NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

COLA D. ALLEN, a married man, *Plaintiff/Appellant*,

v.

VERIZON WIRELESS (VAW) LLC, a Delaware limited liability company,
Defendant/Appellee.

No. 1 CA-CV 16-0586
FILED 12-14-2017

Appeal from the Superior Court in Yavapai County
No. V1300CV201380109
The Honorable Jeffrey G. Paupore, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Cola D. Allen, Littleton, CO
Plaintiff/Appellant

Sherman & Howard, L.L.C., Phoenix
By Gabriel A. Peraza
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

B E E N E, Judge:

¶1 Cola Allen ("Allen") appeals an order from the superior court affirming an arbitration award in favor of Verizon Wireless (VAW), LLC ("Verizon"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2012, Allen filed an arbitration claim against Verizon. Allen did so in accordance with the terms of the standard customer agreement between him and Verizon ("Customer Agreement"). Before the arbitrator issued his arbitration award, and before the final arbitration hearing, Allen filed a complaint in the superior court. The arbitrator issued an award in favor of Verizon 10 days after the final arbitration hearing. Verizon responded to the complaint by filing a motion to dismiss, or in the alternative, a motion for summary judgment ("Motion to Dismiss") and simultaneously filing a motion to confirm the final arbitration award ("Motion to Confirm"). Allen opposed Verizon's Motion to Dismiss and filed a motion to vacate the award ("Motion to Vacate").

¶3 The court denied both Verizon's Motion to Dismiss and Motion to Confirm. The court also granted Allen's Motion to Vacate and remanded the matter back to arbitration. Allen filed a motion for reconsideration of the court's remand of his claims back to arbitration, but the court denied the motion. Verizon next filed a motion to (1) compel arbitration, (2) stay the matter pending arbitration, and (3) remand the matter back to the original arbitrator ("Motion to Compel"). Allen filed a response to this motion seeking a resolution of Verizon's Motion to Compel. The court ordered a remand back to arbitration before "another arbitrator to be selected in accordance with the contract provisions in effect between the parties" and expressly compelled Allen to arbitrate all claims asserted in his complaint.

¶4 Allen attempted to obtain a final appealable order pursuant to Arizona Rule of Civil Procedure ("Rule") 54(b) but was denied. Allen

also filed a special action with this court in which we declined jurisdiction. Allen then filed a second arbitration claim against Verizon in which a new arbitrator issued an award of $611.47 in favor of Verizon and granted Verizon an attorneys' fee award of $26,682.25. Allen filed a motion to vacate the award, while Verizon filed a response to Allen's motion and a motion to confirm the award. The court denied Allen's motion to vacate and granted Verizon's motion to confirm. Allen timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶5 Allen argues the following issues on appeal: (1) Verizon waived its right to arbitration when it filed a motion for summary judgment and then waited until that motion failed before asking the court to compel arbitration; (2) the court erred when it remanded claims to arbitration more than 30 days after the final arbitration hearing and without considering Allen's challenge to the arbitration agreement; (3) the arbitrator exceeded his authority by awarding attorneys' fees under A.R.S. § 12-341.01; and (4) the arbitrator's award of attorneys' fees violated Arizona's reasonable expectations doctrine.

¶6 "We review the superior court's decision to confirm an arbitration award in the light most favorable to upholding the decision and will affirm unless the superior court abused its discretion." *RS Industries, Inc. v. Candrian*, 240 Ariz. 132, 135, ¶ 7 (App. 2016). On review, "[t]he party challenging the arbitration award has the burden of proving the existence of grounds to vacate the award." *Fisher on Behalf of Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 369, ¶ 12 (App. 1998). Arizona public policy favors arbitration, and arbitration clauses are construed liberally with any doubts about whether a matter is subject to arbitration resolved in favor of arbitration. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189 (App. 1994). Indeed, "[t]he primary purpose of arbitration is to provide an alternative to litigation so that the parties may obtain an inexpensive and speedy final disposition of the matter." *Hamblen v. Hatch*, 242 Ariz. 483, 491, ¶ 34 (2017) (citations and quotations omitted).

I. Verizon Did Not Waive Its Right to Arbitrate

¶7 Allen argues that Verizon's conduct in filing its Motion to Dismiss and Motion to Confirm constituted waiver. He contends that by arguing the claims on the merits in the Motion to Dismiss, and by failing to move the court to compel arbitration until after the court both denied

Verizon's Motion to Dismiss and granted Allen's Motion to Vacate, Verizon showed its intent to waive arbitration.

