DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

REQUIP, L.L.C., an Arizona limited liability company, Plaintiff/Counterdefendant/ Appellant, v. JEFFREY C. STONE, INC., an Arizona corporation dba SUMMIT BUILDERS CONSTRUCTION COMPANY, Defendant/Counterclaimant/ Appellee, and RAINTREE CORPORATE CENTER HOLDINGS, L.L.C., an Arizona limited liability company; and SAFECO INSURANCE COMPANY OF AMERICA, a Washington corporation, Defendants/Appellees.	No. 1 CA-CV 09-0091 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV 2006-008043

The Honorable J. Kenneth Mangum, Judge

VACATED AND REMANDED

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D O W N I E, Judge

¶1 ReQuip, L.L.C. appeals from the superior court's award of $240,596.02 in attorneys' fees and $20,481.79 in costs to appellee Jeffrey C. Stone, Inc., d/b/a Summit Builders Construction Company ("Summit"). For the following reasons, we vacate the judgment and remand for further proceedings in the superior court.

FACTS AND PROCEDURAL HISTORY

¶2 Raintree Corporate Center Holdings, L.L.C. ("Raintree") retained Summit to serve as general contractor for a construction project at the Raintree Corporate Center in Scottsdale. Summit and ReQuip entered into a subcontract for excavation, grading, and paving work ("the subcontract"). ReQuip ceased work on the project in December 2005 and thereafter sued Summit, Raintree, and Safeco Insurance Company of America (Summit's surety), asserting claims against the bond and counts for breach of contract and unjust enrichment. Summit counterclaimed for breach of contract.

¶3 The parties litigated their disputes in superior court for almost two years, with no one invoking the alternative dispute resolution (ADR) terms set forth in the subcontract.[1] After private mediation proved unsuccessful, the parties agreed to submit to binding arbitration and executed a Binding Arbitration Agreement ("Arbitration Agreement").

¶4 After an extended hearing, the arbitrator ruled in favor of Summit, awarding $102,408.09 in damages on the counterclaim. Appellees asked the arbitrator for an award of attorneys' fees and costs pursuant to the subcontract's fee provisions, and also requested pre-judgment interest. By order dated July 24, 2008, the arbitrator declined to make such an award. That same day, Appellees filed, with minor

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[1] The subcontract included an arbitration clause that read:

> [D]ispute will be resolved through binding arbitration in accordance with the Construction Industry Rules of the American Arbitration Association. . . .
>
> In any arbitration, action, or proceeding regarding this agreement, the prevailing party shall be entitled to recover its attorneys' and expert fees and costs and to have final judgment entered in any court having jurisdiction over the parties based upon the final award.

As we discuss *infra,* when the parties ultimately agreed to mediate and arbitrate their claims, they did not adopt or follow the subcontract's ADR terms.

modifications, the same application for fees, costs, and pre-judgment interest in the superior court.[2] Over Requip's objection, the superior court awarded fees and costs, stating:

> IT IS ORDERED granting the Application for Attorney's Fees and Costs in the amount of $240,596.02, plus costs in the amount of $20,481.79.
>
> THE COURT CONCLUDES that the failure of the Arbitrator to award fees does not preclude this Court's award of attorney's fees and costs.
>
> THE COURT ALSO CONCLUDES that prejudgment interest is not awardable as it was not awarded by the Arbitrator, and if awardable at all, the Arbitrator would have to make that award.

¶5 Two weeks later, Appellees asked the superior court to confirm the arbitration award. They requested a judgment for $358,088.68, which included the damages awarded by the arbitrator and the fees and costs awarded by the court.[3] ReQuip responded in opposition. On December 12, 2008, the superior court entered judgment, confirming the arbitration award "in its entirety" and awarding "Summit" its attorneys' fees of $240,596.02 and costs of $20,481.79. The signed judgment included Arizona Rule of Civil Procedure 54(b) language. This

[2] Raintree and Summit sought fees under Arizona Revised Statute ("A.R.S.") section 12-341.01(A) (2003); Summit also relied on fee provisions in the subcontract.

[3] ReQuip was entitled to an offset of $5,397.22, representing a damage award in its favor regarding a different project.

timely appeal followed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 Appellees contend the subcontract and A.R.S. § 12-341.01 authorized the superior court to award fees and costs.[4] ReQuip disagrees, arguing that once the parties executed the Arbitration Agreement, the court merely had authority to confirm or deny the ensuing award, but instead "acted as a *de facto* arbitration appellate tribunal during the confirmation proceedings."

1. The Arbitration Agreement

¶7 Arizona public policy favors arbitration as a means of disposing of controversies. *Clarke v. ASARCO Inc.,* 123 Ariz. 587, 589, 601 P.2d 587, 589 (1979) (citation omitted). Arbitration agreements are "construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration." *City of Cottonwood v. James L. Fann Contracting, Inc.,* 179 Ariz. 185, 189, 877 P.2d 284, 288 (App. 1994) (citation omitted). An arbitrator's decision "generally is final and conclusive; the [Uniform Arbitration] act provides

[4] In addition to the ADR terms quoted *supra*, there is a separate fee provision in the subcontract that reads: "General Contractor also shall be entitled to recover any expenses, attorneys fees, and costs incurred and any and all other damages sustained by General Contractor by reason of Subcontractor's default."

very limited grounds for a trial court to deny confirmation of an arbitration award." *Fisher v. Nat'l Gen. Ins. Co.,* 192 Ariz. 366, 369, ¶ 11, 965 P.2d 100, 103 (App. 1998).

¶8 To place the parties' divergent views in context, we first consider the Arbitration Agreement. A written agreement to submit an existing controversy to arbitration is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." A.R.S. § 12-1501 (2003). The Arbitration Agreement here provided, *inter alia*:

- The parties would submit to binding arbitration before an agreed-upon arbitrator;
- ReQuip would withdraw "all pending motions to compel or for sanctions";
- No further discovery would occur, though certain supplemental disclosures were contemplated; and
- Summit would defer its alter ego claim (which was the subject of a proposed third party complaint) until the underlying complaint and counterclaim were resolved.

The Arbitration Agreement further stated: "[E]ach party may present their entire claim to the arbitration [sic], unless the parties agree to resolution of one or more separate claims during the mediation." The Arbitration Agreement did not mention attorneys' fees. It also said nothing about reserving

any claims or issues for the superior court's resolution.

¶9 We conclude that, by agreeing they could "present their entire claim to the [arbitrator]," the parties removed their "entire claim[s]" from the superior court and placed them in the hands of their chosen arbitrator.[5] *Cf. Creative Builders, Inc. v. Avenue Devs., Inc.,* 148 Ariz. 452, 456, 715 P.2d 308, 312 (App. 1986) (reversing award of pre-judgment interest because parties submitted their "entire claim" to arbitration, and "[a]ny claim which [appellee] might have had for pre-award interest must be deemed to have merged in the arbitration award."). The Arbitration Agreement did not provide for hybrid-type resolution, whereby certain claims would be decided by the arbitrator and others would be litigated in superior court. Even Summit's alter ego claim was preserved for future *arbitration* proceedings, not judicial resolution.

¶10 Our decision in *City of Cottonwood* does not compel a contrary conclusion. 179 Ariz. 185, 877 P.2d 284. That case does not stand for the proposition that the superior court may award attorneys' fees incurred in litigating the substantive merits of a dispute before arbitration occurs. Our holding was narrow, allowing Fann (the prevailing party in arbitration) to recover fees it incurred in the superior court for defending

[5] As we discuss *infra,* Raintree's claim for fees and costs merits different treatment.

against the City's attempt to stay arbitration that had already commenced pursuant to the parties' contractual agreement. *Id*. at 293-94, 877 P.2d at 194-95.

¶11 In the case at bar, the arbitrator denied Appellees' request for attorneys' fees, costs, and prejudgment interest. He cited various legal bases for that decision. As with his determination regarding prejudgment interest, the correctness of the arbitrator's ruling is not subject to review by the superior court or this Court. *See Smitty's Super-Valu v. Pasqualetti*, 22 Ariz. App. 178, 180-81, 525 P.2d 309, 311 (App. 1974) (within the boundaries of the arbitrator's powers, his or her decisions are final both as to questions of fact and law) (citations omitted); *Pawlicki v. Farmers Ins. Co.,* 127 Ariz. 170, 171, 618 P.2d 1096, 1097 (App. 1980) (superior court may not decline to confirm arbitration award because it believes award is unsupported by the evidence or that arbitrator committed errors of law).

¶12 The superior court may refuse to confirm an arbitration award under limited circumstances. *See* A.R.S. § 12-1512(A) (2003). None of those situations exist here.[6]

[6] Summit may not attack the arbitrator's ruling by claiming he "exceeded his authority" in denying the fee application, when it affirmatively sought a ruling on fees and also moved to confirm the award under A.R.S. § 12-1511 (2003). In reality, Summit is attacking the arbitrator's rationale for his ruling, not his authority. An arbitration award is not subject to

Similarly, none of the statutory bases for modifying or correcting an arbitration award has been established. *See* A.R.S. § 12-1513(A).

¶13 In *Steer v. Eggleston,* we held that "a trial court is prohibited from merely tacking fees onto the [arbitration] award during confirmation." 202 Ariz. 523, 527, ¶ 18, 47 P.3d 1161, 1165 (App. 2002) (citation omitted). To do so, we noted, "would subvert the purpose of A.R.S. § 12-1510," because the prevailing party in arbitration "would merely shift the complication and expense of a formal trial to the confirmation stage by litigating the propriety of an award for fees during confirmation." *Id.* (citation omitted). Although this case is procedurally different, in that Appellees sought fees from the superior court before moving for confirmation of the arbitration award, the same rationale applies.

¶14 We need not separately address Appellees' claim for fees under A.R.S. § 12-341.01. The foregoing analysis applies equally to the statutory fee claim. Moreover, the failure to specifically submit the issue of fees in the Arbitration Agreement precludes an award of fees incurred in the arbitration proceedings. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.,*

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attack because one party believes the arbitrator erred with respect to factual determinations or legal interpretations. *Hirt v. Hervey,* 118 Ariz. 543, 545, 578 P.2d 624, 626 (App. 1978) (citations omitted).

Inc., 180 Ariz. 148, 152, 882 P.2d 1274, 1278 (1994) ("[A]ttorneys' fees are not to be awarded for work performed in arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement.").

2. Fees and Costs Incurred in Confirming the Award

¶15 There is one category of fees and costs that Summit could properly seek to recover in the superior court. "Under the Uniform [Arbitration] Act, the award of attorney's fees for the confirmation proceeding itself requires separate analysis from the award for fees incurred in the underlying arbitration." *Canon Sch.,* 180 Ariz. at 153, 882 P.2d at 1279. Section 12-1514 (2003) states:

> Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in confirmity [sic] therewith and be enforced as any other judgment or decree. *Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.*

(Emphasis added). This statute permits (but does not require) the superior court to award costs and attorneys' fees incurred during the confirmation proceedings. *Steer,* 202 Ariz. at 528, ¶ 23, 47 P.3d at 1166. On remand, the superior court shall determine whether to award Summit such fees and costs.

3. Raintree's Fees and Costs

¶16 Raintree's claim for attorneys' fees and costs differs

materially from Summit's. The court granted summary judgment to Raintree in September of 2007–-six months before the parties executed the Arbitration Agreement. Soon thereafter, Raintree requested $16,725 in fees pursuant to A.R.S. § 12-341.01(A). The superior court labeled Raintree's application "premature" and denied it without prejudice. Raintree, through Summit, re-urged its claim for fees after the arbitrator's ruling. In awarding fees, the superior court did not specifically mention Raintree and instead issued a lump sum award. Under these circumstances, the superior court was not divested of authority to rule on Raintree's fee request, and that aspect of the award is properly before us.

¶17 ReQuip's sole claim against Raintree was for unjust enrichment. According to ReQuip, Raintree cannot recover fees under A.R.S. § 12-341.01(A) because it did not prevail on "an action arising out of contract." We conclude otherwise.

¶18 In *Schwab Sales, Inc. v. GN Constr. Co., Inc.*, 196 Ariz. 33, 992 P.2d 1128 (App. 1998), a third-party plaintiff sued the general contractor for unjust enrichment when its subcontractor failed to pay plaintiff for equipment used in construction. The general contractor prevailed in defense of the unjust enrichment claim and sought fees under A.R.S. § 12-341.01(A), which the superior court granted. *Schwab*, 196 Ariz. at 37, ¶¶ 11-13, 992 P.2d at 1132. We held that "a cause of

action may arise out of a contract even if one of the litigants was not a party to the contract or the contract was rescinded." *Id.* at ¶ 12, 992 P.2d at 1132 (citations omitted). We affirmed the fee award because the unjust enrichment claim would not have existed "but for a breach of a contract." *Id.* at ¶ 11, 992 P.2d at 1132 (citation omitted). The same logic applies here. Raintree was entitled to recover fees and costs under A.R.S. § 12-341.01(A).

4. Attorneys' Fees Incurred on Appeal

¶19 Summit requests attorneys' fees incurred on appeal pursuant to A.R.S. §§ 12-341.01 and -1514. ReQuip also seeks to recover fees under A.R.S. § 12-1514.

¶20 Summit and Raintree partially prevailed in these proceedings, as did ReQuip. In the exercise of our discretion, we decline to award appellate attorneys' fees to any party. However, ReQuip, which prevailed on the majority of its claims, is entitled to recover its appellate costs.

CONCLUSION

¶21 We vacate the award of attorneys' fees and costs to Summit. We remand for the superior court to determine whether to award Summit its fees and costs incurred during the confirmation proceedings under A.R.S. § 12-1514. Additionally, on remand, Raintree is entitled to judgment for its reasonable attorneys' fees and costs incurred in the superior court. We

award ReQuip its costs incurred on appeal upon compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge