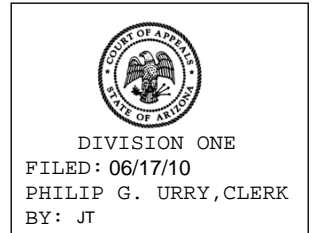


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SMITH WEST, LLC,) 1 CA-CV 09-0568
)
Plaintiff/Movant/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MOHNACH PAYNE INC.; JOHN M.) Rule 28, Arizona Rules of
MOHNACH; and THOMAS PAYNE,) Civil Appellate Procedure)
)
Defendants/Respondents/)
Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-030558

The Honorable Joseph B. Heilman, Judge

AFFIRMED

Thomas N. Payne
Attorney for Defendants/Respondents/Appellants

Paradise Valley

Osborn Maledon, P.A.
by William J. Maledon
Dawn L. Dauphine

Phoenix

and
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Washington, D.C.

P O R T L E Y, Judge

¶1 Mohnach Payne Inc. ("MPI"), John Mohnach, and Thomas Payne (collectively "Appellants") challenge the trial court's

confirmation of the independent accountants' final award in favor of Appellee Smith West, L.L.C.

FACTS AND PROCEDURAL BACKGROUND

¶12 MPI was equally owned by its two shareholders, Thomas Payne and John Mohnach. MPI was engaged in the business of manufacturing aerospace engineering parts and Smith West contracted to buy most of MPI's assets. The sale agreement ("the Agreement"), which was signed by both Payne and Mohnach, required MPI, among other terms, to deliver \$4,685,840 in working capital to Smith West. The Agreement also provided that disputes would be resolved by arbitration, but that any dispute over the closing amount of working capital would be resolved by an independent accounting firm.¹

¶13 A dispute arose after the sale, and Smith West demanded arbitration pursuant to the Agreement's indemnification provision. The accounting firm of Alvarez & Marsal was hired separately to resolve the working capital dispute.² The firm had each party submit its initial position and its reply to the other party's submission. The accounting firm then sent a list of questions to the parties, and both parties were provided the

¹ Both parties acquiesce that the independent accountants' award is governed under the statutory rules to confirm or oppose an arbitration award.

² While the accounting firm was resolving the closing amount of working capital claim, the parties were in a separate arbitration on other issues. The arbitrator's decision was not part of this confirmation.

questions and the answers. The accounting firm subsequently entered its award and found a capital shortfall of \$987,565.

¶14 Smith West then filed an application for confirmation of independent accountants' final determination with the superior court. Appellants opposed the confirmation, and argued that the award was procured by fraud and undue means.³ The trial court granted confirmation of the independent accountants' final determination. Appellants appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B) and -120.21(A)(1) (2003).

DISCUSSION

¶15 Appellants argue that the trial court incorrectly granted a de facto summary judgment. They contend that an evidentiary hearing was required because factual allegations of fraud were presented.

¶16 We review a confirmation of an arbitration award for an abuse of discretion. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 180 Ariz. 148, 150, 882 P.2d 1274, 1276 (1994). The arbitrator's decision is "final both as to questions of fact and law," *Ariz. Pub. Serv. Co. v. Mountain States Tel. & Tel.*

³ In their opposition, Appellants alleged the following: Count One, common law fraud; Count Two, double recovery; and Count Three, an illegal interception of electronic communication. There was also a fourth count that requested specific performance, but it is not a subject of this appeal.

Co., 149 Ariz. 239, 243, 717 P.2d 918, 922 (App. 1985), and the trial court can deny confirmation of an arbitration award only on the limited grounds enumerated in A.R.S. § 12-1512(A) (2003),⁴ see *Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 369, ¶ 11, 965 P.2d 100, 103 (App. 1998). Additionally, the trial court has no authority to modify an award "except upon application made setting forth one of the grounds set forth in A.R.S. § 12-1513(A)."⁵ *Creative Builders, Inc. v. Avenue Devs., Inc.*, 148

⁴ A.R.S. § 12-1512(A) provides that a court will decline confirmation 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 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.

⁵ A.R.S. § 12-1513(A) (2003) requires a court to modify or correct an award where:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; 2. The 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; or 3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

Ariz. 452, 457, 715 P.2d 308, 313 (App. 1986). "The party challenging the arbitration award has the burden of proving the existence of grounds to vacate the award." *Fisher*, 192 Ariz. at 369, ¶ 12, 965 P.2d at 103 (citing *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 530, 937 P.2d 715, 720 (App. 1997)).

¶7 Before confirming an arbitration award, a trial court should hold an evidentiary hearing whenever there is a genuine issue of any material fact. *Brake Masters Sys. Inc. v. Gabbay*, 206 Ariz. 360, 365, ¶ 14, 78 P.3d 1081, 1086 (App. 2003). However, a party seeking to vacate an arbitration award claiming fraud must show "that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).

¶8 Here, we agree with the trial court that an evidentiary hearing was unnecessary. Appellants knew about the alleged fraudulent statements during the working capital dispute arbitration when they received Smith West's submissions, and questions and answers.

¶9 Appellants do not deny they were aware of the alleged fraud during the arbitration. They contend, however, that under

the arbitration rules they were unable to notify the accounting firm of the fraudulent statements. We disagree.

¶10 The arbitration agreement allowed either party to file additional responses for good cause after the reply submissions.⁶ Further, paragraph X of the firm's arbitration agreement with the parties stated that any disputes arising under or relating to the Agreement, or the accounting firm's services, including claims of fraud, would be submitted to the American Arbitration Association. Because Appellants were aware of the fraudulent statements during the arbitration, their remedy was twofold: (a) reveal and challenge the fraudulent statements in a response for good cause; and/or (b) challenge the fraudulent statements separately from the confirmation of the arbitration award. See *Int'l Union of Elec., Radio and Mach. Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 890 (5th Cir. 1983) (holding that unless the arbitrators committed fraud or were biased or prejudiced, courts have no power to review the findings of fact of the arbitrator).⁷

¶11 Moreover, statements alleged to be false may not be enough to overcome confirmation. In *Pawlicki*, the trial court declined to confirm an arbitration award after the claimant

⁶ "[N]o further submissions of the parties will be permitted following the Reply Submissions without good cause shown."

⁷ Because Arizona's arbitration statute A.R.S. § 12-1512(A) is essentially the same as Federal Arbitration Act 9 U.S.C. § 10(a), federal cases are instructive. See *Pawlicki v. Farmers Ins. Co.*, 127 Ariz. 170, 173-74, 618 P.2d 1096, 1099-1100 (App. 1980).

objected and argued that the award had been procured by fraud with perjury. *Id.* at 171, 618 P.2d at 1097. To resolve the issue, we relied on *Kirschner v. West Co.*, 247 F. Supp. 550 (E.D. Pa. 1965). There, plaintiffs pointed to alleged inconsistencies in the testimony of witnesses, even though they relied on evidence before the arbitrator and did not later produce any other evidence. *Id.* at 173, 618 P.2d at 1095 (citing *Kirschner*, 247 F. Supp. at 553-54). The *Kirschner* court found no fraud because the credibility of witnesses was for the arbitrators. *Pawlicki*, 127 Ariz. at 173, 618 P.2d at 1095. Following the *Kirschner* analysis, we vacated the trial court's order, and stated that "[a]ssuming arguendo that appellee had proven that [the witness] had perjured himself at the arbitration hearing, the trial court still would not have had grounds for setting aside the award." *Id.* at 173-74, 618 P.2d at 1095-96.

¶12 Similarly, the accounting firm had the alleged fraudulent statements by Smith West. The firm, in making its determination, noted inconsistencies in Smith West's submissions. Moreover, the firm ruled against Smith West when it failed to provide documents to support its position. Because there was no evidence that the accounting firm acted fraudulently or with prejudice or bias, we defer to the firm's factual findings. Accordingly, we agree with the trial court

that there were no material factual disputes to warrant an evidentiary hearing. Therefore, because the trial court was not required to conduct an evidentiary hearing, the court did not improperly grant a de facto motion for summary judgment or judgment on the pleadings. See *Brake Masters Sys. Inc.*, 206 Ariz. at 365, ¶ 14, 78 P.3d at 1086 (holding on a request to confirm an arbitration award "a trial court is not required to hold an evidentiary hearing if 'the facts produced . . . so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim'"); see also *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (holding the court could vacate or confirm an arbitration award without oral testimony).

¶13 Appellants also argue that the trial court violated their procedural due process rights when the court failed to address the issue of double recovery.⁸ They first argue that the

⁸ One of Smith West's separate arbitration claims included allegations that MPI delivered unpaid accounts payable that should have been paid before the closing date of the sale. The claim was resolved by arbitration and was not before the trial court for this confirmation. In fact, the matter is before the superior court for a separate confirmation, and Appellants have raised the double recovery issue.

Appellants, however, wanted to use the arbitrator's resolution of that claim as an offset to the independent accountants' award for working capital. They argue that because Smith West was awarded the net amount of \$1,460,230 for the unpaid accounts payable in the separate arbitration claim, that amount should increase the amount of working capital based on the Agreement's definition. They claim, as a result, that they

court failed to conduct oral argument on the issue and failed to enter judgment. We disagree.

¶14 A trial court has the discretion to determine how much time it will allow parties to argue an issue, if at all.⁹ See *Gunn v. Superior Court*, 173 P.2d 328, 329 (Cal. Dist. Ct. App. 1947) (“[H]ow much time parties may be allowed for argument in a trial before a court sitting without a jury, or whether they are to be allowed any at all, are matters within the discretion of the court before whom the hearing is had.”). Because Appellants did not make an offer of proof of what they wanted to present for the court’s consideration “[w]e will not interfere in matters within [the trial court’s] discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial.” *O’Reilly Motor Co. v. Rich*, 3 Ariz. App. 21, 27, 411 P.2d 194, 200 (1966). Here, the trial court did not err when it resolved the double recovery claim without allowing Appellant oral argument apart from the fraud issue.

should not be liable for the independent accountants’ final award because Smith West would recover twice for accounts payable. Because the issue is before a different court, it can resolve it as part of that confirmation process.

⁹ Appellants also argue that their due process rights were violated because they did not get an equal amount of time during oral argument. Because Appellants did not raise the issue below, we will not address it.

¶15 Appellants also argue that the trial court erred because it did not enter judgment on their double recovery issue. The court, however, resolved the issue.

¶16 Appellants opposed the confirmation of the accountants' final determination because "the award was procured by fraud and other undue means." Their double recovery claim included that language by incorporating "the preceding paragraphs." Consequently, the court found that Appellants had "failed to show that the independent accountant's final determination and the award based thereon were procured by fraud or other undue means."

¶17 Appellants now contend that the double recovery court argued a different legal theory under a different statute. Appellants, however, never cited to the modification statute, A.R.S. § 12-1513(A), for relief. They only sought relief pursuant to § 12-1512(A) for "fraud and other undue means," and told the court that the "double recovery portion also speaks to whether the independent accountant's decision should be confirmed or not, because that falls under undue means of the statute."

¶18 Moreover, Appellants never raised the argument in their Motion for New Trial and Motion to Alter or Amend Judgment. Consequently, when the trial court found that there

was no fraud or undue means to preclude confirmation of the award, the ruling included the double recovery issue.

CONCLUSION

¶19 Based on the foregoing reasons, we affirm the trial court's confirmation of independent accountants' final determination.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge