DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AUSTIN RANCH, L.L.C., an Arizona limited liability company; COURTLAND CAPITAL, L.L.C., an Arizona limited liability company; AUSTIN RANCH UTILITIES COMPANY, an Arizona corporation, Plaintiffs/Appellees, v. WEST SURPRISE LANDOWNERS GROUP, L.L.C., an Arizona limited liability company, Defendant/Appellant.	1 CA-CV 08-0837 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-015504

The Honorable Peter B. Swann, Judge

AFFIRMED

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I R V I N E, Judge

¶1 West Surprise Landowners Group, L.L.C. ("West Surprise") appeals from the trial court's vacatur of Arbitrator Mark Lassiter's arbitration award. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2005, several home developers and landowners (collectively, the "Owners")[1] in the Town of Surprise entered into a Joint Development Agreement ("JDA") to ensure the construction of a Wastewater Treatment Plan and other sewer improvements for the area (the "Project").[2] The Owners consisted of: (a) West Surprise; (b) Austin Ranch, L.L.C. and Courtland Capital, L.L.C. (collectively, "Hamberlin Owners");[3] and (c) Maracay Rio Rancho, L.L.C., MMK Deer Valley Citrus Investors,

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[1] Each entity owned portions of 5,000 acres of undeveloped property in the western part of Surprise. West Surprise owned or controlled approximately 3,450 gross acres. The proportionate shares for determining votes under the JDA and contributions were: Hamberlin Owners (Austin Ranch and Courtland Capital): 46.93%, $1,628,023.76; West Surprise: 33.33%, $1,156,233.37; Maracay: 12.92%, $448,200.87; MMK: 5.28%, $183,165.68; and Mackaus: 1.54%, $53,423.32.

[2] "Members of [West Surprise], at the time it entered into the JDA, planned to either improve or sell parcels of land and/or commence construction of homes in 2007 on property described in [the JDA]."

[3] Alan Hamberlin holds a 100% ownership interest in Austin Ranch and a 75% ownership interest in Courtland Capital.

L.L.C., and PS Makaus Family Limited Partnership (collectively, "3M Owners").

¶3 The Owners selected Austin Ranch Utilities Company ("Coordinator"), a company owned and directed by Alan Hamberlin ("Alan"), to coordinate the Project.[4] The Coordinator's duties included overseeing planning and development of the Project and directing the activities of all consultants and contractors. The Coordinator was required to "use commercially reasonable efforts to cause the [Project] to be designed and performed in a manner not knowingly and materially favoring the interest of any single Owner over the interests of all Owners . . . and in a manner which does not reduce the Sewer Capacity to which an Owner is entitled hereunder without such Owner's consent." The JDA provided that "[t]he Owners agree that all decisions required to be made in connection with the [Project] shall be made by Coordinator, with such input from the Owners as the Coordinator may deem appropriate or necessary . . . . Coordinator shall exercise reasonable business judgment in making all decisions hereunder."

¶4 The JDA emphasized that the Project was a joint undertaking. The Owners agreed that "[t]ime is of the essence in the performance of each and every obligation herein imposed."

[4] The Owners hired Pacific Environmental Resources ("PERC") to design and build the wastewater treatment facility.

They agreed "to work together and to cooperate with each other and [the] Coordinator, and to support the efforts of Coordinator consistent with this Agreement, and not to hinder or delay any other Owner or Coordinator in pursuing the [Project]." The JDA provided that no Owner could unilaterally terminate the agreement. Termination could only occur upon a mutual and unanimous decision by all of the Owners. Both notice of termination and amendments were only effective if made in writing to the Coordinator and escrow agent.

¶5 On November 8, 2006, Alan sent a letter to the Owners "requesting [in writing] from all JDA partners their respective plans for development 'prior to giving notice to proceed with sewer improvements' . . . . Upon receiving such information, [we will] make a determination as to whether it [is reasonable to all parties] to proceed or delay the project." Alan wrote a letter to the Coordinator's authorized agent, John Wittrock, on November 14, 2006, which stated: "John, Due to the severe correction to the residential real estate market, it makes no sense to expend millions for a sewer plant, the lots for which it was meant to serve, having no buyers. We will delay any development for at least twelve months." Around this time, Hamberlin Owners stopped making payments to the Coordinator and

Wittrock obtained approval from 3M Owners[5] to not issue the Notice to Proceed. On November 17, 2006, Wittrock sent a letter to the Owners in which he stated:

> Due to current market conditions and other factors, a Majority of [the] Owners have indicated that they are delaying the development and construction of their respective projects. Therefore, and based on the criteria set forth in Section 3(c) of the Joint Development Agreement, the Coordinator hereby elects not to issue, at this point in time, the Notice to Proceed to PERC. The Coordinator will issue the Notice to Proceed when all of the criteria of Section 3(c) can be achieved.

At this time, West Surprise had deposited $7.2 million into a non-refundable escrow account under Coordinator's control and wanted to proceed with construction. Therefore, it opposed the directive not to proceed, arguing that it was a breach of the JDA and demanded that the Coordinator commence construction. The Owners met on January 10, 2007, and were unable to come to a unanimous agreement regarding the Coordinator's decision to delay construction of the Project. Following the meeting, Wittrock sent a letter to the Owners, stating that the Coordinator "made the decision to delay giving the notice to proceed under the [JDA] based on a Majority of Owners delaying development plans and construction of their respective projects

[5] Referred to by Lassiter as the "swing vote" in the decision not to proceed.

. . . the only development group wanting to move forward at this time is [West Surprise]."

¶6 West Surprise then invoked the arbitration provision of the JDA[6] before the American Arbitration Association ("AAA"), thereby commencing the proceeding underlying this appeal. It argued that respondents breached the JDA and the implied covenants of good faith and fair dealing arising out of the JDA by delaying the Project. West Surprise contended that the JDA created an "immediate, irrevocable, unequivocal, present obligation of the parties to construct the Project with all due haste." The Hamberlin and 3M Owners claimed the JDA allowed them to instruct the Coordinator to, or the Coordinator could on its own initiative, delay construction of the Project due to declining market conditions.

¶7 The AAA appointed Mark Lassiter ("Lassiter") to arbitrate the dispute. The arbitration took place on March 26-30, April 4, and April 6 of 2007. On May 14, 2007, Lassiter issued his First Interim Draft Award, which granted West

[6] "If the Owners are unable within ten (10) days following the meeting to reach a unanimous agreement on the matter at issue, then any Owner may, within five (5) days after expiration of such ten (10) day period, submit the matter to arbitration as provided in Paragraph 16 below. If any Owner fails to submit any such matter to arbitration within such five (5) day period, then the recommendation of Coordinator as to such matter shall be deemed to be approved as to such Owner and such Owner is thereafter prohibited from objecting to the matter at issue. . . ."

Surprise declaratory relief, specific performance, and included his stated intent to modify the JDA. Hamberlin Owners moved for reconsideration, which was denied. The following are Lassiter's rulings pertinent to this appeal:

a. The JDA required the Coordinator to employ all "commercially reasonable" efforts to complete construction of the Project. The JDA did not permit the Coordinator to consider real estate market conditions, individual business projections, or individual Owner development plans as reasons to stop construction of the Project. The Project could only be stopped, hindered, or delayed by unanimous amendment by all Owners. Lassiter defined commercially reasonable as "those accepted industry practices employed by knowledgeable, independent consultants on such matters in the Phoenix metropolitan area for a party intending to expeditiously obtain sewer improvements for its own property, and willing to take commercially-reasonable risks in so doing."

b. The Hamberlin Companies were obligated to proceed with the Project with "all due haste" and by not doing so, had breached their obligations under the JDA.

c. Under the JDA, the Coordinator must "promptly issue the Notice to Proceed to PERC . . . upon its receipt of this First Interim Award." Construction of the Project must be completed by August 2008. Hamberlin Owners, not West Surprise, would be required to pay the "increased cost of construction."

¶8 Hamberlin Companies did not file a motion to stay enforcement of Lassiter's award. The Coordinator issued the Notice to Proceed and commenced construction on the Project. On August 23, 2007, however, Hamberlin Companies and the Coordinator filed an Application to Vacate the Arbitration

Award, Or in the Alternative, to Modify the Arbitration Award, pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-1513 (2003) and 12-1512 (2003). On October 22, 2007, Appellees filed their supporting memorandum of points and authorities. West Surprise filed its opposition to the application and cross-moved for confirmation of the award under A.R.S. § 12-1511 (2003).

