IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CROWN ENGINEERING SERVICES, LLC,
Plaintiff/Appellant,

v.

SUNDT CONSTRUCTION, INC. AND KIEWIT CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2022-0071
Filed April 7, 2023

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pima County
No. C20200628
The Honorable Richard E. Gordon, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Kelly concurred.

V Á S Q U E Z, Chief Judge:

¶1 Crown Engineering Services appeals from the superior court's grant of summary judgment in favor of Sundt Construction and Kiewit Corporation. Crown argues the court erred in granting summary judgment because it did not consider the facts in Crown's favor and there is a genuine dispute regarding the material facts. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to Crown, the party that opposed summary judgment below. *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2 (App. 2009). The Arizona Department of Transportation (ADOT) chose Sundt and Kiewit's joint venture ("SKJV") to be the construction manager at risk (CMAR) for the Ina Road Traffic Interchange Construction Project ("Ina Project").[1] The contract for the Ina Project permitted SKJV to submit "Value Engineering Proposals" (VEPs) to modify the plans, specifications, or other requirements of the contract to reduce construction costs without impairing the essential functions of the project. If ADOT approved a VEP, SKJV would receive half of the resulting cost savings. However, SKJV was prohibited from "shar[ing] in any cost savings where the [VEP] could have reasonably been made by [SKJV] during the Preconstruction Phase."

[1]Under the CMAR model of construction management, the CMAR is "involved in working proactively with the owner and its design professionals, during the design development process, in providing staged cost estimation and design constructability review services to help control costs and reduce construction time." 2A Philip L. Bruner & Patrick J. O'Connor Jr., Construction Law § 2:16 (July 2022). Because the CMAR "estimates and establishes its guaranteed maximum price," the CMAR assumes "a substantial monetary risk." *Id.*

¶3 The original design of the Ina Project included the addition of a concrete cap to the existing soil cement structure spanning the Santa Cruz River. After construction began, Sundt, on behalf of SKJV, and Crown entered into an agreement under which Crown would suggest VEPs to Sundt, and if SKJV approved, it would submit the VEP for ADOT's consideration and "advocate for approval of the VEP." If a VEP originating from Crown was approved by ADOT, Crown would be compensated a portion of the net savings amount passed to SKJV.

¶4 Crown suggested a VEP to remove the concrete cap on the soil cement structure depending on "verification of the existing condition of the soil cement," which SKJV submitted to ADOT. As required by the CMAR contract, SKJV acknowledged in its written proposal to ADOT that it had "attempted on multiple occasions and at multiple meetings to eliminate the concrete cap" during the preconstruction phase. ADOT rejected the VEP, explaining that the "change in design could have reasonably been proposed and investigated during the Preconstruction Phase of the Project" and "based on the data contained in the submittal, it appears likely that the overall service life would be reduced." SKJV formally "escalated" ADOT's decision to the resident engineer, who again rejected the VEP. SKJV then escalated that decision to the district engineer, who also rejected it because the "concept was discussed during the pre-construction phase" and could have "been reasonably pursued," thus disqualifying it from being a cost-saving VEP. SKJV did not escalate the denial to the state engineer.

¶5 ADOT ultimately decided to eliminate the concrete cap from the Ina Project, reducing the value of the contract by $522,174.80. Because ADOT had rejected the VEP, neither SKJV nor Crown received any portion of the savings.

¶6 Crown then sued Sundt and Kiewit for breach of contract, alleging SKJV's failure to escalate the VEP denial to the state engineer "was a violation of its obligation of good faith to Crown and its specific contract provision to advocate for approval by the owners." SKJV moved for summary judgment, which Crown opposed. The superior court determined there was "sufficient evidence of a breach of contract to survive summary judgment," but, because Crown had not pointed to evidence "that any breach resulted in damages," it granted summary judgment to Sundt and Kiewit. The court entered a final judgment, from which Crown appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶7 We review a court's grant of summary judgment de novo and will affirm when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶ 9 (2022) (quoting Ariz. R. Civ. P. 56(a)). The three essential elements of a breach of contract claim are: (1) the existence of a contract; (2) breach thereof; and (3) resulting damages. *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, ¶ 22 (2016). The first element is undisputedly met here.

¶8 Crown focuses much of its argument on an attempt to bolster the superior court's conclusion that there was sufficient evidence of breach to preclude summary judgment on that basis. SKJV argues as a cross-issue on appeal that in addition to granting summary judgment on the issue of damages, the court could "have also granted [s]ummary [j]udgment to SKJV on the [breach] issue."[2]

¶9 In denying SKJV's motion on the breach of contract claim, the superior court found there was conflicting evidence in the record regarding whether SKJV had breached the covenant of good faith and fair dealing by choosing "not to fully pursue Crown's cap-elimination concept as a VEP because [it] wanted to preserve its relationship with ADOT for future projects." Citing *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, ¶¶ 13-14 (App. 2002), the court reasoned that a breach is possible "even assuming the absence of any contractual right or express obligation on behalf of SKJV to pursue an appeal" to the state engineer. The court's reliance on *Bike Fashion Corp.* is misplaced.

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[2]In its reply, Crown contends we should not address this argument because SKJV did not "cross-appeal[] from that finding." We disagree that a cross-appeal was necessary to challenge this portion of the court's summary judgment ruling. *See CNL Hotels & Resorts, Inc. v. Maricopa County*, 230 Ariz. 21, ¶ 20 (2012) ("[I]f [an] appellee in its brief seeks only to support or defend and uphold the judgment of the lower court from which the opposing party appeals, a cross-appeal is not necessary." (quoting *Maricopa County v. Corp. Comm'n*, 79 Ariz. 307, 310 (1955))). Although a cross-appeal is required if the appellee seeks to attack the judgment by enlarging its rights or lessening the rights of its adversary, "[m]erely seeking to support a lower court's judgment for reasons not relied upon by it" is not such an attack. *Id.*

¶10 In *Bike Fashion Corp.*, this court reversed the trial court's denial of plaintiff's motion for a new trial because the court incorrectly instructed the jury that there could be no violation of the covenant of good faith and fair dealing if there was an express contract provision relating to the same subject. *Id.* ¶¶ 11, 18-19. The defendant in that case sold property in violation of a contract provision that prohibited the sale of property absent approval of fifty-one percent of the partners. *Id.* ¶¶ 3-5. In giving the jury instruction, the trial court apparently agreed with the defendant's argument that the contract only prohibited the managing partner, "not him as a general partner, from conveying the [p]roperty without the requisite consent." *Id.* ¶¶ 8-9.

¶11 We concluded that the trial court misinterpreted "the relationship between a contract's express terms and the implied covenant of good faith and fair dealing." *Id.* ¶¶ 14-15. Although an implied covenant cannot directly contradict an express contract term, where there is no conflict, implied terms are as much a part of the contract as are the express terms. *Id.* ¶¶ 13-14. Thus, the implied covenant can be breached by a party "both by exercising express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Id.* ¶ 14.

¶12 In this case, SKJV's decision to not escalate the VEP denial to the state engineer did not "bear adversely on [Crown]'s reasonably expected benefits of the bargain." *Id.* Indeed, the benefit of Crown's bargain was that if ADOT accepted a VEP, Crown would receive a portion of the savings. ADOT's denial of a VEP is a risk expressly anticipated by the contract. SKJV also had a significant financial incentive to advocate on behalf of the proposed VEP, undermining Crown's argument that it failed to do so.[3]

¶13 Although the parties' agreement provides that SKJV will advocate for the approval of a VEP by ADOT, it does not define the term "advocate." Nevertheless, it is undisputed that SKJV advocated for the VEP by escalating it to the resident engineer and district engineer. It did so even

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[3]Under the parties' amended agreement of September 16, 2017, SKJV would have received sixty percent of its share of the cost savings from any VEP approved by ADOT, compared to Crown's forty percent. Accordingly, SKJV had an even greater financial incentive than Crown to secure approval of the concrete cap VEP.

though the CMAR contract with ADOT expressly denied it the right of review or escalation of a rejected VEP. Subsection 104.13(D)(1) provides that ADOT's decision regarding a VEP is final and not subject to the escalation provision for resolving other CMAR contract disputes. The fact that SKJV escalated the denial without having authority to do so indicates the extent of its advocacy on behalf of the proposal. And the evidence shows that any further escalation would have been futile. "The law does not require a futile act." *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 140 (App. 1981).

¶14 In sum, SKJV did not breach the covenant of good faith and fair dealing by not escalating the denial of the proposed VEP to the highest level. The superior court erred in concluding otherwise.

¶15 Nevertheless, we agree with the court that Crown suffered no damages as a result of any breach. *See Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 6 (App. 2001) ("We will affirm if the trial court's [summary judgment] ruling is correct on any ground.").

¶16 To qualify as a VEP, any proposal could not "have reasonably been made by [SKJV] during the Preconstruction Phase" of the Ina Project. Crown does not dispute that SKJV had raised eliminating the concrete cap in the preconstruction phase. But Crown maintains that its VEP differed from the idea raised by SKJV because the VEP included a plan for core testing to determine the viability of removing the concrete cap. However, it has not pointed to any evidence contradicting the superior court's determination that core testing was reasonably inherent in SKJV's preconstruction proposal to eliminate the cap. Indeed, an ADOT engineer testified that "coring is a relatively common practice" and he expected coring would have been done as part of the preconstruction proposal to remove the concrete cap as a "standard practice."

¶17 As such, Crown's concept did not, and could not, qualify as a VEP. That is the case regardless of how strongly SKJV advocated for its approval or how far SKJV escalated the issue. Notably, Crown has not identified any evidence, beyond mere speculation, that more effort from SKJV would have led to acceptance of the VEP. "Damages that are speculative, remote or uncertain may not form the basis of a judgment." *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521 (1968). The superior court did not err in granting summary judgment to Sundt and Kiewit.

Attorney Fees on Appeal

¶18 All parties request an award of attorney fees under A.R.S. § 12-341.01(A). Because Crown is not the prevailing party, we deny its request. In our discretion, we award Sundt and Kiewit their reasonable attorney fees on appeal. *See Ader v. Est. of Felger*, 240 Ariz. 32, ¶ 48 (App. 2016). Sundt and Kiewit are also entitled to their costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-342(A).

Disposition

¶19 We affirm the superior court's grant of summary judgment to Sundt and Kiewit.