2017 WL 4614724
Only the Westlaw citation is currently available.
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NOT FOR PUBLICATION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).
Court of Appeals of Arizona,
Division 2.

JENNIFER LAKOSKY AND CORY LAKOSKY, WIFE AND HUSBAND,
Plaintiffs/Appellants/Cross-Appellees,
v.
THE SOLAR STORE, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Defendant/Appellee/Cross-Appellant,

No. 2 CA-CV 2016-0216
|
Filed October 16, 2017

Appeal from the Superior Court in Pima County
No. C20152294
The Honorable Leslie Miller, Judge
AFFIRMED

Attorneys and Law Firms

COUNSEL Weeks Law Firm, PLLC, Tucson, By Stephen M. Weeks, Counsel for Plaintiffs/Appellants/Cross-Appellees

Durazzo, Eckel & Hawkins, P.C., Tucson, By Eric Hawkins, Counsel for Defendant/Appellee/Cross-Appellant

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Howard [1] concurred.

MEMORANDUM DECISION

STARING, Presiding Judge:

*1 ¶1 Cory and Jennifer Lakosky appeal from a judgment entered on a jury verdict against The Solar Store, LLC, ("Solar Store") for breach of contract, claiming the trial court erred by reducing the amount of their award of attorney fees. In its cross-appeal, Solar Store challenges the jury verdict and resulting judgment, arguing there was no evidence of breach of contract and "no factual or legal basis" for the damages awarded. Finding no error entitling any party to relief, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury verdict. *S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 3, 31 P.3d 123, 126 (App. 2001). In September 2014, the Lakoskys contacted Solar Store and inquired about purchasing a solar energy system for their home. A Solar Store representative, Kevin Krause, visited their home to discuss various options. The Lakoskys explained to Krause that, due to a recent accident resulting in serious permanent injuries to Cory, their income had substantially decreased, and they were looking into solar energy as an additional way to decrease expenses. When the Lakoskys mentioned they had contacted other solar companies, Krause recommended they cancel any appointments they had made, because "with all the tax credits available[, a Solar Store system] would benefit [them] more financially."

¶3 The Lakoskys entered two contracts with Solar Store, one for a solar electricity system, and the second for a solar water heater. Each contract contains a line-by-line breakdown of the costs associated with purchasing the respective systems. This breakdown starts with the total cost of the system and installation, and subtracts from that number assigned utility incentives, and federal and state tax credits, leaving a final figure labeled as the "Net Out of Pocket" cost to the consumer. Krause added a hand-written line to the contract for the solar energy system, stating that, under the then current electricity rates, the Lakoskys would have a full return on their investment in twelve years. Both contracts also include a "Projected Project Time Line," which approximates the amount of

time from the signing of the contract until the receipt of the specified benefits. The time lines include permit approval, installation, inspection, and receipt of utility rebates, but do not include a timetable for reimbursement through tax credits. Neither contract states that the extent of any tax benefit is to be determined based on a person's income. The Lakoskys asked Krause whether they would get the full amount of the tax credits as a refund in the next tax year, and he assured them they would. Both systems were properly installed and remain in good working order.

¶4 When the Lakoskys consulted their tax preparer later in 2014, they were informed that they would not be receiving the $18,924 refund they had expected from the tax credits, but rather $0 from their federal filing, and $41 in Arizona solar tax credits. On their 2015 filings, the Lakoskys received only $528 in federal solar tax credits and $223 in state tax credits.

*2 ¶5 The Lakoskys sued Solar Store for breach of both contracts and negligent misrepresentation. They alleged they were entitled to either rescission or approximately $18,000 in damages as a remedy. The case was not subject to compulsory arbitration due to the assertion of a claim for rescission. *See* Ariz. R. Civ. P. 72(b)(1)(A).[2] Early in the litigation, the trial court granted summary judgment in favor of Solar Store on the negligent misrepresentation claim. Solar Store subsequently filed a motion in limine, seeking to preclude the Lakoskys from claiming rescission as a remedy. The court denied that motion.

¶6 At trial, the Lakoskys argued that in light of the difference between the actual cost of the systems and the promised "Net Out of Pocket" costs, Solar Store had breached the contracts. Solar Store argued there had been no breach because the Lakoskys had received the tax credits they had been promised and, regardless of whether they were able to use the credits, they had received all the benefits promised in the contracts. Additionally, Solar Store argued that awarding the Lakoskys any damages could result in a double recovery because they may be able to utilize the tax credits in the future.

¶7 After the close of evidence, the Lakoskys elected the remedy of damages rather than rescission. The jury returned a verdict in favor of the Lakoskys for $14,000, and both sides filed motions seeking attorney fees and costs.[3] The trial court ruled in favor of the Lakoskys on the issue of attorney fees, but reduced their award from the $20,739.45 they had requested to $4,602.95 because of "the claim for rescission, motions in limine and jury instructions on which [the Lakoskys] did not prevail."

¶8 This appeal and cross-appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Cross-Appeal

¶9 Because Solar Store challenges the sufficiency of the evidence to support the jury's verdict and award of damages, arguing there was no evidence of breach of contract and "no factual or legal basis" for the damages awarded, we address the cross-appeal first. Appellate jurisdiction is limited by statute, and we independently review whether we have jurisdiction to address an issue. *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶ 6, 254 P.3d 418, 421 (App. 2011). Section 12-2102, A.R.S., generally specifies an appellate court's scope of review on appeal. *Id.* And, specifically, § 12-2102(C) provides that a reviewing court "shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made." *See also Marquette Venture*, 227 Ariz. 179, ¶ 7, 254 P.3d at 421. Solar Store neither challenged the sufficiency of the evidence in a motion for a new trial under Rule 59(a), Ariz. R. Civ. P., nor in a motion for judgment as a matter of law under Rule 50(b), Ariz. R. Civ. P.[4] *Id.* ¶ 9 (Rule 50(b) motion satisfies requirement of § 12-2102(C)). Thus, the cross-appeal is not properly before us, and we do not consider it.[5]

Appeal

*3 ¶10 The Lakoskys argue the trial court improperly reduced the amount of attorney fees they had requested. We review an award of attorney fees for an abuse of discretion. *Motzer v. Escalante*, 228 Ariz. 295, ¶ 4, 265 P.3d 1094, 1095 (App. 2011).

¶11 "[R]easonable attorney fees" may be awarded to "the successful party" in an action arising out of contract. A.R.S. § 12-341.01. The trial court has substantial discretion in identifying the prevailing party. *See Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 12, 369 P.3d 600, 603 (2017). When the contract contains no clause regarding attorney fees "there is no presumption that a successful party should be awarded attorney fees under § 12-341.01." *Motzer*, 228 Ariz. 295, ¶ 5, 265 P.3d at 1095. Rather, in deciding whether and to what extent to grant attorney fees, the trial court has "broad discretion to consider a variety of factors ... including the merits of the defense by the unsuccessful party, whether the parties could have settled, whether the successful party prevailed as to all relief and whether awarding attorney fees would 'discourage other parties with tenable claims.' " *Id., quoting Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985). And, "[w]e will uphold the court's ruling if there is 'any reasonable basis for the decision.' " *Id., quoting State Farm Mut. Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, ¶ 27, 963 P.2d 334, 340 (App. 1998).

¶12 Here, the trial court stated it had considered "the totality of the litigation," including the summary judgment against the Lakoskys on their negligent misrepresentation claim, "motions in limine and jury instructions on which [the Lakoskys] did not prevail," and the fact that absent the Lakoskys' claim for rescission, which they withdrew at the end of the trial "to avoid an adverse ruling," "the matter would have been subject to [compulsory] arbitration." Thus, we conclude the court had a reasonable basis for its determination of whether to award attorney fees and in what amount. *See State Farm Mut. Auto. Ins. Co.*, 192 Ariz. 255, ¶ 27, 963 P.2d at 340.

Attorney Fees on Appeal

¶13 Both parties request attorney fees incurred on appeal pursuant to § 12-341.01 and Rule 21, Ariz. R. Civ. App. P. In our discretion, including because neither side wholly prevailed on appeal, we deny both requests. Similarly, we decline to award costs on appeal. *See Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 585, 606 P.2d 421, 436 (App. 1979) (where neither party wholly prevailed, nor asked for apportionment of costs, court did not err in denying costs to both sides).

Disposition

¶14 For the foregoing reasons, we affirm the judgment of the trial court.

All Citations

Not Reported in P.3d, 2017 WL 4614724

Footnotes

1 The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

2 Section 12-133(A), A.R.S., generally provides that civil cases in which the amount in controversy does not exceed a threshold amount are subject to compulsory arbitration. *See also* Ariz. R. Civ. P. 72–77. In Pima County, the threshold amount is $50,000. Pima Cty. Super. Ct. Loc. R. P. 4.2(a).

3 Solar Store argued it was the prevailing party because it prevailed on the claim for rescission.

4 Solar Store made a Rule 50(a) motion at the end of the first trial day. That motion was denied, and Solar Store failed to renew it after the verdict under Rule 50(b). A Rule 50(a) motion is insufficient to preserve a sufficiency of the evidence challenge. *Marquette Venture*, 227 Ariz. 179, ¶ 22, 254 P.3d at 423.

5 Solar Store has failed to provide any legal citation in support of its argument that the damages amounted to a "double recovery," as opposed to being speculative or otherwise insufficiently supported by the evidence. Thus, even were we to conclude it had not waived the "double recovery" argument by failing to preserve a challenge to the sufficiency of the evidence, Solar Store has waived it by failing to brief the issue adequately. *See* Ariz. R. Civ. App. P. 13(a)(7); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007).

End of Document