Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000398-001 DT 02/28/2023

HONORABLE JULIE A. LAFAVE

CLERK OF THE COURT
S. Motzer
Deputy

FULTON HOMES AT COOLEY STATION COMMUNITY ASSOCIATION

NICHOLAS C NOGAMI

v.

AMRO HASSAN (001)
HALA M SHAMS (001)

AMRO HASSAN
2714 S BAR DIAMOND ST
GILBERT AZ 85295
HALA M SHAMS
2714 S BAR DIAMOND ST
GILBERT AZ 85295

COMM. LAFAVE
HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING – AFFIRMED & REMANDED

CC2021-137641 RC

Defendants/Appellants, **AMRO A. HASSAN and HALA M. SHAMS ("Homeowners")**, appeal from a civil judgment entered in the Highland Justice Court. The trial court granted a Judgment on the Pleadings ("JOP") in favor of Plaintiff/Appellee, **FULTON HOMES AT COOLEY STATION COMMUNITY ASSOCIATION ("Fulton Homes")**. It subsequently issued a Judgment and Attorneys' Fees and Costs in favor of Fulton Homes. This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261. For the following reasons, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The underlying facts of this case are uncontested. On August 27, 2021, Fulton Homes filed its lawsuit. *See* Complaint. It alleged that Homeowners deposited $3,500 in their account with Fulton Home for landscaping which was then refunded to them upon completion. *Id.* at 2:20-25. Fulton Homes also alleged that it "then inadvertently issued a duplicate reimbursement of $3,500 to Defendants a short time later, due to an administrative error". *Id.* at 2:25-27. Fulton Homes attached to the Complaint a copy of its ledger which it represented illustrated the erroneous additional payment. *Id.* at Exhibit "A". Fulton Homes alleged when it sought return of the funds, Homeowners refused to do so. *Id.* at 3:2-6. Fulton Homes demanded relief in the amount of $3,500, as well as attorneys' fees and costs. *Id.* at 5:16-23.

In their Answer, Homeowners denied any allegation of wrongdoing, but admitted the funds belonged to Fulton Homes. *See* Answer, dated November 12, 2021. Homeowners acknowledged the funds had been given to them in error and that they were owed to Fulton Homes, but indicated they wanted to pay them back in a payment plan due to financial hardship. *Id.*

On December 20, 2021, Fulton Homes filed its Motion for JOP. *See* Motion for Judgment on the Pleadings. On December 29, 2021, Homeowners filed a response which read in full "We are unable financially to afford the whole amount". *See* Response. The trial court granted the JOP on January 12, 2022. *See* Ruling on Motion. The parties then briefed the issue of attorneys' fees and the final award, including attorneys' fees and costs was entered on April 28, 2022. *See* Ruling on Motion.

On May 12, 2022, Homeowners filed their Motion to Set Aside Judgment. They argued only that the arbitration clause in the party's agreement necessitated arbitration rather than litigation and thus the trial court had no jurisdiction over the matter. *See* Motion to Set Aside Judgment. Fulton Homes responded that the nature of the action sought was not contemplated by the claims provision of the governing documents and thus arbitration was not necessary. On June 17, 2022, the trial court denied the Motion to Set Aside Judgment. *See* Calendar Events and Hearings at P:4.[1] This timely appeal followed.

II. GENERAL APPELLATE CONSIDERATIONS

When reviewing a trial court judgment, the reviewing court views "the evidence in a light most favorable to sustaining the verdict." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51–52 (App. 2009). This Court does not "reweigh the evidence or substitute [its] evaluation of the facts" for that of the trial court. *Id.*

[1] This court was not provided a copy of the ruling on appeal.

In this contract case, Homeowners bore the burden of proof by a preponderance of the evidence. *See, e.g., Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291 (2004). The preponderance standard "essentially allocates the risk of error equally between the parties involved." *Gila River Indian Community. v. Dep't of Child Safety*, 238 Ariz. 531, 536–37 (App. 2015) (internal quotation omitted). A witness' testimony, if believed by the trial court, is sufficient proof to sustain a verdict and judgment. *Cf. State v. Montano*, 121 Ariz. 147, 149 (App. 1978) ("one witness, if relevant and credible, is sufficient to support a conviction").

The validity and enforceability of a contract and arbitration clause are mixed questions of fact and law, subject to de novo review. *See Estate of DeCamacho ex rel Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 20, ¶ 9 (App. 2014)(Denial of a motion to compel arbitration is reviewed de novo); *See also Sun Valley Ranch 308 Ltd. v. Robson*, 231 Ariz. 287, 291, ¶ 9 (App. 2012); *National Bank of Ariz. v. Schwartz*, 230 Ariz. 310, 311, ¶ 4 (App. 2012). *Schoneberger v. Oelze*, 208 Ariz. 591, ¶ 12 (App.2004); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5, (App.2008) (statutory construction is a matter of law); *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App.2009)(contract interpretation is a matter of law).

Whether conduct amounts to waiver of the right to arbitrate is also a question of law reviewed de novo. *See In re Estate of Cortez*, 226 Ariz. 207, 210, ¶ 3 (App. 2010). "When the facts are undisputed, this [C]ourt is not bound by the trial court's conclusions and may make its own analysis of the facts or legal instruments on which the case turns." *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 150 (1992).

III. ISSUES ON APPEAL

On appeal, Homeowners raise the following issues: 1) Fulton Homes' lawyers signed the pleadings[2]; 2) the fees were not reasonable[3]; 3) there was no contractual relationship between the parties[4]; 4) there was a mandatory arbitration clause which divested the trial court of jurisdiction, and; 5) the JOP reply was untimely[5].

Issues raised for the first time on appeal cannot be considered. *See McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5 (1997) (issues not raised in the proceeding below are not considered on appeal); *National Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 216, ¶30 (App. 2005) (appellate courts "will not address issues raised for the

[2] Permitted under Arizona Justice Court Rules of Civil Procedure ("JCRCP") Rule 109(a)
[3] Left to the discretion of the trial court under JCRCP Rule 139(e)
[4] A restrictive covenant deed is a contract. *See* Powell v. Washburn, 211 Ariz. 553, 555 (2006)
[5] There is no evidence the Reply was even considered and none is required. *JCRCP Rule 128(e).* However, based on the docket, the Reply was timely filed.

first time on appeal"); *City of Tempe v. Fleming*, 168 Ariz. 454, 456 (App. 1991) ("arguments not made at the trial court cannot be asserted on appeal"); Palmer v. City of Phoenix, 242 Ariz. 158, 165, ¶26 (App. 2017) (stating that "a party must timely present his legal theories to the trial court so as to give it an opportunity to rule properly" (citation and internal quotation marks omitted)). As a result, the only issue before this court for determination is if the JOP was properly granted and if the matter was subject to arbitration[6].

IV. DISCUSSION

A. The JOP was properly granted.

After the pleadings have been filed, any party may file a motion for judgment on the pleadings. The motion will be granted if, for purposes of the motion only, all of the allegations in the opposing party's pleadings are considered to be true, and the party who filed the motion would be entitled to judgment on the pleadings in their favor as a matter of law. If matters outside the pleadings are presented to the court, the court will treat the motion as a motion for summary judgment under Rule 129. [ARCP 12(c)]

JCRCP Rule 128(g)

A court may properly grant a Judgment on the Pleadings if the complaint sets forth a claim for relief and the answer fails to assert a legally sufficient defense. *See Walker v. Estavillo*, 73 Ariz. 211 (1952); *Pac. Fire Rating Bureau v. Ins. Co. of North America*, 83 Ariz. 369 (1958). Such was the case here. Homeowners did not raise any legal defense to the Complaint. They argued only that it would be a financial hardship to return the funds all at once. Fulton Homes had no legal obligation to offer a payment plan for a refund of monies erroneously transferred to Homeowners. They admitted the money was Fulton Homes' and needed to be repaid. "The law is well settled that an admission in an answer is binding on the party making it, and is conclusive as to the admitted fact. No evidence may be shown to contradict the admitted fact, a finding contrary thereto is erroneous." *Schwartz v. Schwerin*, 85 Ariz. 242, 249 (1959).

B. Arbitration was not required in this case, nor was it requested.

Homeowners argue that Declaration of Covenants, Conditions and Restrictions for Fulton Homes at Cooley Station ("the contract') required the parties to arbitrate this matter rather than litigate it in the trial court. *See* Appellant's Memorandum at P:5. Homeowners raised this

[6] The Court briefly directed Homeowners to the law which would have made their appeal unsuccessful even if considered on the merits simply to allow them to understand those provisions but they did not substantively effect this appeal.

jurisdictional issue in their Motion to Set Aside Judgment. Section 10.2 of the contract requires parties to arbitrate "claims" which arise in two specific ways:

- related in any way to an Alleged Defect, including, without limitation, any claim or cause of action for breach of express or implied warranties or that a Declarant Party was negligent in the planning, design, engineering, grading, construction or development of the Project; or
- related to the development of the Project or the management or operation of the Association, including, without limitation, any claim for negligence, fraud, intentional misconduct or breach of fiduciary duty.

See Contract Section 10.2(c)(1) and(2).

Fulton Homes argues the instant lawsuit did not contain the type of claim which required arbitration. *See* Plaintiff/Appellee's Response Memoranda at 7:16-23. This court agrees. The remainder of the arbitration provision in the contract clearly sets out that it is meant to allow remedy of defects and other claims related to the community. *See* Contract at Sections 10.3 and 10.4. The binding arbitration is meant to resolve claims "not resolved by direct negotiations". *Id.* at section 10.5. Here, there was no negotiation necessary. Fulton Homes made an accounting error and gave Homeowners $3,500 that it should not have. Homeowners acknowledged that but apparently no longer had the funds to repay. The lawsuit did not involve any alleged defect or any issue in the development of the Project. *Id.* at Section 10.2. It simply did not fall within the parameters of the arbitration clause. Further, to the extent the trial court would have made that decision, it was never asked to do so. Thus, homeowners have waived the right to ask this Court to review the need for arbitration as it never sought that relief prior to the JOP.

If a party *makes a motion to the court to order arbitration*, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

*ARS 12-3007(F)(emphasis added); See also A.R.S. §12-1502(*setting forth requirements for a trial court once "an application" has been made to refer to arbitration).

Homeowners failed to raise a legal defense to the action. They admitted owing Fulton Homes $3,500. Judgment on the Pleading was appropriate. This court could reach no other conclusion in its review. Further, the arbitration clause of the contract did not contemplate an action of the nature filed. While the trial court may have considered referring the matter to arbitration, no motion was made to do so prior to Homeowner's admission the money was owed. There was no negotiation to be had, nothing an arbitration could have resolved. The Complaint and Answer alone establish Homeowner's owed Fulton Homes $3,500. The attorneys' fees and

costs generated thereafter were a result of Homeowners refusal to repay funds. The trial court properly awarded those fees, as this court will on appeal should Fulton Homes file the appropriate request for same.

As the apparent prevailing party, Fulton Homes may be entitled to its taxable costs and reasonable attorneys' fees on appeal. Upon Fulton Homes' compliance with Rule 13, Superior Court Rules of Appellate Procedure—Civil, this Court will consider its request for costs and fees as to the filing of the appeal. If it contends that this Court is required to award reasonable attorneys' fees due to a provision of a contract between the parties, Fulton Homes' Rule 13 filing must either supply the contractual provision requiring the award of fees or specifically identify where in the existing record that provision can be found. *See Bennett Blum, M.D., Inc. v. Cowan,* 235 Ariz. 204, 206 (App. 2014). Fulton Homes' Rule 13 filing also "must disclose the terms of any fee agreement for the services for which the claim is made." *Rule 54(g)(4), Ariz. R. Civ. P. See also Jerman v. O'Leary*, 145 Ariz. 397, 403 (App. 1985) ("[I]t is vital to know what the agreement was between appellees and their lawyer.").

V. DISPOSITION AND ORDERS

Homeowners have not shown reversible error in the trial court proceedings. Nor has a de novo review of the arbitration clause of the contract supported their argument that it applies.

Accordingly,

IT IS THEREFORE ORDERED affirming the judgment of the Highland Justice Court.

IT IS FURTHER ORDERED that, because the issue of attorneys' fees and costs remain pending, this ruling is not a final decision of this Court for purposes of ARCP 54(c) or Superior Court Rule of Appellate Procedure-Civil 12(d). At an appropriate time, this Court will consider a motion from either party declaring these review proceedings to be concluded for purposes of Rule 13 and issue its final order pursuant to ARCP 54 and SCRAP-Civil R. 12 once the attorneys' fee issue had been briefed and determined.

IT IS ALSO ORDERED signing this ruling as a formal order of the Court.

/s/ Julie A. LaFave
THE HON. JULIE A. LAFAVE
Judicial Officer of the Superior Court

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