MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Stephen Alexander, et al.,

Appellants-Defendants,

v.

Davis Hotel Capital, Inc.,

Appellee-Plaintiff.

November 12, 2021

Court of Appeals Case No. 21A-MI-1366

Appeal from the Marion Superior Court

The Honorable Gary L. Miller, Judge

The Honorable David J. Dreyer, Senior Judge

Trial Court Cause No. 49D03-2010-MI-37981

Altice, Judge.

Case Summary

[1] Stephen Alexander, Neal Burnett, Midwest GC, LLC, MWA, LLC, and MWA True, LLC, (collectively, MWA) appeal the trial court's confirmation of an arbitration award against them following Davis Hotel Capital, Inc.'s (Davis) claim to recover fees for locating lenders and equity capital sources who would provide funding for the construction of a hotel development project in Indianapolis (the Project). MWA claims that the judgment must be set aside because the arbitrator exceeded his authority in awarding fees to Davis, that the arbitrator refused to hear certain "in-person" testimony, and that the virtual arbitration hearing should have been postponed. Davis cross-appeals, claiming that it is entitled to appellate attorneys' fees.

[2] We affirm but deny Davis's request for appellate attorneys' fees.

Facts and Procedural History

[3] Sometime in 2018, Burnett contacted a commercial real estate broker to assist him and Alexander in obtaining capital funding for the Project. After researching hotel investment bankers, Davis was selected to solicit possible investors to fund the Project.

[4] On May 15, 2018, Davis and Merrill Hotels (Merrill) entered into an agreement (the Agreement) whereby Davis would assist Merrill and related entities—including MWA—in locating capital funding for the Project. More

particularly, Davis would "assist and advise . . . in the identification of prospective Lenders and/or Equity capital sources to provide debt financing . . . as well as equity investment capital [to develop the Project]." *Appellee's Appendix Vol. II* at 24. Davis agreed to "prepare due diligence materials, summaries," and a "financing offering memorandum" (FOM) describing the Project and outlining the terms "for acquiring debt or other capital." *Id.* at 24-25.

[5] Davis's services were more particularly set forth in Section I (C) of the Agreement as follows:

> Advisor shall have an exclusive right to arrange financing for the Property, as further defined and limited by this agreement, and will serve as the Advisor to Developer in contacting Lenders who may be provided with a copy of the materials if they express interest in financing the Property or providing debt capital and/or other form of financing.

Id. at 25.

[6] Section III (B) of the Agreement went on to provide that

> The terms of the Agreement shall apply should any Lender/Investor approached by Advisor during the Exclusive Period who provides a term sheet or closes a Transaction during the Exclusive Period, or within eight (8) calendar months from the end of the Exclusive Period (such subsequent eight (8) month period being the "Holdover Period"). Lenders approached by Advisor shall consist of those Lenders *who have either reviewed the FOM, met with or spoken to Developer, negotiated or provided a term*

> *sheet, or been provided substantive material on the Properties . . .* in a concerted effort to affect an acceptable transaction on behalf of Developer. . . .

Id. at 26 (emphasis added).

[7] In exchange for performing its duties under the Agreement, Davis was to receive the following fees from MWA:

> **A. Advisory Fee**
>
> If [MWA] enters into a Transaction with a Lender introduced during the Term of this Agreement (and any extensions thereof), [MWA] shall pay Advisor a fee ('Debt Fee') as follows:
>
> > (i) A fee equal to one (1.5%) percent of any senior debt arranged, which will be defined as the Debt Fee.
> >
> > (ii) A fee equal to one and two (2.0%) of any mezzanine, junior debt or preferred equity provided, also referred to as the Debt Fee.
>
> (iii) A fee equal to two and one-half (2.5%) of any equity investment provided, which shall be defined as the Transaction Fee.
>
> **B. Payment**
>
> Debt Fee and Transaction Fee are due and payable at the closing of the funding of said loans or transaction closing. Payable via wire transfer to a [Davis] account to be provided.

Id. at 25.

