

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Rickman Brown, et al.,
Petitioners,
v.
Eva Sperber-Porter, et al.,
Respondents.

No. CV-16-02801-PHX-SRB
ORDER

At issue is Petitioner’s Request for Entry of Judgment (Sealed) (“Req.”) (Doc. 14). The Court held oral argument on the Request on November 7, 2016. (Doc. 29, Minute Entry.) The Court also considers Respondents’ Motion to Supplement the Record (“MTS”) (Doc. 30.)

I. BACKGROUND¹

Respondents hired Petitioners to represent Respondents and their co-plaintiffs in a suit against Greenberg Traurig and other defendants (“GT case”). Respondents and their co-plaintiffs signed engagement agreements with Petitioners that included “majority rule” provisions. The majority rule provisions state that if a majority of the co-plaintiffs vote in favor of a settlement agreement, the majority’s vote binds any dissenters. Petitioners filed suit in the GT case in July 2010, and, in April 2012, a majority of the co-plaintiffs voted to accept a minimum settlement amount. Respondents rejected the offer, but when

¹ The factual background is drawn from Respondents’ background section as the parties’ background sections are not materially different. (Doc. 15, Opp’n to Confirmation of Arbitration Award (“Opp’n”) at 2-7.)

1 offered the minimum settlement amount at mediation, Petitioners accepted on behalf of
2 all co-plaintiffs.

3 Respondents argued to the Superior Court in Maricopa County that the settlement
4 should not be enforced against them. Petitioners argued that they had both implied and
5 express authority to enter into the settlement pursuant to the engagement agreement's
6 majority rule provision. Respondents then fired Petitioners. The Superior Court entered
7 judgment on the settlement agreement concluding that Petitioners had apparent authority
8 to settle on Respondents' behalf. Respondents moved for a new trial, which the Superior
9 Court denied. Respondents then appealed both the entering of the judgment and denial of
10 a new trial. The Court of Appeals vacated the trial court's decision in the GT case and
11 remanded because the Superior Court had entered judgment when there was a factual
12 dispute ("GT appeal"). On remand, the Superior Court granted summary judgment for
13 Petitioners upholding the majority rule provision. Respondents are currently appealing
14 that decision. The co-plaintiffs in favor of the settlement sued Respondents for delaying
15 the settlement ("Ashkenazi case"). The Superior Court entered a ruling on the co-
16 plaintiffs' request for judgment in favor of the co-plaintiffs, but has not entered final
17 judgment.

18 While both of those claims were pending, Respondents initiated an arbitration
19 action against Petitioners for improperly settling on their behalf without authority.
20 Petitioners counterclaimed for their contingency fee, delay damages, and fees and costs
21 incurred in the matter. On October 22, 2014, Respondents filed a motion to stay the
22 arbitration pending the GT appeal, which was denied. On June 25, 2015, after the case
23 was remanded to the Superior Court, Respondents filed another motion to stay pending
24 resolution of the GT case, which was denied. On February 26, 2016, Respondents moved
25 to bifurcate the arbitration and stay the part of the case that would be affected by
26 resolution of the latest GT appeal, which was also denied. On July 27, 2016, the arbitrator
27 entered his final arbitration award. Respondents oppose confirmation of the final
28 arbitration award for five reasons: (1) Arizona law governs the confirmation of and

1 opposition to the arbitration award, (2) the proposed form of judgment caption and parties
2 deviates from the final arbitration award, (3) the award should not be confirmed because
3 the arbitrator should have postponed the arbitration proceedings, (4) the proposed form of
4 judgment does not clearly note that delay damages are contingent on the GT settlement
5 funds being disbursed, and (5) the arbitrator failed to follow Arizona law. (*See Opp'n at*
6 *7-13.*)

7 **II. LEGAL STANDARD AND ANALYSIS**

8 “Judicial review of arbitration awards is severely restricted.” *Nolan v. Kenner*, 250
9 P.3d 236, 238 (Ariz. Ct. App. 2011). The Court shall enter judgment upon an arbitration
10 award unless opposition is made in accordance to Arizona Revised Statutes § 12-1512.
11 A.R.S. § 12-1511. Section 12-1512 sets forth the five circumstances which justify a
12 court’s avoidance of the award. A.R.S. § 12-1512(A). The party challenging the
13 arbitration award has the burden of proving the existence of grounds to vacate the award.
14 *Fisher on Behalf of Fisher v. Nat’l Gen. Ins. Co.*, 965 P.2d 100, 103 (Ariz. Ct. App.
15 1998).

16 **A. Motion to Supplement the Record**

17 Respondents move to supplement the record to make clear that they asked the
18 arbitrator to stay the arbitration proceedings until the majority rule issue had been
19 ultimately decided on appeal. (MTS at 1.) Petitioners argue that Respondents’ Motion
20 should be denied because the offered evidence was previously available. (Doc. 31, Resp.
21 to MTS at 1.) Petitioners specifically argue that motions to supplement are not to be used
22 to make arguments that a party had the opportunity to present in their papers or during a
23 hearing. (*Id.*) Respondents seek to add one exhibit, which includes the Order of Arbitrator
24 Fogel denying their Motion to Bifurcate Arbitration. The Order does not further the
25 Court’s analysis; therefore, the Court denies Respondents’ Motion to Supplement the
26 Record.

27 **B. Request for Entry of Judgment**

28 Petitioners request that the Court enter judgment confirming the arbitration award.

1 (Req. at 1.) Respondents argue that (1) only Arizona law should be applied, (2) the form
2 of judgment wrongly designates Helen Baldino in her individual capacity, (3) the
3 arbitrator erred by failing to postpone the arbitration proceedings, (4) the form of
4 judgment mischaracterizes under what circumstances damages should be paid, and (5) the
5 arbitrator erred by not using Arizona law. (*See* Opp’n at 7-13.)

6 **1. Application of Arizona Law**

7 Respondents argue that the Court should only consider A.R.S. §§ 12-1511 and 12-
8 1512 when considering if the arbitration award should be confirmed and should disregard
9 Petitioners’ citation to the Federal Arbitration Act. (Opp’n at 7.) Petitioners agree that
10 Arizona law does apply, but argue that the narrow grounds for upsetting an arbitration
11 award are identical “in all relevant respects” to the Federal Arbitration Act. (Doc. 18,
12 Reply in Supp. of Pet. for Confirmation of Arbitration Award (“Reply”) at 6.) The
13 Arbitration Agreement makes Arizona law the applicable law for confirmation
14 proceedings. (Doc. 8-1, Ex. A ¶¶ 5, 8.) The Court will therefore use A.R.S. § 12-1511
15 and § 12-1512 when determining whether the arbitration award should be confirmed.

16 **2. Designation of Helen Baldino**

17 Respondents argue that judgment should not be entered because Petitioner’s
18 proposed form of judgment deviates from the arbitration award in its caption, failing to
19 identify Joseph Baldino and Mrs. Baldino as “husband and wife,” which has the effect of
20 making Mrs. Baldino separately liable when only her community property should be
21 liable. (Opp’n at 8.) Petitioners concede that the proposed form of judgment caption does
22 not accurately reflect Mrs. Baldino’s liability under the arbitration award. (Reply at 6.)
23 Petitioners filed a Motion for Entry of Revised Judgment incorporating these changes;
24 therefore, the Court will not withhold entry of judgment on this ground. (*See* Docs. 24 &
25 20-1.)

26 **3. Characterization of Damages**

27 Respondents argue that the form of proposed judgment does not clearly reflect that
28 delay damages are contingent upon distribution of the GT settlement proceeds. (Opp’n at

1 11.) Petitioners do not dispute that delay damages are payable upon distribution of the
2 GT settlement and lodged a revision of paragraph five of the proposed form of judgment
3 to that effect. (Reply at 9-10; *see* Doc. 20-1.) The Court will not withhold entry of
4 judgment on this ground.

5 **4. Postponement of Arbitration Proceedings**

6 Respondents argue that the arbitrator erred by refusing to postpone the arbitration
7 hearing despite three motions by Respondents asking him to stay the proceedings pending
8 resolution of the GT case. (Opp'n at 9.) Respondents specifically argue that the ruling in
9 the GT case and resolution of the majority rule issue on appeal "dramatically impacts the
10 basis upon which a ruling in the arbitration would be made." (*Id.*) Petitioners argue that
11 the arbitrator was entitled to decide the case without waiting for the various appeals.
12 (Reply at 9.) The Court must decline to confirm an award where "the arbitrator[] refused
13 to postpone the hearing upon sufficient cause being shown." A.R.S. § 12-1512(A)(4). As
14 the objecting party has the burden of proving why the arbitration award should not be
15 confirmed, Respondents bear the burden of proving that the arbitrator's denial was in
16 error. *Nat'l Gen. Ins. Co.*, 965 P.2d at 103.

17 Respondents made three requests to the arbitrator asking him to stay the
18 proceedings in light of state court proceedings. While the arbitrator denied Respondents'
19 first two requests for a stay, he did not submit his final arbitration award until July 27,
20 2016. (*See* Doc. 15-1, Ex. F at 92-96 (noting that the Superior Court of Arizona Maricopa
21 County made its ruling on the Motion for Summary Judgment on February 9, 2016); Doc.
22 15-2, Ex. C at 1-4 (noting that the Superior Court of Arizona Maricopa County made its
23 ruling on the Majority Rule Provision on February 25, 2016); Doc. 15-1, Ex. F at 44
24 (issuing the Final Award on July 27, 2016).) The Court therefore concludes that
25 Respondents obtained the relief they sought, namely an arbitration award after the first
26 two rulings had been issued. The parties have not produced, and the Court is not aware
27 of, any case law applying § 12-1512(A)(4) when determining if an arbitration award
28 should be confirmed. Although the arbitrator also denied Respondents' third request, it is

1 not evident to the Court that this was in error. The arbitrator had, by that time,
2 notification of at least one court ruling noting that the majority rule provision was not
3 void under Arizona law. Respondents have not persuasively argued that the arbitrator was
4 then required to wait for a decision of the Arizona Court of Appeals before making his
5 award. Furthermore, it was Respondents who filed the arbitration while a parallel state
6 court action was pending. The Court will not withhold confirmation of the award on this
7 ground.

8 **5. Arbitrator's Application of Arizona Law**

9 Respondents argue that the arbitration award should not be confirmed because the
10 arbitrator "failed to follow well-defined Arizona law on the issues of an award of 10%
11 interest, attorneys' fees, and on the pending Arizona ruling on the 'majority rule'
12 provision." (Opp'n at 11.) Petitioners argue that alleged errors of law are not appropriate
13 grounds for overturning an arbitration award. (Reply at 10.) "[A]n arbitration award is
14 not subject to attack merely because one party believes that the arbitrators erred with
15 respect to factual determinations or legal interpretations." *Hirt v. Hervey*, 578 P.2d 624,
16 626 (Ariz. Ct. App. 1978). "The decisions of the arbitrators on questions of fact and of
17 law are final and conclusive, except when they conflict with express guidelines or
18 standards set forth or adopted in the arbitration agreement." *Smitty's Super-Value, Inc. v.*
19 *Pasqualetti*, 525 P.2d 309, 313 (Ariz. 1974).

20 The Arbitration Agreement states that Arizona substantive law applies. (*See* Doc.
21 15-2, Ex. G ¶ 6.) According to the evidence presented to the Court, Respondents
22 presented their arguments regarding interest and attorneys' fees to the arbitrator. (*See*
23 Doc. 15-2, Ex. I at 45-53.) Petitioners also provided the arbitrator with briefing on the
24 issues. (*See* Doc. 18-1, Ex. 1.) The arbitrator having considered both memoranda
25 concluded that interest and attorneys' fees were appropriate. While the Court may
26 disagree with the arbitrator's conclusions of law, it may not disturb the conclusion absent
27 a showing that he did not in fact consider Arizona law in making his decision. *Smitty's*
28 *Super Value*, 525 P.2d at 311 ("[E]ven though a court reviewing an arbitration award

1 might consider erroneous some rulings on questions of law, the rulings made by the
2 arbitrators are binding unless they result in extending the arbitration beyond the scope of
3 the submission.”). Therefore, the Court will not withhold confirmation of the award on
4 this ground.

5 **III. CONCLUSION**

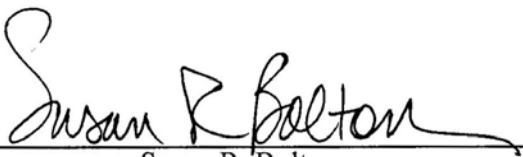
6 The Court confirms the award of the arbitrator because Respondents have not met
7 their burden of proving the existence of grounds to deny confirmation of the award.

8 **IT IS ORDERED** denying Respondents’ Motion to Supplement the Record (Doc.
9 30).

10 **IT IS FURTHER ORDERED** granting Petitioner’s Request for Entry of
11 Judgment (Doc. 14).

12 **IT IS FURTHER ORDERED** that the Court will sign the Revised Proposed
13 Form of Judgment lodged on September 26, 2016 upon submission of the same to this
14 Court’s Chambers Mailbox.

15
16 Dated this 13th day of December, 2016.

17
18 
19
20 _____
21 Susan R. Bolton
22 United States District Judge
23
24
25
26
27
28