¶8 A party may be deemed to have waived arbitration through "conduct inconsistent with utilization of the arbitration remedy—conduct showing an intent not to arbitrate." *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 181 (App. 1984). But, "[p]ublic policy favors arbitration and thus, the burden is heavy on the party seeking to prove waiver of an agreement to arbitrate." *In re Estate of Cortez*, 226 Ariz. 207, 210, ¶ 3 (App. 2010).

¶9 Here, Verizon's actions in responding to Allen's complaint did not constitute waiver. The arbitration agreement within the Customer Agreement applies both the Federal Arbitration Act and the Wireless Industry Arbitration ("WIA") Rules of the American Arbitration Association. Under the WIA rules, "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." WIA R-46(a).

¶10 Verizon consistently showed an intent to arbitrate. Verizon fully participated in the first arbitration proceeding brought by Allen. When Allen filed a complaint in the superior court, Verizon countered by filing its Motion to Dismiss and Motion to Confirm. Specifically, Verizon requested that the court (1) dismiss Allen's complaint because the arbitration agreed to by the parties barred the complaint as a matter of law, (2) confirm the final award of the arbitrator, and (3) enter judgment against Allen in conformance with the award. Verizon did not bring a complaint to the superior court to get "an unfair second bite at the apple" but rather responded to Allen's complaint after a final arbitration hearing. *Rancho Pescado*, 140 Ariz. at 182. Even though Verizon did not file its Motion to Compel until after the court had remanded the matter to arbitration, both Verizon's (1) participation in arbitration proceedings before responding to Allen's complaint, and (2) insistence in its motions on confirming and acting in accordance with the final arbitration award show that Verizon's conduct was not "inconsistent with utilization of the arbitration remedy." *Id*. at 181. Therefore, Allen fails to overcome the heavy burden of proving Verizon's actions constituted waiver.

II. The Court Did Not Err by Remanding All Claims to Arbitration

¶11 Allen next argues that the superior court erred by remanding claims to arbitration more than 30 days after the final hearing in the first

arbitration. He contends that "[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b). He argues that the Customer Agreement and WIA rules require that "[t]he award shall be made promptly by the arbitrator and, unless specified by law, no later than thirty (30) days from the date of close of hearings." He thus concludes that, because the arbitration hearing took place on March 18, 2013, the court's November 13, 2013 order remanding the matter back to arbitration was untimely.

¶12 Allen's claim fails because the arbitrator issued the award 10 days after the close of hearings of the first arbitration, which was within the 30-day time frame required under WIA R-39. Although the court vacated the initial award, this did not trigger a new time period in which the arbitrator failed to issue an award before expiration as Allen suggests. *See* WIA R-33 ("The time limit within which the arbitrator is required to make the award shall commence to run . . . upon the closing of hearings."). When the court vacated the award, the arbitration was ongoing, and the "close of hearings" had yet to occur because the court had remanded the matter back to arbitration for a new hearing before a new arbitrator. Accordingly, the court did not err.

¶13 Allen also argues that the court exceeded its authority by ruling that there was a valid and enforceable arbitration agreement before either party sought to compel arbitration. He argues that the appropriate time for him to argue arbitrability was in response to a motion to compel arbitration, which he contends did not occur before the court's order remanding the matter to the arbitrator. He concludes that the court had no interest in hearing arguments on the merits of Verizon's Motion to Compel because the court had already ruled the arbitration agreement was valid and enforceable.

¶14 "[T]he general rule is that '[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.'" *Duenas v. Life Care Centers of Am., Inc.*, 236 Ariz. 130, 140, ¶ 31 (App. 2014) (quoting A.R.S. § 12–3006(B)). Here, the court specifically ruled that there was an enforceable agreement between the parties and remanded the matter back to arbitration with instructions to arbitrate in accordance with the terms of the Customer Agreement. Allen had the opportunity to argue arbitrability in his complaint, even without responding to a specific motion to compel arbitration, but failed to do so. Therefore, the court did not err nor exceed its authority in remanding all claims to the arbitrator.

III. The Arbitrator Did Not Exceed His Authority by Awarding Attorneys' Fees to Verizon

¶15 Allen argues that the arbitrator exceeded his authority by bypassing the contractual attorneys' fees provisions and awarding attorneys' fees under A.R.S. § 12-341.01. He argues that § 12-341.01 is not applicable because the Customer Agreement "specifically addresses conditions under which attorneys' fees may be recovered." However, Allen fails to articulate such conditions.

¶16 Moreover, according to the Customer Agreement, "**IF THE LAW ALLOWS FOR AN AWARD OF ATTORNEYS' FEES, AN ARBITRATOR CAN AWARD THEM** . . . ." The Customer Agreement is governed by both federal and Arizona law. "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A.R.S. § 12-341.01. "The trial court has discretion in awarding attorneys' fees under A.R.S. section 12-341.01 . . . [and w]e will uphold the exercise of that discretion if the record contains a reasonable basis to do so." *City of Cottonwood*, 179 Ariz. at 195 (internal citation omitted). Under the Customer Agreement, the arbitrator had the same authority "**AS A COURT WOULD**" to award attorneys' fees.

¶17 Here, after considering (1) Verizon's attorney's experience and resources, (2) the appropriate pay rate for attorneys in the locality where the hearing was held, and (3) Allen's complicated claims that "were pleaded and argued with legal sophistication," the arbitrator awarded Verizon $26,682.25 in attorneys' fees.[1] We find that the arbitrator did not abuse his discretion nor exceed his authority by awarding Verizon attorneys' fees.

IV. The Arbitrator's Award of Attorneys' Fees Did Not Violate the Reasonable Expectations Doctrine

¶18 Allen also argues that the arbitrator's award of attorneys' fees violated the reasonable expectations doctrine. He argues that, under the Customer Agreement, "the risk of an attorney fee award is not apparent to a consumer who attempts to check his rights before arbitrating" because Verizon (1) agreed to pay the consumer's arbitration fees under certain conditions, and (2) incorporates the WIA rules that provide each party will bear its own attorneys' fees.

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[1] Verizon requested $49,851.00 in attorneys' fees, which the arbitrator reduced to $26,682.25.

¶19 The reasonable expectations doctrine provides that "[a] party who signs a standardized agreement generally adopts the terms set forth therein[.]" *Duenas*, 236 Ariz. at 137, ¶ 17. However, "terms are beyond the range of reasonable expectation if one party to the contract 'has reason to believe that the [other party] would not have accepted the agreement if he had known that the agreement contained the particular term.'" *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 247, ¶ 19 (App. 2005) (citation omitted). This "reason to believe" can be

> (1) shown by the prior negotiations, (2) inferred from the circumstances, (3) inferred from the fact that the term is bizarre or oppressive, (4) proved because the term eviscerates the non-standard terms explicitly agreed to, . . . (5) proved if the term eliminates the dominant purpose of the transaction[,] (6) shown if the term would not be understandable to a consumer who attempted to check on his rights, or (7) shown by any other relevant facts.

Duenas, 236 Ariz. at 137, ¶ 17 (citations and quotations omitted).

¶20 Here, Allen had the opportunity to read the Customer Agreement and see the provision that clearly states "**IF THE LAW ALLOWS FOR AN AWARD OF ATTORNEYS' FEES, AN ARBITRATOR CAN AWARD THEM** . . . ." Considering the above factors, nothing indicates that Verizon had a reason to believe Allen would not have accepted the Customer Agreement had he known of this attorneys' fees provision. *Harrington*, 211 Ariz. at 247, ¶ 19. Although the Customer Agreement states that under certain circumstances Verizon will pay any filing, administrative, and arbitrator fees, it also clearly states that the arbitrator can award attorneys' fees, which would "be understandable to a consumer who attempted to check on his rights." *Duenas*, 236 Ariz. at 137, ¶ 17. Moreover, while WIA R-48 provides that each party will bear its own attorneys' fees, under WIA R-1, "[t]he parties, by written agreement, may vary the procedures set forth in these Rules." We therefore find that the arbitrator's award of attorneys' fees to Verizon pursuant to the applicable provision of the Customer Agreement did not violate the reasonable expectations doctrine.

V. Verizon's Request for Attorneys' Fees and Costs on Appeal

¶21 Verizon requests an award of attorneys' fees and costs incurred on appeal under the Customer Agreement, A.R.S. §§ 12-341.01 and 12-342, and in accordance with ARCAP 21. Because Verizon is the

prevailing party on appeal, we award Verizon its taxable costs and reasonable attorneys' fees upon compliance with ARCAP 21.

CONCLUSION

¶22 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA