IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/17/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

NATIONAL BANK OF ARIZONA, a national banking association,	)	1 CA-CV 09-0692
	)	DEPARTMENT A
Plaintiff/Appellant/ Cross-Appellee,	)	**MEMORANDUM DECISION**
v.	)	
	)	Not for Publication –
ROGER STOCKTON,	)	(Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
Defendant/Appellee/ Cross-Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-030819

The Honorable Bethany G. Hicks, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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Roger Stockton San Juan Capistrano, CA
Defendant/Appellee/Cross-Appellant
In Propria Persona

T H O M P S O N, Judge

¶1 Appellant National Bank of Arizona, N.A. (Bank) appeals the court's judgment dismissing its complaint against

Roger Stockton and referring the matter to arbitration, and the court's denial of its motion for new trial. Stockton cross-appeals the denial of his request for an award of attorneys' fees and costs. For the following reasons, we affirm the orders referring this matter to arbitration and denying Stockton's request for an award of attorneys' fees and costs. We reverse the dismissal of the Bank's complaint, remand, and direct the court to stay the action pending arbitration.

FACTUAL AND PROCEDURAL HISTORY

¶2 The Bank made three loans to Stockton, each secured by a deed of trust on a separate parcel of land. For each loan, Stockton executed a promissory note that contained an arbitration provision. Stockton allegedly failed to repay the loans as agreed and the Bank proceeded with non-judicial foreclosures on the collateral properties.

¶3 On December 5, 2008, the Bank filed a complaint seeking a deficiency judgment on the promissory notes. It served Stockton with the complaint on December 20, 2008. On January 20, 2009, Stockton filed a verified answer.

¶4 On February 20, 2009, Stockton moved for summary judgment on the Bank's claims. He argued the court lacked jurisdiction over the claims because the loan agreements required the parties to arbitrate them and asked the court to dismiss the action. The Bank opposed the motion and cross-moved

for summary judgment on the issue of Stockton's liability under the notes. It argued the deficiency claims were not subject to arbitration and that, in any event, Stockton had waived his right to demand arbitration by failing to request it within forty-five days after service of the complaint. The Bank argued, in the alternative, that if the court determined the deficiency claims were subject to arbitration, it should stay the action and enter an order compelling arbitration rather than dismiss the lawsuit. The court granted Stockton's motion for summary judgment, ruling that the complaint must be dismissed and the matter referred to arbitration. The court denied Stockton's request for an award of attorneys' fees.

¶5 The Bank moved for new trial, arguing that the judgment was not supported by the evidence and was contrary to law because its deficiency claims were not subject to arbitration under the terms of the loan documents. The Bank also argued that dismissal was inappropriate because the proper procedure under Arizona law when a claim is subject to an arbitration agreement is to stay the action pending the outcome of arbitration. The court denied the motion.

¶6 The Bank timely appealed the judgment and the order denying its motion for new trial. Stockton cross-appealed the court's denial of his request for attorneys' fees. We have

jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) and (F)(1) (2003).[1]

ISSUES

¶7 The Bank argues the court erred in finding that its deficiency claims are subject to the arbitration provision in the loan documents and by dismissing the action rather than staying it pending the outcome of the arbitration. Stockton cross-appeals the court's denial of his request for an award of attorneys' fees.

I. The Bank's Appeal

A. Applicability of the Arbitration Provision

¶8 The superior court's review on a motion to compel arbitration is limited to the determination of whether an arbitration agreement exists and governs the dispute at issue. A.R.S. § 12-1502(A), (B) (2003); *Foy v. Thorp*, 186 Ariz. 151, 153-54, 920 P.2d 31, 33-34 (App. 1996). Although Arizona favors arbitration to resolve disputes, *Clarke v. ASARCO Inc.*, 123 Ariz. 587, 589, 601 P.2d 587, 589 (1979), parties are required to arbitrate only those disputes they have clearly agreed to

[1] Generally, an order referring a matter to arbitration is interlocutory and not appealable. *S. Cal. Edison v. Peabody W. Coal Co.*, 194 Ariz. 47, 54, ¶ 23, 977 P.2d 769, 776 (1999). However, if the superior court enters a final order or judgment under Arizona Rule of Civil Procedure 54(b) or A.R.S. § 12-2101, it is appealable. *Id.*

arbitrate. *S. Cal. Edison*, 194 Ariz. at 51, ¶ 11, 977 P.2d at 773.

¶9 The arbitration agreement states, as relevant:

> (a) Any claim or controversy ("Dispute") between or among the parties and their employees, agents, affiliates, and assigns, including, but not limited to, **Disputes arising out of or relating to** this agreement, **this arbitration provision** ("arbitration clause"), or any related agreements or instruments relating hereto or delivered in connection herewith ("Related Agreements"), and including, but not limited to, a Dispute based on or arising from an alleged tort, shall at the request of any party be resolved by binding arbitration in accordance with the applicable arbitration rules of the American Arbitration Association (the "Administrator"). . .
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> (b) . . . **The arbitrator(s) shall have the authority to resolve any Dispute regarding the terms of this agreement, this arbitration clause, or Related Agreements, including any claim or controversy regarding the arbitrability of any Dispute**. . .
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> . . .
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> (e) No provision of this arbitration clause, nor the exercise of any rights hereunder, shall limit the right of any party to: (1) judicially or non-judicially foreclose against any real or personal property collateral or other security; (2) exercise self-help remedies, including but not limited to repossession and setoff rights; or (3) obtain from a court having jurisdiction thereover any provisional or ancillary remedies including but not limited to injunctive relief, foreclosure, sequestration, attachment, replevin, garnishment, or the appointment of a receiver. Such rights can be exercised at any time, before or after initiation of an arbitration proceeding, except to the extent such action is contrary to the arbitration award. The exercise of such rights shall not constitute a waiver of the right to submit any Dispute to arbitration, and **any claim or controversy related to the exercise of such rights shall be a Dispute to be resolved under the provisions**

> **of this arbitration clause.** Any party may initiate arbitration with the Administrator. If any party desires to arbitrate a Dispute asserted against such party in a complaint, counterclaim, cross-claim, or third-party complaint thereto, or in any answer or other reply to any such pleading, such party must make an appropriate motion to the trial court seeking to compel arbitration, **which motion must be filed with the court within 45 days of service of the pleading, or amendment thereto, setting forth such Dispute.** If arbitration is compelled after commencement of litigation of a Dispute, the party obtaining an order compelling arbitration shall commence arbitration and pay the Administrator's filing fees and costs within 45 days of entry of such order. Failure to do so shall constitute an agreement to proceed with litigation and waiver of the right to arbitrate. . .

(Emphasis added).

¶10 The Bank argues the court erred in applying the arbitration agreement to its deficiency claims because those claims were "ancillary" to its statutory foreclosure action and therefore excepted from the arbitration agreement. Stockton maintains the Bank's deficiency action is not an ancillary remedy and therefore not subject to that exception to the arbitration provision.

¶11 Pursuant to the terms of the arbitration agreement, the arbitrator must decide whether the Bank's deficiency action is a claim for an "ancillary remedy" and therefore not subject to the arbitration provision. *See Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 367, ¶¶ 20-21, 78 P.3d 1081, 1088 (App. 2003) (holding arbitrator had the authority to determine whether issues were subject to arbitration, and trial court was required

to defer to the arbitrator's arbitrability ruling). The promissory notes specifically included in the definition of a dispute governed by the arbitration provision those claims and controversies arising out of or relating to the arbitration provision. It also explicitly granted the arbitrator the authority to resolve any claim or controversy regarding the arbitration provision, "including any claim or controversy regarding the arbitrability of any Dispute" if made timely. Because the arbitration provision grants the arbitrator primary authority to decide the arbitrability of the Bank's deficiency claims, the court was required to refer the matter to arbitration to allow the arbitrator to make that determination. *See id.* Therefore, the court rightly determines whether there is an arbitration agreement and the arbitrator is to decide whether a request was made and made timely. If it is not timely, the matter is returned to the court.

B. Waiver

¶12 The Bank contends that, even if the deficiency claims are subject to arbitration, Stockton waived his right to arbitrate those claims by participating in the litigation and failing to move to compel arbitration within forty-five days after service of the Bank's complaint.

¶13 A party may, by its conduct, repudiate an arbitration agreement and thereby waive its right to enforce that agreement.

Meineke v. Twin City Fire Ins. Co., 181 Ariz. 576, 581, 892 P.2d 1365, 1370 (App. 1994). "Waiver occurs when a party relinquishes a known right or exhibits conduct that clearly warrants inference of an intentional relinquishment." *Id.* There is a distinction between conduct inconsistent with the use of the arbitration remedy that supports an inference of waiver (i.e., "preventing arbitration, making arbitration impossible, proceeding at all times in disregard of the arbitration clause, expressly agreeing to waive arbitration or unreasonable delay." *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370 (citation omitted)), and a party's forfeiture of its right to arbitrate by failing to satisfy a procedural condition to arbitration (i.e., a timely demand). *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 192-93, 877 P.2d 284 (App. 1994). The court determines whether a party has repudiated an arbitration agreement; the arbitrator determines whether a party failed to satisfy a procedural condition to arbitration. *Id.*

¶14 In order to determine that a party has repudiated an arbitration agreement by unreasonably delaying its demand for arbitration, a court must find "clear evidence of 1) prejudice suffered by the other party and 2) a demand for arbitration so egregiously untimely and inconsistent with an intent to assert the right to arbitrate that an intentional relinquishment can be inferred." *Id.* The party seeking to avoid arbitration bears

the burden of proof on the issue of waiver. *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370.

