COLORADO COURT OF APPEALS

DATE FILED: November 23, 2022
CASE NUMBER: 2021CA821

Court of Appeals No. 21CA0821
City and County of Denver District Court No. 17CV34287
Honorable Eric M. Johnson, Judge
Honorable Michael A. Martinez, Judge

Paul M. Zimmerman and West Hallam, LLC

Plaintiffs-Appellants,

v.

Sherman & Howard, L.L.C., Charlotte Wiessner, and B. Joseph Krabacher

Defendants-Appellees.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE BERNARD*
Dunn and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 23, 2022

Semler & Associates, P.C., R. Parker Semler, Andrew G. Oh-Willeke, James L. French, Denver, Colorado, for Plaintiffs-Appellants

Wheeler, Trigg, O'Donnell, LLP, Carolyn J. Fairless, William D. Hauptman, Denver, Colorado; Sherman & Howard, L.L.C., Joseph J. Bronesky, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiffs, Paul M. Zimmerman, whom we shall call "the buyer," and West Hallam, LLC, which we shall call "the corporation," appeal the district court's judgment compelling arbitration and confirming an arbitration award to defendants, Sherman & Howard, L.L.C., which we shall call "the law firm," and two lawyers who worked for the law firm, Charlotte Wiessner and B. Joseph Krabacher. We will refer to the buyer and the corporation collectively as "the buyer" unless the context requires us to refer to them individually; we will refer to the law firm and the lawyers collectively as "the law firm" unless the context requires us to refer to them individually. We affirm.

I. Background

A. The Original Engagement

¶ 2 In July 2010, the buyer engaged the law firm to help him buy property in Aspen. Mr. Krabacher, who worked in the law firm's Aspen office, sent the buyer a fee agreement describing the scope of the law firm's representation. Among other things, the agreement stated, "We understand that while we may from time to time be engaged on other matters in the future, our present engagement is limited to . . . the purchase of [the Aspen property]."

¶ 3 The fee agreement also discussed what the law firm would charge the buyer. The various rates for services would be "based on the experience and expertise of the individuals involved," and those rates would be "adjusted at the beginning of a calendar year." For example, "as the attorney who will coordinate and oversee the services [the law firm] perform[s] on your behalf," Mr. Krabacher would charge $425.00 per hour.

¶ 4 The fee agreement went on to state that, if the buyer agreed with its terms and conditions, he should sign an enclosed copy and return it to the law firm. But it added, "Even if you elect not to return a signed agreement to us, we will consider this [fee agreement as governing] . . . our relationship unless you and we agree otherwise in writing."

¶ 5 A memorandum discussing the law firm's policies was affixed to the fee agreement. It contained an arbitration clause. As is pertinent to our analysis, the clause stated that

- the buyer and the law firm "agree" that "any controversy arising out of or related to" the buyer's relationship with the law firm "shall be settled by binding arbitration in Denver, Colorado";

- "[b]y agreeing to arbitrate any disputes" with the law firm, the buyer was "waiving [his] right to file a lawsuit to resolve such disputes and certain rights [he] otherwise may have at law"; and
- "[b]y executing and returning this agreement" to the law firm, the buyer "agree[s] to waive any such rights that [he] may otherwise possess in the event of a dispute with" the law firm.

¶ 6 The buyer did not return a signed fee agreement to the law firm. But he formed the corporation for the purpose of buying the property. The law firm then did the work that it had agreed to do to assist the buyer in the purchase, overseeing the corporation's closing on the property in September 2010.

B. Arbitration Concerning Renovation of the Property

¶ 7 Two years later, the buyer asked the law firm to oversee the corporation's negotiations with Aspen Constructors, Inc., which would renovate the property. In August 2013, the law firm negotiated an amended contract between the corporation and the renovators for a second phase of renovation.

¶ 8 This second renovation phase resulted in costly defects and was overbudget. As part of the law firm's representation of the buyer and of the corporation, Mr. Krabacher sent the renovators notices of claim beginning in May 2014. The law firm also added Ms. Wiessner, an experienced construction attorney who worked in the firm's Denver office, to help with the case.

¶ 9 In October 2018, the law firm filed an arbitration demand on the corporation's behalf against the renovators, alleging that they had billed for costs that were neither reasonable nor necessary and that a subcontractor, whom the renovators had hired, had not properly installed some fixtures.

¶ 10 The case went to arbitration. After a weeks-long hearing, the arbitrator awarded the corporation $337,488 for the renovators' overbilling and for the construction defects.

¶ 11 The law firm then filed a motion seeking attorney fees and costs. The motion included an attached affidavit from Mr. Krabacher. A copy of the fee agreement was also attached. As is relevant to our discussion, the affidavit stated that, "[a]lthough sent in connection with the original purchase of the . . . property, the parties agreed it would govern representation of [the corporation] in

its dispute with [the renovators] and the arbitration." The buyer claims that he did not see the motion or Mr. Krabacher's affidavit before the law firm filed them with the arbitrator.

¶ 12 After filing the motion, Ms. Wiessner emailed the buyer a copy of the motion with the affidavit attached. The buyer did not reply that he had any problems with, or objections to, either document.

¶ 13 The renovators opposed the motion for attorney fees and costs, in part because the fee agreement referred to an hourly rate of $425 for Mr. Krabacher, but the invoices it had received showed that the law firm's lawyers sometimes billed at higher rates.

¶ 14 Before filing a reply to the renovators' opposition to the motion, Ms. Wiessner sent the buyer a draft for his approval. The draft incorporated Mr. Krabacher's affidavit as evidence that the original fee agreement for the purchase of the property applied to the arbitration case with the renovators and that the attorney fees were reasonable.

¶ 15 Ms. Wiessner and the buyer also talked on the telephone about the reply. After that, Ms. Wiessner filed the reply with the supplemental affidavit from Mr. Krabacher. The affidavit stated that, "[a]lthough the [fee] agreement was established in connection

with the original purchase of the . . . property, the parties agreed it would govern representation of [the corporation] in its dispute with [the renovators] and [in] the arbitration."

¶ 16 Ms. Wiessner then emailed the buyer a copy of the reply. The buyer replied, "Looks good."

¶ 17 The arbitrator granted the corporation's motion for attorney fees and costs and awarded the entirety of the corporation's request — $165,026.35 in costs and $756,939.50 in attorney fees — plus $38,283.52 in prejudgment interest. So the corporation's total award in the arbitration involving the renovators was $1,297,737.37.

C. Arbitration Involving the Buyer and the Law Firm

¶ 18 The renovators' insurer denied coverage. The buyer terminated the attorney-client relationship with the law firm and, in October 2017, hired different counsel to collect the arbitration award.

¶ 19 The law firm then sent the buyer a letter informing him that, unless he paid the outstanding legal fees, which were $375,320.34, it would pursue that amount in an arbitration proceeding.

¶ 20 The buyer responded by filing this lawsuit against the law firm, claiming, among other things, that the law firm had committed malpractice. The buyer demanded a jury trial.

¶ 21 Around this same time, the buyer collected $1.2 million in a settlement with the insurers of the renovators and their subcontractor.

¶ 22 The law firm filed a motion asking the district court to compel arbitration of the buyer's claims. The motion argued that the fee agreement required all controversies "arising out of or related to" the "relationship" between the buyer and the law firm be resolved via arbitration. The court ruling on this motion, which we shall call the "first court," granted it, reasoning that the fee agreement contained a "clear and unambiguous arbitration provision" that encompassed the parties' claims and that the parties' "dispute regarding the enforceability of the underlying contract" was "properly within the province of the arbitrator."

¶ 23 The parties proceeded to arbitration. The law firm asserted claims against the buyer for breach of contract and quantum meruit.

¶ 24 At the outset of the arbitration proceedings, the buyer argued that the fee agreement did not bind him to arbitrate his dispute with the law firm, so the arbitrator should dismiss the proceedings. The arbitrator denied the motion.

¶ 25 Before the arbitration hearing began, the buyer asked a second court to reconsider the order compelling arbitration. He also asked the second court to sanction the law firm because it had allegedly fraudulently represented in filings in the renovators' arbitration proceeding that it had provided the buyer with Mr. Krabacher's affidavit before it filed its motion for attorney fees and costs with the arbitrator.

¶ 26 The second court held a hearing. It then denied the motion for reconsideration because it did "not address sufficient new information" and because it "[sought] to relitigate issues already evaluated and rejected by the court."

¶ 27 After hearing extensive testimony and reviewing the evidence, the second court also denied the request for sanctions. It found that neither Ms. Wiessner nor Joseph Bronesky, an attorney for the law firm who had filed the motion to compel arbitration, had violated C.R.C.P. 11(a) by stating that they had given Mr.

Krabacher's affidavit to the buyer before filing the motion for attorney fees and costs in the renovators' arbitration proceeding. The second court found that both Ms. Wiessner and Mr. Bronesky had worked "diligently and extensively" when investigating the facts and that both had a "good faith belief" that Ms. Wiessner had sent Mr. Krabacher's affidavit to the buyer before filing the motion for attorney fees and costs in the renovators' arbitration proceeding.

¶ 28 The arbitration hearing began in November 2019 and spanned fifteen days, ultimately concluding in February 2020. The buyer asked the arbitrator to determine whether (1) the fee agreement applied to the renovators' arbitration proceeding; (2) the law firm had breached its fiduciary duties by representing that the fee agreement applied to that proceeding; and (3) the hourly rates requested in the motion for attorney fees and costs in the renovators' arbitration proceeding exceeded what was outlined on the fee agreement or whether the doctrine of quantum meruit should be used to determine the value of the law firm's legal services.

¶ 29 In the end, the arbitrator decided all issues in the law firm's favor, ruling that it had proved its claims and awarding it $362,311

in damages. The arbitrator also decided that the buyer's claims for exemplary damages and civil theft, and his allegation that he should have received a larger award in the renovators' arbitration proceeding were not supported by facts in the record or were based on borderline "illusory" numbers. There was no evidence, the arbitrator continued, that the arbitrator in the renovators' arbitration proceeding had incorrectly assessed damages or would have awarded more damages to the buyer had the law firm presented additional evidence.

¶ 30 The law firm then moved for a supplemental award of attorney fees and costs under Rule R-47(d)(ii) of the Commercial Arbitration Rules of the American Arbitration Association (AAA). The arbitrator issued a supplemental award for all attorney fees and costs that the law firm had requested.

D. Post-Arbitration Motions

¶ 31 The law firm then filed a motion with a third court to confirm the arbitration award and the supplemental award.

¶ 32 The buyer asked the third court to vacate both awards and, alternatively, to modify the supplemental award. The motion to vacate argued that there was no valid arbitration agreement. The

motion to modify argued that the arbitrator lacked the authority to award supplemental attorney fees because the buyer had withdrawn his request for attorney fees during closing arguments. In response, the law firm argued that the buyer had waived his jurisdictional objection and that his voluntary submission of certain issues to arbitration precluded him from challenging whether (1) there was a valid agreement to arbitrate; and (2) the fee agreement was binding.

¶ 33 The third court granted the law firm's motion to confirm the arbitration awards, and it denied the buyer's motion to vacate the arbitration award.

¶ 34 The third court also denied the buyer's motion to modify the supplemental award, finding that "it [was] uncontroverted that the parties submitted the issues of attorney fees to the arbiter."

¶ 35 The law firm then filed a motion for post-arbitration attorney fees and costs that the third court granted.

II. The Court Did Not Err When It Ordered the Buyer to Arbitrate His Dispute with the Law Firm

¶ 36 The buyer contends that the first court erred when it

1. compelled arbitration because (1) the buyer never signed the fee agreement; (2) the doctrine of equitable estoppel did not permit the law firm to enforce the arbitration provision against the buyer because the law firm had, in the motion for attorney fees and costs filed in the renovators' arbitration proceeding, misrepresented that the buyer had agreed to arbitration; and (3) the parties did not mutually assent to arbitration;
2. ordered the buyer and the law firm to arbitrate their dispute because the law firm had unclean hands;
3. ordered the buyer and the law firm to arbitrate their dispute even though the law firm had not obtained the buyer's informed consent to do so; and
4. did not hold an evidentiary hearing on the issue of whether the buyer should be required to arbitrate his dispute with the law firm.

Some of these contentions contain subparts, which we also analyze below.

¶ 37 The buyer also contends that the third court erred when it confirmed the arbitration award and when it decided that the buyer "never lodged any objection to the proceedings with the arbiter."

¶ 38 Conversely, the law firm asserts that the buyer consented to arbitrate his claims and that he waived his jurisdictional objection, willingly submitting the issue of whether the fee agreement bound him to pay the law firm's attorney fees to the arbitrator.

¶ 39 As we set out in more detail below, we conclude that the buyer is equitably estopped from contesting the first court's order compelling him to arbitrate his dispute with the law firm. In reaching that conclusion, we focus on the buyer's contention as explained in the opening brief: the law firm's equitable estoppel theory is contrary to our supreme court's decision in *N.A. Rugby Union LLC v. United States of America Rugby Football Union*, 2019 CO 56, ¶ 16. We will not consider the new argument that he raised during oral argument, which was that the law firm had not established that he had induced it to detrimentally change its position in reliance on his conduct. *See Rucker v. Fed. Nat'l Mortg. Ass'n*, 2016 COA 114, ¶ 35 (declining to address an argument raised for the first time during oral argument).

¶ 40 By reaching this conclusion, we need not address the buyer's assertion that the third court erred when it ruled that he did not object to the proceedings before the arbitrator and the law firm's assertion that the buyer affirmatively waived his right to object to arbitrating his dispute with the law firm.

A. Standard of Review

¶ 41 We review de novo the first court's decision to compel arbitration, employing the same legal standards that the court employed. *Johnson v. Rowan Inc.*, 2021 COA 7, ¶ 16. The existence and the scope of an arbitration clause are questions of law that we review de novo, applying principles governing contract interpretation. *Radil v. Nat'l Union Fire Ins. Co. of Pittsburg*, 233 P.3d 688, 692 (Colo. 2010). We review the court's factual findings as to the existence of an agreement to arbitrate for clear error. *Barrett v. Inv. Mgmt. Consultants, Ltd.*, 190 P.3d 800, 802 (Colo. App. 2008). We will not disturb the court's factual findings if they are supported by the record. *May v. Petersen*, 2020 COA 75, ¶ 10.

B. Applicable Law

¶ 42 In considering a motion to compel, the court must first determine whether a valid agreement to arbitrate exists between the

parties to the action. *Moffett v. Life Care Ctrs. of Am.*, 187 P.3d 1140, 1143 (Colo. App. 2008), *aff'd*, 219 P.3d 1068 (Colo. 2009). A court may refuse to compel arbitration only upon a showing that there is not an agreement to arbitrate or if the issue sought to be arbitrated is beyond the scope of the arbitration provision. *See City & Cnty. of Denver v. Dist. Ct.*, 939 P.2d 1353, 1364 (Colo. 1997). An agreement to arbitrate will be enforced as written unless there is ambiguity in its language, meaning that the provision is susceptible to more than one interpretation. *Lane v. Urgitus*, 145 P.3d 672, 677-78 (Colo. 2006). When resolving ambiguities, courts interpret contracts, such as agreements to arbitrate, by examining the entire instrument and not by reviewing clauses or phrases in isolation. *Fed. Deposit Ins. Corp. v. Fisher*, 2013 CO 5, ¶ 12.

C. The Fee Agreement Contains a Valid Arbitration Clause

¶ 43 The buyer asserts that the fee agreement's arbitration clause expressly states that it is only applicable if both parties execute the agreement and, therefore, without the buyer's or the corporation's signatures agreeing to arbitration, the clause is not enforceable. We conclude that the record, including several factual findings that the

first court made, does not support this assertion and that general principles of contract law do not support the buyer's position.

¶ 44 First, the fee agreement expressly states that the agreement as a whole, including the arbitration clause, applies even without the buyer's or the corporation's signatures: "Even if you elect not to return a signed agreement to us, we will consider this letter and the enclosed memorandum to govern our relationship unless you and we agree otherwise in writing." As a result, the buyer and the corporation were bound by the fee agreement even though neither of them signed it. And the buyer does not argue that he came to a different written agreement with the law firm.

¶ 45 Second, contract law states that a specific provision controls the more general provisions in a contract. *Massingill v. State Farm Mut. Auto. Ins. Co.*, 176 P.3d 816, 825 (Colo. App. 2007). The buyer contends that the arbitration clause is more specific than the clause in the fee agreement that deems the agreement accepted even without a signature because the arbitration clause states, "By executing and returning this agreement to [the law firm], you agree to waive any such rights that you may otherwise possess in the event of a dispute with the firm." The buyer continues his

contention by asserting that, because the arbitration clause expressly requires a signature as the form of acceptance to arbitrate disputes, it is the more specific provision and is therefore controlling.

¶ 46 After examining the entire instrument, we reject this contention. The language of the arbitration clause is not any more specific in its request for a returned and signed agreement than other language in the fee agreement, which states, "If you are in agreement with the terms and conditions of this engagement . . . please execute the enclosed copy of this . . . agreement and return it to me promptly." Indeed, the language is nearly identical. And the fee agreement's acceptance clause indicates that, if the buyer had desired different terms, he and the law firm could have agreed to them in writing.

¶ 47 We also agree with the first court's interpretation of the fee agreement. In its order compelling arbitration, the first court quoted the fee agreement's language when finding that it was broad and that it encompassed "any controversy arising out of or related to your relationship with the law firm." It likewise quoted the fee

agreement's language when deciding that the agreement required that such claims be resolved through arbitration.

¶ 48 The record also supports the second court's order denying the buyer's motion to reconsider the court's order compelling arbitration. The motion alleged that new evidence revealed that Ms. Wiessner and Mr. Krabacher had committed fraud because Ms. Wiessner had attested to sending Mr. Krabacher's affidavit to the buyer before she filed the motion for attorney fees and costs in the renovators' arbitration proceeding. Rather, the motion went on, there was no record that the affidavit had been sent at that time.

¶ 49 At the hearing, the second court found that the buyer's motion for reconsideration did not "address sufficient new information," that the issues had already been "evaluated and rejected by the court," and that the allegations in the motion were "repetitive in terms of the relief requested" as they pertained to the existence of an agreement to arbitrate. The second court correctly deemed these arguments to be more relevant to the buyer's motion for sanctions rather than proof that an agreement to arbitrate did not exist.

D. The Scope of the Arbitration Was Proper

¶ 50 A court must determine the scope of an arbitration clause when deciding whether to issue an order compelling arbitration. *See Lane*, 145 P.3d at 677. We determine the scope of an arbitration clause by examining the contract's wording to ascertain the subject matter and the parties' intent. *Id.*

¶ 51 The buyer's claims against the law firm generally revolved around whether the fee agreement's terms were enforceable in the renovators' arbitration proceeding. The first court found that the plain language of the arbitration provision provided that the parties agreed to binding arbitration regarding "any controversy arising out of or related to your relationship with [the law firm]." When arbitration provisions use broad language such as this, a presumption favoring arbitration arises, and the scope of the arbitration is equally broad. *See City & Cnty. of Denver*, 939 P.2d at 1364. Because the issues arbitrated between the buyer and the law firm fell within this broad language, they were proper subjects for the arbitration proceeding.

E. The Agreement Applies to the Corporation

¶ 52 The buyer submits that the corporation was not bound by the fee agreement because the corporation did not exist when the buyer engaged the law firm under the terms set out in the fee agreement. Relying on *Rugby Union*, the buyer asserts that, because the corporation was not a party to the fee agreement and because the corporation did not fall within one of the exceptions to when a signatory can compel a nonsignatory to arbitrate, the district court erred in compelling arbitration.

¶ 53 In *Rugby Union*, a financier formed a company to launch a professional rugby league in the United States. *Rugby Union*, ¶ 3. The company and the national rugby governing body entered into a contract that named an entity that was not then in existence as the exclusive marketing agent for player representation and commercial rights. *Id.* at ¶¶ 4-5. The contract included an arbitration clause reading that the parties agreed to settle all claims or disputes related to the agreement by arbitration. *Id.* at ¶ 7. The entity was not a party to the contract, and the company and the entity never agreed on player representation and commercial rights. *Id.* at ¶ 8. After an unsuccessful first year, the financier folded the league, and

he and the company sued the entity, alleging that it had forced him out of business. *Id.* at ¶ 9.

¶ 54 The supreme court concluded that the entity was not bound by the arbitration clause, reasoning that the entity was not a party to the contract and that the financier had not established that any of the exceptions to when a nonsignatory to a contract can be compelled to arbitrate applied. *Id.* at ¶ 16. The supreme court also thought that the concept of an equitable estoppel exception did not apply to the entity because it had not received any benefits from the contract and because it had not asserted any claims or counterclaims under it. *Id.* at ¶ 39. Instead, the supreme court noted, the entity had only argued that the contract claims should be dismissed because it was not a party to the agreement. *Id.*

¶ 55 The buyer's reliance on *Rugby Union* is misplaced because the corporation reaped many direct benefits from the fee agreement. For example, the law firm assisted the corporation in buying the property, negotiated construction contracts on the corporation's behalf, and litigated on its behalf in the renovators' arbitration proceeding. In addition, the law firm billed the corporation for legal

services, and the buyer, through the corporation, paid the law firm for those services.

¶ 56 *Rugby Union* also instructs that the doctrine of "equitable estoppel can bind a nonsignatory to an arbitration provision in an agreement when the nonsignatory has knowingly exploited that agreement, as, for example, by claiming or accepting direct benefits of the agreement." *Id.* at ¶ 38. Unlike in *Rugby Union*, where the only thing that the entity did was to file a motion asking the court to dismiss the claims against it, the corporation, through the law firm, asserted claims against the renovators in arbitration and used the fee agreement to win awards in arbitration, including for costs and attorney fees. In other words, the corporation "exploited" the fee agreement to obtain direct benefits. *See id.* As a result, we conclude that the corporation was precluded from "enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." *Id.* (quoting *Ouadani v. TF Final Mile LLC*, 876 F.3d 31, 38 (1st Cir. 2017)).

¶ 57 Nevertheless, the buyer contends that the law firm cannot rely on a theory of equitable estoppel. He submits that the law firm was dishonest when stating that the law firm and the buyer had agreed

that the fee agreement would govern the renovators' arbitration proceeding. In support of this contention, he cites *Haynes Trane Service Agency, Inc. v. American Standard, Inc.*, 573 F.3d 947, 958-59 (10th Cir. 2009), for the proposition that equitable estoppel is not allowed when the party asserting it was dishonest or had unclean hands. And therefore, because the law firm misrepresented that it had emailed a copy of the motion and Mr. Krabacher's affidavit to the buyer before the motion for costs and attorney fees was filed in the renovators' arbitration proceeding, the law firm is barred from claiming any theory of estoppel.

¶ 58 We are not persuaded because there is evidence in the record that the buyer and the law firm talked about the contents of the motion over the telephone. The record also contains evidence that the buyer received the motion shortly after it was filed and that he did not object to its form or use. In fact, he wrote, "Looks good" in an email after reviewing the law firm's reply to the renovators' objection to the motion, which contained Mr. Krabacher's similar, supplemental affidavit.

¶ 59 In addition, the second court considered this same argument when denying the buyer's motion for sanctions. In that order, the

court, based on its review of telephone records and of the buyer's email confirming that he had reviewed Mr. Krabacher's supplemental affidavit, concluded that Ms. Wiessner and Mr. Bronesky both had good faith beliefs that Ms. Wiessner had sent Mr. Krabacher's original affidavit to the buyer. And we will not disturb the second court's factual findings because they are supported by the record. *See Fresquez v. Trinidad Inn, Inc.*, 2022 COA 96, ¶ 15.

F. The Arbitration Clause Did Not Violate Public Policy

¶ 60 The buyer contends that the fee agreement is unenforceable as a matter of public policy because a contract that violates Colo. RPC 1.8, which addresses conflicts of interest, is presumptively void. He further submits that the law firm violated public policy because it did not inform him of the scope and of the consequences of entering into an arbitration agreement. The fee agreement's arbitration clause violates the Rule, the buyer wraps up his argument, because he did not give informed consent to arbitrate.

¶ 61 But the record shows that the fee agreement itself informed the buyer of the scope and of the consequences of arbitration. It stated that arbitration would be binding, that it would be governed

by national arbitration rules, and that agreeing to arbitration would waive the buyer's right to a jury trial. *Cf.* Colo. RPC 1.8 cmt. 17 (The rule "does not . . . prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement."). As we have concluded above, the arbitration clause in the fee agreement was enforceable.

III. The Court Did Not Err when It Denied the Buyer's Motion to Modify the Supplemental Award

¶ 62 The buyer asserts that the third court erred when it denied his motion to modify the supplemental award because the arbitrator had no authority to award attorney fees and costs to the law firm and because he withdrew his motion for attorney fees in his closing arguments. We are not persuaded.

¶ 63 When addressing the issue of whether a court erred in confirming an arbitration award, we review a court's legal conclusions de novo and its factual findings for clear error. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 18 (Colo. App. 2010).

¶ 64 Absent statutory authority, an express contractual provision, or a court rule, the parties in a lawsuit are required to bear their own legal expenses. *Smith v. Mehaffy*, 30 P.3d 727, 732 (Colo. App. 2000). In this case, there was not an express contractual provision allowing an award of supplemental attorney fees, but early in the proceedings, the arbitrator ordered that the Commercial Rules of the American Arbitration Association applied to the dispute.

¶ 65 AAA Rule R-47(d)(ii) authorizes an award of attorney fees if all parties have requested such an award. The buyer requested attorney fees in his prehearing brief, and the law firm requested attorney fees in its reply to the buyer's amended counterclaims. But in the buyer's closing argument, his counsel stated, "We have not sought attorney fees."

¶ 66 In its order denying the motion to modify the award, the court conceded that section 13-22-224(1)(b), C.R.S. 2022, authorized it to modify an award if "[t]he arbitrator has made an award on a claim not submitted to the arbitrator." But as we just noted above, the buyer originally *requested* attorney fees, so the issue *had been* submitted to the arbitrator. As a result, AAA Rule R-47(d)(ii) authorized an award of attorney fees because both the buyer and

the law firm asked for them. We therefore conclude that the third court did not err when it denied the motion to modify the supplemental order.

IV. The Court Did Not Err When It Denied the Buyer's Request for an Evidentiary Hearing on the Issue of Whether the Arbitration Clause Was Enforceable

¶ 67 The buyer contends that the first court erred by compelling the parties to arbitrate without first holding an evidentiary hearing to determine whether the arbitration clause was valid. We disagree because to "require an evidentiary hearing regardless of the circumstances would defeat the benefits of arbitration." *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 130 (Colo. 2007).

¶ 68 Section 13-22-207(1)(b), C.R.S. 2022, permits a court to decide challenges to arbitration agreements without a hearing when there is no dispute of a material fact. *Id.* If the material facts are not disputed, then the trial court can resolve all challenges on the record it has before it. *Id.*

¶ 69 We conclude, for the following reasons, that the record supports the first court's decision to deny the buyer's request for an evidentiary hearing.

¶ 70 First, the first court denied the buyer's motion for an evidentiary hearing because it determined that there were no disputed material facts. The question before the court was whether the fee agreement was valid and applied to the buyer. The material facts that the court used to compel arbitration were the contents of the fee agreement and the buyer's later conduct in asking the law firm to represent him in the renovators' arbitration proceeding.

¶ 71 Second, the buyer did not present any new material facts in the motion asking the second court to reconsider its decision to compel arbitration. Whether the buyer saw Mr. Krabacher's affidavit before or after the motion for attorney fees was filed in the renovators' arbitration proceeding does not change the plain language of the fee agreement. And it does not change the facts that (1) the buyer relied on the affidavit during the renovators' arbitration proceeding; and (2) the buyer did not object to the affidavit's use when the motion for attorney fees was filed or when the law firm filed a subsequent pleading.

V. The Law Firm's Request for Attorney Fees

¶ 72 Finally, the law firm asserts that it is entitled to attorney fees and costs generated in the course of this appeal, citing section 13-

22-225(2)-(3), C.R.S. 2022, and C.A.R. 39(a) and 39.1. We grant the request for costs to be taxed against the buyer because we are affirming the court's judgment. C.A.R. 39(a)(2).

¶ 73 But the law firm does nothing more in its request for attorney fees than cite statutes and court rules. More specifically, the law firm's principal brief does not "explain the legal and factual basis[] for an award of attorney fees." C.A.R. 39.1. "Mere citation to [C.A.R. 39.1] or to a statute, without more, does not satisfy the legal basis requirement." *Id.* There is no more that "[m]ere citation" to C.A.R. 39.1 or a statute in the law firm's request for attorney fees, so we deny its request for such fees.

¶ 74 We remand this issue to the court for the sole purpose of determining the amount of costs that the law firm generated in the course of this appeal and then to award the law firm those costs.

¶ 75 The district court's judgment is affirmed, and the case is remanded to determine the amount of costs generated in the course of this appeal and then award the law firm those costs.

JUDGE DUNN and JUDGE GROVE concur.

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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