[8] The FOM that Davis prepared included a detailed explanation of the Project, recommendations concerning the Indianapolis marketplace, and an investment analysis. The FOM was the primary set of documents that Davis personnel would present to potential investors for the Project. After the FOM was completed, Davis began contacting various resources to secure a commitment for the financing. Davis obtained financing proposals from two investors, but Alexander ultimately rejected those offers.

[9] On May 16, 2019, Alexander advised Davis that he had obtained financing from another source. Davis learned that financing was obtained from First Farmers Bank & Trust (First Farmers). The financing included a loan for $15,500,000 and an additional $6,674,780.50 from individual investors. MWA obtained the financing from First Farmers during the term of the Agreement, and Davis's FOM had been presented to representatives at First Farmers for their review and consideration. Even though the funding was successfully procured, MWA refused to pay Davis any fees. MWA claimed that it had been in contact with First Farmers prior to engaging Davis, and that Davis had not arranged the financing. Thus, MWA contended that it owed Davis no fees.

[10] On July 23, 2019, Davis filed a demand for arbitration pursuant to the Agreement. Davis sought $350,000 representing a percentage of the senior debt and a percentage of the equity investments involved in the Project. Davis maintained that its role was exclusive, and it would earn its fee no matter who financed the project. In response, MWA maintained that Davis agreed not to

have that exclusive role and would not be entitled to a fee if the Project was financed from sources that Davis had not arranged.

[11] The parties selected Brian L. Busby, an attorney in Columbus, Ohio, as arbitrator (the Arbitrator). A two-day arbitration hearing was scheduled to commence on July 16, 2020, but in light of the onset of the COVID-19 pandemic, Davis subsequently submitted a motion to the Arbitrator requesting that the hearing be conducted virtually via Zoom.

[12] MWA objected to the Zoom hearing, arguing that failing to hold an in-person hearing would prejudice the parties and that conducting a Zoom hearing would be too cumbersome. Nonetheless, MWA's counsel subsequently sent a letter to the Arbitrator on June 25, 2020, stating that "we are now in receipt of your proposed order, which I believe we understand and will respect. *We will proceed along the lines of your ruling." Appellee's Appendix Vol. II* at 44 (emphasis added).

[13] On July 6, 2020, the Arbitrator issued an order vacating the in-person hearing and ordered the parties to submit their arguments in writing. The Arbitrator's order stated in part that

> The AAA Rules under which the parties agreed to handle this dispute give broad discretion to the Arbitrator as to the manner and means of conducting any hearing in this matter. Rule 32, specifically, for example, allows the Arbitrator to 'allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation.'

Pursuant to the AAA Rules in this matter and weighing and balancing the parties' right to a prompt and fair hearing, but one that is as safe as possible with the issues posed by the virus, the Arbitrator . . . orders that the hearing in this matter will proceed [as follows]:

1. The current in-person hearing in this matter set for July 16-17, 2020, is hereby vacated and continued.

2. All parties presenting affirmative claims whether as a Claimant or counter-claimant shall submit their entire case in chief in writing with written arguments of fact and law, sworn witness statements, affidavits, or depositions, exhibits, and other such written material. All such written materials by any party making an affirmative claim in this matter shall be due on or before July 20, 2020.

3. If any party determines it would be more efficient or effective to present certain select direct witnesses in an in-person setting, the parties will give notice of such a request on or before July 20, 2020. The Arbitrator will then determine, and further order, whether such in-person testimony is warranted or necessary, given the ability to present the testimony and evidence in writing, and, if the in-person testimony is permitted, arrangements will be made to present that testimony and conduct that examination remotely.

4. All parties responding to any such affirmative claims shall submit their responses and defenses in the same manner as above on or before July 31, 2020.

5. All Claimants and counter-claimants shall submit any further replies in the same manner as above on or before August 7, 2020.

> 6. After all submissions are completed and submitted pursuant to the above schedule, all parties will have 7 days to August 14, 2020, to determine whether any party wants to cross-examine any witness presented or cited by any opposing party. If such a request is made, the Arbitrator will determine pursuant to the AAA Rules whether such further evidence is warranted and necessary and, if so, a further conference call will be set to determine the date and manner of taking such cross-examination testimony.
>
> 7. Depending on whether a further request is made for additional testimony of any witness, the Arbitrator will declare the record closed in this matter after the submissions above are completed.
>
> 8. The parties and the Arbitrator have agreed to directly exchange and submit to the Arbitrator all materials in this matter.
> . . .

Id. at 46-48.

[14] On July 20, 2020, MWA filed a request for the presentation of Alexander and Burnett's testimony at the hearing. MWA also requested that it be allowed to cross examine Geoffrey Davis and one of his associates. Thereafter, on August 24, 2020, the Arbitrator issued an order permitting MWA to call one in-person witness and allowing the cross-examination of one witness during the Zoom hearing. Pursuant to that order, MWA selected Alexander as the lone in-person witness who could testify during its case-in-chief, and Davis as the sole witness who could be cross-examined. On September 14, 2020, the Arbitrator issued a supplemental order stating:

> Pursuant to our conference call, your Arbitrator has determined, and so orders, that this testimony be scheduled and taken remotely. This decision is based, primarily, on two considerations. First, due to the Covid-19 pandemic, there are still risks involved in travel and larger in-person gatherings. A remote examination removes that risk. *Second, Messrs. Davis and Alexander have already presented extensive testimony in this matter via written sworn Affidavits such that your Arbitrator determined the time and expense involved in all of the necessary travel to take this further testimony in-person is not warranted.*

Id. at 242-43 (emphasis added).

[15] Alexander presented his testimony at the September 24, 2020 Zoom hearing. Additionally, the record shows that MWA submitted sixteen affidavits in support of its case in chief, including three affidavits from Alexander and two affidavits from Burnett. MWA also presented written arguments and additional statements and exhibits in further support of its case-in-chief.

[16] On October 21, 2020, the Arbitrator issued an award in Davis's favor and against MWA in the amount of $351,850 with prejudgment interest. In arriving at this result, the Arbitrator's seven-page order, which contained various findings from the evidence presented, provided in part that

> [I]t appears that [First Farmers] considered investing in this project for years, but never did until after Respondents engaged [Davis] and after [First Farmers] received the FOM from [Davis].
>
> . . .

[A]fter failing to obtain financing from [First Farmers] for years, it is simply too curious that [First Farmers] ultimately agrees to provide financing to Alexander, et. al., after [Davis] is engaged, after [Davis] prepares the FOM, after the FOM is provided to [First Farmers], and after financing offers are obtained from [two other lenders].

On this record, it appears virtually certain that [Davis] performed what it contracted to do under the Agreement and was instrumental, at least in some part, if not a major part, in obtaining the ultimate financing from [First Farmers].

Accordingly, under the specific and explicit terms of the Agreement signed by the parties in this matter, [Davis] is entitled to its fee under the Agreement and the failure to pay that fee is a breach of the contract.

This leaves two remaining issues—the amount of the fee and who were the parties to the Agreement.

The Agreement provides for various levels of the fee. It provides, initially, that [Davis] will receive a fee of 1.5% of any senior debt arranged and a second level of 2.5% of any equity investment provided.

The senior debt was provided by [First Farmers] in the amount of $15,500,000. This results in a fee of $232,500. The equity debt, subtracting the value of the real estate Alexander brought to the deal, was $4,774,000. This results in a fee of $119,350. Thus, [Davis] is entitled to a total fee of $351,850.

Indiana law, the law applicable to these transactions, allows prejudgment interest at the rate of 8%. (Ind. Code section 34-51-4-8). This obligation was due and should have been paid on May

19, 2019, the date [Davis] would have been entitled to its fee under the Agreement when the [First Farmers] loan closed. As such, prejudgment interest is due on this debt at the rate of 8% from May 19, 2019.

Based on the findings and conclusions set forth above, it is, accordingly, the judgment and finding in this arbitration that Respondents, [MWA], are in breach of the letter Agreement of May 14, 2018, with [Davis], and the damages arising from that breach are $351,850.00 with interest, including prejudgment interest accruing under Indiana law from May 19, 2019, the date of the breach of the Agreement.

. . .

The letter Agreement between the parties provides for an award of attorneys' fee[s] to the prevailing party 'as determined by the arbitrator.' The Arbitrator finds, however, that the issues and disagreements between the parties herein were raised in good faith and there were legitimate issues concerning the scope and meaning of the Agreement. Accordingly, the Arbitrator finds no reason to depart from the traditional 'American rule' that all parties to a good faith litigation dispute are responsible for their own attorneys' fees. As such, the claim for attorneys' fees is DENIED.

For all of these reasons, findings, and conclusions set forth herein, the Arbitrator finds and determines that a judgment in this matter should be, and hereby is, GRANTED in favor of [Davis], against [MWA], . . . jointly and severally, in the amount of $351,850 for damages incurred by Claimant as a direct and proximate result of Respondents breach of their Agreement with Claimant with pre-judgment interest due and owing under Indiana Code § 34-51-4-8 from May 19, 2019, and continuing interest until paid in full.

Id. at 19-21.

[17] On October 27, 2020, Davis filed its petition with the trial court to confirm the arbitration award.[1] Following a virtual hearing on May 26, 2021, the trial court issued an order summarily confirming the award and denying Davis's request for attorneys' fees. MWA now appeals.

Discussion and Decision

I. Standard of Review

[18] We initially observe that the purpose of arbitration is to afford parties the opportunity to reach a final disposition of differences in an easier, more expeditious manner than by litigation. *Bopp v. Brames*, 677 N.E.2d 629, 631 (Ind. Ct. App. 1997). It is the policy of our state to favor enforcement of an arbitration award, and arbitration disputes are interpreted in accordance with that policy. *Chesterfield Mgmt., Inc. v. Cook,* 655 N.E.2d 98, 102 (Ind. Ct. App. 1995), *trans. denied.* An arbitrator is limited by the bounds of the agreement from which he draws his authority, and an arbitrator is expected to be aware of those limits. *Fiducial Inv. Advisors v. Patton*, 900 N.E.2d 53, 60 (Ind. Ct. App. 2009).

[1] Ind. Code § 34-57-2-12 provides that "[u]pon application of a party . . . the court shall confirm an [arbitration] award. . . . Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in the court."

[19] In this case, MWA challenges the trial court's confirmation of the arbitration award pursuant to the Uniform Arbitration Act (the Act), I.C. § 34-57-2-1, -22. Judicial review of arbitration awards is very narrow in scope. *Fiducial Inv. Advisors,* 900 N.E.2d at 60. An award should be set aside only when one of the grounds specified by the Act for vacation of an award is shown. *Citizens Gas & Coke Util. v. Local Union No. 1400, IBEW,* 874 N.E.2d 391, 397 (Ind. Ct. App. 2007). A party who seeks to vacate an arbitration award under the Act bears the burden of proving the grounds to set aside the award. *Id.*

[20] The role of this court in reviewing an arbitration award is limited to determining whether the appellant has established any of the grounds for challenge permitted by the Act. *Id.* The Act does not declare which issues are subject to arbitration. *Marion Cmty. Sch. Corp. v. Marion Teachers Ass'n,* 873 N.E.2d 605, 608 (Ind. Ct. App. 2007). Rather, arbitration arises through contract, and the parties are essentially free to define for themselves what questions may be arbitrated, what remedies the arbitrator may afford, and the extent to which a decision must conform to the general principles of law. *Id.* at 608-09.

[21] When an award is attacked under the Act on the grounds that the arbitrator exceeded its powers through erroneous interpretation of a contract, this court determines whether the arbitrator's construction of the contract is a reasonably possible one that can seriously be made in the context in which the contract was made. *Id.* An arbitrator's mistake of law or erroneous interpretation of the law does not constitute an act in excess of the arbitrator's powers. *Southwest Parke*

Educ. Ass'n v. Southwest Parke Cmty. Sch. Trs. Corp., 427 N.E.2d 1140, 1147 (Ind. Ct. App. 1981).

[22] Because MWA has the burden of proving the grounds to set aside the award, MWA is appealing from a negative judgment. Therefore, the trial court's judgment confirming the arbitration award will be reversed only if there is no evidence to support the trial court's conclusion. *Fiducial Inv. Advisors,* 900 N.E.2d at 60.

II. MWA's Claims

A. Davis's Entitlement to Fees

[23] MWA claims that the judgment must be set aside because the Arbitrator exceeded his authority in disregarding the language of the Agreement and erroneously awarded Davis a fee. MWA asserts that Davis was not entitled to a fee because the evidence failed to establish that it assisted MWA in obtaining financing for the Project.

[24] In resolving this issue, we note that the Agreement states that the term "lender" includes those "who have either reviewed the FOM, met with or spoken to Developer, negotiated or provided a term sheet, or been provided substantive material on the Properties." *Appellee's Appendix Vol. II* at 26. Notwithstanding these terms, MWA asserts that it is not obligated to pay Davis a fee because First Farmers ultimately offered capital in light of the historical relationship it had with Alexander and Burnett and not because of Davis's efforts.

Alexander's testimony, however, refutes that contention. More specifically, Alexander testified during deposition that he "circulated [the FOM] to First Farmers after we were significantly through the initial application with them." *Alexander Deposition* at 69-70.

[25] In our view—and as the Arbitrator concluded—it is irrelevant whether financing came about in part because of efforts from others in addition to Davis's involvement. The Agreement provides that so long as the financing is obtained, and if obtained from the materials that Davis provided, Davis is entitled to its fee. Thus, the Arbitrator acted well within his discretion in determining that

> Lenders . . . have either reviewed the FOM . . . or been provided substantive materials on the Properties . . . by [Davis].
>
> Looking at Respondents' submissions herein and Alexander's deposition testimony, it appears Respondents are attempting to distinguish between whether materials from [Davis] were provided to *potential lenders and investors* from [Davis] as opposed to being provided with those materials from Respondents. The Agreement, however, makes no such distinction and rightly so. *Whether materials prepared by [Davis] are provided by [Davis] or by others to the potential lenders and investors should make no difference as to whether [Davis] is compensated for the preparation, submission, and use of such materials.*

Appellee's Appendix Vol. II at 19-20 (emphasis added).

[26] As for the fees that Davis was awarded, the evidence established that the senior debt obtained for the Project totaled $15,500,000, and the equity debt totaled

$6,674,780.50. Thus, as the Agreement provides for a fee to [Davis] in the amount of 1.5% of the senior debt and 2.5% of the equity debt, the Arbitrator awarded a fee to Davis in the amount of $351,850. In arriving at this result, the Arbitrator set forth the following calculations:

> The senior debt was provided by [First Farmers] in the amount of $15,500,000. This results in a fee of $232,500. The equity debt, subtracting the value of the real estate Alexander brought to the deal, was $4,774,000. . . . This results in a fee of $119,350. Thus, [Davis] is entitled to a total fee of $351,850.

Id. at 21.

[27] The Arbitrator was well within his powers in calculating the fees owed to Davis, and the basis for the award was fully supported by the evidence that was presented and considered. And the Arbitrator noted that because the Agreement makes no distinction as to Davis's fee entitlement based upon who physically provided materials to lenders and investors that were prepared by Davis, its fee was earned so long as funding was acquired from the Davis FOM and other supporting materials. Such was precisely the case here, and Alexander testified as much. As a result, the Arbitrator properly exercised his powers in awarding the fee that it did to Davis. Hence, the trial court did not err in confirming the arbitration award.

B. Virtual Hearings, Postponement, and Presentation of Evidence

[28] MWA also claims that the arbitration award must be set aside because the Arbitrator conducted a virtual hearing, refused to postpone the hearing, and improperly prevented it from presenting relevant and material evidence.

[29] In addressing MWA's claims, we first note that Rule 32 of the AAA Commercial Arbitration Rules and Mediation Procedures (Rule 32) provides:

> When deemed appropriate, the arbitrator may . . . allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

Appellee's Appendix Vol. III at 23.

[30] Arbitrators are afforded wide latitude regarding evidentiary issues and are not bound by the rules of evidence. *Citizens Gas,* 874 N.E.2d at 400. Similarly, an arbitrator is not required to hear all evidence tendered by the parties but must give each of the parties an adequate opportunity to present evidence and arguments. *Id.* It is only when the exclusion of relevant evidence actually deprived a party of a fair hearing that it is appropriate to vacate an arbitration award. *Id.*

[31] Although MWA may have preferred in-person proceedings, it agreed to follow the Arbitrator's decision to hold virtual proceedings via Zoom. Similarly, the Arbitrator's decision to hold virtual proceedings was fueled in part by the

unprecedented events of the COVID-19 pandemic and the public health concerns associated with that crisis. That said, the record indicates that the parties fully briefed the matter and presented relevant witnesses and written testimony in support of their respective positions. MWA presented depositions, sixteen affidavits, and witness testimony at the Zoom hearing in support of its case.

[32] MWA has failed to show how the Arbitrator's decision to conduct a virtual hearing and preclude various witnesses from testifying in person "substantially prejudiced" its right to due process. *Appellants' Brief* at 19. The Arbitrator had sufficient evidence and information to consider and render a decision. Moreover, Rule 32 afforded the Arbitrator the discretion to conduct the proceedings remotely and virtually to protect the parties' health and wellbeing during the ongoing COVID-19 pandemic, while providing the parties with a fair opportunity to present their cases.

[33] In sum, MWA has failed to show a violation of its due process rights as a result of the Arbitrator's decision to conduct the proceedings virtually or in limiting the number of witnesses who were permitted to testify. Both parties presented a voluminous amount of written evidence including affidavits, exhibits, and depositions pursuant to the Arbitrator's order, as well as witness testimony at the Zoom hearing. As a result, we conclude that the arbitration award in Davis's favor was proper, and the trial court correctly confirmed the award.

C. Appellate Attorneys' Fees

[34] On cross-appeal, Davis claims that it is entitled to an award of appellate attorneys' fees. Davis asserts that although the Arbitrator and the trial court denied its request for attorneys' fees at those stages of the proceedings, it is not foreclosed from recovering attorneys' fees at the appellate level pursuant to Indiana Appellate Rule 66(E).[2]

[35] App. R. 66(E) provides that we may assess damages if an appeal is frivolous or in bad faith. Damages may include attorneys' fees and "shall be in the Court's discretion." A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. *Bessolo v. Rosario,* 966 N.E.2d 725, 734 (Ind. Ct. App. 2012), *trans. denied.* We must act with extreme restraint when awarding such damages due to the potential chilling effect on the exercise of the right to appeal. *Harness v. Schmitt,* 924 N.E.2d 162, 168 (Ind. Ct. App. 2010). To prevail on its request, Davis must show that MWA's arguments on appeal are "utterly devoid of all plausibility." *See id.*

[36] In light of our discussion above regarding the issues that MWA presents in this appeal, it is readily apparent that those issues were not frivolous or raised in bad faith. We agree with the Arbitrator's determination that there were legitimate issues concerning the meaning and scope of the Agreement. In other words, there is no showing that MWA has acted in bad faith in raising its issues on

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[2] Davis does not challenge the Arbitrator's denial of attorneys' fees.

appeal. While we note that the arbitration proceeding in this case was not the usual way of conducting an arbitration, considering the ongoing pandemic and the public safety issues, it was a prudent way of conducting the arbitration hearing without an extended delay. Although MWA did not prevail on its arguments, we cannot say that they were "utterly devoid of all plausibility." *See Bessolo,* 966 N.E.2d at 734. For these reasons, we deny Davis's request for appellate attorneys' fees.

[37] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.