DIVISION ONE
FILED: 04/28/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT J. STUCKE, a single man, Plaintiff/Appellee, v. GERMAIN MOTOR COMPANY, a Delaware corporation, Defendant/Appellant.	)	1 CA-CV 10-0541 DEPARTMENT D **MEMORANDUM DECISION** (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-054923

The Honorable Brian Hauser, Judge

AFFIRMED

Gregory E. Hinkel — Glendale
Attorney for Plaintiff/Appellee

Park & Moring, PLC — Scottsdale
By Thomas S. Moring
And
Seyfarth Shaw LLP — Houston, TX
By Kate Birenbaum
Attorneys for Defendant/Appellant

G E M M I L L, Judge

¶1 Germain Motor Company ("Germain") appeals from the judgment entered after a bench trial awarding Robert J. Stucke

treble wage damages and attorneys' fees on Stucke's breach of contract claim. Germain argues the court erred in admitting parol evidence to interpret the employment agreement between the parties. For the reasons set forth below, we find no error and therefore affirm.

BACKGROUND

¶2 In the beginning of August 2008, Stucke and Ken Morrand discussed the possibility of Stucke working as a Special Finance Director for Avondale Hyundai, the car dealership operated by Germain and where Morrand worked. Stucke had previously worked at Avondale Hyundai, but was working for another automobile company at the time. On August 8, 2008, Stucke executed a "Pay Plan" agreement prepared by Morrand that specified, among other things, the rate of commission Stucke would earn. Because Stucke was leaving his existing job, and according to Germain "it would take some time for [Stucke] to earn the level of commissions that he desired[,]" the Pay Plan provided for a "Guarantee paid over months of August, September, October 2008 ($10,000)" (the "Guarantee Provision").

¶3 Stucke worked at Avondale Hyundai from August 8, 2008 until he was terminated on September 19, 2008. He was paid $18,000.00. On October 31, 2008, Stucke demanded from Germain payment of $12,000.00, which amount he argued reflected the outstanding balance of the $30,000.00 Germain owed him under the

Guarantee Provision. Germain refused to pay Stucke the $12,000.00 that he demanded.

¶4 Stucke commenced this breach of contract action against Germain seeking triple damages of $36,000.00 under Arizona Revised Statutes ("A.R.S.") section 23-355 (Supp. 2010).[1] Germain moved to dismiss arguing the Guarantee Provision reflected the parties' intent that Stucke would be entitled to receive $10,000 monthly for three months only if he remained employed at Avondale Hyundai during that time. Because, according to Germain, the Guarantee Provision is unambiguous on this point, "parol evidence concerning [Stucke's] compensation structure" would be inadmissible and his breach of contract claim was therefore without merit. The court denied Germain's motion and specifically found the Guarantee Provision reasonably susceptible to Stucke's interpretation that the parties agreed to a $30,000 payment disbursed monthly in equal amounts from August to October. The court therefore found that "extrinsic proof will be admissible to permit a fact finder to interpret the terms of the agreement."

¶5 Germain also unsuccessfully moved for summary judgment on the same grounds. The court subsequently conducted a one-day bench trial at which the minute entry reflects Stucke and

[1] We cite a statute's current version when it has not been materially amended during the relevant time period.

Morrand testified. Germain did not include the trial transcripts in the record on appeal.

¶6 The court issued detailed findings of fact and concluded: "The evidence presented at trial strongly supports plaintiff's contention that defendant agreed to pay him $30,000 over three months to induce him to work at its dealership. The document, Exhibit 1, prepared by defendant is reasonably susceptible of this interpretation and the extrinsic evidence is consistent with it." The court's final judgment awarded Stucke treble damages in the amount of $36,000.[2] *See* A.R.S. § 23-355 (improperly withholding wages subjects employer to treble damages).[3] Germain timely appeals, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶7 Of the three issues Germain expressly presents for review, we address in detail only whether the court erred in considering parol evidence to interpret the Guarantee Provision.[4]

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[2] The court also awarded Stucke his attorneys' fees. Germain does not contest the amount of this award of fees.

[3] Germain does not challenge the amount of the damage award. The record reflects Germain agreed at trial that the Guarantee Provision entitled Stucke to $10,000 monthly as "wages" under Arizona law. Germain maintains, however, that these "wages" would be payable only if Stucke worked the full three months.

