determining the triviality or immateriality of a breach"). Because the court made no such finding here, JWFS's argument is unavailing.

¶8 JWFS additionally contends "REA is not entitled to invoke the interest clause in the construction contract" because its claims "were based upon unilateral change orders and invoices, rather than the parties' contract." Thus, JWFS reasons, REA's claims "constituted a claim on an open account," not a claim for breach of

contract. But, again, the trial court did not find that REA's claims were not based on the parties' contract. Indeed, it specifically found JWFS had abandoned its "open account" argument and that "[o]ral authorizations for extra work beyond the scope of the contract waived a contract provision requiring that change-orders . . . be in writing." JWFS does not contest this finding.[1] Thus, the court plainly found the change orders to be part of the contract. Pursuant to that contract, REA therefore is entitled to interest on the amounts owed by JWFS.

¶9 REA also argues the trial court incorrectly calculated the interest due for Invoice #2857 from the date of its order awarding that interest, rather than the date of REA's 2004 demand for payment from JWFS. In a related argument, REA asserts the court should have awarded it interest on the $26,863.03 payment JWFS made before trial. JWFS does not respond to these arguments. We find no basis in the record to support the court's decision to calculate interest owed only from the date of its order, nor for its decision to exclude the $26,863.03 payment—an amount JWFS agreed it owed—from its interest calculation. We therefore vacate the judgment and remand the case to the trial court to calculate interest on the sums owed REA, from the date those sums were due to be paid by JWFS.

[1]Although JWFS asserted its "open account" theory precluded REA from recovering damages for the unpaid invoices, a claim the trial court necessarily rejected, it did not contend that theory precluded REA from being awarded interest owed on those invoices.

Attorney Fees

¶10 REA asserts the trial court erred in determining JWFS was the prevailing party under their contract and therefore entitled to be awarded its attorney fees and costs. Although the contract states "the prevailing party" is entitled to recover reasonable attorney fees and costs in any action to enforce the contract, it does not define the term "prevailing party." After evaluating the totality of the circumstances, the trial court concluded JWFS was the prevailing party because, inter alia, "REA's decisions on how and when to bill were largely responsible for this dispute" and "the cost of its business practices ought not to be borne by [JWFS]." The court found REA had failed to account properly for money JWFS had paid and had failed to document change orders properly, and that "REA's invoicing methods . . . resulted in delayed submission of some billings and insufficient documentation on other billings." The court also found JWFS had prevailed because REA was not entitled to the entire $88,000 it had demanded at trial and that REA had "contrived or manufactured billing documentation as part of an attempt to inflate the amount that [JWFS] owed at the completion of the Mortuary project." Thus, the court awarded JWFS seventy-five percent of the attorney fees it had requested and all of its costs and expenses, a total of $84,085.38.

¶11 REA contends that, because it "was awarded more than [JWFS]," it is the prevailing party and therefore is entitled to an award of its attorney fees. Relying on *Trollope v. Koerner*, 21 Ariz. App. 43, 515 P.2d 340 (1973), and *Ocean West Contractors v. Halec Construction Co.*, 123 Ariz. 470, 600 P.2d 1102 (1979), REA asserts the trial court should have applied the "net judgment rule," which, as described in

Trollope, permits a court to determine the prevailing party by comparing any amount awarded to any setoff or amount awarded in a counterclaim. 21 Ariz. App. at 47, 515 P.2d at 344. But neither case holds that the net judgment rule is the only method by which a court may determine which party has prevailed. Indeed, our supreme court in *Ocean West* observed that, although "the award of money is . . . an important item to consider in deciding who . . . did prevail," "[t]he party who is awarded a money judgment in a lawsuit is not always the successful or prevailing party." 123 Ariz. at 473, 600 P.2d at 1105.

¶12 Because the contract does not define the term "prevailing party," we can draw guidance from our caselaw addressing the definition of the term "successful party" in A.R.S. §§ 12-341 and 12-341.01. When applying those statutes, "[t]he trial court possesses discretion to determine who is the successful party in multiple-party litigation and in cases where there are multiple[ ]parties as well as multiple[ ]claims." *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990). To that end, and depending on the circumstances, it may apply a net judgment determination, as in *Trollope*, or it may evaluate the parties' respective percentage of success, or consider the totality of the litigation. *See id.* REA asserts, however, that the court erred by applying a totality-of-the-circumstances analysis here because both parties sought only monetary relief. But it cites no authority, nor have we found any, supporting the proposition that an analysis based on the totality of the circumstances may only be employed when the parties have sought nonmonetary relief. Indeed, in *Schwartz*, Division One of this court approved the trial court's use of that analysis when the plaintiff had not prevailed in its

claim for punitive damages, despite the fact the plaintiff had obtained a money judgment. 166 Ariz. at 38-39, 800 P.2d at 25-26. As long as the factors relied upon by the trial court are supported by the record and relevant to a determination of which party is the more successful, we will not find an abuse of the court's discretion. *See id*. at 38, 800 P.2d at 25 (describing several methods by which court can determine successful party). A trial court is in the best position to evaluate the positions taken by the parties during litigation and, based on that evaluation, determine which party has prevailed in the litigation as a whole.

¶13 REA argues the trial court nonetheless relied on improper factors in determining JWFS was the prevailing party by considering the following factors identified in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985): the merits of the unsuccessful party's claim or defense; whether the litigation could have been avoided or settled; whether "the successful party's efforts were completely superfluous in achieving the result"; whether assessing fees would cause "extreme hardship" to the unsuccessful party; whether the successful party prevailed "with respect to all of the relief sought"; "the novelty of the legal question presented"; "whether such claim or defense had previously been adjudicated in this jurisdiction"; and whether the award "would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees."

¶14 Those factors generally "are not a guide for deciding who is the prevailing party but rather are intended 'to assist the trial judge in determining whether attorney's

fees should be granted . . . *once eligibility has been established.*'" *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994), *quoting Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 394, 710 P.2d 1025, 1049 (1985) (alteration and emphasis in *Sanborn*). But the factors are not necessarily irrelevant to the determination of which is the successful party. For example, whether a party prevailed with respect to all or only some of its claims is germane to the determination of whether that party was, in fact, the more successful party. Thus, in deciding which is the prevailing party, the trial court properly relied on its finding that REA had inflated the value of its claims and the relative success of the parties in light of the relief sought. We agree with REA, however, that other factors the court relied on were not appropriate, such as whether the litigation could have been avoided or whether REA's billing practices contributed to the scope of the litigation. Those factors might be relevant to an evaluation of the reasonableness of the amount of attorney fees requested, although not which party was successful. *See Leveraged Land Co. v. Hodges*, 224 Ariz. 442, ¶ 31, 232 P.3d 756, 765 (App. 2010) (determination of reasonable attorney fee includes consideration of "reasonableness of the positions advanced [by the prevailing party] throughout the case").

¶15 Because we vacate the judgment and remand this matter to the trial court with directions to award REA any interest it is owed, and because it is unclear what weight the court might have given inappropriate factors in determining which party prevailed, we also vacate the award of attorney fees in favor of JWFS. We reject REA's

argument, however, that it is the prevailing party as a matter of law. Instead, we instruct the trial court to reconsider the attorney fee award consistent with this decision.

Motion for New Trial

¶16 REA asserts the trial court erred by denying its motion for a new trial, arguing the evidence did not support the court's finding that a $22,000 check JWFS had issued to REA was payment for the Mortuary project and not, as REA contended, payment for a separate project. REA also contends the court erred in rejecting its claim that additional evidence submitted with its new trial motion demonstrated the testimony of one of JWFS's witnesses had been false, thereby entitling it to a new trial pursuant to Rule 59(a)(1) and (2), Ariz. R. Civ. P. We review for an abuse of discretion a court's denial of a motion for a new trial. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007).

¶17 One of JWFS's owners, Janet Warren, testified the $22,000 payment it made to REA was a down payment for the mortuary project. REA asserts the testimony of its "principal," Robert Atchen, and other evidence establishes her testimony was incorrect. Atchen testified the $22,000 payment was instead for a separate project, which consisted of repairing and rebuilding another JWFS facility following a fire. REA also identifies testimony and several trial exhibits that it asserts show the $22,000 payment is not reflected in any documents related to the mortuary project, that Warren never asked Atchen why those documents did not reflect the payment and acknowledged there was no documentation tying that payment to the mortuary project, and that JWFS would have

paid approximately $23,000 less than the cost of the separate project if the $22,000 check were not applied to it.

¶18 The court found Warren's testimony credible, determined the $22,000 payment was for the mortuary project, and reiterated that finding in its order denying REA's motion for new trial. None of the evidence REA identifies necessarily renders the court's conclusion incorrect; it does nothing more than create a reasonable conflict in the evidence. We will not disturb on appeal the trial court's resolution of that conflict. *See Moreno v. Jones*, 213 Ariz. 94, ¶ 20, 139 P.3d 612, 616 (2006) ("We uphold a trial court's findings of fact unless clearly erroneous as not either 'supported by reasonable evidence or based on a reasonable conflict of evidence.'"), *quoting O'Hern v. Bowling*, 109 Ariz. 90, 93, 505 P.2d 550, 553 (1973). We will not reweigh the evidence and "must give due regard to the trial court's opportunity to judge the credibility of the witnesses." *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, ¶ 41, 114 P.3d 835, 843 (App. 2005). Viewed through that deferential lens, we have no basis to disturb the court's finding that Warren's testimony was credible.

¶19 REA contends, however, that materials it had attached to its motion for new trial established Warren had committed perjury. The materials included an affidavit by David Ponder, the insurance adjuster who dealt with JWFS regarding the repair of its other facility, and related, supporting documentation. REA contends that evidence suggests Warner had sent to Ponder by facsimile certain documents she previously had denied seeing, and that the insurance payments for repairs to the other facility were more

consistent with REA's position that the $22,000 check was payment for that project rather than the mortuary project.

¶20 The trial court rejected REA's argument, finding the affidavit and the supporting documents did not constitute newly discovered evidence, and that REA had failed to demonstrate "perjury." REA asserts on appeal that the court abused its discretion by considering its motion as based on newly discovered evidence under Rule 59(a)(4) when their motion requested relief pursuant to Rule 59(a)(1), "[i]rregularity in the proceedings of the . . . prevailing party," and Rule 59(a)(2), "[m]isconduct of the . . . prevailing party." *See Althaus v. Cornelio*, 203 Ariz. 597, ¶ 4, 58 P.3d 973, 974 (App. 2002) (court abuses discretion by committing error of law).

¶21 We agree with REA that a party may, in certain circumstances, present evidence to demonstrate a claim of misconduct or irregularity. *See Perez v. Cmty. Hosp. of Chandler, Inc.*, 187 Ariz. 355, 358-59, 929 P.2d 1303, 1306-07 (1997) (juror affidavits and testimony to demonstrate alleged misconduct by bailiff); *Quila v. Schafer's Estate*, 7 Ariz. App. 301, 302-03, 438 P.2d 770, 771-72 (1968) ("depositions and affidavits of certain individuals . . . concern[ing] the activities and conduct of" witness accused of giving false testimony). But a trial court may only grant a motion for a new trial based on new evidence if that evidence was "in existence at the time of the judgment" but "could not have been discovered before the granting of judgment despite the exercise of due diligence" and "would probably change the result of the litigation." *Boatman v. Samaritan Health Servs.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990); *see* Ariz. R. Civ. P. 59(a)(4). A party may not circumvent this rule by characterizing a new trial

motion based on evidence not presented at trial as seeking relief under some provision of Rule 59(a) other than Rule 59(a)(4).

¶22 The cases REA cites do not suggest otherwise. The relevant evidence in *Perez* was juror affidavits and testimony demonstrating misconduct by the bailiff during trial; our supreme court noted that evidence had not been available to the moving party until after judgment had been entered. 187 Ariz. at 357-58, 929 P.2d at 1305-06. The appellate court in *Quila* did not address whether the evidence submitted in support of the new trial motion could have been discovered before the judgment, but nothing in that case suggests either party had raised that issue. *See* 7 Ariz. App. at 302-03, 438 P.2d at 771-72. Nothing in the record here suggests REA could not have obtained the additional evidence before trial, and REA does not argue otherwise. The trial court therefore did not err in rejecting REA's new trial motion on that basis.

¶23 In any event, REA overlooks that the trial court expressly rejected its argument that the additional evidence established Warren's testimony was perjured. Although the submitted evidence appears to contradict Warren's testimony, it did not establish Warren's testimony was false, much less that Warren knew her testimony was false. *See* A.R.S. § 13-2702(A)(1) (person commits perjury by making "[a] false sworn statement in regard to a material issue, believing it to be false"); *see Quila*, 7 Ariz. App. at 303, 438 P.2d at 772 ("[A] new trial may be granted when it is shown that a witness wilfully testified falsely to a material fact."). For these reasons, we cannot say the trial court abused its discretion in denying REA's new trial motion.

Disposition

¶24 We affirm the trial court's denial of REA's motion for a new trial. We vacate the judgment, however, and return the matter to the trial court to calculate and award any interest applicable to the amounts JWFS owed under the contract, and for the court to reconsider the attorney fee award. Both parties request attorney fees on appeal pursuant to the contract. We find that neither party has prevailed in this appeal and therefore deny their requests for attorney fees.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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