¶15 By dismissing the Bank's action and referring the matter to arbitration, the court impliedly found that Stockton had not repudiated the arbitration agreement. We find no error in this ruling because the Bank did not present any evidence that Stockton's belated demand for arbitration was inconsistent with an intent to arbitrate or that the Bank suffered any prejudice as a result of the delay. Stockton timely answered the Bank's complaint and expediently moved to dismiss the action on the basis that the parties were required to arbitrate the deficiency claims. Stockton's filing of an answer did not constitute significant participation in the litigation and was not inconsistent with arbitration. *Noel R. Shahan Irrevocable and Inter Vivos Trust v. Staley*, 188 Ariz. 74, 78, 932 P.2d 1345, 1349 (App. 1996) (holding defendant who answered complaint and participated in limited discovery had not "significantly participated" in litigation and therefore did not waive his right to demand arbitration).[2]

[2] We reject the Bank's argument that Stockton repudiated the arbitration agreement by failing to plead "arbitration and award" as an affirmative defense in his answer, because Arizona Rule of Civil Procedure 8(c) does not require the assertion of an arbitration clause as an affirmative defense. *See Mapes v. Chevron USA Prods. Co., a Division of Chevron U.S.A., Inc.*, 237 F.Supp.2d 739, 745 (S.D. Tex. 2002) (holding Federal Rule of Civil Procedure 8(c) applies only when the dispute has already

¶16 The question of whether Stockton failed to satisfy a procedural condition to arbitration because he did not file a motion to compel arbitration within forty-five days of being served with the Bank's complaint must be resolved by the arbitrator. *See City of Cottonwood*, 179 Ariz. at 193, 877 P.2d at 292.

C. Dismissal of Complaint

¶17 The Bank argues that even if the court properly referred this matter to arbitration, it erred by dismissing the action rather than staying it pending the outcome of the arbitration. Arizona law requires the court to stay an action involving an issue subject to arbitration when it compels arbitration of the matter. A.R.S. § 12-1502(D) (2003). Thus, the court erred in dismissing the Bank's complaint when it referred the deficiency claims to arbitration.

II. Stockton's Cross-Appeal

¶18 Stockton cross-appeals the court's order denying his request for an award of costs and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and -341.01(A) (2003). We review

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been arbitrated and the award obtained and does not require the assertion of an arbitration clause as an affirmative defense); *Foremost-McKesson Corp. v. Allied Chem. Co.*, 140 Ariz. 108, 112, 680 P.2d 818, 822 (App. 1993) ("The interpretation of federal rules regarding affirmative defenses applies to the corresponding Arizona rules.").

the court's decision for an abuse of discretion. *City of Cottonwood*, 179 Ariz. at 195, 877 P.2d at 294.

¶19 Section 12-341 directs the court to award costs to the successful party in a civil action, whereas A.R.S. § 12-341.01(A) provides for a discretionary award of fees to the successful party in an action arising out of a contract. As there has not been a decision on the merits of the Bank's claims, and thus no successful party in the action, we find no error in the court's denial of Stockton's request for costs and attorneys' fees. See *U.S. Insulation, Inc. v. Hilro Constr. Co., Inc.*, 146 Ariz. 250, 259, 705 P.2d 490, 499 (App. 1985) (declining to rule on attorneys' fees request under A.R.S. § 12-341.01 when general contractor had prevailed on appeal regarding its motion to compel arbitration).

CONCLUSION

¶20 For the foregoing reasons, we affirm the order referring this matter to arbitration, but reverse its dismissal of the complaint, remand, and direct the court to stay the action pending the arbitration proceedings. We affirm the court's denial of Stockton's request for an award of attorneys' fees and costs.

¶21 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341 and -341.01(A). At this preliminary stage of the proceedings, the action is far

from concluded and an award of fees would be premature. Instead, it is more appropriate for the arbitrator, (or, if the claims are not arbitrable, the trial court) to consider awarding fees for this appeal when the case is resolved on the merits and there is a prevailing party. We award Stockton appellate costs conditioned on compliance with Arizona Rule of Civil Appellate Procedure 21(a).

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JON W. THOMPSON, Judge

CONCURRING:

_____
DONN KESSLER, Presiding Judge

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DANIEL A. BARKER, Judge