IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JODY FOREMAN, et al., *Plaintiffs/Appellants*,

v.

GRAND CANYON UNIVERSITY INC., et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0078
FILED 12-12-2019

Appeal from the Superior Court in Maricopa County
CV2017-010182
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

P E R K I N S, Judge:

¶1 Jody Foreman, Michelle Dudley, Tyrone Blackburn, Bao Tran, and Sharmin Prince (the "Students") challenge the superior court's denial of their motion to vacate its order compelling them to pursue their claims against Appellee Grand Canyon University Inc. ("GCU") in private arbitration. They contend substantial revisions to the U.S. Department of Education's Borrower Defense Rule, which became effective after the superior court ordered them to arbitrate, require that their claims return to court. We disagree and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Students enrolled at GCU between 2010 and 2012 to pursue doctoral degrees. Each of them signed an "Agreement to Binding Arbitration and Waiver of Jury Trial" (the "Arbitration Agreement") at enrollment under which they agreed that "any dispute" between themselves and GCU would be "submitted to arbitration."

¶3 The Students sued GCU in July 2017 raising three Arizona law claims (consumer fraud, intentional or negligent misrepresentation, and breach of the covenant of good faith and fair dealing) claiming GCU misled them regarding the time it would take to complete their degree programs. GCU moved to compel arbitration under the Arbitration Agreements, and the superior court ordered the parties to arbitrate. Another named plaintiff, Brian Peace, did not sign an Arbitration Agreement. His claims are not at issue in this appeal.

¶4 Approximately two months later, the Students moved for reconsideration, arguing GCU voided the Arbitration Agreements by suing another student, Harland Larson. The court denied the motion without prejudice and stated that it would reconsider its ruling if GCU sued other students.

¶5 Nine months later, the Students moved to set aside the order compelling arbitration under Arizona Rule of Civil Procedure 60(b)(6),

contending new U.S. Department of Education ("Department") regulations (referred to here as the "2018 Regulations") allowed them to terminate private arbitration and bring their claims in court:

> At noon on October 16, 2018, 34 C.F.R. § 685.300(f)(a)(1) and the rest of the Borrower Defense Rule, related to the U.S. Department of Education's Direct Loan Program, went into effect. Under 34 C.F.R. § 685.300(f)(a)(1), a school that participates in the Direct Loan Program is prohibited from relying on pre-dispute arbitration agreements against a student with respect to any aspect of a "borrower defense claim." In their Verified Complaint filed on July 12, 2017, Plaintiffs asserted claims against GCU that constitute borrower defense claims.

The Students also argued that "key information relevant to Plaintiffs' claims [is] in the exclusive control of GCU, who has staunchly resisted Plaintiffs' attempts to conduct discovery in the arbitration proceedings" and noted that they were "approaching the deadlines to exchange documents prior to their one-day arbitration proceedings."

¶6 GCU asserted that the Students' motion was untimely under Rule 60(c)(1) and that the 2018 Regulations did not apply retroactively. The court agreed on both counts, denied the Students' motion, and entered a Rule 54(b) judgment dismissing their claims. The Students timely appealed.

JURISDICTION

¶7 Although neither side raises the issue, we have an independent duty to determine whether we have jurisdiction over this appeal. *Dabrowski v. Bartlett*, 246 Ariz. 504, 511, ¶ 13 (App. 2019). We must dismiss an appeal over which we lack jurisdiction. *Id.*

¶8 The court did not specify whether its dismissal of the Students' claims was with or without prejudice. The better practice under either Arizona's version of the Uniform Arbitration Act or its version of the Revised Uniform Arbitration Act would have been to stay, not dismiss, the Students' claims. *See* A.R.S. § 12-1502(D); A.R.S. § 12-3007(G). That said, there is no suggestion that the dismissal order was appealable absent entry of an appealable final judgment. *See Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 430–31, ¶¶ 20–21 (App. 2016). Moreover, "[a] dismissal of claims subject to arbitration should be entered without prejudice, to allow for further judicial determinations that may prove necessary." *Duenas v. Life Care Centers of Am., Inc.*, 236 Ariz. 130, 142, ¶ 40 (App. 2014). We

therefore assume the court dismissed the Students' claims without prejudice.

¶9 We generally lack jurisdiction over a dismissal without prejudice even if reflected in a partial final judgment entered under Rule 54(b). *Dunn v. FastMed Urgent Care PC*, 245 Ariz. 35, 38, ¶ 9 (App. 2018). But an exception lies for "a party seeking judicial review of an order compelling arbitration." *S. Cal. Edison Co. v. Peabody Western Coal Co.*, 194 Ariz. 47, 53, ¶ 18–20 (1999); *see also W. Agr. Ins. Co. v. Chrysler Corp.*, 198 Ariz. 64, 66, ¶ 8 (App. 2000) ("[A]n order that compels arbitration, dismisses the arbitrable claims *and* includes a Rule 54(b) certification of finality is appealable.").

¶10 Accordingly, we conclude we have jurisdiction pursuant to A.R.S. § 12-2101(A)(3). *S. Cal. Edison*, 194 Ariz. at 54, ¶ 23.

DISCUSSION

I. The Students' Second Motion Was Timely.

¶11 GCU claims that the Students' second motion was untimely under Rule 60(c)(1), which requires Rule 60(b)(6) motions be brought "within a reasonable time." GCU contends the motion was untimely because it was filed "over a year after the trial court enforced the arbitration clauses and transferred the Students' matter to arbitration on October 4, 2017."

¶12 Although the Students styled their motion as one brought under Rule 60(b)(6), they now argue we should treat it as a motion for reconsideration because the order compelling arbitration was not final at that time. We agree, given that Rule 60(b) only applies to "judgments, orders, or proceedings that are final." *Sw. Barricades, L.L.C. v. Traffic Mgmt., Inc.*, 240 Ariz. 139, 141, ¶ 11 (App. 2016). Accordingly, we treat the Students' motion as one seeking reconsideration.

¶13 Rule 7.1(e), which governs motions for reconsideration, does not set a time limit on when they may be filed. As applied, the Students had no basis for filing their second motion until the 2018 Regulations became effective, following resolution of federal court litigation that had enjoined their effective date. *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 164 (D.D.C. 2018) ("*CAPPS*"); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 78–79 (D.D.C. 2018); *see also* William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 9,964 (March 19, 2019) (memorializing October 16, 2018 effective date). The Students filed their motion 22 days thereafter. We

cannot say the Students unreasonably delayed in seeking relief. Accordingly, the motion was timely.

II. The Borrower Defense Rule

¶14 A brief description and procedural history of the 2018 Regulations provides context for the issue resolved in this appeal. The William D. Ford Federal Direct Loan Program ("Direct Loan Program") allows students who attend "participating institutions of higher education" to obtain direct loans from the federal government to pay for their educational expenses. 20 U.S.C. § 1087a(a); *CAPPS*, 344 F. Supp. 3d at 165. To participate in the Direct Loan Program, higher education institutions must enter into Program Participation Agreements with the Secretary of Education and agree to comply with the Higher Education Act of 1965, all applicable regulations, and certain other conditions. *Id.* at 165. One of those regulations is the Borrower Defense Rule, which was first promulgated in 1994 and allowed borrowers to assert "as a defense against repayment, any act or omission of the school attended by the [borrower] that would give rise to a cause of action against the school under applicable State law." *Id.* at 165–66; *see also* 34 C.F.R. § 685.206(c)(1).

¶15 On November 1, 2016, the Department published a final rule that would eventually become the 2018 Regulations. The final rule prohibited participating schools from entering into "a predispute agreement to arbitrate a borrower defense claim" or relying in any way on "a predispute arbitration agreement with respect to any aspect of a borrower defense claim." 34 C.F.R. § 685.300(f)(1)(i). It further required schools that had entered into predispute arbitration agreements before the effective date to "ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section." 34 C.F.R. § 685.300(f)(3)(ii).

¶16 The Department twice stayed the effective date due to ongoing litigation. *See* William D. Ford Federal Direct Loan Program, 82 Fed. Reg. 49,114 (Oct. 24, 2017); William D. Ford Federal Direct Loan Program, 83 Fed. Reg. 6,458 (Feb. 14, 2018). Additional litigation seeking to terminate these stays resulted in the final rule becoming effective on October 16, 2018. William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 9,964 (March 19, 2019).

III. The 2018 Regulations Do Not Apply Retroactively.

¶17 The Students contend the 2018 Regulations "bar enforcement of arbitration agreements entered both prior to enactment and after enactment." We review *de novo* the superior court's determination that the 2018 Regulations do not retroactively bar enforcement of the Arbitration Agreements. *State v. Carver*, 227 Ariz. 438, 441, ¶ 8 (App. 2011).

¶18 Retroactivity is not favored in the law, and federal "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Elim Church of God v. Harris*, 722 F.3d 1137, 1140 (9th Cir. 2013) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). As such, federal regulations do not apply retroactively "unless Congress has so authorized the administrative agency and the language of the regulations requires this result." *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002); *see also Enter. Leasing Co. of Phoenix v. Ariz. Dept. of Revenue*, 221 Ariz. 123, 128, ¶ 23 n.1 (App. 2008).

¶19 Courts use a two-step framework to determine whether a federal regulation has a retroactive effect. *Sacks v. S.E.C.*, 648 F.3d 945, 951 (9th Cir. 2011). The court first determines "whether the . . . regulation clearly expresses that the law is to be applied retroactively." *Id.* If not, it considers "whether application of the regulation would have a retroactive effect by 'attach[ing] new legal consequences to events completed before its enactment.'" *Id.* (quoting *Mejia v. Gonzales*, 499 F.3d 991, 997 (9th Cir. 2007)). Even if the regulation appears to have a retroactive effect under this second consideration, it still will not govern "absent clear *congressional* intent favoring such a result." *Sacks*, 648 F.3d at 951 (quoting *Koch v. S.E.C.*, 177 F.3d 784, 786 (9th Cir. 1999)).

¶20 The Students contend 34 C.F.R. § 685.300(f)(1)(i) clearly expresses retroactivity by prohibiting participating schools from "enter[ing] into a predispute agreement to arbitrate a borrower defense claim, or rely[ing] in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." The Students interpret the phrase "rely in any way" as broadly prohibiting schools from requiring students to arbitrate "borrower defense claims" regardless of when the claims arise or when they file suit. But subsection (f)(2) defines reliance more narrowly:

> Reliance on a predispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

> (i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;
>
> (ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and
>
> (iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

34 C.F.R. § 685.300(f)(2). GCU relied on the Arbitration Agreements in its motion to dismiss well before the 2018 Regulations became effective. The Students identify nothing GCU did after the effective date that would constitute "reliance" under subsection (f)(2); they only cite GCU's response to their second motion as a "violation of th[e] bar to enforcement of an arbitration agreement." Merely responding to the Students' motion does not constitute reliance on the Arbitration Agreements, as GCU only sought to preserve the status quo as previously ordered by the court.

¶21 The Students also contend 34 C.F.R. § 685.300(f)(3)(ii), which requires schools to "amend all [predispute arbitration] agreements to express that bar to enforcement . . . or provide notice of the bar to enforcement," prohibits schools from continuing to arbitrate claims already in arbitration. While the record is silent on whether GCU either amended the Arbitration Agreements or provided notice to the Students, that obligation did not arise until the 2018 Regulations became effective. *See* 34 C.F.R. § 685.300(b)(11) (requiring schools to "[c]omply with the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes"); William D. Ford Federal Direct Loan Program, 81 Fed. Reg. 76,087 (Nov. 1, 2016) (noting the addition of subsection (b)(11)). And the required amendment language only bars *future* attempts to compel arbitration, stating in relevant part that neither the school "nor anyone else *will use* this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained" and further stating that students "*may file* a lawsuit for such a claim or . . . be a member of a class action lawsuit for such a claim even if you do not file it." 34 C.F.R. § 685.300(f)(3)(i), (f)(3)(iii)(A), (B) (emphases added). Again, GCU exercised its contractual right to compel arbitration before the regulations became effective.

¶22 The Students also cite the Department's discussion of the 2018 Regulations in the Federal Register as supporting retroactivity. Specifically, they cite the Department's statement that the 2018 Regulations would "thereafter bar the institution that chooses to continue to participate from exercising rights acquired by the institution under agreements already executed with students." William D. Ford Federal Direct Loan Program, 81 Fed. Reg. at 76,025. We need not resolve an issue by resorting to agency interpretations of a regulation where the matter is resolved by looking to the plain text. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). But assuming *arguendo* that Department interpretations were controlling, they also stated that the regulations would only "impose requirements on the future conduct of institutions that intend to continue to participate in the Direct Loan Program." *Id*. at 76,024. The Department also stated that, if a school chose to continue participating in the Direct Loan Program, "it agrees to do so under rules such as these that change—*prospectively*—the conduct in which it can engage." *Id*. at 76,025 (emphasis added). In other words, while the 2018 Regulations may have barred GCU from moving to compel arbitration after the effective date, there is nothing in Department guidance to suggest the 2018 Regulations offered the Students the chance to claw back claims already in arbitration.

¶23 The Students also cite *Bauer*, but their reliance is misplaced. There, the district court stated that if the 2018 Regulations were allowed to take effect, the school "would be prohibited from relying on [its arbitration] provisions to keep Del Rose and Bauer from banding together with other alleged victims . . . *to bring suit* in state court." *Bauer*, 325 F. Supp. 3d at 89 (emphasis added). Unlike the Students, the *Bauer* individual plaintiffs had not sued their former school; they instead sued to end the stay of the 2018 Regulations. *Id*. at 79, 82.

¶24 For these reasons, the 2018 Regulations did not bar GCU from continuing to arbitrate the Students' claims. As a result, we need not (and expressly do not) reach GCU's contention that the Students' claims are not "borrower defense claims" under the Borrower Defense Rule.

IV. GCU's Lawsuit Against Larson Did Not Invalidate The Students' Arbitration Agreements.

¶25 The Students also contend GCU waived its right to arbitrate by suing Larson; an issue GCU did not address in its answering brief. The failure to address a debatable issue in the answering brief may be construed as a confession of error. *Caretto v. Ariz. Dept. of Transp.*, 192 Ariz. 297, 303, ¶ 25 (App. 1998). Given our strong preference to resolve cases on the merits,

however, we decline to find a confession of error in this case. *DeLong v. Merrill*, 233 Ariz. 163, 166, ¶ 9 (App. 2013).

¶26 "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract." A.R.S. § 12-3006(A). Although the arbitration requirement may be waived, waiver is not generally favored and the party seeking to prove waiver bears a heavy evidentiary burden once notice of an intent to arbitrate is given. *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 181 (App. 1984).

¶27 The Students contend GCU's suit against Larson was "conduct destroying [its] right to demand arbitration," citing *Bolo Corp. v. Homes & Son Const. Co.*, 105 Ariz. 343, 345 (1970). Setting aside the fact that GCU had already demanded arbitration in this case when it sued Larson, *Bolo Corp.* is distinguishable. There, the party demanding arbitration first "sought redress through the courts, in lieu of the arbitration tribunal, and asked the court for exactly the same type of relief" *against the same defendant*. *Id.* at 347. While GCU may have waived its right to arbitrate with Larson by suing him—an issue that is not before us in this appeal—the Students cite no GCU conduct as to them suggesting an intent not to arbitrate their claims. *See EFC Dev. Corp. v. F. F. Baugh Plumbing & Heating, Inc.*, 24 Ariz. App. 566, 569 (1975) ("The basis of the finding of waiver of an arbitration provision is the showing of conduct inconsistent with utilization of the arbitration remedy—conduct showing an intent not to arbitrate."). The Students also cite no authority suggesting a party waives its contractual right to arbitrate in one case by not demanding arbitration in an unrelated case.

V. Attorney Fees and Costs on Appeal

¶28 Both sides request their attorney fees incurred in this appeal. The Arbitration Agreements provide:

> Both I and the school agree that filing a court action will cause damage to the other party. We agree that an appropriate measure of this damage includes the costs and attorney's fees actually incurred in compelling arbitration.

We generally enforce contractual attorney fee provisions according to their terms. *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269, ¶ 14 (App. 2007). We retain discretion, however, to limit the recovery to a reasonable amount. *Id.* at 270, ¶ 16.

¶29 At issue in this appeal is whether the Students may proceed in court. Because GCU prevailed on that issue, it therefore may recover reasonable attorney fees upon compliance with ARCAP 21. We do not reach the parties' fee claims under § 12-341.01(A). *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 207, ¶ 11 (App. 2014). GCU also may recover its taxable costs as the successful party under A.R.S. § 12-341 upon compliance with ARCAP 21.

CONCLUSION

¶30 We affirm.

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