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

C&I ENGINEERING, LLC, a Washington limited liability company, Plaintiff/Appellant, v. PERFORMANCE IMPROVEMENT OF VIRGINIA, a Virginia corporation; STEVEN SWARTHOUT and KATHLEEN SWARTHOUT, husband and wife, Defendants/Appellees.	No. 1 CA-CV 11-0111 1 CA-CV 11-0319 (Consolidated) DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure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. CV2010-093130

The Honorable Emmet J. Ronan, Judge

DISMISSED IN PART, AFFIRMED IN PART, REVERSED IN PART, REMANDED

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T I M M E R, Judge

¶1 These consolidated appeals stem from the superior court's dismissal of C&I Engineering, LLC's ("C&I") complaint against Performance Improvement of Virginia ("PIV") and Steven and Kathleen Swarthout for lack of personal and subject matter jurisdiction. In addition to challenging the merits of the dismissal, C&I also contests the court's award of attorneys' fees and costs to PIV and the Swarthouts. For the reasons that follow, we dismiss the appeal in CV 11-0111. In CV 11-0319, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND[1]

¶2 In August 2009, C&I, a Washington company authorized to conduct business in Arizona, entered in a written contract with PIV, a Virginia corporation, for the latter to perform services at a nuclear generating station located in California. Steven Swarthout, a Virginia resident, signed the contract for PIV in his capacity as President. The contract includes a

[1] On review of a judgment dismissing a complaint, we consider the facts alleged in the complaint to be accurate. *Dunlap v. City of Phoenix*, 169 Ariz. 63, 65, 817 P.2d 8, 10 (App. 1990). We do not consider facts asserted by the parties that are not supported by the record. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (stating appellate court review limited to evidence in trial court record at time of challenged decision). Likewise, we do not consider as evidence any statements of counsel at oral argument on the motion to dismiss. *London v. Green Acres Trust*, 159 Ariz. 136, 141, 765 P.2d 538, 543 (App. 1988) ("A statement by counsel is not . . . evidence before the court.").

forum-selection clause, which provides that any lawsuit arising from the contract will be brought in the appropriate court in Maricopa County, Arizona.[2]

¶3 Disputes arose between the parties and, in May 2010, C&I filed a complaint in the superior court in Maricopa County asserting claims for breach of contract against PIV and intentional interference with business expectancy against the Swarthouts. The complaint also asks the court to pierce PIV's corporate veil and hold Mr. Swarthout liable for PIV's breach of contract.[3] Appellees moved the court to dismiss the complaint pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(1), (2), and (6) because (1) the court lacked personal jurisdiction over the Swarthouts, (2) the court lacked subject matter jurisdiction, and (3) C&I failed to state a cognizable claim against the Swarthouts. After briefing and oral argument, the court granted the motion in a signed minute entry on the basis of lack of personal and subject matter jurisdiction. C&I immediately filed a notice of appeal (CV 11-0111). Thereafter, on motion of Appellees, the court awarded them $7,819 in attorneys' fees and $223 in costs and entered judgment. C&I

[2] The contract is not in the record. Counsel for PIV and the Swarthouts admitted at oral argument on the motion to dismiss that the contract contains a forum-selection clause specifying Arizona as the appropriate forum.

[3] The complaint does not make any allegations against Mrs. Swarthout.

then filed a notice of appeal challenging the entire judgment (CV 11-0319). We consolidated the appeals.

¶4 We review the superior court's dismissal for lack of personal and subject matter jurisdiction de novo and view the facts in the light most favorable to C&I as the plaintiff. *Rollin v. William V. Frankel & Co.*, 196 Ariz. 350, 352, ¶ 5, 996 P.2d 1254, 1256 (App. 2000) (citing *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 567, 569, 892 P.2d 1354, 1356, 1358 (1995)); *Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122, 124, ¶ 6, 970 P.2d 954, 956 (App. 1998). We review whether the court is authorized to award attorneys' fees de novo. *Camelback Plaza Dev., L.C. v. Hard Rock Café Int'l.*, 200 Ariz. 206, 208, ¶ 4, 25 P.3d 8, 10 (App. 2001).

DISCUSSION

I. Personal jurisdiction

¶5 Under the Arizona long-arm statute, an Arizona court may exercise personal jurisdiction over a nonresident defendant "to the maximum extent permitted" by the Arizona and United States Constitutions. Rule 4.2(a). Arizona courts will exercise personal jurisdiction over a defendant who "has [either] consented to such jurisdiction or . . . has sufficient minimum contacts with the [] state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Bohreer v. Erie Ins. Exch.*, 216 Ariz.

208, 213, ¶ 19, 165 P.3d 186, 191 (App. 2007). With this framework in mind, we address whether the superior court correctly determined it lacked personal jurisdiction over PIV and the Swarthouts.

A. PIV

¶6 Although PIV did not base its motion to dismiss on a lack of personal jurisdiction, and its counsel at oral argument on the motion conceded the superior court possessed personal jurisdiction over PIV, the court nevertheless ruled it lacked personal jurisdiction after conducting a minimum-contacts analysis. On appeal, PIV does not argue in support of the court's ruling concerning personal jurisdiction.

¶7 When a party explicitly consents to personal jurisdiction through an enforceable forum-selection clause in a contract, it obviates the need for the court to conduct a minimum-contacts analysis under the due process clause. *Id.*; *Morgan Bank (Del.) v. Wilson*, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990). "[A] forum selection clause is enforceable as long as it is not the result of unfair bargaining or so unreasonable that the plaintiff would be deprived of his or her day in court." *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 377, ¶ 19, 35 P.3d 426, 431 (App. 2001). The party attempting to disavow a forum-selection clause bears a heavy burden to prove these circumstances. *Id.* at 377, ¶ 20, 35 P.3d at 431.

¶8 PIV executed a contract with C&I in which the parties selected Arizona as the forum state to resolve any disputes arising under the contract. Nothing in the record supports a finding that the forum-selection clause results from unfair bargaining or is so unreasonable it would deprive PIV of its day in court. Consequently, the forum-selection clause is sufficient to confer personal jurisdiction over PIV regardless of the quality of its contacts with Arizona. The superior court erred by finding it lacked personal jurisdiction over PIV.

B. The Swarthouts

¶9 C&I does not make any arguments that Arizona may exercise personal jurisdiction over the Swarthouts due to their minimum contacts with the state, and the record does not reveal such contacts. Instead, C&I argues the forum-selection clause in the contract between C&I and PIV also serves to confer personal jurisdiction over the Swarthouts. C&I acknowledges that the Swarthouts are not signatories to the contract. But, relying on *Schwab Sales, Inc. v. GN Construction Company*, 196 Ariz. 33, 992 P.2d 1128 (App. 1998), C&I argues that because its claims against the Swarthouts arise from the contract, and the forum-selection clause applies to claims "directly or indirectly" related to the contract, the forum-selection clause applies to them. **[id]** *Schwab Sales*, however, addressed claims "arising under contract" in relation to a discretionary award of

attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") § 12-341.01(A) (West 2012).[4] *Schwab Sales*, 196 Ariz. at 37, ¶ 11, 992 P.2d at 1132. Neither *Schwab Sales* nor any known authority holds that a party can bind others to a forum-selection clause merely by bringing claims against them that arise from the contract containing the clause. Indeed, such a holding is at odds with the general notion that only parties to a contract and their assignees are bound by its provisions.

¶10 Next, C&I argues the Swarthouts are bound by the forum-selection clause because Mr. Swarthout signed the contract for PIV and performed under the contract, so "he had fair warning that his actions subjected him to personal jurisdiction." But the law is clear that an agent who signs an agreement on behalf of a principal is not personally bound. *See Ferrarell v. Robinson*, 11 Ariz. App. 473, 475, 465 P.2d 610, 612 (1970) ("One who signs an agreement as the agent of a fully disclosed principal is not a party to that agreement and thus incurs no personal liability for the principal's breach of that agreement.").

¶11 C&I lastly argues the Swarthouts voluntarily subjected themselves to jurisdiction in Arizona courts by asking for attorneys' fees in the reply concerning their motion to dismiss.

[4] Absent material revisions after the date of the events at issue, we cite a statute's current version.

To support its argument, C&I relies on *National Homes Corporation v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 682 P.2d 439 (App. 1984), which held that a defendant waives the defense of insufficiency of service of process "by seeking affirmative relief from the court, which usually arises when a defendant files a voluntary counter-claim or cross-claim." *Id.* at 437, 682 P.2d at 442; *see also Carlton v. Emhardt*, 138 Ariz. 353, 356, 674 P.2d 907, 910 (App. 1983) (holding defendant waives defense of lack of personal jurisdiction by filing a third-party complaint). C&I does not cite any authority supporting its contention that a request for fees is a request for "affirmative relief" on par with a counterclaim or cross-claim, and we are not aware of any. *See* 5C Charles Alan Wright et al., *Federal Practice & Procedure* § 1391 (West 2011) (discussing the principle in terms of asserting causes of action). And a request for fees expended to obtain a dismissal based on lack of jurisdiction is not inconsistent with an assertion the court lacks jurisdiction to adjudicate the plaintiff's claim; it is simply collateral to the challenge. *See Moore v. Permanente Med. Grp., Inc.*, 981 F.2d 443, 445 (9th Cir. 1992) (explaining "it is clear that an award of attorney's fees is a collateral matter over which a court normally retains jurisdiction even after being divested of jurisdiction on the merits"); *see also Prime Ins. Syndicate, Inc. v. Soil Tech*

Distribs. Inc., 270 F. App'x 962, 965 (11th Cir. 2008) (to same effect). For these reasons, we do not consider a request for attorneys' fees as a voluntary submission of a claim for adjudication on the merits. *See Bituminous, Inc. v. Uerling*, 607 S.W.2d 331, 333 (Ark. 1980) (rejecting plaintiff's argument that seeking attorneys' fees amounts to a prayer for affirmative relief that waives any venue objection).

¶12 In summary, the Swarthouts are not bound by the forum-selection clause contained in the contract between C&I and PIV. Because the Swarthouts have no contacts with Arizona, the superior court correctly ruled it could not exercise personal jurisdiction over them. Dismissal was proper regardless of the propriety of the court's subject matter jurisdiction, which we now address to decide whether the court properly dismissed the complaint against PIV.

II. Subject matter jurisdiction

¶13 C&I argues the superior court erred by finding it lacked subject matter jurisdiction as the court is clearly authorized to adjudicate contract-based actions. PIV responds the court lacks subject matter jurisdiction because Arizona has no contacts with either the parties, the performance of the contract at issue, or the dispute, and the forum-selection clause cannot confer such jurisdiction. The superior court agreed with PIV, reasoning parties cannot confer subject matter

jurisdiction on the court when it would not exist otherwise and concluding the court lacked jurisdiction because the contract at issue "has nothing to do with Arizona."

¶14 PIV and the superior court conflate the principles of subject matter and personal jurisdiction to reach an incorrect result. Although personal jurisdiction turns on a party's submission to jurisdiction or minimum contacts, *see Williams v. Lakeview Co.*, 199 Ariz. 1, 3, ¶ 6, 13 P.3d 280, 282 (2000), subject matter jurisdiction addresses "a court's statutory or constitutional power to hear and determine a particular type of case." *State v. Moldanado*, 223 Ariz. 309, 311, ¶ 14, 223 P.3d 653, 655 (2010) (citations omitted); *see also Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 81-82, 402 P.2d 22, 25 (1965) ("Jurisdiction of the subject matter . . . includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question." (citation omitted)). Whether the court possesses subject matter jurisdiction turns on the nature of the allegations set forth in the complaint. *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 507, 744 P.2d 29, 34 (App. 1987). Here, C&I alleges a breach-of-contract claim against PIV, which unquestionably falls within the superior court's general jurisdiction. *Id.*; Ariz. Const. art. 6, § 14 (providing general jurisdiction of

superior court consists of "[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court").

¶15 PIV argues parties cannot confer subject matter jurisdiction on the court by agreement when it would not exist otherwise. *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 594-95, ¶¶ 12-14, 218 P.3d 1045, 1051-52 (App. 2009); *Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 184, ¶ 18, 33 P.3d 514, 518 (App. 2001). Although we agree with this principle, it is irrelevant because subject matter jurisdiction in this case is not dependent on the forum-selection clause; it exists because the court has jurisdiction to adjudicate contract claims. Additionally, we reject PIV's contention that the superior court lacks subject matter jurisdiction because the lawsuit involves foreign residents concerning a contract performed in a foreign jurisdiction. Minimum-contacts analysis is invoked to determine personal jurisdiction, not subject matter jurisdiction. *See A. Uberti & C.*, 181 Ariz. at 569-70, 892 P.2d at 1358-59 (stating minimum-contacts analysis used to decide whether exercise of personal jurisdiction complies with due process). The cases cited by PIV to support the opposite conclusion concern *personal* jurisdiction. *See* Morgan Bank (Del.), 164 Ariz. 535, 794 P.2d 959; *Global Packaging, Inc. v. Superior Court*, 127 Cal. Rptr. 3d 813 (Ct. App. 2011).

¶16 For these reasons, the superior court erred by finding it lacked subject matter jurisdiction to adjudicate C&I's contract claim against PIV. We therefore reverse the judgment to the extent it dismisses the complaint against PIV and remand for further proceedings.

III. Attorneys' fees and costs

¶17 C&I next argues the court improperly awarded attorneys' fees and costs to the Swarthouts[5] because (1) it had been divested of jurisdiction to rule in light of C&I's pending appeal, and (2) according to its ruling, the court lacked personal and subject matter jurisdiction over the Swarthouts and, therefore, it could not award them affirmative relief. We address each issue in turn.[6]

A. Effect of initial appeal

[5] C&I also challenges the award to PIV. But because we reverse the judgment to the extent it dismisses the complaint against PIV, we also vacate the fee award in its favor. We therefore address C&I's arguments only as they concern the Swarthouts.

[6] The Swarthouts argue C&I waived these issues by failing to present them in a "response" to the request for fees. Because C&I presented the issues in a "Notice" and a reply regarding that notice, C&I sufficiently preserved them. *See* William Shakespeare, *Romeo and Juliet*, act 2, sc. 2 ("What's in a name? That which we call a rose / By any other name would smell as sweet."). Additionally, challenges to a court's subject matter jurisdiction can be made at any time, including for the first time on appeal. *Health for Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 12, 57 P.3d 726, 728 (App. 2002).

¶18 On January 7, 2011, the court dismissed C&I's complaint without prejudice in a signed minute entry due to lack of jurisdiction.[7] C&I filed a notice of appeal on January 12. Nine days later, on January 21, the Swarthouts moved the court for an award of attorneys' fees and filed its statement of costs. The court entered a signed judgment dismissing the complaint and awarding attorneys' fees and costs on April 6. **[RA 70]** C&I's second notice of appeal followed.

¶19 C&I argues the January 7 signed minute entry constituted a final appealable judgment pursuant to Rule 58(a), and its notice of appeal filed on January 12 therefore divested the superior court of jurisdiction to award attorneys' fees and costs. *See Focal Point, Inc. v. Court of Appeals*, 149 Ariz. 128, 129-30, 717 P.2d 432, 433-34 (1986) (holding signed minute entry can be a "judgment"); *Sw. Gas Corp. v. Irwin ex rel. County of Cochise*, 629 Ariz. Adv. Rep. 16, ¶ 8 (App. Feb. 29, 2012) (noting that when a party files a notice of appeal from final judgment, it usually divests the superior court of jurisdiction to proceed except in furtherance of the appeal). The Swarthouts respond that the January 7 order was not appealable because their claim for fees remained outstanding,

[7] The court entered an unsigned minute entry on December 22, 2010 setting forth its ruling, but the court later withdrew that order for "clerical error." We therefore consider the January 7, 2011 order as the initial ruling on Appellees' motion to dismiss.

and the court therefore acted within its jurisdiction by awarding fees and costs.[8]

¶20 We begin by examining rules governing entry of civil judgments. Rule 58(g) provides that "a judgment shall not be entered until claims for attorneys' fees have been resolved and are addressed in the judgment," unless the court certifies a merits decision for immediate appeal pursuant to Rule 54(b). According to State Bar Committee Notes to the 1999 Amendments to Rule 58(g), this procedure fosters resolution of all issues in one judgment for efficient review in a single appeal. Thus, in the absence of Rule 54(b) certification, a signed order only constitutes a final judgment for purposes of appeal if it adjudicates all claims, including claims for attorneys' fees. *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218, ¶ 37, 119 P.3d 477, 485 (App. 2005).

¶21 The Swarthouts submitted a claim for fees by requesting an award in the reply concerning the motion to dismiss for lack of jurisdiction. *See id.* (characterizing request for attorneys' fees in answer and in open court as "claims"). Although a motion for fees was not pending at the

[8] Although it is not improper for the superior court to issue signed minute entries, we encourage to court to avoid doing so when claims for attorneys' fees are outstanding. Nothing is gained by signing a minute entry when claims are pending, and parties are often confused by the impact of such orders and file multiple notices of appeal to protect their interests, as occurred in this case.

time the court entered the January 7 order, we agree with this court's decision in *Britt v. Steffen*, 220 Ariz. 265, 270, ¶ 22, 205 P.3d 357, 362 (App. 2008), that the superior court retained jurisdiction to consider a timely filed motion for fees. In *Britt*, the plaintiff filed a breach-of-contract complaint, the defendant requested fees in the answer, and the court entered a signed order dismissing the complaint for failure to prosecute and later granted the defendant's fee motion, which was timely filed after entry of the signed order. *Id*. at 268, ¶ 12, 205 P.3d at 360. After reviewing amendments to procedural rules, *t*he *Britt* court held that the superior court retains jurisdiction to consider a timely filed motion for attorneys' fees. *Id*. at 270, ¶ 22, 205 P.3d at 362. As the *Britt* court noted, it would "defy reason" to hold that the court deprives itself of awarding attorneys' fees to the prevailing party by entering a signed order that the party, in fact, prevailed and qualifies for a fee award. *Id*.

¶22 Based on the foregoing authorities, we decide that the January 7 signed minute entry was not a final appealable judgment because the Swarthouts' fee claim remained outstanding, the time for filing a motion for fees had not expired, and the court did not certify the order pursuant to Rule 54(b). Rule 54(g)(2). Like the defendant in *Britt*, the Swarthouts timely filed a motion for fees and statement of costs after entry of

the January 7 signed minute entry. *See* Rule 54(g); A.R.S. § 12-346(A). The superior court therefore retained jurisdiction to award fees and costs. *Nat'l Broker Assocs.*, 211 Ariz. at 218, ¶ 37, 119 P.3d at 485; Rule 58(g). Consequently, C&I's notice of appeal from the January 7 order was ineffective as that order was not a final, appealable judgment. We therefore dismiss that appeal (CV 11-0111).[9]

B. Effect of jurisdictional ruling

¶23 C&I next argues the superior court erred by awarding attorneys' fees and costs in light of its ruling it lacked jurisdiction over the Swarthouts. This argument is a variant of C&I's contention that the Swarthouts waived their jurisdictional challenge by seeking attorneys' fees, and we reject it for the reasons previously explained. *See supra* ¶ 11.

¶24 In summary, the superior court did not act in excess of its jurisdiction by awarding attorneys' fees and costs to the Swarthouts.

ATTORNEYS' FEES ON APPEAL

¶25 All parties request an award of attorneys' fees pursuant to A.R.S. § 12-341.01. In our discretion, we award fees to the Swarthouts, subject to their compliance with Arizona

[9] Because C&I appealed from the entirety of the April 6, 2011 judgment, its challenge to the superior court's dismissal of the complaint for lack of personal and subject matter jurisdiction is properly before us. *See supra* ¶¶ 5-16.

Rule of Civil Appellate Procedure ("ARCAP") 21. The fee application must not seek fees attributable solely to addressing issues relating to PIV. Although C&I prevailed in this appeal as against PIV, because no party has yet prevailed on the merits of the case, we decline to award fees to C&I. If C&I ultimately prevails on the merits of its complaint, it may move the superior court for reimbursement of attorneys' fees incurred in this appeal.

MOTIONS ON APPEAL

¶26 Appellees move to strike C&I's reply brief or portions of it relating to the court's personal jurisdiction over the Swarthouts, the bond on appeal, and a new statement of the case and facts. In light of our resolution of the jurisdiction issue in favor of the Swarthouts, and because we do not rely on the other contested sections of the brief, we deny the motion as moot.

¶27 C&I moves for an award of sanctions against Appellees for filing their motion to strike. We do not find the motion so lacking in merit that sanctions are warranted under ARCAP 25. We therefore deny the motion. Additionally, we deny C&I's request for an extension of time to file the reply to its motion for sanctions.

CONCLUSION

¶28 For the foregoing reasons, we dismiss the appeal in CV 11-0111 because we lack jurisdiction to decide an appeal taken from a judgment that is not final. We have jurisdiction to decide the appeal in CV 11-0319. In that appeal, we affirm the judgment to the extent it dismisses the complaint without prejudice against the Swarthouts for lack of personal jurisdiction and awards them attorneys' fees and costs. We reverse to the extent the judgment dismisses the complaint against PIV and awards fees to PIV. We award attorneys' fees to the Swarthouts subject to their compliance with ARCAP 21(c), and we deny the remaining parties' request for fees. Finally, we remand to the superior court for further proceedings.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge