IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN LEGAL FUNDING, LLC, and ALFUND LIMITED PREFERRED LLC, *Petitioners/Appellants*,

v.

EDDIE LOPEZ, *Respondent/Appellee*.

No. 1 CA-CV 15-0389
FILED 9-20-2016

Appeal from the Superior Court in Maricopa County
No. CV2012-008290
The Honorable Dawn M. Bergin, Judge

AFFIRMED

COUNSEL

Bruce Freiberg, Scottsdale
By Bruce Freiberg
Counsel for Petitioners/Appellants

Tiffany & Bosco, P.A., Phoenix
By Christopher A. LaVoy
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

N O R R I S, Judge:

¶1 This appeal arises out of the dismissal on summary judgment of a petition filed by petitioners/appellants, American Legal Funding, LLC, and Alfund Limited Preferred LLC (collectively, "ALF"), to vacate a partial arbitration award in favor of respondent/appellee, Eddie Lopez. Because the superior court properly found ALF had failed to contest the applicability of the Federal Arbitration Act ("FAA") to the case, and had failed to timely serve Lopez with its petition to vacate under the FAA, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2007, Lopez and ALF entered into a lien agreement. Under the lien agreement, ALF agreed to advance $35,000 to Lopez in "pre-settlement funding" in exchange for a security interest in any recovery (up to a specified maximum) Lopez received in a personal injury case he had filed against a third party. The lien agreement contained an arbitration provision that required all disputes under the agreement to be "determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association ["AAA"] in Arizona at the election of either party."

¶3 In 2008, after he settled his personal injury case, Lopez refused to provide ALF with information regarding the settlement, and refused to repay ALF in accordance with the lien agreement. ALF submitted a demand for arbitration to the AAA to collect under the lien agreement. In response to ALF's demand for arbitration, Lopez sued ALF in Illinois state court ("Illinois case") and challenged the enforceability of the lien agreement. Lopez also moved to stay the arbitration pending the Illinois court's determination of the enforceability of the lien agreement. The Illinois court denied Lopez's motion to stay and ordered the parties to advise the court of any resolution in the arbitration.

¶4 Lopez then filed a counterclaim in the arbitration and alleged the underlying lien agreement was unenforceable. He also sought to pursue

his claims on behalf of a class, even though the arbitration provision was silent on whether any arbitration could proceed as a class action. On January 6, 2010, the AAA arbitrator entered a partial Clause Construction Award ("CCA") allowing the arbitration to proceed on behalf of a class, and stayed the proceedings for 30 days to allow the parties to either confirm or vacate the CCA.

¶5 On February 5, 2010, ALF filed a petition in the Maricopa County Superior Court to vacate the CCA ("first petition to vacate" and "first Arizona case," respectively). In the first petition to vacate, ALF alleged the arbitrator had exceeded his powers in issuing the CCA asserting, in part, that the FAA, 9 U.S.C. §§ 1-307 (2012), barred class arbitration because the arbitration agreement was silent on the matter. ALF principally sought relief under the FAA, but mentioned in passing Arizona Revised Statutes ("A.R.S.") section 12-1512 (2016)[1]—the governing statute regarding pleadings filed in opposition to an arbitration award under Arizona's version of the Uniform Arbitration Act. *See generally* A.R.S. §§ 12-1501 to 12-1518, 12-2101.01 (2016).

¶6 On February 16, 2010, Lopez moved to confirm the CCA in the pending Illinois case.

¶7 On April 25, 2010, ALF served Lopez with the petition in the first Arizona case. Given the pendency of the Illinois case, Lopez asked the superior court to stay the first Arizona case, arguing it was duplicative of the Illinois case. The superior court stayed the first Arizona case and eventually dismissed it without prejudice for failure to prosecute on December 7, 2011.

¶8 Subsequently, the Illinois court refused to confirm the CCA, and also refused to vacate the CCA because the issue was not before it. The parties cross-appealed to the Illinois Appellate Court.

¶9 On May 25, 2012, while the Illinois appeal was pending, ALF filed a second petition to vacate the CCA in the Maricopa County Superior Court ("second petition to vacate" and "second Arizona case," respectively). In the second petition to vacate, ALF again asserted the arbitrator had exceeded his powers in issuing the CCA because the FAA prohibited class arbitration when the parties' arbitration agreement was

[1]Although the Arizona Legislature amended certain statutes cited in this decision after the date ALF filed the first Arizona case, the revisions are immaterial to our resolution of this appeal. Thus, we cite to the current version of these statutes.

silent on the matter. As it had in the first petition to vacate, ALF principally sought relief under the FAA, but mentioned in passing A.R.S. § 12-1512. ALF served Lopez with the second petition to vacate on June 7, 2012.

¶10 On July 3, 2012, the Illinois trial court enjoined ALF from prosecuting the second Arizona case, and ALF appealed that ruling to the Illinois Appellate Court.

¶11 On March 25, 2013, the Illinois Appellate Court held the Illinois trial court should consider Lopez's motion to confirm the CCA and vacated the trial court's injunction barring ALF from prosecuting the second Arizona case.[2]

¶12 On April 1, 2013, the parties submitted a joint pretrial memorandum in the second Arizona case. ALF argued the court should vacate the CCA under the FAA. In response**,** Lopez argued ALF's second petition to vacate was untimely under section 12 of the FAA. *See* 9 U.S.C. § 12. Section 12 of the FAA requires a party to serve a motion to vacate an award on "the adverse party or his attorney within three months after the award is filed or delivered."[3] As an issue to be decided, the parties jointly

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[2] On April 15, 2014, the Illinois trial court confirmed the CCA. ALF has appealed that ruling, and its appeal is currently pending.

[3] In full, 9 U.S.C. § 12 states:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the

listed whether the case was "timely under Section 12 of the FAA." The memorandum did not mention A.R.S. § 12-1512.

¶13 On July 17, 2013, ALF filed an amended petition to vacate the CCA in the second Arizona case and sought relief under the FAA. Of significance to this appeal, it did not reference A.R.S. § 12-1512.

¶14 ALF then moved for summary judgment in the second Arizona case, arguing, as relevant here, that it was entitled to relief under A.R.S. § 12-504 (2016), Arizona's savings statute, because it had filed the second petition to vacate within six months of the superior court's dismissal of the first Arizona case. Lopez cross-moved for summary judgment, asserting ALF had conceded the FAA governed its efforts to vacate the CCA. In light of this claimed concession, Lopez then argued, first, that ALF's second petition to vacate was untimely under section 12 because ALF had filed it years after the arbitrator issued the CCA; and second, even if a state savings statute could extend section 12's limitation period, ALF was not entitled to any relief under Arizona's savings statute because ALF had not served Lopez with the first petition to vacate within section 12's three month deadline ("the first petition section 12 defense"). *See generally* A.R.S. § 12-504(A) (court may grant relief under savings statute when "action timely commenced" is dismissed for lack of prosecution). Accordingly, Lopez asked the court to dismiss ALF's second petition to vacate.

¶15 ALF filed a reply in support of its motion for summary judgment, and a response to Lopez's cross-motion for summary judgment. Although it continued to argue it was entitled to relief under the savings statute, in neither filing did it dispute the applicability of the FAA, argue it had served the first petition to vacate within the three-month period specified by section 12, or directly address Lopez's first petition section 12 defense.

¶16 During oral argument on the motions, the superior court asked the parties whether Lopez had raised the first petition section 12 defense in the first Arizona case. ALF's lawyer responded Lopez had not done so. The court, however, refused to consider whether Lopez had waived his right to raise that defense in the second Arizona case because ALF had not argued waiver in its summary judgment filings.

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notice of motion, staying the proceedings of the adverse party to enforce the award.

¶17 After oral argument, ALF moved for additional briefing and to supplement the record, asserting it had additional evidence that would show Lopez had received actual notice of its "challenge to the arbitrator's rulings" and "why Lopez [had] waived his ability to challenge the timeliness of service." Before the superior court could act on that filing, ALF filed an amended motion for additional briefing and to supplement the record and attached to that motion an email exchange between the parties' Illinois attorneys which showed Lopez's attorney had received actual notice of ALF's first petition to vacate on February 16, 2010 (the "email exchange"). The superior court granted ALF's motions to supplement the record with the email exchange but denied its request to submit additional briefing on whether Lopez had waived the first petition section 12 defense by not raising it earlier. The court authorized Lopez to file a supplemental brief addressing the "sole issue of the timeliness of service" of the first petition to vacate in light of the email exchange.

¶18 In his supplemental briefing, Lopez addressed the factual requirements for service under section 12 and argued the email exchange failed to satisfy these requirements. The court then authorized ALF to respond to Lopez's supplemental briefing. In its supplemental briefing, ALF did not dispute the factual requirements for service under section 12. Instead, ALF briefed whether Lopez had waived the first petition section 12 defense by not raising it in the first Arizona case.

¶19 On January 26, 2015, the superior court denied ALF's summary judgment motion and granted Lopez's cross-motion for summary judgment. The court found on undisputed facts that ALF had failed to personally serve Lopez with the first petition to vacate within section 12's service deadline and that the email exchange was not effective service under section 12. In so ruling, the superior court noted ALF had "not disputed that the deadline for service under § 12 of the FAA applies to this case," and thus, it refused "to undertake any independent analysis of its applicability in Arizona state court proceedings." Finally, the court again refused to consider ALF's argument that Lopez had waived the first petition section 12 defense because he had not raised it in the first Arizona action, explaining ALF had not "raised this waiver argument in any of the briefing on [its] motion or cross-motion for summary judgment, and the supplemental briefing requested by the court [had been] limited to whether the email communication between counsel qualified as proper service under § 12."

DISCUSSION

¶20 ALF does not challenge the superior court's findings and conclusions that it failed to personally serve Lopez within section 12's service deadline, or that the email exchange failed to constitute effective service under section 12. Instead, ALF argues the superior court "incorrectly" found it had failed to dispute the applicability of section 12's deadline to the case when, in fact, it had. In making this argument, ALF first points to its counsel's final comment during oral argument and his apparent reference to Arizona Rule of Civil Procedure 4(i):[4]

> The question really would become whether the federal rule is jurisdictional or procedural. If procedural, the 120-day rule of Arizona would control, and we did get service within 120 days.

¶21 In light of ALF's filings, counsel's apparent reference to Rule 4(i) during oral argument did not raise a "dispute" regarding the applicability of section 12. First, in the April 2013 joint pretrial memorandum, ALF joined Lopez in listing as a disputed issue whether the second petition to vacate was timely under section 12. *See Murcott v. Best Western Intern., Inc.*, 198 Ariz. 349, 358, ¶ 47, 9 P.3d 1088, 1097 (App. 2000) (citation omitted) ("A joint pre-trial statement controls the subsequent course of litigation and may amend the pleadings."); *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (omitting lack of personal jurisdiction defense in joint pre-trial memorandum removed the defense from the case). Second, at no time in its summary judgment filings or in its filings in response to Lopez's cross-motion did ALF contest the applicability of the FAA or section 12. Indeed, ALF made no reference to Rule 4(i) in any of those filings. Third, the only time ALF made any arguable reference to Rule 4(i) was at oral argument, and even then its counsel simply posed a question and did not provide the superior court with any authority that Rule 4(i) somehow governed the timeliness of service of the first petition to vacate. Fourth, in its first petition to vacate and in its original petition in the second Arizona case, ALF affirmatively alleged that "the lien agreement . . . arise[s] out of a contract or transaction involving interstate commerce, and therefore the lien agreement is governed by the FAA." And in both petitions, as well as in the amended petition in the second Arizona case, ALF affirmatively sought relief "pursuant to the Federal Arbitration Act." And, as noted above, in its amended petition in the second Arizona

[4]Rule 4(i) provides that if "service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action . . . ."

case, ALF dropped its prior reference to A.R.S. § 12-1512, thus signaling it was proceeding solely under the FAA.

¶22 A party must timely present legal theories to the trial court to give it an opportunity to rule properly. *Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109, ¶ 17, 158 P.3d 232, 238 (App. 2007) (citation omitted); *see also State v. Kinney*, 225 Ariz. 550, 554, ¶ 7, 241 P.3d 914, 918 (App. 2010) (citation omitted) (preserving an argument for review on appeal requires a party to make a sufficient argument to allow the superior court to rule on the issue). "In other words, the court must have had the opportunity to address the issue on its merits." *Airfreight*, 215 Ariz. at 109, ¶ 17, 158 P.3d at 238 (citation omitted). Here, given the entirety of ALF's filings in the case, the single question ALF's counsel posed at oral argument simply failed to present the superior court with a legal theory meaningfully challenging the applicability of section 12. *See MidFirst Bank v. Chase*, 230 Ariz. 366, 369 n.4, ¶ 8, 284 P.3d 877, 880 n.4 (App. 2012) (trial court may refuse to consider arguments raised for the first time in a reply); *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, ¶ 13, 83 P.3d 1114, 1118 (App. 2004) (citation omitted) (when challenge is not raised with specificity and addressed in the trial court, appellate court will generally not consider it). Accordingly, we reject ALF's argument that during oral argument on the cross-motions it disputed the applicability of section 12 to this case.

¶23 ALF also argues that it disputed the applicability of section 12, contrary to what the superior court found, when it argued, in its post oral argument supplemental filings, that Lopez had waived his right to raise the first petition section 12 defense because he had not raised it in the first Arizona case. In making this argument, ALF has misconstrued the record and its own filings. In its supplemental filings, ALF did not argue section 12 was inapplicable or that state procedural rules governed service of the first petition to vacate. Instead, it simply argued that Lopez could not rely on section 12, that is, the first petition section 12 defense, because he had not raised it in the first Arizona case.

¶24 Based on the record before it, the superior court properly concluded ALF failed to dispute "that the deadline for service under § 12 of the FAA applies to this case."

¶25 Finally, ALF argues the superior court should have considered its argument that Lopez waived the first petition section 12 defense because he had not raised it in the first Arizona case. Again, on this record, the superior court did not abuse its discretion in refusing to consider ALF's waiver argument. *See* cases cited *supra* ¶ 22.

¶26 The record reflects that well before ALF moved for summary judgment, it was on notice of Lopez's first petition section 12 defense. In filings made by Lopez in April and August 2010 in the Illinois case, Lopez argued ALF had failed to timely serve him with the first Arizona petition to vacate under section 12. Further, even if Lopez had not raised the first petition section 12 defense in the Illinois case before ALF moved for summary judgement, he clearly raised it in the parties' joint pretrial memorandum filed in April 2013, long before the parties cross-moved for summary judgment. ALF could easily have raised its waiver argument in its own motion papers or in its response to Lopez's cross-motion. Finally, the parties had fully briefed the issues raised in the cross-motions, and the superior court had invested substantial time in addressing their arguments. Under these circumstances the superior court did not abuse its discretion in refusing to consider ALF's waiver argument. Simply put, ALF waited too long to raise it.[5]

CONCLUSION

¶27 For the foregoing reasons, we affirm the superior court's summary judgment in favor of Lopez, dismissing ALF's petition to vacate the CCA. As the prevailing party on appeal, and pursuant to the lien agreement, we award Lopez attorneys' fees and costs on appeal contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA

[5]We also note the superior court dismissed the first Arizona case for lack of prosecution, meaning the court did not adjudicate it on the merits. *See Ader v. Estate of Felger*, 240 Ariz. 32, ___, ¶ 44, 375 P.3d 97, 109 (App. 2016) (citation omitted) (judgment on merits is based on legal rights, not on matters of practice, procedure, jurisdiction, or form). Accordingly, the dismissal did not bar Lopez from raising the first petition section 12 defense in the second Arizona action.