[4] We may quickly resolve two other issues: "Whether the superior court applied the appropriate standard" in ruling in Stucke's favor, and whether the Guarantee Provision "guaranteed

We review issues of contract interpretation *de novo*. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). Specifically, we review *de novo* whether contract language is reasonably susceptible to more than one interpretation thereby permitting extrinsic evidence of the parties' intent. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶8 "Generally, and in Arizona, a court will attempt to enforce a contract according to the parties' intent." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). When a trial court interprets a written agreement to determine the intent of the parties, before admitting external evidence, the court first must consider the alleged interpretation of the agreement offered by the proponent

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Stucke a salary for a period of three full months" despite Stucke's at-will employment status and his agreement "to receive '0' compensation in salary." To the extent these issues address the sufficiency of evidence supporting the court's factual findings and legal conclusions, Germain has not provided the trial transcripts. When no transcripts are provided on appeal, we assume the unavailable record supports the trial court's decision. *See Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998); *see also Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). Further, Stucke's status as an "at-will" employee, his agreement to not receive salary as opposed to commissions, and the Pay Plan's pre-printed form statement that Germain could "change any and all terms of this plan at anytime," do not require construing the Guarantee Provision as unambiguously precluding payment of $30,000 to Stucke.

of the extrinsic evidence in light of the extrinsic evidence offered. *Long v. City of Glendale*, 208 Ariz. 319, 328, ¶ 28, 93 P.3d 519, 528 (App. 2004). "If the court finds that the writing is 'reasonably susceptible' to the interpretation suggested by the proponent of the extrinsic evidence then the court should admit the extrinsic evidence." *Id.* (quoting *Taylor,* 175 Ariz. at 155, 854 P.2d at 1140).

¶9 We find the Guarantee Provision is reasonably susceptible to the interpretation proposed by Stucke; namely, that the provision constitutes a promise by Germain to pay Stucke a total of $30,000 in three equal monthly installments even if he was terminated during that time. Although the Guarantee Provision is also reasonably interpreted in the manner suggested by Germain -- i.e., Stucke was entitled to the guaranteed payments only if he remained employed at Avondale Hyundai from August to October -- we note that nothing in the provision or elsewhere in the Pay Plan expressly conditions the guaranteed payments on Stucke's continued employment. We agree with the trial court that the Guarantee Provision is ambiguous as to the parties' intent regarding Stucke's right to the guaranteed payments in the event his employment was terminated during the payment period. The trial court therefore did not err when it considered Stucke's and Morrand's testimony to clarify that intent.

¶10 Germain raises two additional arguments that are unpersuasive to us. First, the Pay Plan states: "This pay plan supersedes any other pay plan verbal or written." Germain contends the court improperly considered parol evidence because the Pay Plan was a "fully integrated" agreement. The court, however, did not consider evidence of *another agreement or pay plan* between the parties. Instead, the court considered testimony to assist it in construing the Guarantee Provision. *See Thomas v. Goudreault,* 163 Ariz. 159, 167, 786 P.2d 1010, 1018 (App. 1989) ("The parol evidence rule prevents the use of evidence of prior or contemporaneous oral agreements to vary, contradict or enlarge a fully integrated, written agreement.").

¶11 Second, Germain asserts that the court erred in not applying the provisions of the Arizona Employment Protection Act ("AEPA"). But this is not a wrongful termination or constructive discharge case. *See* A.R.S. §§ 23-1501, -1502 (Supp. 2010). For this reason, Germain's reliance on *Johnson v. Hispanic Broadcaster of Tucson, Inc.*, 196 Ariz. 597, 2 P.3d 687 (App. 2000) is unhelpful. The central issue in that case was whether an employment agreement's provision guaranteeing an amount of first year income could be interpreted as setting forth an employment relationship effective for a "specified duration of time," and thereby providing the employee with a basis for a wrongful termination claim under the AEPA. *Johnson*,

196 Ariz. at 599-600, ¶¶ 5-6, 2 P.3d at 689-90; *see also* A.R.S. § 23-1501(2), (3)(a). Here, Stucke did not argue that the Guarantee Provision constitutes an agreement that he be employed at Avondale Hyundai for a certain length of time; indeed, he admitted it does not. We conclude that this case does not fall under the AEPA and *Johnson* is therefore inapposite.

CONCLUSION

¶12 The judgment is affirmed. Both parties request attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01 (2003). We deny Germain's request because it is not the prevailing party. *See* A.R.S. § 12-341.01(A). In the exercise of our discretion, we grant Stucke his reasonable fees and his taxable costs subject to his compliance with ARCAP 21.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICIA K. NORRIS, Presiding Judge

___/s/_____
PATRICIA A. OROZCO, Judge