¶9 The trial court granted the motion to vacate the arbitration award, recognizing that "review of arbitrators' decisions pursuant to the Arizona Arbitration Act is extraordinarily narrow in scope . . . but the record in this case is indeed extraordinary." The trial court noted that it had never before vacated an arbitration award. It held: "[i]n determining that the arbitrator improperly rewrote the agreement, the Court does not merely conclude that the arbitrator erred as a matter of law – rather, the Court concludes that the creation of a remedy falling far outside the remedies available to Arizona courts was not a power granted to the arbitrator in the agreement itself." The court determined that Lassiter's grant of specific performance "was not constrained to the type of interpretation that characterized the declaratory relief awarded[,]" reasoning that:

> Rather than interpret the agreement, the specific performance award provided that "these respondents shall perform the JDA in the following manner." What follows is a long series of precisely drafted terms that appear nowhere in

> the parties' agreement. For example, though the JDA contained no force majeure clause, the arbitrator imposed an extensive force majeure clause, which consumed a full single-spaced typed page that provided specific notice requirements and conditions that were not reasonably implied by the terms of the agreement but created by the arbitrator. The award further imposed upon the Coordinator a warranty against budget overruns caused by future delays – despite the fact that the JDA specifically disclaimed any warranties pertaining to budget issues. Further, the arbitrator replaced the provision of the JDA providing reasonable discretion to the Coordinator in changing and performing the contract between [Coordinator] and [PERC] with an obligation to perform pursuant to "accepted industry practices employed by knowledgeable, independent consultants on such matters in the Phoenix metropolitan area for a party intending to expeditiously obtain sewer improvements for its own property, and willing to take commercially-reasonable risks in so doing." This is not what the parties agreed to.

¶10 The court concluded that the portions of Lassiter's award citing the JDA did not resolve the issues presented by the parties. Instead, it held that the award exceeded the relief that could be awarded by an Arizona court by ruling on issues that were not presented and were not part of the evidence.[7] Therefore, Lassiter's award exceeded the relief that could be awarded by an Arizona court when he ruled on issues that were

[7] "[The provisions of the arbitration award] represent a forward-looking attempt by the arbitrator to resolve issues that might arise in the future and forecast decisions on those issues by rewriting the parties' agreement. No Arizona court could fashion such a remedy."

not presented and were not part of the evidence.[8] The trial court noted, however, that its "order in no way constitutes a decision on the merits of any portion of the underlying dispute, much of which may have been correctly decided . . . the parties may seek rehearing before a different arbitrator pursuant to the terms of the JDA."

¶11 Although Appellees did not request attorneys' fees in their subsequent pleadings pursuant to Rule 54(g), the trial court granted their application for attorneys' fees. It reasoned that "Rule 54(g) does not pose a bar to relief. Under Rule 15(b), amendment would be permitted as the parties fully contemplated precise enforcement of their contract and its fee provisions during this litigation." The court awarded Appellees' fees incurred in the vacatur/confirmation action because the "[v]acatur action was brought to enforce the terms of the contract between the parties by confining the arbitrator to his contractually-defined powers."

[8] The trial court, however, agreed with several provisions of Lassiter's arbitration award. It concluded that Lassiter acted within the purview of his authority in construing the commercial reasonableness provision of the JDA, imposing start and completion dates, ordering construction to commence upon the Coordinator's receipt of the arbitral award, and requiring Hamberlin Companies to advance increased construction costs. The court also concluded that Lassiter did not act with bias and he did not err by denying Hamberlin Companies' continuance request.

¶12 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶13 West Surprise presents four issues for this court to decide:

> 1. Was the trial court's finding that Lassiter exceeded his authority in assembling portions of the specific performance relief set forth in section 3 of the arbitral award reversible error where both the JDA and AAA granted him authority to put together any remedy that an Arizona court could construct for breach of contract?
>
> 2. Was it reversible error to vacate the entire award, rather than sever or modify the specific performance section of the arbitral award?
>
> 3. Was it reversible error for the trial court to award Hamberlin Companies attorneys' fees for prosecuting the statutory vacatur action where it resolved none of the underlying issues on the merits?
>
> 4. Did the trial court abuse its discretion by requiring any rehearing to take place before a different arbitrator?

¶14 Arizona's arbitration statute limits a trial court's power to set aside an arbitrator's award to five narrowly-defined statutory grounds:

> A. Upon filing of a pleading in opposition to an award, and upon an adequate showing in support thereof, the court shall decline to confirm and award and enter judgment thereon where:
>
> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an

> arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers;
>
> 4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 12-1505, as to prejudice substantially the rights of a party; or
>
> 5. There was no arbitration agreement and the issue was not adversely determined in proceedings under § 12-1502 and the adverse party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

A.R.S. § 12-1512. Section (A)(3) is relevant to this dispute.

¶15 Arizona public policy favors arbitration as a means of disposing of controversies. *Clarke v. ASARCO Inc.*, 123 Ariz. 587, 589, 601 P.2d 587, 589 (1979). An arbitrator, however, "cannot resolve issues which go beyond the scope of the submission agreement." *Id.* "An arbitrator's decision generally is final and conclusive; the [arbitration] act provides very limited grounds for a trial court to deny confirmation of an arbitration award. . . ." *Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 369, ¶ 11, 965 P.2d 100, 103 (App. 1998).

I. Trial Court's Vacatur of the Arbitration Award

A. Standard of Review

¶16 West Surprise argues that the arbitration award should have been affirmed in its entirety. West Surprise contends that although there is no case that explicitly addresses the standard of review to be used in reviewing a trial court's vacatur of an arbitration award, a panel of this court previously applied a de novo standard to determine an arbitrator's evident partiality violated § 12-1512 (A)(2). *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 532, 937 P.2d 715, 722 (App. 1997) ("After examining the totality of the circumstances . . . we find that a reasonable person could indeed conclude that [Arbitrator] Warnock was partial to Wages."). The Ninth Circuit Court of Appeals has held that a district court's decision confirming the arbitration award and denying vacatur is reviewed de novo. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1485 (9th Cir. 1991).

¶17 Appellees, however, suggest that the standard of review for this case is abuse of discretion but "acknowledge that even if the standard of review is abuse of discretion, this Court may review for errors of law, which is in essence a de novo standard as to purely legal issues." They cite several cases that applied an abuse of discretion standard to a trial court's decision to confirm or refusal to confirm an arbitration

award. *See, e.g., Brakemasters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 364 n.3, ¶ 12, 78 P.3d 1081, 1085 n.3 (App. 2003) ("Normally, we review a trial court's decision to confirm an arbitration award for an abuse of discretion."). Therefore, Appellees argue, the cases suggest the abuse of discretion standard would also apply to a trial court's decision to vacate an arbitration award.

¶18 We need not address which standard applies generally to vacaturs of arbitration awards; in our opinion, the result in this case is the same using either standard. The trial court correctly determined that Lassiter exceeded the scope of his authority in section 3 of his arbitration award.

B. Did Lassiter exceed the authority granted to him by the JDA?

¶19 Paragraph 16(f) of the JDA provides:

> The arbitrator *shall have the authority to award any remedy or relief that a court of the State of Arizona could order or grant, including, without limitation, specific performance of any obligation created under this Agreement*, the issuance of an injunction, or the imposition of sanctions for abuse or frustration of the arbitration process, but any Owner shall be limited to recovery of actual damages from any Owner or Coordinator and shall not be entitled to recover from any Owner or Coordinator exemplary, punitive, special, indirect, consequential or any other damages other than actual damages.

(Emphasis added.)

The trial court determined that the force majeure clause, the purported warranty provision – that Hamberlin Companies would be responsible for construction delays, and changes to the JDA's dispute resolution procedures amounted to Lassiter "rewriting" the agreement, instead of merely "interpreting" it. The court emphasized that the specific performance remedies, section 3 of the award, did not resolve issues presented to the court but instead imposed future remedies for issues that had not yet arisen.

¶20 "Pursuant to A.R.S. § 12-1512(A)(3), the superior court will not confirm an arbitrator's award if the arbitrator exceeded his authority." *Hembree v. Broadway Realty & Trust Co.*, 151 Ariz. 418, 419, 728 P.2d 288, 289 (App. 1986). "[A]rbitration awards are open to attack by judicial review on the ground that the arbitrator exceeded his powers derived from the agreement of the parties to arbitrate." *Snowberger v. Young*, 24 Ariz. App. 177, 178, 536 P.2d 1069, 1070 (1975). The JDA gave Lassiter authority to award any remedy or relief that an Arizona trial court could award. We conclude that he exceeded the scope of his authority.

