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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

ANTHONY POLIGONO and CYNTHIA) 1 CA-CV 09-0265
POLIGONO, husband and wife,)
) DEPARTMENT D
Plaintiffs/Appellees,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
AVALON CUSTOM HOMES, LLC, an) of Civil Appellate
Arizona limited liability) Procedure)
company,)
)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CV 2008-4223

The Honorable James E. Chavez, Judge

AFFIRMED

Law Offices of Daniel J. Oehler
By Daniel J. Oehler
Attorneys for Appellees

Bullhead City

Law Offices of Paul Lenkowsky
By Paul Lenkowsky
And Randal W. Studer
Attorneys for Appellant

Bullhead City

O R O Z C O, Judge

¶1 Avalon Custom Homes, LLC (Avalon) appeals the trial court's judgment confirming the arbitration award entered in favor of Anthony Poligono and Cynthia Poligono (collectively, the Poligonos).¹ For the reasons set forth below, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 On or about November 3, 2005, Avalon and the Poligonos entered into a fixed price construction contract (Construction Contract), which provided that Avalon was to build a home for the Poligonos. While the home was being constructed, the Poligonos were required to make construction draw payments to Avalon. The Poligonos made all the draw payments with the exception of the final draw in the amount of \$71,550, which was requested on August 17, 2007. As a result of the nonpayment, on September 17, 2007, Avalon recorded a mechanic's lien against the Poligonos' property in the amount of \$86,550.² A certificate of occupancy was issued by Bullhead City on October 12, 2007.

¹ We note that the record before us contains variations in the spelling of the Plaintiffs-Appellees last name including both "Poligano" and "Poligono."

² Avalon's lien of \$86,550 represented the final draw of \$71,550 plus an additional \$15,000 for "delays relating to the cabinetry."

¶3 On November 16, 2007, Avalon increased its demand to \$121,653.85,³ but stated it would accept \$100,000 if the Poligonos would execute an agreement holding Avalon harmless for any issues arising out of the construction project (Release Agreement). On November 21, 2007, the Poligonos gave Avalon a cashier's check for \$121,653.85, but refused to sign the Release Agreement.

¶4 The Construction Contract provided that the Poligonos "shall not occupy the property until final payment has been received by [Avalon] and a Certificate of Occupancy has been obtained." After both conditions were satisfied, Avalon gave the Poligonos a key to the home to show it to a visiting family member. The Poligonos did not return the key, changed the locks and moved in. On December 5, 2007, Avalon again requested the Poligonos sign the Release Agreement, and the Poligonos again refused. As a result of the Poligonos' refusal to sign the Release Agreement, Avalon returned the \$121,653.85 cashier's check, entered the home and changed the locks while the Poligonos were shopping. Upon their return, the Poligonos contacted the police, but they were refused entry into their home. The Poligonos were later permitted to re-enter their home and in late January or February made a payment of \$56,371.11 to Avalon.

³ Avalon increased the payoff amount "to account for various factors including delays caused by [the Poligonos]."

¶15 Avalon filed a demand for arbitration on or around February 11, 2008. Article 12.1 of the Construction Contract provided:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Additionally, Article 15.1 of the Construction Contract provided:

"[i]n the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses." The Poligonos counterclaimed, alleging claims including overcharging for goods and upgrades, failure to apply credits and failing to construct the home in accordance with the specified plans.

¶16 After a hearing, the arbitrator awarded Avalon \$37,814.85 and the Poligonos \$16,705.47. The Poligonos were also awarded \$50,000 in attorney fees and \$8,067.21 in costs. The arbitrator also ordered that Avalon pay the fees and costs of the arbitration, which totaled approximately \$45,000. Totaling all awards, fees and costs, Avalon owed the Poligonos \$60,181.27 as a result of the arbitration plus interest at the rate of eight percent per annum from the October 13, 2008 award date, until paid in full. The Poligonos filed an application for

confirmation of award with the trial court. The trial court confirmed the arbitration award in its entirety. The trial court also awarded an additional \$10,136.00 to the Poligonos for their reasonable attorney fees and taxable costs incurred during the confirmation action pursuant to Arizona Revised Statutes (A.R.S.) section 12-1514 (2003).

¶17 Avalon timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101.B, -2101.01.A.6 and -120.21.A.1 (2003).

DISCUSSION

¶18 Avalon contends the provisions of A.R.S. §§ 12-341 and -341.01.A (2003), which provide for attorney fees and costs for the "successful party" in a civil action, governed the arbitrator's determination of who was the "prevailing party" for purposes of an award of attorney fees and costs. Avalon further argues the trial court's order confirming the arbitration award should be overturned because the arbitrator acted in manifest disregard of the law and his award met the "completely irrational" standard as it did not follow A.R.S. §§ 12-341 and -341.01.A. Specifically, Avalon contends that as each party received monetary awards at the arbitration proceeding, neither party was the prevailing party and therefore: (1) the Poligonos should not have been awarded their attorney fees and costs; and (2) Avalon should not have been ordered to pay the arbitration fees and costs.

¶9 The Poligonos counter that the Construction Contract's arbitration and fee provisions, not the statutory provisions, control the award of attorney fees and costs. The Poligonos argue that the arbitrator, acting pursuant to the American Arbitration Association (AAA) Construction Industry Arbitration Rules, had the power to declare the Poligonos the prevailing party and award them their reasonable attorney fees, costs, and the arbitration fees and costs.

Attorney and arbitrator fees and costs

¶10 "[W]e review a trial court's decision to confirm an arbitration award for an abuse of discretion." *Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 364 n.3, ¶ 12, 78 P.3d 1081, 1085 n.3 (App. 2003). Additionally, we review the trial court's determination in the light most favorable to upholding it. *Park Imperial, Inc. v. E.L. Farmer Constr. Co.*, 9 Ariz. App. 511, 513-14, 454 P.2d 181, 183-84 (1969). In Arizona, "the law favors arbitration of disputes that the parties have agreed to arbitrate." *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, ¶ 11, 977 P.2d 769, 773 (1999). As public policy favors arbitration, arbitration clauses are liberally construed. *Foy v. Thorp*, 186 Ariz. 151, 153, 920 P.2d 31, 33 (App. 1996).

¶11 Avalon first contends the arbitrator should have determined who was the "successful party" pursuant A.R.S. §§ 12-341 and -341.01.A and awarded attorney fees and costs

accordingly. However, a contractual provision for attorney fees will control to the exclusion of any applicable statute. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 90, ¶ 26, 138 P.3d 1210, 1217 (App. 2006).

¶12 Article 15.1 of the Construction Contract specifically provided for an award of attorney fees as it stated: “[i]n the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses.” Article 12.1 of the parties’ Construction Contract provided for arbitration of disputes arising from the contract. The Construction Contract also provided that arbitration was to be conducted by an AAA arbitrator pursuant to the Construction Industry Arbitration Rules. Rule R-44(c) of the Construction Industry Arbitration Rules provides, in part, that “the arbitrator shall assess fees, expenses, and compensation [and] . . . may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.” Additionally, Rule R-44(d) of the Construction Industry Arbitration Rules provides, in part, that the arbitrator’s award may include “an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.”

¶13 Because the parties' Construction Contract provided for arbitration governed by the Construction Industry Arbitration Rules, which give the arbitrator discretion to award fees, we conclude that A.R.S. §§ 12-341 and -341.01.A are inapplicable to the question of both the award of attorney fees and costs incurred in the arbitration and fees and costs of the arbitration. The parties' Construction Contract provisions, not the statutes govern the award of attorney fees and costs. *Grubb & Ellis*, 213 Ariz. at 90, ¶ 26, 138 P.3d at 1217 ("[W]hen a contract has an attorney's fee provision it controls to the exclusion of the statute.") (quoting *Lisa v. Strom*, 183 Ariz. 415, 418 n.2, 904 P.2d 1239, 1242 n.2 (App. 1995)).

¶14 Avalon next argues that the arbitrator's award should not have been confirmed because it was "completely irrational" and because the arbitrator acted in manifest disregard of the law. The "manifest disregard" and "completely irrational" standards are applied in federal arbitration cases.⁴ Arizona courts have not adopted these standards. Arizona limits a trial court's power to set aside an arbitrator's award to five narrowly defined statutory grounds set forth in A.R.S. § 12-1512.A (2003). As the party contesting the entry of judgment on award, Avalon bears the burden of proving the existence of at least one

⁴ See, e.g., *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826 (9th Cir. 1995).

statutory ground to vacate the award. *Brake Masters*, 206 Ariz. at 364, ¶ 11, 78 P.3d at 1085. Avalon has failed to argue or raise any of the five statutory grounds for setting aside the arbitrator's award. However, even if we were to liberally construe Avalon's assertions as an argument for overturning the arbitrator's award pursuant to A.R.S. § 12-1512.A.3,⁵ which applies when an arbitrator exceeded his power, the argument would fail.

¶15 "An arbitrator's powers are defined by the agreement of the parties." *Matthews ex rel. Matthews v. Life Care Ctrs. of Am., Inc.*, 217 Ariz. 606, 610, ¶ 19, 177 P.3d 867, 871 (App. 2008) (quoting *Hembree v. Broadway Realty & Trust Co., Inc.*, 151 Ariz. 418, 419, 728 P.2d 288, 289 (App. 1986)); see *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 180, 525 P.2d 309, 311 (1974) (noting "[t]he boundaries of the arbitrators' powers are defined by the agreement of the parties.")

¶16 In this case, the parties specifically contracted for the arbitration of claims arising out of the Construction Contract. Additionally, the parties contracted to have the arbitration conducted by the AAA. The Construction Contract mandates that any arbitration proceedings are to be governed by

⁵ Section 12-1512.A.3 is the only statutory ground for overturning an arbitration award that is remotely applicable to Avalon's arguments regarding the confirmation of the arbitration award.

Construction Industry Arbitration Rules, which give the arbitrator the discretion to assess fees and expenses, including attorney fees if the award was "authorized by law or their arbitration agreement." The Construction Contract permitted the award of "reasonable attorney fees, costs and expenses" to the "prevailing party." In regards to attorney fees and costs, the arbitrator concluded:

Although neither party fully prevailed in this case, *the POLIGONOS will be considered the prevailing party for purposes of a costs and attorneys' fees award.* On November 21, 2007, the POLIGONOS paid AVALON \$121,653.85, the full balance AVALON demanded on the contract. AVALON had no legal right to demand that POLIGONOS waive any rights available to them under the contract and under the law. By improperly demanding that POLIGONOS waive their rights, by refusing to accept the full payment which it had demanded, and by causing the POLIGONOS to be dispossessed from their home, AVALON set in motion events that ultimately led to this litigation which, in all likelihood, would not otherwise have been initiated.

(Emphasis added.) The arbitrator was authorized by the Construction Contract to determine the prevailing party and award attorney fees and costs to that party. In light of the power given to the arbitrator in the Construction Contract, we cannot say that the arbitrator exceeded his authority in ordering Avalon to bear the entirety of the arbitration costs and fees or in ordering it to pay the Poligonos their attorney fees and costs for the arbitration proceedings. As such, the trial court did

not abuse its discretion in confirming the award in favor of the Poligonos.

Attorney fees and costs on appeal

¶17 The Poligonos request attorney fees and costs pursuant to the parties' contract. As the prevailing party on appeal, the Poligonos are entitled to recover their reasonable attorney fees pursuant to Article 15.1 of the Construction Contract. In our discretion, we award the Poligonos their reasonable attorney fees on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21(c). Additionally, as the prevailing party on appeal, the Poligonos are entitled to costs upon their compliance with ARCAP 21(c).

CONCLUSION

¶18 For the foregoing reasons, we affirm the trial court's judgment confirming the arbitration award entered in favor of the Poligonos.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

JON W. THOMPSON, Judge