

FACTS AND PROCEDURAL HISTORY

¶2 In February 1994, Phoenix Phive entered into an agreement to lease certain real estate from Monarch. The lease originally included a March 1999 expiration date, but was extended in 1996 to expire in March 2001, and extended again in 2000 to expire in March 2003. Both extension agreements stated that "[a]ll terms and conditions contained in the original lease shall continue to apply with full force and effect during this extended term." However, the 2000 extension agreement included the additional "[o]ption" that Phoenix Phive could "terminate this extended lease on 60 days written notice to Lessor."

¶3 In October 2002, the parties entered into an "Expansion and Extension Agreement" whereby the lease was extended until March 2009, and expanded to include additional rental space. In March 2005, however, Phoenix Phive terminated the lease in accordance with the sixty-day termination option contained in the second extension agreement. This lawsuit then arose from the parties' dispute about whether that termination provision applied to the 2002 Expansion and Extension Agreement.

¶4 Monarch filed a complaint alleging that Phoenix Phive had breached the Expansion and Extension Agreement and claiming damages for unpaid rent from the date of Phoenix Phive's termination until the date Monarch re-let the subject premises. Phoenix Phive

counterclaimed for conversion based on Monarch's retention of its deposit money.

¶15 Monarch moved for summary judgment on its claim and on Phoenix Phive's counterclaim. It argued that the Expansion and Extension Agreement was a "fully integrated contract . . . not subject to any previous or subsequent agreements, and that the sixty-day termination provision was inconsistent with, and therefore not incorporated in, the 'new lease.'" Monarch also argued that Phoenix Phive had not stated a claim for conversion.

¶16 The trial court found that Monarch was "entitled to judgment as a matter of law on both the complaint and counterclaim for the reason that the 60-day option to vacate was not incorporated into or otherwise made a part of the Expansion and Extension Agreement."¹ Phoenix Phive filed a timely appeal, and we have jurisdiction pursuant to Arizona Revised Statute § 12-2101(B) (2003).

STANDARD OF REVIEW

¶17 We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002). We also

¹The trial court then entered judgment in favor of Monarch for damages of \$37,361.50 plus interest and \$8,617.90 in attorneys' fees and costs.

review de novo issues of law relating to contract interpretation. *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

DISCUSSION

¶18 Phoenix Phive argues that the trial court erroneously concluded that the Expansion and Extension Agreement did not include the sixty-day option to vacate the lease. Instead, Phoenix Phive asserts, that the plain language of the Expansion and Extension agreement specifically incorporates the sixty-day option to vacate. Monarch responds that the sixty-day option clause from the 2000 extension agreement is inconsistent with the expiration date of the Expansion and Extension agreement and, therefore, is not a term of the revised lease.

¶19 The Expansion and Extension Agreement specifically incorporates the provisions set forth in the original lease and the first two extension agreements unless the provisions therein are inconsistent with the terms expressed in the Expansion and Extension Agreement. The agreement states:

This Agreement sets forth the entire Agreement between the parties with respect to the matters set forth herein. There have been no additional oral or written representations or agreements. As amended herein, the Lease between the parties shall remain in full force and effect. In case of any inconsistency between the provisions of the Lease and this Agreement, the latter provisions shall govern and control.

The agreement also defines "Lease" to mean collectively, the original lease agreement and the 1996 and 2000 extension agreements.² Indeed, Monarch admits that the Expansion and Extension Agreement incorporates "consistent terms of the prior lease."

¶10 Below, Monarch argued that the termination provision was inconsistent with the terms of the Expansion and Extension Agreement because the latter specified a period of six years and did not expressly include the early termination option. On appeal, for the first time, Monarch also contends that the termination provision is inconsistent with the provision in the Expansion and Extension agreement for Monarch to loan Phoenix Phive \$10,000.00

²The agreement provides:

Lessor or its predecessor in interest, and Lessee or its predecessor in interest, have heretofore entered into that certain lease dated the 2nd day of February, 2002 for premises (the "Original premises") described as Space, Store, Suite, or Unit No. 400, initially containing approximately 2,200 square feet, in the property known as Monarch Condominiums (the "Property") . . . which lease has heretofore been amended or assigned by instruments dated July 10, 1995 and December 7, 2000 (collectively, the "Lease").

