DIVISION ONE
FILED: 06/28/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

S. ALAN COOK, P.C., an Arizona professional corporation, Plaintiff/Appellant, v. MICHAEL DERSHOWITZ and JANE DOE DERSHOWITZ, husband and wife, Defendants/Appellees.	)	1 CA-CV 11-0627 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-029607

The Honorable Hugh E. Hegyi, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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K E S S L E R, Judge

¶1 Plaintiff/Appellant S. Alan Cook ("Cook") appeals the superior court's order granting Appellee Michael Dershowitz's

("Dershowitz")[1] motion to compel arbitration, dismissing Cook's complaint with prejudice, awarding Dershowitz attorneys' fees and costs, and abating in part the interest demanded by Cook. For the following reasons, we affirm in part, reverse in part and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In December 2008, Dershowitz retained Cook as his attorney to represent him in his divorce proceeding. Cook and Dershowitz entered into a fee agreement, which provided any dispute would be resolved through private, binding arbitration:

> **Disputes/Binding Arbitration.** In the unlikely event that you and the firm have a dispute about the services rendered, the charges for those services, or any other dispute arising out of this firm's or its employees' representation of you, YOU AND THE FIRM AND ITS EMPLOYEES agree to submit any such disagreements to binding arbitration . . . . Said arbitrator shall be a person selected jointly by the parties . . . .
>
> This provision of this agreement shall be binding on all parties to this agreement . . . . By signing this agreement, you are waiving your right to file a civil suit and to have your claims, if any, tried to a judge or jury.

¶3 In October 2010, despite this provision, Cook filed this lawsuit against Dershowitz claiming Dershowitz had failed to make his payments pursuant to the agreement and was indebted to Cook for the principal sum of $77,453.78. The complaint

[1] In his answer, Dershowitz denied the existence of Jane Doe Dershowitz as a decree of dissolution of marriage was issued before Cook filed this lawsuit.

further demanded Dershowitz pay interest on the debt at a rate of 26.64% per annum beginning July 1, 2010 until the debt was paid in full. Cook filed a certificate of arbitrability, which certified that although the amount in controversy exceeded the limits set by Maricopa County Superior Court Local Rule 3.10,[2] the dispute was nevertheless subject to arbitration pursuant to the agreement.

¶4 Dershowitz filed an answer and a controverting certificate in which he claimed the dispute was subject to private arbitration per the agreement, but that Cook waived this provision by filing the lawsuit against him. Moreover, the case, according to Dershowitz, was not subject to court-administered, compulsory arbitration.

¶5 In December 2010, the trial court referred the matter to the arbitration clerk for appointment of an arbitrator, holding, "[t]he procedures required by Rules 72-77, [Arizona Rules of Civil Procedure], are not affected by the parties' agreement concerning private arbitration." Two weeks later, court administration assigned the case to an arbitrator.

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[2] Local Rule 3.10 states: "All civil cases, which are filed with the Clerk of the Superior Court in which the Court finds or the parties agree that the amount in controversy does not exceed $50,000, . . . shall be submitted to and decided by an arbitrator . . . ." Ariz. Local R. Prac. Super. Ct. (Maricopa) 3.10.

¶6 In January 2010, Cook filed a motion for summary judgment. Dershowitz then moved to compel arbitration and alternatively responded to the summary judgment motion. Dershowitz argued the fee agreement required the parties to settle the dispute through private, binding arbitration. Dershowitz alleged Cook's failure to comply with the private, binding arbitration provision of the fee agreement delayed proceedings and breached their agreement. Thus, he requested the court award him attorneys' fees and suspend the 2% monthly late fee beginning the date Cook filed his complaint in superior court.[3]

¶7 In response, Cook argued the court should deny the motion to compel because the court already considered the issue and held the case was not subject to private arbitration per its December 2010 minute entry. Cook conceded that the amount in controversy exceeded the limits set forth in Local Rule 3.10, and therefore was not subject to court-administered arbitration, contrary to the court's order. However, he claimed that if the case was subject to court-administered arbitration, his motion for summary judgment was properly filed with the superior court.

[3] The fee agreement states: "[w]e charge an amount equal to 2.0 percent per month on any unpaid balances. (Interest charges at that rate would incur at an annual percentage rate of 26.64%.)" For purposes of simplicity, we refer to the charges under this clause as interest charges.

¶8 In May 2011, the superior court granted Dershowitz's motion to compel aribtration, denied Cook's motion for summary judgment, dismissed the case, and ordered Dershowitz to submit a form of order within 30 days. The court held, "the parties' fee agreement required private arbitration before resorting to this court action. Both the Federal and Arizona Arbitration Acts require enforcement of that agreement."

¶9 In June 2011, Dershowitz filed a form of judgment and an application for attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-349(A)(3) (2003). Dershowitz argued that by filing this action in superior court, despite the mandatory, private arbitration provision, Cook unreasonably expanded or delayed proceedings by eight months. Using the 26.64% per annum interest rate Cook demanded in the complaint, Dershowitz calculated the eight month delay resulted in a $13,755.79 increase in interest. Dershowitz requested the court to abate the interest beginning on the date the complaint was filed until the date the judgment ordering dismissal was entered.

¶10 Cook argued in response that an award of attorneys' fees "should abide the outcome of this case, in private arbitration, on the merits." To support his argument, Cook cited *U.S. Insulation, Inc. v. Hilro Construction Co.*, 146 Ariz. 250, 705 P.2d 490 (App. 1985) in which we denied an award of

attorneys' fees pursuant to A.R.S. § 12-341.01 (2003) because no decision had been made on the merits of the case. Cook also argued that it would be improper for the court to abate the interest on the debt because abatement was a partial decision on the merits and subject to arbitration. Finally, he argued that the case should not have been dismissed with prejudice.

¶11 In reply, Dershowitz argued his request for attorneys' fees was pursuant to A.R.S. § 12-349(A)(3), not A.R.S. § 12-341.01(A). Thus, a determination of success on the merits was not necessary. The court signed a formal written judgment drafted by Dershowitz, which granted Dershowitz attorneys' fees and costs, partially abated the interest demanded by Cook, and dismissed the complaint with prejudice. The formal written judgment drafted by Dershowitz and signed by the court cited A.R.S. § 12-341.01(A) as the basis for the award of attorneys' fees rather than A.R.S. § 12-349(A)(3) as was cited in Dershowitz's application. Cook timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1)(Supp. 2011).[4]

[4] Generally, an order compelling arbitration is not appealable. *See* A.R.S. § 12-2101.01 (Supp. 2011); *see also Roeder v. Huish*, 105 Ariz. 508, 510, 467 P.2d 902, 904 (1970). Here, the court's judgment compelling arbitration also dismissed all claims against Dershowitz and contained Rule 54(b) language. Therefore, we have jurisdiction over dismissal as well as any intermediate order incorporated into the judgment. *See Dusold v. Porta-John Corp.*, 167 Ariz. 358, 360-61, 807 P.2d 526, 528-29 (App. 1990).

DISCUSSION

¶12 Cook asserts the trial court erred because: 1) the court violated the "law of the case" doctrine when it ordered private arbitration despite its December 2010 order mandating court-administered arbitration; 2) the court improperly dismissed the case with prejudice rather than staying the action pending arbitration; 3) the court improperly awarded attorneys' fees under A.R.S. § 12-341.01; and 4) the court improperly made a partial ruling on the merits when it abated the interest due on the alleged debt. Dershowitz agrees that the court erred in granting a dismissal with prejudice rather than staying the case pending private arbitration, but contends that the law of the case doctrine does not bar the order requiring private arbitration and the court had authority to award attorneys' fees and abate interest under A.R.S. § 12-349 and its inherent powers. We reverse the abatement of interest on Cook's claim and the dismissal of the case with prejudice and remand to the superior court to stay the case pending arbitration and to correct the judgment on the basis for the award of attorneys' fees. In all other respects, we affirm.