¶21 Although the parties granted broad discretion to Lassiter through the JDA, his instructions in section 3 of the award do not fall within the purview of his authority. Lassiter did not stop at setting a completion date and allowing the

Coordinator to use commercially reasonable efforts to get the Project done. Instead, he set forth specific notice conditions and requirements that were not contemplated in or reasonably inferred from the JDA. He imposed a warranty for budget overruns on the Coordinator even though the JDA explicitly disclaimed budget warranties. He replaced the "reasonable business discretion" provided to the Coordinator in performing the contract with PERC with requirements to employ "accepted industry practices employed by knowledgeable, independent consultants on such matters in the Phoenix metropolitan area for a party intending to expeditiously obtain sewer improvements for its own property, and willing to take commercially-reasonable risks in so doing." Moreover, by appointing himself permanent arbitrator of future disputes, Lassiter essentially rewrote the dispute resolution procedure contemplated by the parties. Therefore, vacatur was justified pursuant to A.R.S. § 12-1512(A)(3).

II. Modification of the Award

¶22 Appellees filed their Application to Vacate Arbitration Award, Or in the Alternative, to Modify Arbitration Award on August 23, 2007. Appellant opposed Appellees' application and did not file its own Application to Modify. West Surprise now argues that the "trial court . . . should have modified the award pursuant to A.R.S. § 15-1513 by excising

those portions that it found address[ed] issues not presented to the arbitrator." Specifically, it argues that § 12-1513(A)(2) encompasses the parts the trial court found defective. This section provides that "[u]pon application made within ninety days after delivery of a copy of the award to the applicant, if judgment has not been entered thereon, the court shall modify or correct the award where . . . [t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." A.R.S. § 12-1513 (2003).

¶23 "The superior court's jurisdiction in a confirmation proceeding is limited to considering opposition on statutorily enumerated grounds, A.R.S. section 12-1512, and to confirming or rejecting the arbitration award." *Heinig v. Hudman*, 177 Ariz. 66, 73, 865 P.2d 110, 117 (App. 1993). In this case, West Surprise never filed an application to modify the award. In fact, it opposed Appellees' application to modify, an application which Appellees' later withdrew. Consequently, there was no application to modify pending before the trial court. Thus, the trial court's options were to confirm or vacate. It selected the latter. Therefore, the trial court did not err in vacating the award.

III. Attorneys' Fees

¶24 The attorneys' fees provision of the JDA provided:

> [i]f any Owner finds it necessary to bring any action at law or other proceeding against any other Owner to *enforce any of the terms, covenants or conditions hereof*, the Owner prevailing in any such action or other proceeding shall be paid all reasonable costs and reasonable attorneys' fees by the non-prevailing Owner, and if any judgment is secured by said prevailing Owner, all such costs and attorneys' fees shall be included therein, such fees to be set by the court and not by jury.

(Emphasis added.)[9]

¶25 The trial court awarded $166,660.00 to Appellees for fees incurred in the vacatur/confirmation action.[10] The court reasoned that fees were reasonable and appropriate because

[9] The Arbitration Fees provision of the JDA, paragraph 16(g), provides that the:

> arbitrator shall assess its fees, all other fees and costs of any such arbitration proceeding and reasonable attorneys' fees . . . against the Owner who in the arbitrator's opinion is not the prevailing party. For purposes of this Paragraph 16(g), the term "prevailing party" shall mean (i) with respect to the claimaint, one who is successful in obtaining substantially all of the relief sought, and (ii) with respect to the respondent, one who is successful in denying substantially all of the relief sought by the claimant. If neither Owner substantially prevails, then the award for attorneys' fees shall be apportioned in the arbitrator's discretion.

[10] Although the minute entry accompanying judgment states that it is granting "Plaintiff's First Amended Application in its entirety[,]" the amount of $166,660.00 reflects the amount in Appellee's original application. Appellees later submitted their First Amended Application to include additional fees but chose not to seek correction of the amount.

"[t]his vacatur action was brought to enforce the terms of the contract between the parties by confining the arbitrator to his contractually-defined powers. Austin Ranch was successful in that effort."

¶26 West Surprise argues that the trial court erred in granting Appellees' Application for Attorneys' Fees because they did not prevail in "any action or proceeding to enforce any term, covenant or condition of the JDA[,]" they are not entitled to statutory fees because the JDA provision controls, and they are precluded from fees for failure to comply with Arizona Rules of Civil Procedure Rule 54. Attorneys' fees awards are typically reviewed for abuse of discretion. *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 205 Ariz. 532, 539, ¶ 29, 73 P.3d 1267, 1274 (App. 2003), *aff'd in part, vacated in part on other grounds*, 208 Ariz. 147, 91 P.3d 990 (2004). West Surprise argues this court should review the grant of fees de novo because "[w]hether a trial court correctly construed a contract or statutory provision is reviewed *de novo*." (Citation omitted.) We review the issue of whether the JDA attorney's fees provision controls under a de novo standard. We review whether the trial court properly awarded fees despite Appellees' failure to ask for fees in the pleadings for abuse of discretion.

¶27 "[W]hen a contract has an attorney's fees provision it controls to the exclusion of the statute." *Grubb & Ellis Mgmt.*

Servs., Inc. v. 407417 B.C., L.L.C., 213 Ariz. 83, 90, 138 P.3d 1210, 1217 (App. 2006) (citation omitted). Paragraph 20 of the JDA contained an attorneys' fees provision. We agree with the trial court that this provision of the JDA is applicable to Appellees' vacatur action. We disagree with West Surprise's argument that Paragraph 20 does not "embrace a successful statutory action to vacate an arbitral award that leaves the issue of enforcement of the JDA open for future decision, either explicitly or implicitly." Appellees prevailed in their action to vacate the arbitration award, a decision this court affirms. As the "prevailing" Owners in an action to enforce the terms of the JDA as written by confining the arbitrator to the scope of his authority, Appellees are entitled to their trial court fees.

¶28 Arizona Rules of Civil Procedure Rule 54(g)(1) states that "[a] claim for attorneys' fees shall be made in the pleadings." *See* Bruce E. Meyerson and Patricia K. Norris, Arizona Attorneys' Fees Manual § 1.3.1 (State Bar of Arizona 2003)("[T]he attorneys' claim fee must be made in a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint and a third-party answer."). Appellees did not request attorneys' fees in any pleading. The trial court, however, still granted Appellees' attorneys' fees for fees incurred in the vacatur action, explaining that "the fees requested are reasonable in these circumstances . . . Rule

54(g) does not pose a bar to relief. Under Rule 15(b), amendment would be permitted as the parties fully contemplated precise enforcement of their contract and its fee provisions during this litigation."[11] Appellees' only recourse to enforce the JDA language was to file the vacatur action. Paragraph 20 of the JDA provides for recovery of attorneys' fees in an action to enforce the JDA. It does not require parties to specifically request attorneys' fees in the pleadings. It also does not preclude amendment by implied consent of the parties under Rule 15(b). Therefore, we affirm the trial court's grant of Appellees' attorneys' fees for fees incurred in the vacatur action.

IV. New Arbitrator

¶29 West Surprise contends that the trial court abused its discretion by requiring any rehearing to take place before a different arbitrator. Both parties agree that the standard of

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[11] Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues . . . .

Ariz.R.Civ.P. 15(b).

review regarding a trial court's ruling that any arbitration must be before a new arbitrator is abuse of discretion.[12]

¶30 West Surprise conceded in its Motion for Clarification or Reconsideration to the trial court that the court did not lack authority or abuse its discretion in ordering that any rehearing of the dispute be heard before a new Arbitrator. West Surprise stated: "Section 12-1512(B) of the Arizona Revised Statutes incontrovertibly embraces those provisions of the Uniform Arbitration Act that empower the trial court, upon declining to confirm an arbitral award, either (1) to order a rehearing before new Arbitrators, except where it has been found that there was no arbitration agreement in the first place or (2) to order that the rehearing take place before the same Arbitrators who made the award where the basis for the vacatur is that the Arbitrators exceeded their power or refused to postpone the hearing upon sufficient cause." West Surprise argued below that allowing Lassiter to preside over a rehearing would promote the purposes of arbitration.

¶31 On appeal, West Surprise argues that other jurisdictions have only required a new arbitrator where the arbitrator was partial, the award involved corruption or fraud,

[12] West Surprise argues the decision to appoint a new arbitrator should be supported by specific findings of fact which justify "reinvent[ing] the wheel."

or the decision for a new arbitrator was supported by specific findings of fact. Arizona courts have not adopted the standard that West Surprise proposes regarding A.R.S. § 12-1512(B) and we decline to do so here. Moreover, as we read it, the JDA does not contemplate appointment of a permanent arbitrator. Therefore, we affirm the trial court's order that parties may seek a rehearing before a different arbitrator.

CONCLUSION

¶32 For the foregoing reasons, we affirm. West Surprise requested attorneys' fees which we decline to award since it is not the prevailing party on appeal. Appellees did not ask for attorneys' fees on appeal. Therefore, we decline to award them.

/s/
_____
PATRICK IRVINE, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge