IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TIMOTHY DONALD, et al., *Plaintiffs/Appellants*,

v.

ALEC PAPADAKIS, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0728
FILED 9-27-2018

Appeal from the Superior Court in Maricopa County
No. CV2017-001526
The Honorable Lori Bustamante, Judge
The Honorable Teresa A. Sanders, Judge

AFFIRMED AS MODIFIED

COUNSEL

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 Timothy Donald and American Soccer Marketing, L.L.C.[1] appeal the superior court's order dismissing their complaint against United Soccer Leagues, LLC, its owner and CEO, Alex Papadakis, and its President, Tim Holt (collectively, "the League"). For the following reasons, we affirm all but the portion of the order dismissing the complaint "with prejudice."

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2013, Donald entered into a franchise agreement (the "Franchise Agreement") with the League, an organization operating a nationwide, private soccer league, to own and manage a Phoenix area soccer franchise. On February 24, 2014, after a dispute arose over Donald's alleged failure to remedy defaults on certain requirements under the Franchise Agreement, the League terminated Donald's franchise.

¶3 On February 13, 2017, Donald filed a complaint in the superior court in Arizona against the League and Kyle Eng, the new owner of the Phoenix soccer franchise. On the same day, Donald filed a nearly identical lawsuit with the American Arbitration Association's Phoenix office (the "Arbitration Case") against the League. The Arbitration Case was subsequently transferred, per the Franchise Agreement's arbitration clause, to Tampa, Florida. The League moved to dismiss the court action, arguing that valid and enforceable forum-selection and arbitration clauses within the Franchise Agreement required Donald to submit any claim arising between them to an appropriate forum in Hillsborough County, Florida.

¶4 On June 6, 2017, the court granted the League's motion to dismiss the action. The court found that dismissal was appropriate because

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[1] Because Timothy Donald is the sole shareholder of American Soccer Marketing, L.L.C., we will refer to both collectively as "Donald."

the Franchise Agreement contained "clear and unambiguous" arbitration and forum-selection clauses. The court also found that because Donald failed to meet his burden of establishing either clause's non-enforceability, both clauses were valid and enforceable, and "[Donald's] case against [the League] [could not] be pursued in Arizona."

¶5 Following the court's order dismissing Donald's complaint, the League moved for attorney's fees and costs, requesting $54,796 for fees incurred, $2000 in estimated fees related to the preparation of the fee application, and $322.73 in taxable costs. Over objections to the application, the court granted the League's motion and awarded $56,796 in fees and requested costs. On October 9, 2017, the court entered a final judgment under Arizona Rule of Civil Procedure ("Rule") 54(b), dismissing Donald's complaint against the League "with prejudice." Donald timely appealed from that order.[2]

DISCUSSION

A. Dismissing Donald's Action Against the League "With Prejudice" Was Inappropriate, But We Nonetheless Have Jurisdiction to Hear Donald's Appeal.

¶6 At the outset, we hold the superior court's dismissal of Donald's claims against the League should have been made without prejudice. Rule 41(b) provides that "[u]nless the dismissal order states otherwise, a dismissal under this Rule 41(b) and any dismissal not under this rule—except one for *lack of jurisdiction*, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." (Emphasis added). A dismissal based on valid and enforceable forum-selection and arbitration clauses effectively acknowledges that the court lacks jurisdiction to hear the action on the merits, and therefore dismissal without prejudice is more appropriate. "A dismissal of claims subject to arbitration should be entered without prejudice, to allow for

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[2] During the pendency of this appeal, a final award in the Arbitration Case was issued, and both parties submitted requests for this court to take judicial notice, under Arizona Rule of Evidence 201, of the award and certain filings submitted during the case. Although we may take judicial notice "of any matter of which the trial court may take judicial notice," *State v. McGuire*, 124 Ariz. 64, 66 (App. 1978), we decline to take judicial notice of the Arbitration Case materials because they were not presented to the superior court and are not relevant to the issues raised.

further judicial determinations that may prove necessary." *Duenas v. Life Care Ctrs. of America, Inc.*, 236 Ariz. 130, 142, ¶ 40 (App. 2014).

¶7 Modifying the judgment in this manner raises the question of whether Donald's appeal should be dismissed for lack of jurisdiction, as we "generally do not have appellate jurisdiction when a case is dismissed without prejudice." *Dunn v. FastMed Urgent Care PC*, 245 Ariz. 35, 37, ¶ 9 (App. 2018). But as we recently reaffirmed in *Dunn*, "[d]ismissal pursuant to a forum-selection clause . . . is an appealable order under A.R.S. § 12-2101(A)(3)." *Id.*; *see also Dusold v. Porta-John Corp.*, 167 Ariz. 358, 361 (App. 1990) (finding appellate jurisdiction under predecessor to § 12-2101(A)(3) to consider the dismissal and jurisdictional aspects of the trial court's order transferring arbitration to Michigan).

¶8 Accordingly, although the dismissal should have been made without prejudice, we nonetheless have jurisdiction to consider Donald's appeal under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(3).

B. The Superior Court Properly Entered a Final Judgment under Rule 54(b) Regarding Donald's Claims Against the League.

¶9 Donald argues the superior court erred by certifying its October 9, 2017 order as a final judgment pursuant to Rule 54(b) because "there was nothing about [the] case that was final" when the court dismissed Donald's claims against the League. We disagree.

¶10 Although we typically review a court's Rule 54(b) certification for an abuse of discretion, when "the issue is whether 'the judgment in fact is not final, i.e., did not dispose of at least one separate claim of a multi-claim action,' . . . we review the trial court's determination *de novo*." *Kim v. Mansoori*, 214 Ariz. 457, 459, ¶ 6 (App. 2007) (quoting *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991)).

¶11 Rule 54(b) provides an exception to the general rule that appellate court jurisdiction is "limited to final judgments which dispose of all claims and all parties." *Musa v. Adrian*, 130 Ariz. 311, 312 (1981); *see also* A.R.S. § 12-2101(A) (setting forth the instances where an appeal may be taken to the court of appeals from the superior court). When an action concerns multiple claims for relief or multiple parties, Rule 54(b) permits the superior court to direct entry of a final judgment as to fewer than all the claims or parties, but "only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 54(b)." Ariz. R. Civ. P. 54(b). "That an order or judgment contains Rule 54(b) language, however, does not make it final and appealable; the certification

also must be substantively warranted." *Sw. Gas Corp. v. Irwin ex rel County of Cochise*, 229 Ariz. 198, 202, ¶ 12 (App. 2012). "A final judgment . . . decides and disposes of the cause on its merits, leaving no question open for judicial determination." *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 593, ¶ 10 (App. 2007) (omission in original) (quoting *Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54 (App. 1977)).

¶12 The superior court properly certified its dismissal under Rule 54(b). After finding the arbitration and forum-selection clauses within the Franchise Agreement valid and enforceable,[3] the court correctly held that Donald's claims against the League and its officers could not be pursued in Arizona. *See Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 377–78, ¶ 25 (App. 2001) (affirming the superior court's dismissal based on an enforceable forum-selection clause). The court's order dismissing Donald's action against the League, based on the arbitration and forum-selection clauses, disposed of all claims against the League and its officers, and Rule 54(b) certification following that order was proper. *See* Ariz. R. Civ. P. 54(b) ("[I]f multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties.").

¶13 None of the arguments Donald raises challenging the judgment's finality are availing. Donald first argues that the dismissal was not a final judgment because it was entered before the Arbitration Case ended and while proceedings against Eng continue. The Arbitration Case and the proceedings in the superior court are entirely separate actions, brought by separate complaints within separate tribunals. That Donald filed identical complaints on the same calendar day or may ultimately seek enforcement of any arbitration award in Arizona is irrelevant. And we are unaware of any law authorizing this court to treat the Arbitration Case and the superior court action as one and the same.

¶14 As for Donald's action against Eng, Rule 54(b) was specifically designed to address a situation where entering final judgment is proper for some parties, but proceedings must continue for others. "It is logical, if not axiomatic, that [Rule 54(b)] thereby permits the portion of the case that is

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[3] Because Donald did not argue in the superior court that the forum-selection or arbitration clauses were unenforceable, we will not consider their enforceability. *See Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 538–39 (1982) (matters not raised in the superior court are properly not considered on appeal).

not part of the appeal to proceed in the trial court while the appeal moves forward." *Sw. Gas Corp.*, 229 Ariz. at 202, ¶ 10.

¶15 Donald also contends the superior court erred because it entered a final judgment under Rule 54(b) only on the pleadings, before the court heard any evidence or witness testimony. Donald does not explain, however, why the court needed to hear evidence or witness testimony to conclude that the forum-selection and arbitration clauses within the Franchise Agreement necessitated dismissal. And dismissal on the pleadings is typical in cases where a forum-selection or arbitration clause binds the parties to bring an action elsewhere. *See, e.g.*, *Dunn*, 245 Ariz. at 40–41, ¶¶ 22–25 (affirming dismissal based on an enforceable forum-selection clause at the pleadings stage); *Bennett*, 201 Ariz. at 375, ¶ 25 (same).

¶16 Accordingly, the superior court did not err by entering a final judgment under Rule 54(b) before the Arbitration Case and Donald's action against Eng had ended, or by dismissing all claims against the League and its officers on the pleadings alone.

C. The Superior Court Did Not Abuse its Discretion by Finding There Was "No Just Reason for Delay" under Rule 54(b).

¶17 Donald next argues the superior court erred by incorrectly finding that there was "no just reason for delay" before certifying its judgment pursuant to Rule 54(b). We review a court's decision to certify a judgment under Rule 54(b) for an abuse of discretion. *Sw. Gas Corp.*, 229 Ariz. at 201, ¶ 7.

¶18 To properly certify a judgment under Rule 54(b), a court must "expressly determine[] there is no just reason for delay." Ariz. R. Civ. P. 54(b). The phrase "no just reason for delay" means that "some hardship or injustice would result from a delay in entering a final judgment." *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 53, ¶ 19 (1999). By requiring this assessment, Rule 54(b) represents "a compromise between the rule against deciding appeals in a piecemeal fashion and the desirability of having a final judgment in some situations with multiple claims or parties." *Davis*, 168 Ariz. at 304.

¶19 Rule 54(b) certification was proper here. While the court's decision to certify the judgment under the rule means the case must now proceed piecemeal, enforcement of parties' rights "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis

omitted); *Forest City Dillon, Inc. v. Superior Court*, 138 Ariz. 410, 412 (App. 1984). Moreover, both parties likely would have suffered hardship if the appeal was delayed until the litigation's end. The League would have been forced to wait to ensure that its rights under the Franchise Agreement were enforced, and Donald would have been delayed from filing an action in the appropriate forum.

¶20 Because piecemeal litigation is required in this case, and hardship would have resulted from a delay in entering a final judgment, the superior court did not abuse its discretion by certifying the judgment under Rule 54(b).

D. The Superior Court Properly Awarded Attorney's Fees to the League.

¶21 Donald argues the superior court erred with respect to its award of attorney's fees to the League in two ways. Donald first claims the superior court abused its discretion by awarding excessive and improper fees to the League. Donald also contends the superior court did not have the authority—under either the Franchise agreement or A.R.S. § 12-341.01—to grant the League's requested attorney's fees. We review the court's authority to grant or deny attorney's fees *de novo*, but we review a determination regarding the amount of fees awarded for an abuse of discretion. *Thompson v. Corry*, 231 Ariz. 161, 163, ¶ 4 (App. 2012).

1. The Superior Court Properly Awarded the League Attorney's Fees Pursuant to the Franchise Agreement.

¶22 Donald maintains the superior court erred by awarding the League attorney's fees because neither the Franchise Agreement nor A.R.S. § 12-341.01(A) entitled the League to fees. We will affirm the award of attorney's fees "if it was appropriate under any of the authorities relied upon by the proponent." *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 206, ¶ 5 (App. 2014).

¶23 The Franchise Agreement contains the following provision for Attorney's fees:

> **Cost of Enforcement.** Franchisor shall be entitled to recover from Franchisee all reasonable attorney's fees, plus court costs and other expenses, incurred by franchisor in enforcing the covenants, terms and conditions of this Agreement against Franchisee, including

> without limitation (a) the collection of any fees required to be paid by Franchisee under this agreement, (b) the enforcement of post-termination covenants and (c) the protection of the USL Marks.

In Arizona, it is well-settled that "[c]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract." *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269, ¶ 14 (App. 2007) (alteration in original) (quoting *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977)). If a contract provides for attorney's fees, "the court lacks discretion to refuse to award fees under [that] contractual provision." *Id.* (quoting *Chase Bank v. Acosta*, 179 Ariz. 563, 575 (App. 1994)).

¶24 Here, the League's efforts to enforce the forum-selection and arbitration clauses fall under the Franchise Agreement's broad fee provision. The fee provision provides the League is entitled to recover "all attorney's fees, plus court costs and other expenses" incurred "in *enforcing* the *covenants, terms and conditions* of this Agreement." (Emphasis added). The "terms and conditions" of the Franchise Agreement necessarily include the forum-selection and arbitration clauses, which were at issue in the superior court proceedings.

¶25 Donald's arguments against the applicability of the fee provision are unpersuasive. Donald claims the fee provision merely furnishes "affirmative powers" to the League, and contains no clause authorizing recovery for "the defense of any claim." But no Arizona law holds a party may not seek to enforce contractual provisions as a defense to an action, and the text of the fee provision specifies the list of causes for recovery are provided "without limitation."

¶26 The Franchise Agreement also contains a choice-of-law provision purporting to require application of Florida law to all disputes arising out of the terms and conditions of the Agreement. Because Donald has never developed an argument concerning the effect of that provision on the superior court's award of attorney's fees, we decline to consider the matter. *See State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370 (App. 1990). Moreover, under either Florida or Arizona law, our analysis and determination of the attorney's fees issues raised in this case would remain the same. *Compare Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187 (App. 1983) (identifying factors to be considered in determining a reasonable fee award), *and Bennett*, 201 Ariz. at 378, ¶ 26 ("The awarding of attorneys' fees to a prevailing party pursuant to a contract between the parties is

mandatory."), *with Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985) (identifying nearly identical reasonable fee award factors as *China Doll*), *and Holiday Square Owners Ass'n v. Tsetsenis*, 820 So. 2d 450, 453 (Fla. Dist. Ct. App. 2002) (an award under a contract clause for prevailing party attorney's fees is mandatory).

¶27 The terms or provisions of a lawful contract, "where clear and unambiguous, are conclusive." *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966). We conclude the clear and unambiguous terms of the Franchise Agreement's fee provision apply here. The court had both the authority and the obligation to award the League its attorney's fees.

2. The Superior Court Did Not Abuse its Discretion by Awarding the League's Requested Attorney's Fees.

¶28 Donald also claims that the fees awarded to the League by the court were excessive and improper. We review the amount of an award of attorney's fees for an abuse of discretion. *RS Indus., Inc. v. Candrian*, 240 Ariz. 132, 138, ¶ 21 (App. 2016). An award of attorney's fees is within the sound discretion of the superior court, and we will not disturb the award "if there is any reasonable basis for it." *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18 (App. 2004) (quoting *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, 117, ¶ 20 (App. 1998)).

¶29 Citing *Schweiger v. China Doll*, Donald argues: (1) the court erred by awarding $2000 in fees based on an estimate of the cost of preparing the League's fee application; (2) the hourly billing rate charged by one of the League's attorneys was too high; (3) the fee application contained improper block-billing entries; (4) some of the tasks billed were "secretarial" in nature and thus were not awardable; and (5) the fee application contained duplicative entries and was generally excessive.

Donald's arguments do not persuade us to overturn or modify the fee award, and we decline to substitute our judgment for that of the superior court by engaging in an item-by-item review of each objection. *Solimeno v. Yonan*, 224 Ariz. 74, 82, ¶ 38 (App. 2010). To comply with *China Doll*, a fee application "must contain sufficient detail so as to enable the court to assess the reasonableness of the time incurred." *Orfaly*, 209 Ariz. at 266, ¶ 23. Within the fee application, "counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service, . . . and the time spent in providing the service." *China Doll*, 138 Ariz. at 188. Regarding billing rates, "the rate charged by the lawyer to the client is the best indication of what is reasonable under the

circumstances of the particular case." *Id.* at 187–88. The League's fee application and accompanying affidavits met these requirements; they included a breakdown of the hours and tasks claimed by each attorney and explanations both for the billing rate charged by each attorney and any additions to the final calculated fee amount. *See id.* at 188 (fee applications may include fees incurred by "[p]reparing post-decision motions").

On this record we cannot say that the superior court lacked any reasonable basis for awarding the League the full amount of its requested attorney's fees. "And, because a reasonable basis exists for the award, we may not substitute our discretion for that of the trial court." *Orfaly*, 209 Ariz. at 266, ¶ 21.

ATTORNEY'S FEES AND COSTS ON APPEAL

¶30 Both parties request an award of attorney's fees and costs pursuant to the Franchise Agreement and A.R.S. § 12-341.01(A). As both parties prevailed on some aspect of the appeal, we exercise our discretion and decline to award attorney's fees or costs. *See Vortex Corp v. Denkewicz*, 235 Ariz. 551, 562, ¶¶ 40–41 (App. 2014).

CONCLUSION

¶31 For the reasons discussed above, we affirm the dismissal of Donald's claims against the League, but modify the judgment to be without prejudice.

AMY M. WOOD • Clerk of the Court
FILED: AA