I. The court's order for private, binding arbitration was consistent with the parties' agreement and did not violate the law of the case.

¶13 Cook argues the trial court's December 2010 ruling, which ordered court-administered, non-binding arbitration,

established the "law of the case," and therefore, its May 2011 minute entry ordering private, binding arbitration was in error. The issue of whether the court acted contrary to the "law of the case" is a legal issue subject to *de novo* review. *See Sholes v. Fernando*, 228 Ariz. 455, 458, ¶ 6, 268 P.3d 1112, 1115 (App. 2011) (holding we review conclusions of law *de novo*).

¶14 The "law of the case" doctrine is defined as:

> [T]he judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court. . . . [H]owever, . . . the rule is one of procedure, not of substance. A court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage.

Hall v. Smith, 214 Ariz. 309, 317, ¶ 28, 152 P.3d 1192, 1200 (App. 2007) (internal quotation marks and citations omitted). The Arizona Supreme Court recognized the law of the case doctrine as a "harsh rule" that "should not be strictly applied when it would result in a manifestly unjust decision." *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The Court identified several exceptions to its application:

> [T]he "law of the case" is not applied when 1) there has been a change in the essential facts or issues; 2) there has been a substantial change of evidence; 3) there has been an error in the first appellate decision so as to render it manifestly erroneous or unjust; 4) there has been a change in the applicable law; 5) the issue was not actually decided in the first decision or the decision is ambiguous; and 6)

> the doctrine is inapplicable if the prior appellate decision was not on the merits.

Id. at 483, 720 P.2d at 84; *see also Sibley v. Jeffreys*, 81 Ariz. 272, 277, 305 P.2d 427, 430 (1956) ("[A] ruling . . . if manifestly or palpably erroneous is not to be treated as conclusive."); *Love v. Farmers Ins. Grp.*, 121 Ariz. 71, 73, 588 P.2d 364, 366 (App. 1978) (upholding a trial court's granting of summary judgment even though a previous judge hearing the same case ruled against summary judgment).

¶15 We conclude the law of the case doctrine does not apply here because the earlier order ignored the fact that the complaint exceeded the jurisdictional limit for compulsory court-ordered arbitration.

¶16 Moreover, it is well-settled that courts must give effect to a contract as written. *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). Here, the contract required the parties to submit any dispute to private, binding arbitration. Adhering to the December 2010 order assigning the case to court-administered, non-binding arbitration would be "manifestly erroneous." Cook seeks to enforce an order that is directly contrary to the contract he drafted. Thus, the "law of the case" doctrine is not applicable, and we uphold the May 2011 order requiring private arbitration.

II. The trial court improperly dismissed the case with prejudice.

¶17 The parties agree that dismissal with prejudice was inappropriate. The arbitration provision of the fee agreement is governed by A.R.S. § 12-1502(D) (2003),[5] which provides:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

The proper procedure was to stay the judicial proceeding pending the final arbitration award. *See Broemmer v. Otto*, 169 Ariz. 543, 550, 821 P.2d 204, 211 (App. 1991) (holding A.R.S. § 12-1502(D) requires a stay only when a trial court has ordered arbitration or an application has been made for arbitration), *vacated in part on other grounds by Broemmer v. Abortion Servs.*

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[5] Cook claims A.R.S. § 12-3003 (Supp. 2011) (Arizona's Revised Uniform Arbitration Act) applies to the arbitration provision in the agreement. However, that statute provides: "This chapter governs an agreement to arbitrate made before January 1, 2011 if all the parties to the agreement or to the arbitration proceeding so agree in a record." A.R.S. § 12-3003(A)(2). Furthermore, the Editor's note to A.R.S. § 12-3001 (Supp. 2011) states:

> Title 12, chapter 21, [A.R.S.], as added by this act, does not affect an action or proceeding commenced or a right accrued before January 1, 2011. . . . [A]n arbitration agreement made before January 1, 2011 is governed by title 12, chapter 9, article 1, [A.R.S.].

2010 Ariz. Sess. Laws, ch. 139, § 5 (2d Reg. Sess.). Because this action commenced prior to January 1, 2011, A.R.S. § 12-1502(D) governs this agreement.

of Phx., Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992); *Hallmark Indus., L.L.C. v. First Systech Int'l, Inc.*, 203 Ariz. 243, 246, ¶ 11, 52 P.3d 812, 815 (App. 2002) ("[I]f an action or proceeding involves . . . claims . . . which are arbitrable, the court action must be stayed pending the arbitration."). Therefore, we reverse the May 2011 dismissal and remand to the trial court to stay the judicial proceeding pending arbitration.

III. The trial court properly awarded Dershowitz's attorneys' fees.

¶18 Although we review attorneys' fees awards generally for an abuse of discretion, whether a fee statute applies to an award of attorneys' fees is a question of law we review *de novo*. *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 272, ¶ 6, 77 P.3d 444, 447 (App. 2003); *see also Motel 6 Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 569, 572, ¶ 15, 991 P.2d 272, 275 (App. 1999) (holding the applicability of a fee statute is a conclusion of law reviewed *de novo*). Cook does not contest Dershowitz's allegations of unreasonable delay or argue that the trial court failed to make the necessary findings of fact for an award under A.R.S. § 12-349(A)(3). Rather, he argues the court erroneously based the award on A.R.S. § 12-341.01. Accordingly, the only issue before us is whether there was a statutory basis for an award of attorneys' fees, an issue which is subject to *de novo* review.

¶19 Cook argues that the award of attorneys' fees was erroneous because: 1) pursuant to A.R.S. § 12-3025(C) (Supp. 2011), attorneys' fees are properly awarded by the arbitrator, and the court may only award additional reasonable attorneys' fees after the confirmation of an arbitration award; and 2) A.R.S. § 12-341.01 is not applicable because there was no "contested case."

¶20 In response, Dershowitz argues his fee request was made pursuant to A.R.S. § 12-349(A)(3), not A.R.S. § 12-341.01. Dershowitz acknowledges that the signed final judgment, which he prepared, cited A.R.S. § 12-341.01(A) and not A.R.S. § 12-349(A)(3); however, he claims this citation was merely a typographical error.

¶21 Based on the entire record, we conclude that the actual basis for the court's fee award was A.R.S. § 349(A)(3), not A.R.S. § 12-341.01(A). Dershowitz's fee application specifically cited A.R.S. § 12-349(A)(3) and was based on the assertion that Cook unreasonably delayed the proceedings for the purpose of increasing his potential damage award. Nowhere in Dershowitz's fee application does he request an award under A.R.S. § 12-341.01(A), nor does he reference any of its statutory language. Furthermore, Dershowitz explicitly denied requesting fees under A.R.S. § 12-341.01(A) in his reply in support of his fee application. Although the form of judgment

was drafted by Dershowitz, the court's minute entry did not reference A.R.S. § 12-341.01. Based upon a review of the entire record, the court's citation to A.R.S. § 12-341.01 was simply an oversight by both Dershowitz and the court, which can be corrected based on the entire record. *See State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969) ("[A] trial court's record may be . . . contradicted by other matters in the record. . . . It is our duty to interpret all parts of the record together. . . . [A] deficiency in one place may be supplied by what appears in another.").[6]

¶22 Cook also cites A.R.S. § 12-3025(C) to argue the trial court was not authorized to award attorneys' fees prior to a final decision. Dershowitz did not request fees pursuant to A.R.S. § 12-3025(C); rather, he requested fees pursuant to A.R.S. § 12-349 as a sanction for Cook's unreasonable delay by filing the court action. In any event, A.R.S. § 12-3025(C)[7] does

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[6] Cook does not argue that Dershowitz's form of judgment amounted to invited error, thus waiving that issue on appeal.

[7] Section 12-3025(C) provides:

> On application of a prevailing party to a contested judicial proceeding under § 12-3022, 12-3023 or 12-3024, the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment vacating an award without directing a rehearing or confirming, modifying or correcting an award.

not apply to the arbitration agreement. *See supra* note 4. The court had authority to issue sanctions even though it lacked jurisdiction over the merits of the case. *See Bryant v. Bloch Cos.*, 166 Ariz. 46, 50, 800 P.2d 33, 37 (App. 1990). The award of attorneys' fees under A.R.S. § 12-349 was within the court's authority.

¶23 Therefore, we uphold the award of attorneys' fees, but remand to the trial court to correct the judgment to reflect the basis of the award of attorneys' fees as A.R.S. § 12-349(A), not A.R.S. § 12-341.01(A).

IV. The court's order to abate the interest on Cook's claim was an issue to be considered by the arbitrator.

¶24 Cook argues the trial court improperly granted Dershowitz's request to abate the interest on Cook's claim from the date the complaint was filed until the date of the entry of judgment.[8] In his fee application, Dershowitz implied Cook purposely breached the mandatory private arbitration provision of the fee agreement to unreasonably delay resolution of the dispute for the purpose of aggrandizing his claim. Applying the 26.64% per annum interest rate Cook demanded in his complaint, the eight month delay in the resolution of this case resulted in $13,755.79 of additional interest on the claim. Dershowitz

[8] Cook does not dispute Dershowitz's claims; he only challenges the court's legal authority to abate the interest.

requested the court abate the interest on Cook's claim as an equitable remedy for Cook's breach of the fee agreement.

¶25 Dershowitz argues that the court's abatement of interest was an appropriate sanction for Cook's alleged misconduct. He cites *Hmielewski v. Maricopa County*, 192 Ariz. 1, 4, ¶ 14, 960 P.2d 47, 50 (App. 1997), to argue the trial court had authority pursuant to its inherent powers to abate the interest on Cook's claim as a sanction for Cook's bad faith conduct. However, when the court granted Dershowitz's request, it made no factual findings of Cook's misconduct and made no reference to sanctions. Thus, we cannot characterize the court's decision to abate the interest as a sanction for Cook's alleged misconduct.

¶26 Nor can we simply remand for such findings. The court's abatement of the interest on Cook's claim constituted a partial ruling on the merits, which was contrary to its order for private arbitration and the arbitration clause of the fee agreement. The clear language of the fee agreement required a private arbitrator to resolve "any . . . dispute arising out of [the] firm's or its employees' representation of [Dershowitz]." There is no language limiting this provision to disputes arising only out of the performance of the contract. *See U.S Insulation, Inc.*, 146 Ariz. at 259, 705 P.2d at 499 (holding an arbitration agreement applied to all disputes arising out of the

contract, not just to those arising out of the performance of the contract). "[I]n the absence of language restricting the use of arbitration, we will not imply that its use was intended to be so limited." *Id.* (citation omitted). The issue of abatement of interest on Cook's claim arose from the contract, and it is properly to be considered by the arbitrator. Thus, we reverse the court's order with regards to abatement.

V. Cook is not entitled to attorneys' fees on appeal.

¶27 Cook requests this Court award him attorneys' fees pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 21(c),[9] and A.R.S. § 12-341.01. Cook is not entitled to attorneys' fees under A.R.S. § 12-341.01(A) because he has not prevailed on appeal. Nor does Rule 21 provide a substantive basis for an award of fees. *Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010).

CONCLUSION

¶28 For the foregoing reasons, we reverse the court's abatement of interest and dismissal with prejudice and remand to the superior court. On remand, the court shall enter a corrected judgment ordering an award of attorneys' fees to Dershowitz pursuant to A.R.S. § 12-349(A) rather than A.R.S. § 12-341.01, and ordering the case to be stayed pending private

[9] Cook requested fees pursuant to Arizona Rule of Civil Procedure 21(c). We presume this to be a typographical error and analyze Cook's request under ARCAP 21(c).

arbitration. We affirm the judgment in all other respects. We deny Cook's request for attorneys' fees on appeal. Dershowitz is entitled to his costs on appeal upon timely compliance with ARCAP 21(a).

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
ANN A. SCOTT TIMMER, Presiding Judge

/S/
PATRICIA K. NORRIS, Judge