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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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RUTH A. WILLINGHAM,
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BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NICKI NELSON, an individual,) No. 1 CA-CV 12-0121
)
Applicant/Appellee,) DEPARTMENT C
)
)
v.) MEMORANDUM DECISION
)
)
JILLIAN OCHSNER, an individual,) (Not for Publication -
) Rule 28, Arizona Rules of
Respondent/Appellant.) Civil Appellate Procedure)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-03892

The Honorable George H. Foster, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Jillian Ochsner appeals the superior court's confirmation of an arbitration award in favor of Nicki Nelson. We affirm the judgment confirming the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 Ochsner and Nelson signed a "Co-Parenting Agreement" ("Agreement") in 2004. The Agreement stated that Ochsner and Nelson were "partners in a committed relationship, have been for over 3 years, and plan to share the responsibilities of raising a child." The Agreement set out each party's rights and responsibilities with respect to the contemplated child. The Agreement also contained a "Mediation and Arbitration" provision, which provided "that any dispute arising out of this contract shall be mediated by a mutually agreed upon third person." The "Mediation and Arbitration" provision further provided that if a mediation did not result in a "mutually agreeable solution" to a dispute, either party could:

12.1 Initiate arbitration by making a written demand for arbitration, defining the dispute and naming one arbitrator.

12.2 Within five days from receipt of this notice, the other shall name the second arbitrator.

12.3 The two named arbitrators shall within ten days name a third arbitrator.

12.4 Within seven days after the naming of the third arbitrator, an arbitration meeting will be held. Each party may have an attorney or other person with her if so

desired, and may present evidence and witnesses pertinent to the issue(s);

12.5 The arbitrators shall make their decision within five days after the hearing. Their decision shall be in writing and shall be binding upon the parties;

12.6 If the person to whom the demand for arbitration is directed fails to respond within five days, the other must give an additional five days' written notice of her intent to proceed. If the other party still fails to respond, the person initiating the arbitration may proceed with the arbitration before the arbitrator she has designated, and the award shall have the same force as if it had been settled by all three arbitrators.

¶13 In June 2009, Nelson invoked the "Mediation and Arbitration" provision. After Ochsner declined to participate in mediation, Nelson demanded arbitration pursuant to the Agreement. Ochsner failed to respond to the demand for arbitration. A default arbitration hearing was set. Despite receiving notice, Ochsner did not appear at the hearing. Based on the evidence presented, the arbitrator awarded Nelson \$6,299.75 in damages and fees.

¶14 Nelson then filed an application for confirmation of the arbitration award. Ochsner filed an objection to confirmation of the award, arguing the court should decline to confirm the award pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1512(A)(5) (West 2013), which directs that

[u]pon filing of a pleading in opposition to an [arbitration] award, and upon an adequate showing in support thereof, the court shall decline to confirm and award and enter judgment thereon where . . . [t]here was no arbitration agreement and the issue was not adversely determined in proceedings under § 12-1502 and the adverse party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(Emphasis added).¹

¶15 Ochsner argued there was no "arbitration agreement" because the Agreement in which the arbitration provision appeared was "null and void *ab initio*." She asserted the Agreement was void because it violated A.R.S. § 25-218(A) (West 2013), which states that "[n]o person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract." Ochsner then filed a motion to dismiss and a motion for summary judgment, arguing in both that the Agreement was unenforceable pursuant to A.R.S. § 25-218.²

¹ Absent material revisions after the relevant date, we cite a statute's current version.

² Only the motion to dismiss contained any substantive argument. Ochsner's motion for summary judgment simply asserted that "[t]he underlying contract is unenforceable because it is for an illegal act" and incorporated "those arguments put forward by [Ochsner] in her Objection and Opposition to Arbitration Award previously filed with this Court."

¶16 In confirming the award, the superior court noted that Ochsner's objection to the award raised a legal determination that was within the authority of the arbitrator to determine. The superior court also observed that a court "generally is without the authority to review the legal conclusions of an arbitrator," and held that neither of Ochsner's motions demonstrated "an adequate showing that the award should not be confirmed." The superior court then affirmed the award and entered judgment.

¶17 We have jurisdiction over Ochsner's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

DISCUSSION

¶18 We review a superior court's confirmation of an arbitration award for an abuse of discretion. *Nolan v. Kenner*, 226 Ariz. 459, 461, ¶ 4, 250 P.3d 236, 238 (App. 2011). "An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Benkendorf v. Advanced Cardiac Specialists Chartered*, 228 Ariz. 528, 530, ¶ 7, 269 P.3d 704, 706 (App. 2012) (quotation omitted).

¶19 A superior court's review of an arbitration award is sharply limited. *Nolan*, 226 Ariz. at 461, ¶ 4, 250 P.3d at 238.

Pursuant to A.R.S. § 12-1512(A), a court may decline to confirm an arbitration award only upon one of five narrow grounds. In the superior court, Ochsner cited only A.R.S. § 12-1512(A)(5), arguing that "there was no arbitration agreement" because the Agreement in which the arbitration provision was found was void because it violated A.R.S. § 25-218. On appeal, Ochsner does not cite A.R.S. § 12-1512(A)(5), but repeats the argument she made in the superior court that the Agreement "was void *ab initio* because it was an illegal contract" in contravention of A.R.S. § 25-218(A), unconscionable and in violation of public policy. She asserts that because the subject matter of the Agreement was invalid, so too was the arbitration provision, meaning there was no "arbitration agreement" as required by A.R.S. § 12-1512(A)(5).

¶10 The validity of a contract that contains a valid arbitration clause, however, is for the arbitrator to decide, not the court. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("the issue of the contract's validity is considered by the arbitrator in the first instance"); *WB, The Building Co. v. El Destino, LP*, 227 Ariz. 302, 307, ¶ 12, 257 P.3d 1182, 1187 (App. 2011).³ As the superior court held, under

³ The premise underlying this principle is that an arbitration clause is independent of the contract in which it lies. *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 253, 705 P.2d 490, 493 (App. 1985). Thus, although A.R.S.

these authorities, the question of whether the Agreement is invalid under A.R.S. § 25-218 was arbitrable, meaning it was to be decided by the arbitrator, not by the court.

¶11 Ochsner argues *El Destino* supports her contention that she may challenge the validity of the Agreement in the superior court and on appeal. In that case, a contractor sued a client and asked the court to compel arbitration of its claims pursuant to the parties' contract, which contained an arbitration clause. 227 Ariz. at 305, ¶ 4, 257 P.3d at 1185. The defendant objected to arbitration, arguing that the arbitration clause and the underlying contract both were void and unenforceable because the contractor did not have a valid license at the time of the contract as required by A.R.S. § 32-1151 (West 2013). *Id.* at ¶ 5. We held the superior court had the power to address the validity of both the arbitration clause and the underlying contract because the defendant had separately challenged each as void. *Id.* at 306-07, ¶¶ 9, 13, 257 P.3d at 1186-87. We explained that a party contesting arbitration may challenge both the arbitration clause and the underlying contract on the same

§ 12-1501 (West 2013) provides that an arbitration provision is valid "save upon such grounds as exist at law or in equity for the revocation of any contract," the "save upon" language "refers to grounds alleged with respect to the formation of the arbitration agreement itself, not the underlying contract." *U.S. Insulation*, 146 Ariz. at 254, 705 P.2d at 494; see *El Destino*, 227 Ariz. at 306, ¶ 11, 257 P.3d at 1186 ("[A] court may only stay arbitration if there is a challenge to the arbitration clause itself.").

grounds, but only "so long as an arbitration agreement itself is separately and distinctly challenged on those grounds." *Id.* at 307, ¶ 13, 257 P.3d at 1187.⁴

¶12 Ochsner's reliance on *El Destino* is misplaced. By contrast to the appellant in that case, Ochsner offers no argument for the invalidity of the "Mediation and Arbitration" provision of the Agreement. While she argues at length that the Agreement runs afoul of A.R.S. § 25-218 and other statutes, she never explains why the arbitration provision itself should be revoked "at law or in equity" pursuant to A.R.S. § 12-1501 (West 2013).

¶13 As the superior court acknowledged in denying Ochsner's motion to dismiss, in entering the damage award, the arbitrator impliedly ruled that the Agreement was "valid and binding." An arbitrator's powers are defined by the arbitration provision and, provided that the arbitrator acts within those boundaries, the arbitrator's decision "is final both as to questions of fact and law." *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 180-81, 525 P.2d 309, 311-12

⁴ We went on to hold that the arbitration clause was invalid pursuant to A.R.S. § 12-1501 because of A.R.S. § 32-1151, which makes it "unlawful for any [entity] to . . . act or offer to act in the capacity of or purport to have the capacity of a contractor without having a contractor's license[.]" *El Destino*, 227 Ariz. at 308, ¶ 15, 257 P.3d at 1188. Because the contractor lacked the capacity to enter into any construction agreement, including the arbitration agreement itself, the arbitration provision of the contract was invalid. *Id.*

(1974). Here, the "Mediation and Arbitration" provision of the Agreement explicitly applied to "any dispute arising out of [the Agreement]," meaning the validity of the Agreement itself was a legal question properly to be decided by the arbitrator. Given that Ochsner offered no argument in the superior court why the arbitration provision was invalid, the court did not abuse its discretion in inferring that the arbitrator determined the Agreement was enforceable and in confirming the award.

¶14 We do not address Ochsner's argument - made for the first time on appeal - that we should vacate the award because the arbitrator exceeded her authority in awarding "general damages" when the Agreement only allows for "child support." See A.R.S. § 12-1512(A)(3) (allowing a court to deny confirmation of an arbitration award when arbitrators exceed their powers under a valid arbitration provision). Because "we generally do not consider issues . . . raised for the first time on appeal," we conclude Ochsner waived this argument by failing to make it in the superior court. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000).

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's confirmation of the arbitration award. Contingent on compliance with Arizona Rule of Civil Appellate Procedure 21, Nelson may recover her costs of appeal and her reasonable

attorney's fees pursuant to A.R.S. § 12-1514 (West 2013). See *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 180 Ariz. 148, 154, 882 P.2d 1274, 1280 (1994).

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Presiding Judge

/s/

MICHAEL J. BROWN, Judge