DIVISION ONE
FILED: 12/18/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0143
	)	
KAREN A. HARKINS,	)	DEPARTMENT C
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
DANIEL E. HARKINS,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-005222

The Honorable Thomas L. LeClaire, Judge

AFFIRMED

Sternberg & Singer, Ltd. Phoenix
By Melvin Sternberg
And
Law Office of Paul M. Briggs Phoenix
By Paul M. Briggs
Attorneys for Appellant

The Cavanagh Law Firm Phoenix
By Christina S. Hamilton
Attorneys for Appellee

T H U M M A, Judge

¶1 Karen A. Harkins appeals from the superior court's order approving an arbitration award setting forth the terms of a confidentiality agreement. Because Karen failed to establish that the arbitrator exceeded her authority, the superior court's order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Karen petitioned for dissolution of her marriage to Daniel E. Harkins in August 2010. In early June 2011, following a mediation, the parties agreed to and the superior court entered a detailed consent decree dissolving the marriage. The decree included the parties' written agreement to submit to binding arbitration certain types of disputes that might arise in the future, but contained no general, overarching arbitration agreement. The decree also contained a broad anti-disparagement provision.

¶3 The final paragraph of the decree required the parties to execute a confidentiality agreement, which Karen was to draft and provide for Daniel to review. No draft confidentiality agreement was exchanged for several months after entry of the decree. In early September 2011, Daniel asked Karen to provide a draft confidentiality agreement or Daniel would "take this matter to [the arbitrator's] attention." Also in September, the parties were preparing to arbitrate a variety of issues left

open or disputed in the wake of the decree. Daniel specified the confidentiality agreement as one such issue to be arbitrated. In a late-September arbitration memorandum, Karen acknowledged that Daniel "ha[d] also raised issues regarding the confidentiality agreement." Karen joined the issue for resolution in the arbitration, arguing against enforcement of the decree's provision calling for a confidentiality agreement.

¶4 At the end of September, Karen provided Daniel a draft confidentiality agreement. The record does not include any objections by Daniel to this proposal. In mid-October, however, Daniel did request the addition of non-disparagement and liquidated damages provisions to Karen's draft confidentiality agreement. The record does not include Karen's response, if any, to Daniel's request for this additional language.

¶5 Pre-hearing, Karen did not challenge the arbitrability of the issues. As relevant here, the parties proceeded to arbitration on November 7. The arbitration decision states that "issues addressed included [] what language should be contained in the Confidentiality Agreement to be executed by the parties," recounting that "[t]he parties have been unable to reach agreement on the additional [non-disparagement and liquidated damages] language and the issue has been presented to [the arbitrator] for binding arbitration." The arbitrator disagreed with Karen's testimony as to how the decree's non-disparagement

provision was limited. The arbitration decision includes, in substance, the confidentiality agreement Karen proposed, modified to account for and include a non-disparagement and liquidated damages provision similar to Daniel's proposal.

¶6 After the arbitrator filed the arbitration award with the superior court, Karen filed an objection to this portion of the award. Karen conceded that, "[f]or convenience, the parties also arbitrated the issue of the confidentiality agreement, although there was no written agreement to do so." Karen argued, however, that the arbitrator exceeded her authority and infringed on Karen's First Amendment right to free speech by modifying her confidentiality agreement to include the non-disparagement and liquidated damages provisions.

¶7 The superior court overruled Karen's objection and approved the arbitration award. The superior court found "[t]he parties voluntarily submitted the terms of the draft of the Confidentiality Agreement, a document that was required to be produced by the parties consistent with the requirements of the [decree,] . . . to arbitration and the parties' chosen arbitrator," rendering it "appropriate for the arbitrator to determine the scope and language of the Confidentiality Agreement when the parties could not agree on a final draft." The superior court therefore concluded the arbitrator did not exceed her authority. The superior court found no merit in

Karen's First Amendment argument, as the non-disparagement language in the confidentiality agreement was at least as narrow as the applicable portion of the decree to which Karen had agreed.

¶8 Karen timely appealed from the superior court's order overruling Karen's objections and approving the arbitration award.[1] This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1).[2]

DISCUSSION

¶9 Karen argues the superior court erred in approving the arbitration decision because the arbitrator exceeded her

[1] The parties filed no motion to seal any documents in this court. The clerk of this court nevertheless received the record on appeal under seal in furtherance of the superior court's order sealing the case. The superior court's order granted an unopposed motion to seal the entire file, based on a conclusory recitation of "good cause" without reference to any authority to seal the otherwise-public court file and without addressing the presumption of public access to court records. *See* Ariz. R. Supreme Ct. 123(d); A.R.S. § 39-121; *Griffs v. Pinal County*, 215 Ariz. 1, 5, ¶ 13, 156 P.3d 418, 422 (2007) ("[T]he presumption favoring disclosure applies [to public records] and, when necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure."); *see also Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). No party has challenged the propriety of the superior court's blanket sealing order, but there is no basis in the record upon which to seal the proceedings in this court.

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

authority by deciding issues beyond those the parties agreed to submit to arbitration. On appeal, the superior court's confirmation of an arbitration award is reviewed for an abuse of discretion. *Nolan v. Kenner*, 226 Ariz. 459, 461, ¶4, 250 P.3d 236, 238 (App. 2011).

¶10 Judicial review of an arbitration award is narrowly constrained; the superior court "shall decline to confirm" an award only on specific enumerated grounds. A.R.S. § 12-1512(A); *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 180, 525 P.2d 309, 311 (1974). One such ground is where "[t]he arbitrators exceeded their powers," A.R.S. § 12-1512(A)(3), as "[t]he boundaries of the arbitrators' powers are defined by the agreement of the parties," *Smitty's Super-Valu*, 22 Ariz. App. at 180, 525 P.2d at 311. On review, the arbitrator is presumed to have decided only matters within the scope of issues submitted for arbitration, and the party opposing the award has the burden to prove otherwise. *Einhorn v. Valley Med. Specialists, P.C.*, 172 Ariz. 571, 573, 838 P.2d 1332, 1334 (App. 1992); *Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 369, ¶ 12, 965 P.2d 100, 103 (App. 1998).

¶11 Karen has failed to demonstrate that the arbitrator exceeded her authority by deciding the non-disparagement and liquidated damages language to be included in the confidentiality agreement. Karen concedes that she "agreed to

arbitrate the terms of a confidentiality agreement." Indeed, Karen's arbitration memorandum recognized that "[Daniel] has also raised issues regarding the confidentiality agreement" and Karen joined that issue on the merits by challenging the decree's requirement of a confidentiality agreement.

¶12 Karen objects that non-disparagement and liquidated damages were not within the terms of the agreement she agreed to arbitrate. By mid-October -- weeks before the arbitration -- Karen was on notice that Daniel disputed the terms of the confidentiality agreement by asking to include non-disparagement and liquidated damages language. The arbitration decision expressly confirms this dispute -- that the parties were unable to agree on inclusion of non-disparagement and liquidated damages language -- and states that "the issue has been presented to [the arbitrator] for binding arbitration." The decision further recites that Karen testified about the scope of the decree's non-disparagement clause, apparently contesting the propriety of including non-disparagement language in the confidentiality agreement. Karen's participation in this manner clearly suggests the dispute over inclusion of non-disparagement language was submitted to arbitration.

¶13 The record is not to the contrary. Daniel's mid-October request to insert non-disparagement and liquidated damages language into Karen's draft confidentiality agreement

gave Karen notice of the scope of the dispute. No record evidence suggests that Karen objected to arbitrating this dispute before the arbitration hearing. Although at least one arbitration session was transcribed, Karen has provided no transcript -- and no pre-award written objection -- showing any objection to the arbitrator's consideration of the disputed language. Given this absence of record evidence showing non-disparagement and liquidated damages were not properly submitted to arbitration, Karen has not met her burden to show the arbitration award fell outside of the arbitrator's authority.

¶14 Based on the record on appeal, it appears the *only* remaining dispute about the confidentiality agreement by the time of the November 7 arbitration was whether to include the non-disparagement and liquidated damages provisions. Although Karen's arbitration memorandum argued against any confidentiality agreement, Karen's counsel provided a draft confidentiality agreement less than a week later, and Daniel's only requested change was to include non-disparagement and liquidated damages language. The arbitration decision itself based the final confidentiality agreement on Karen's proposal, modified largely by inserting a paragraph addressing non-disparagement and liquidated damages. Because Karen concedes the terms of the confidentiality agreement were submitted to arbitration and no other dispute about the terms of the

agreement is evidenced in the record, the superior court did not abuse its discretion by confirming the arbitration award.

¶15 Relying on *Clarke v. ASARCO Inc.*, 123 Ariz. 587, 601 P.2d 587 (1979), Karen contends that, although the parties agreed to arbitrate an issue arising out of one paragraph of the decree (confidentiality agreement), the arbitrator must have exceeded her authority because she decided an issue related to a different paragraph (non-disparagement) "not included in the arbitration provision." *Clarke* does not support this argument. *Clarke* simply held that disputes were arbitrable pursuant to a contractual arbitration provision only if they fell within the scope of that provision; thus, one paragraph providing for arbitration of disputes "upon all matters covered by this paragraph" did not serve to mandate arbitration of disputes not "covered by this paragraph." *Id.* at 589, 601 P.2d at 589. Here, however, the record shows no such paragraph-specific limitation on the agreement to arbitrate. As set forth above, Karen agreed that the confidentiality agreement terms were subject to arbitration and has not shown any limitation on that issue that would exclude the non-disparagement provision.

¶16 Karen next argues the non-disparagement language in the arbitration award constitutes an unconstitutional prior restraint on her speech and thus necessarily indicates the arbitrator exceeded her authority. Although parties may properly

waive constitutional rights, including by agreement, the First Amendment issue Karen raises is not necessary to resolution of this appeal. A court reviewing an arbitration award does not independently assess the arbitrator's rulings "unless they result in extending the arbitration beyond the scope of the submission." *Smitty's Super Valu*, 22 Ariz. App. at 180-81, 525 P.2d at 311. Here, as described above, Karen has not established that inclusion of non-disparagement language was outside of the dispute submitted to arbitration. Karen had notice of Daniel's request to include a non-disparagement clause in the confidentiality agreement before arbitration, but Karen never asked the court to restrict the scope of arbitration to exclude non-disparagement nor does the record reflect any objection to the arbitrator on this ground. In any event, the non-disparagement clause specified in the arbitration award expressly limits itself to preventing any disparagement "as required by [the non-disparagement provision] of the parties' Consent Decree," to which Karen undisputedly agreed. Inclusion of a restriction to which the parties had earlier agreed does not, as Karen argues, "demonstrate[] how the arbitrator exceeded her powers by extending the matter beyond what the parties submitted."

¶17 Karen also contends the liquidated damages provision "is completely devoid of any factual support," and that the

arbitrator exceeded her authority by rewriting the parties' agreement to include this provision. Review of an arbitration award in these circumstances is limited to whether the arbitrator acted beyond her powers, not whether the substance of the award is supported by sufficient evidence. *See id.* Although Karen argues the parties "did not jointly ask the arbitrator to 'fashion a new contract' for them regarding liquidated damages," the parties did seek arbitration of the terms to be included in a confidentiality agreement. Daniel had raised liquidated damages as a proposed term in the confidentiality agreement before arbitration, and Karen has provided no evidence (as opposed to argument) restricting consideration of the confidentiality terms that would exclude consideration of liquidated damages.

¶18 Karen last argues the superior court erred by awarding Daniel his attorneys' fees and seeks reversal as fees "will be unjustified if [Karen] is successful on appeal." As Karen was not successful on appeal, the superior court's fee award is affirmed.

¶19 Daniel requests his attorneys' fees on appeal pursuant to A.R.S. § 25-324 and Arizona Rule of Family Law Procedure 31. Having considered the relevant factors under § 25-324 and in the exercise of this court's discretion, Daniel's request for fees is denied. As the prevailing party on appeal, however, Daniel is

entitled to recover costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. A.R.S. § 12-341.

CONCLUSION

¶20 Because Karen failed to establish that the arbitrator exceeded her authority, the superior court's order confirming the arbitration award is affirmed.

/s/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PETER B. SWANN, Judge