The parties agree that the date identified for the original lease is a typographical error and should state 1994, rather than 2002.

for improvements to be amortized over the life of the lease.³ Monarch correctly points out that the agreement does not provide for the repayment of such funds if Phoenix Phive terminates the lease early. Although arguments made for the first time on appeal may be considered waived by this court, *see Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) ("The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue."), we will consider Monarch's arguments. However, we find both to be unavailing.

¶11 Early termination is specifically provided for in the Expansion and Extension Agreement. It states: "The term of the Lease is hereby modified such that the current term will expire and a new extended term ("Extended Term") will commence on April 1, 2003 (the "Extension Date") and continue until March 31, 2009 (the "New Expiration Date"), *unless sooner terminated in accordance with the terms of the Lease or as provided below.*" (Emphasis added.) As noted above, the term "Lease" is specifically defined in the Expansion and Extension Agreement to include the second extension agreement. Therefore, rather than excluding the early termination option, the plain wording of the Expansion and Extension Agreement

³The provision states:

Tenant Improvements. Lessor shall provide to Lessee an allowance up to but not to exceed \$10,000.00 towards tenant improvements to the Premises. Lessor shall amortize the cost of said improvements over the term of the Lease at 8% interest.

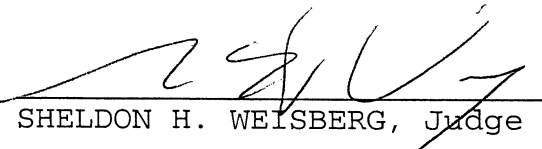
expressly incorporates it. That the agreement does not provide for repayment of the tenant improvement loan does not render early termination inconsistent with terms of the Expansion and Extension Agreement, merely more advantageous to Phoenix Phive.

¶12 Monarch also argues that the termination provision should be limited to the period of time identified in the second extension agreement because the "option" was inserted there only to allow Phoenix Phive to "experiment" with leasing a larger space prior to entering into the extended six-year term. Monarch supports this argument with the affidavit of Apker, in which he states: "When Phoenix Phive entered into the Second Amendment, they leased a larger portion of the Premises on a trial basis. The sixty-day option to vacate was only included in the Second Amendment as an accommodation to Phoenix Phive in the event the rental of the larger space proved to be too burdensome." But the second extension agreement did not provide for Phoenix Phive to lease additional space, and neither it nor the Expansion and Extension Agreement are amenable to Monarch's interpretation. The parole evidence rule precludes admission of "extrinsic evidence that would vary or contradict the meaning of the written words." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). In this case, Apker's affidavit does just that.

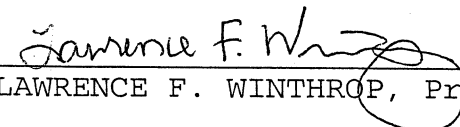
CONCLUSION

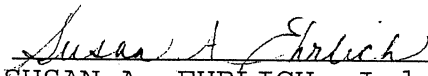
¶13 Having found the trial court erred by interpreting the parties' contract to exclude the termination provision, and

granting summary judgment on that basis, we reverse the trial court's judgment and remand this matter for further proceedings consistent with this decision. Phoenix Phive has requested attorney fees on appeal. We deny that request. However, the trial court may consider attorney fees incurred on appeal at the conclusion of this matter upon remand.


SHELDON H. WEISBERG, Judge

CONCURRING:


LAWRENCE F. WINTHROP, Presiding Judge


SUSAN A. EHRLICH, Judge