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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

EHM PRODUCTIONS, INC., Plaintiff and Respondent, v. STARLINE TOURS OF HOLLYWOOD, INC., Defendant and Appellant.	B277311 (Los Angeles County Super. Ct. No. BS162433)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

Mohammed K. Ghods, Jeremy A. Rhyne, and Lori Speak for Defendant and Appellant.

Boies Schiller Flexner, Linda M. Burrow and Cameron J. Johnson for Plaintiff and Respondent.

Starline Tours of Hollywood, Inc. (appellant) appeals from a judgment confirming an arbitration award. The arbitration involved a contract dispute between appellant and EHM Productions, Inc. (respondent) regarding appellant's duty to defend respondent in a lawsuit brought by appellant's bus drivers.[1] Respondent obtained an award requiring appellant to defend respondent in the bus driver action. Respondent filed a petition to confirm the award, which was granted.

Appellant argues that the trial court should have vacated the arbitration award pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(5),[2] because the arbitrator deemed abandoned appellant's cross-claim for indemnification and defense. Appellant further argues that the trial court should have vacated the award pursuant to section 1286.2, subdivision (a)(4), because the arbitrator exceeded his power by ordering a remedy beyond the scope of the parties' agreement; retaining jurisdiction to enforce the award; and retaining jurisdiction on an issue not submitted to the arbitrator. Finally, appellant argues

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[1] The contract between the parties refers to respondent as "EHM Productions, Inc. d/b/a TMZ, a California corporation," and thereafter refers to respondent as "TMZ." EHM Productions is the only respondent in this appeal, but is sometimes referred to as "TMZ" in the factual summary in accordance with the contract. However, another entity, TMZ Productions, Inc., was named as a defendant in the bus driver lawsuit. This entity is also referred to in the record and by the parties as "TMZ," but was apparently not a party to the contract between appellant and respondent. Neither party has clarified to this court the precise corporate relationships between respondent and any other TMZ entity.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

that the trial court erred in substantively changing the terms of the arbitration award.

We find no reversible error, therefore we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The parties

Appellant is a tour bus operator located in Los Angeles, California. Respondent owns and operates the TMZ website and television show.

The contract

In August 2012, appellant and respondent entered into a written contractual agreement captioned "TMZ-Starline Tour Bus Agreement." The agreement solidified the parties' intent to run a "TMZ branded, multi-media Hollywood bus tour in Southern California." Pursuant to the agreement, appellant was responsible for bus acquisition and build-outs of customized buses, bus tour operations, and bus maintenance. TMZ was responsible for providing tour guides and tour content, on board video and cameras, and tour bus promotion.

The agreement contains the following indemnity and defense provisions:

> "14.1 Starline will indemnify, defend and hold TMZ harmless, as well as its respective successors, assignees, licensees and employees from any and all claims, suits, actions, liabilities, losses, damages, expenses (including, but not limited to, legal expenses and reasonable outside attorney's fees), judgments, and penalties incurred by TMZ (or its related entities) that arise out of any performance or non-performance by Starline's employees or Starline's negligence, wrongful acts, or any breach, in whole or in part, of the representations, warranties, and/or covenants set forth in this Agreement.

> "14.2 TMZ will indemnify, defend and hold Starline harmless, as well as its respective successors, assignees, licensees and employees from any and all third party claims, suits, actions, liabilities, losses, damages, expenses, (including, but not limited to, legal expenses and reasonable outside attorney's fees), judgments, and penalties incurred by Starline (or its related entities) that arise out of the Tour Content provided by TMZ, or TMZ's and its employee's negligence, wrongful acts, or any breach, in whole or in part, of the representations, warranties, and/or covenants set forth in this Agreement."

The contract also contains an arbitration provision, which provides that "[i]n the event the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration." Any arbitration is to be conducted under the "JAMS Streamlined" or "JAMS Comprehensive" arbitration rules, and the arbitrator must "follow California law and the Federal Rules of Evidence" in adjudicating the dispute. The agreement further provides:

> "If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including reasonable attorneys' fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered."

The lawsuit

In December 2012, several bus drivers filed a putative class action against appellant alleging that it had violated certain wage and hour laws. The named plaintiffs sought to represent all similarly situated employees regardless of whether they worked in connection with the TMZ tour or one of appellant's other tours. On June 14, 2013, the putative class action complaint was amended to add TMZ Productions, Inc. (TMZ) as a defendant.

Respondent tendered TMZ's defense to appellant. Appellant responded that it had no duty to defend TMZ, a non-signatory to the agreement. However, it offered to defend TMZ only if respondent "'expressly agreed that [appellant] does not have an indemnity obligation under the contract . . . to defend TMZ productions'" and that appellant could withdraw from representation for any valid reason which might arise. Appellant's offer was also conditioned on respondent agreeing that TMZ would be represented by appellant's attorney.

In August 2013, respondent retained Mitchell Silberberg & Knupp (MSK) to represent respondent and TMZ. Between June 2013 and January 2014, respondent voluntarily agreed with the plaintiffs in the underlying lawsuit to be added as a defendant in order to secure the dismissal of TMZ. The plaintiffs added respondent as a defendant in January 2014 and voluntarily dismissed TMZ in April 2014.

The litigation is still pending.

The arbitration

On June 2, 2014, respondent filed a demand for arbitration, alleging breach of contract by appellant arising from its refusal to defend TMZ and respondent in the underlying lawsuit. Respondent sought a declaration that appellant was required to defend TMZ and respondent. Respondent sought an award of its costs and fees incurred through January 31, 2015, and a

declaration that appellant is required to pay respondent's reasonable attorney fees as they are incurred going forward.

On November 26, 2014, appellant answered the demand and submitted a cross-claim against respondent for indemnity.

The arbitration hearing took place on March 16 and 17, 2015. At the hearing, each side offered documentary evidence, called witnesses, and cross-examined opposing witnesses. At the conclusion of the evidence, the arbitrator asked for posthearing briefs. The briefing was completed on May 11, 2015.

On June 8, 2015, the arbitrator issued a 10-page written "partial final award." The arbitrator found that appellant was obligated to defend TMZ and respondent in the underlying lawsuit. Because the litigation was ongoing, the award of respondent's attorney fees and costs through January 31, 2015, was a partial award.

The arbitrator noted that appellant had filed a cross-claim against respondent for indemnity. However, "[appellant] presented no evidence to support its claim and failed to address the claim in its Post-Hearing Brief." Therefore, the arbitrator deemed the claim to be abandoned.

The arbitrator ordered appellant to pay respondent $185,725 for its attorney fees and $15,836.83 for its costs incurred in the underlying litigation through January 31, 2015. The arbitrator further ordered:

> "[Appellant] shall pay [respondent's] reasonable attorneys' fees and costs incurred in the Underlying Action from February 1, 2015 and onward, as they are incurred, within thirty days of receipt by [appellant] of MSK's invoices."

The arbitrator expressly reserved jurisdiction over the matter "to ensure enforcement of [appellant's] defense obligation,

payment of [respondent's] reasonable attorneys' fees and costs, and to resolve any dispute regarding indemnity, if necessary."

Appellant appealed the award under the JAMS Optional Appeal Procedure, as permitted in the parties' agreement. The appellate panel affirmed the arbitrator's partial final award in its entirety.

Petition to confirm arbitration award

On May 9, 2016, respondent filed a petition to confirm the contractual arbitration award in Los Angeles Superior Court. Appellant filed an opposition. The trial court heard the petition on June 21, 2016. No one appeared for appellant, although proper notice of the hearing was given. The trial court issued a minute order granting the petition. It ordered respondent to give notice of its minute order and prepare and serve a proposed order.

Appellant failed to object to the proposed order within the time limit required under California Rules of Court, rule 3.1312(a) and (b). Therefore, respondent filed a notice of nonobjection.

Two days later, appellant filed an objection to the proposed order. Respondent responded to appellant's objections on June 20, 2016. A hearing on appellant's objections was held on July 27, 2016.

At the conclusion of the hearing, the trial court signed an amended judgment, ordering that:

> "1. In accordance with the arbitration award issued by JAMS on June 8, 2015, . . . [appellant] shall pay to [respondent] $201,561.83, which consists of $185,725 that [respondent] incurred in attorneys' fees in the [underlying] action . . . as of January 31, 2015 and $15,836.83 that [respondent] incurred in costs . . . as of that date.

"2. In accordance with the Arbitration Award, [appellant] shall pay any other of [respondent's] reasonable attorneys' fees and costs incurred in the [underlying] action from February 1, 2015 onward, as they are incurred, within 30 days of receipt by [appellant] of [respondent's] invoices.

"3. In accordance with the Arbitration Award, the JAMS arbitrator shall retain jurisdiction over this matter to ensure enforcement of [appellant's] defense obligation, payment of [respondent's] reasonable attorneys' fees and costs, and to resolve any disputes regarding indemnity, if necessary."

On August 26, 2016, appellant filed this appeal from the trial court judgment.

DISCUSSION

I. Applicable law and standard of review

The trial court's review of an arbitration award is narrowly limited by statute. (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541 (*Roos*)). Sections 1286.2 and 1286.6 set forth the specific grounds on which an award may be vacated or corrected by a reviewing court. (*Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 Cal.App.4th 394, 399 ["'[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction)'"].)[3]

Pursuant to section 1286.2, subdivision (a), an arbitration award may be vacated for the following reasons:

"(1) The award was procured by corruption, fraud or other undue means.

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[3] Appellant does not seek correction of the award pursuant to section 1286.6.

> "(2) There was corruption in any of the arbitrators.
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> "(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
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> "(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
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> "(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
>
> "(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed . . . to disqualify himself or herself . . . ."

"[T]he arbitrator's award is entitled to deferential review. [Citation.]" (*Roos, supra*, 87 Cal.App.4th at p. 541.) The scope of judicial review is extremely narrow because of the strong public policy in favor of according finality to arbitration awards. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 32 (*Moncharsh*); *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390 (*Advanced Micro*).) In determining whether arbitrators have exceeded their powers, the courts must accord "substantial deference to the arbitrators' own assessments of their contractual authority." (*Advanced Micro*, at p. 373.) An arbitration award

will be upheld "so long as it was even arguably based on the contract." (*Id.* at p. 395.)

On appeal from a judgment confirming an arbitration award, we review the trial court's order de novo. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217.)

II. Appellant's cross-claim

Appellant argues that the judgment should be reversed and the arbitrators' award vacated pursuant to section 1286.2, subdivision (a)(5), because the arbitrator failed to consider the merits of appellant's cross-claim.

Under section 1286.2, subdivision (a)(5), an award should be vacated where a party is substantially prejudiced by conduct of the arbitrator that is contrary to the California Arbitration Act (CAA). Appellant argues that pursuant to the CAA, an arbitrator is required to "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." (§ 1283.4.) Appellant cites several cases suggesting that the arbitrator is bound to resolve all issues that the parties have placed before him. (*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 882 [finding that arbitrator has authority to supply omitted rulings where, due to inadvertent omission, arbitrator failed to rule on certain issues]; *Elliott & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, 502 (*Elliott & Ten*) [judge, acting as judicial officer, was permitted to modify award where several issues had been tried but not decided].)

In contrast to the cases cited, the arbitrator in this matter did not ignore or neglect the issue raised in appellant's cross-appeal. Instead, the arbitrator rendered a decision on the cross-appeal. In his written decision, the arbitrator specifically noted that appellant had filed a cross-claim against respondent for

indemnity. However, the arbitrator further noted that "[appellant] presented no evidence to support its claim and failed to address the claim in its Post-Hearing brief." Therefore, the arbitrator deemed the claim to be abandoned.

Appellant cites no authority suggesting that an arbitrator may not deem an issue abandoned where the issue has not been sufficiently supported by evidence and argument during the proceedings. The arbitrator's decision reflected his position that appellant had failed to provide sufficient support for the cross-claim.

Appellant argues that its cross-claim was based on the interpretation of a contract already before the arbitrator. Accordingly, appellant argues, the primary piece of evidence necessary to make a decision on appellant's cross-claim was clearly before the arbitrator. Further, appellant argues that while it failed to address the cross-claim in its closing brief, it made such arguments in its opening brief. In other words, appellant argues that the arbitrator wrongly rejected appellant's cross-claim.

We may not consider whether the arbitrator erroneously rejected appellant's cross-claim. "[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh, supra*, 3 Cal.4th at p. 11.) Thus, we will not review the validity of the arbitrator's reasoning in making the determination of abandonment, nor will we review the sufficiency of the evidence supporting the arbitrator's decision. (*Ibid.*) A claim that the arbitrator allegedly failed to consider appellant's evidence in support of the cross-claim is not a ground to vacate the award. (*Gonzales v. Interinsurance Exchange* (1978) 84 Cal.App.3d 58, 63 [petition to vacate award fatally defective in that it did not allege a failure to

hear evidence, but a failure to consider evidence, which is not a ground to vacate an arbitration award].)

The cases appellant cites regarding waiver are inapplicable. Waiver is ""the intentional relinquishment of a known right after full knowledge of the facts and dependent upon the intention of one party only."" (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1189.) The arbitrator did not cite waiver as the reason for its rejection of appellant's claim. Instead, the arbitrator cited abandonment. A claim may be deemed abandoned at the trial level where a party fails to request a ruling and fails to provide briefing on the issue. (*People v. Catlin* (2001) 26 Cal.4th 81, 162 ["defendant abandoned this claim at the trial level, never asking the court . . . for a ruling on the motion and never filing the points and authorities requested by the trial court"].) Thus, we decline to discuss the cases cited by appellant concerning intentional waiver.

In sum, appellant has provided no authority suggesting the arbitrator acted contrary to the CAA in finding that appellant abandoned its cross-claim under the circumstances of this case. As it is beyond the scope of our review, we decline to address the merits of the arbitrator's decision.

III. The remedy -- requirement of future payments

Appellant next argues that the arbitrator exceeded his powers by issuing a remedy beyond the scope of the parties' agreement, the Civil Code, and public policy. Specifically, appellant argues that the remedy requires it to pay reasonable outside attorney fees, but fails to provide a mechanism by which the reasonableness of the fees may be challenged before payment is required.

The award directs appellant to pay respondent's reasonable attorneys' fees and costs incurred in the underlying action "as

they are incurred, within thirty days of receipt." Appellant argues that this allows respondent to simply send whatever invoices it wishes to appellant and demand payment. Appellant argues that this is inconsistent with its obligation to pay defense costs and out-of-pocket expenses. Instead, appellant argues, it is an order to pay a third-party law firm's invoices, sight unseen, for the purported defense of respondent.

Appellant argues that to award such future payments without proof of reasonableness is not rationally derived from the contract, is contrary to Civil Code section 2778, subdivisions (2) and (3),[4] and is contrary to the public policy expressed in rule 4-200(A) of the Rules of Professional Conduct.[5] Appellant contends that the award is also in contravention of the rule that future damages that are "'speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery. [Citations.]' [Citation.]" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989.)

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[4] Civil Code section 2778, subdivision (2), provides that "[u]pon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." Subdivision (3), provides that "[a]n indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion."

[5] Rule 4-200(A) of the Rules of Professional Conduct provides that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."

A. The arbitrator had the authority to award future payments

A contractual arbitration award "will be upheld so long as it was even arguably based on the contract." (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 381.)

Here, the award is based on the contractual provision requiring appellant to "indemnify, defend and hold [respondent] harmless . . . from any and all claims . . . that arise out of any performance or non-performance by [appellant's] employees or [appellant's] negligence, wrongful acts, or any breach . . . of the representations . . . set forth in this Agreement." The broad language of the provision, requiring indemnification and defense of "any and all claims," supports the arbitrator's finding of an ongoing duty to defend in a situation where the litigation is ongoing. Thus, it was within reason for the arbitrator to require appellant to pay respondent's reasonable attorneys' fees and costs incurred in the underlying action "as they are incurred, within thirty days of receipt." Because the award appears reasonably based on the contract, it was properly confirmed.

Appellant cites *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 809 (*Bonshire*) for the proposition that "'the courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers, whether for an unauthorized remedy or decision on an unsubmitted issue.' [Citation.]" *Bonshire* is distinguishable. In *Bonshire*, the contract at issue had an "unusual prohibition" against the use of extrinsic evidence of any "contemporaneous oral agreement." (*Id.* at p. 806.) In contravention of this contractual provision, the arbitrator considered evidence of an oral understanding between the parties. (*Id.* at p. 807.) The *Bonshire* court cited Supreme Court authority that "'[t]he award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the

reviewing court is compelled to infer the award was based on an extrinsic source. [Citations.]' [Citation.]" (*Id.* at p. 809, citing *Advanced Micro, supra*, 9 Cal.4th at p. 381.) The *Bonshire* court was compelled to conclude that the arbitrator must have relied on extrinsic evidence as the basis for the award, and thus determined that the award should have been vacated due to the arbitrator's actions in excess of his authority. (*Bonshire*, at pp. 810-812.)

Bonshire does not provide support for appellant's argument that the arbitrator in this matter acted in excess of his authority by ordering appellant to pay respondent's reasonable attorneys' fees and costs incurred in the underlying action "as they are incurred, within thirty days of receipt." As the *Bonshire* court noted, our review of an arbitration award is quite limited:

> "'Arbitrators are not obligated to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. [Citation.] The remedy awarded, however, must bear some rational relationship to the contract and the breach.'"

(*Bonshire, supra,* 52 Cal.App.4th at p. 809, citing *Advanced Micro, supra*, 9 Cal.4th at p. 381.)

The arbitrator's award in this matter bears a rational relationship to the contract and the breach. Thus, the arbitrator did not exceed his authority in issuing it, and the trial court correctly confirmed the award.

B. Reasonableness is required

Appellant insists that to award such future payments without requiring proof of reasonableness exceeds appellant's obligations under the agreement. However, the arbitrator made it clear that appellant is only required to pay reasonable attorney

fees and costs. The partial final award states: "[Appellant] shall pay [respondent's] *reasonable* attorneys' fees and costs incurred in the Underlying Action from February 1, 2015 and onward." (Italics added.) The arbitrator also retained jurisdiction "to ensure enforcement of . . . payment of [respondent's] *reasonable* attorneys' fees and costs." (Italics added.)

The trial court reiterated appellant's obligation to pay only reasonable attorney fees, ordering that "[appellant] shall pay any other of [respondent's] *reasonable* attorneys' fees and costs incurred in the [underlying] action." (Italics added.) The trial court also affirmed the arbitrator's retention of jurisdiction "to ensure . . . payment of [respondent's] *reasonable* attorneys' fees and costs." The language leaves no question that appellant is only required to pay reasonable attorney fees and costs.

C. The arbitrator was not required to specify a forum for determination of reasonableness

Appellant argues that the arbitrator's failure to require a forum for the review of reasonableness requires vacatur of the award. In support of this argument, appellant cites several cases, none of which convinces us of reversible error in this matter. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, did not involve an arbitration award. It involved an insurer's obligation to pay for independent counsel for its insured. The issue on appeal arose out of a cross-claim for reimbursement brought by the insurer against independent counsel seeking reimbursement of excess payments. The court held that the insurer's obligation to pay for independent counsel was not unlimited, and "did not ultimately extend beyond the duty to pay the reasonable costs of the defense." (*Id.* at p. 1001.) The court held that the insurer was entitled to seek reimbursement directly from the attorneys. The case does not

suggest that the arbitrator was required to specify a process for review of reasonableness in this matter.

In *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, the court concluded that an arbitrator exceeded his power by refusing to provide an award of attorneys' fees to a prevailing party when the parties' agreement expressly required this. Again, the case does not stand for the proposition that an arbitrator must specifically provide for a forum for review of reasonableness.

Asbestos Claims Facility v. Berry & Berry (1990) 219 Cal.App.3d 9 (*Asbestos Claims*), disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897, did not involve arbitration. It involved a fee dispute in complex litigation. The trial courts in two counties granted a law firm's motions to compel the defendants to pay certain past due bills immediately and all future bills within 30 days. (*Id.* at pp. 13-14.) The law firm's evidentiary showing in support of the past due bills were deficient, failing to "specify what services were performed, or provide any basis upon which the trial court could have concluded . . . that . . . fees were reasonable." (*Id.* at p. 25.) The matter was remanded for rehearing on whether the billings were within the scope of the order and whether the fees charged were reasonable. (*Ibid.*) The court further noted:

> "On rehearing, even if the trial courts again find in favor of respondent on both issues, they should not order the payment of all future bills within 30 days, as did their original orders. While respondent's bills should ordinarily be paid promptly, appellants must retain the right to a hearing should they question the services provided or the reasonableness of the fees. That portion of the orders concerning future bills appears to compel timely payment regardless of whether the services performed were authorized or whether the fees charged were reasonable. Respondent cites and we

have found no authority which would justify such an absolute order."

(*Asbestos Claims, supra*, 219 Cal.App.3d at p. 25.)

Unlike the order in *Asbestos Claims,* the arbitration award in this matter does not require timely payment of "all future bills within 30 days of receipt." (*Asbestos Claims, supra,* 219 Cal.App.3d at p. 16.) Instead, it requires payment of *reasonable* attorney fees within 30 days of receipt of such invoices.

Asbestos Claims does not suggest that a court has the authority to vacate an arbitration award simply because it does not provide a specific mechanism for determining the reasonableness of attorney fees. Absent an explicit clause in the agreement requiring such a provision in the award, our authority ends with our determination that the award is rationally based on the contract.[6]

D. The award does not violate the Rules of Professional Conduct or public policy

Finally, we note that the arbitrator's award does not violate the Rules of Professional Conduct or public policy.

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[6] Appellant's arguments that the award violates Civil Code section 2778, subdivision (2), (requiring that "the person indemnified is not entitled to recover without payment thereof"), and Civil Code section 2778, subdivision (3), (requiring that costs be incurred "in good faith, and in the exercise of a reasonable discretion"), are grounded on appellant's argument that the arbitrator failed to provide a forum for the determinations of reasonableness. Arguably the arbitrator effectively provided a forum for the parties to dispute the reasonableness of attorney fees by retaining jurisdiction, without any obligation to do so. As set forth above, appellant has failed to convince this court that the arbitrator was *required* to provide a forum for the resolution of issues of reasonableness, therefore these claims also fail.

Rules of Professional Conduct, rule 4-200 (A), prohibits a member of the Bar from collecting an illegal or unconscionable fee. The arbitrator's award does not allow such an improper fee nor does it mandate payment of such an improper fee. Instead, it requires payment of "reasonable" fees and costs.

Nor is the award "'speculative, remote, imaginary, contingent, or merely possible.'" (*Piscitelli v. Friedenberg, supra,* 87 Cal.App.4th at p. 989, quoting *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367-368.) The award requires payment of specified attorney fees and costs previously incurred by respondent. It further orders payment of future reasonable attorney fees and costs in litigation which the parties agree is ongoing. Having concluded that respondent is entitled to a defense in the underlying litigation, the arbitrator was justified in awarding the reasonable costs and fees incurred by respondent as the matter proceeds. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295 ["The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded"].)[7]

IV. The arbitrator's reservation of jurisdiction

Appellant raises two issues with respect to the arbitrator's decision to retain jurisdiction to "ensure enforcement of [appellant's] defense obligation, payment of [respondent's] reasonable attorneys' fees and costs, and to resolve any disputes regarding indemnity, if necessary. First, appellant argues that the arbitrator exceeded his authority by retaining jurisdiction to enforce the award. Second, appellant argues that the arbitrator exceeded his authority by retaining jurisdiction on an issue not

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[7] The arbitrator noted in its written ruling that respondent specifically requested an order that appellant "is obligated to pay [respondent's] reasonable attorneys' fees and costs as they are incurred going forward."

submitted to the arbitrator: indemnity. We address each contention separately below, and find that the arbitrator did not exceed his authority by retaining jurisdiction under the circumstances of this case.

A. Enforcement of the award

Appellant argues that no statute or arbitration rule permits an arbitrator to retain jurisdiction to enforce an award. While the CAA expressly recognizes an arbitrator's authority to enforce discovery orders, "[t]here is no counterpart to this provision giving the arbitrator the statutory power to enforce the award." (*Luster v. Collins* (1993)15 Cal.App.4th 1338, 1348.) Instead, sections 1285 and 1287.4 of the CAA allow a party to petition a court to confirm the award. Further, appellant argues, the agreement between the parties makes no mention of authorization of enforcement for arbitrators. Instead, the agreement explicitly reserves enforcement with the judiciary, stating:

> "If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County."

Thus, appellant argues, the arbitrator exceeded his powers by retaining jurisdiction as set forth in the arbitration award.

Appellant did not raise this issue in the trial court. Nevertheless, appellant argues that he did not forfeit the issue because appellant argued generally that the arbitrator exceeded his powers. Appellant cites *Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 641, for the proposition that the doctrine of forfeiture does not apply where a party provides additional support for a theory that was argued below. In *Unilab,* the

appellant discussed two sections of the Restatement Third of Restitution in support of its theory on appeal. The opposing party noted that those Restatement provisions were not mentioned below. In discussing the provisions, the *Unilab* court noted that the doctrine of forfeiture does not apply where a party raises additional support for a theory argued below. (*Unilab*, at p. 641, fn. 7.)

Here, appellant is not merely mentioning additional authority for a theory raised below. Appellant never presented to the trial court its theory that the arbitrator exceeded his authority by retaining jurisdiction to enforce the award. We do not consider claims made for the first time on appeal. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 (*Lauron*).) "Appellate courts are loathe to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.]" (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) "'We will therefore "ignore arguments, authority, and facts not presented and litigated in the trial court." [Citation.] Such arguments raised for the first time on appeal are generally deemed forfeited. [Citation.]'" (*Lauron, supra*, at p. 972.)

Further, even if appellant had not forfeited this argument, we find that the language of the contract permits the arbitrator to retain jurisdiction to "ensure enforcement of [appellant's] defense obligation, payment of [respondent's] reasonable attorneys' fees and costs, and to resolve any disputes regarding indemnity, if necessary."

The contract between the parties provides that any "Dispute" between the parties shall be submitted to final and binding arbitration. "Dispute" is defined as "[a]ny and all controversies, claims or disputes arising out of or related to this

Agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate."

The underlying litigation in this matter was ongoing at the time that the arbitrator issued the partial final award. The arbitrator specifically held that appellant was required to defend respondent in the underlying action, and had a "continuing duty" to do so while the litigation is pending. The arbitrator reasonably concluded that his broad authority to resolve "[a]ny and all controversies, claims or disputes arising out of or related to" the agreement encompasses potential future disputes regarding appellant's duty to defend respondent. We must accord substantial deference to the arbitrator's assessment of his contractual authority. (*Advanced Micro, supra*, 9 Cal.4th at p. 373.) The arbitrator did not exceed his authority in retaining jurisdiction to decide such disputes.[8]

B. Indemnity

Appellant next argues that the arbitrator's reservation of jurisdiction regarding indemnity exceeded the scope of his powers because the issue of indemnity was not submitted to the arbitrator.[9] Appellant cites *Roos* for the proposition that an

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[8] Nor did the arbitrator violate JAMS rules 24(k) and 25, neither of which prohibits an arbitrator from retaining jurisdiction to enforce the parties' contractual rights.

[9] As both parties point out, indemnification is different from a duty to defend. A duty to defend is a duty "to assume the indemnitee's defense . . . against all claims 'embraced by the indemnity,'" upon request. (*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 557.) This duty is "distinct and separate" from the contractual obligation to pay an indemnitee's costs "after the fact, as part of any indemnity owed under the

arbitrator may not exert or retain jurisdiction over issues that the parties have not submitted. However, the *Roos* court correctly noted that "'courts should generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or his contractual authority.' [Citation.]" (*Roos, supra*, 87 Cal.App.4th at p. 542.) Further, the *Roos* court concluded that an arbitration panel did not exceed its authority in determining that an arbitration provision would extend to future disputes arising out of the arbitration award despite termination of the underlying contract. (*Id.* at p. 537.) The court concluded that "the challenged portions of the award are rationally drawn from the parties' agreement as interpreted in the arbitration proceeding. [Citation.]" (*Id.* at p. 544.)

Similar to *Roos,* the arbitrator's decision here to retain jurisdiction on "any dispute regarding indemnity, if necessary," was rationally drawn from the parties' agreement. The clause at issue in the arbitration required appellant to "indemnify, defend and hold [respondent] harmless" for certain claims and actions. Respondent's petition to confirm arbitration described the dispute between the parties as a dispute over the "contractual right to indemnity and a defense in connection with litigation." Thus, on the record before us, it appears that the issue of indemnity was submitted to the arbitrator.[10]

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agreement." (*Id.* at p 558.) "One can only indemnify against 'claims for damages' that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages." (*Id.* at p. 559.)

[10] As respondent points out, appellant has not provided a copy of the original demand for arbitration as part of the record, so we are unable to determine the actual questions put to the arbitrator in that document. However, the petition to confirm arbitration suggests that the issue of indemnification was submitted to the

The arbitrator held that, pursuant to the indemnification clause of the agreement, appellant was required to defend respondent in the underlying litigation in this matter. Appellant's duty to indemnify arises from the same sentence in the agreement that governs its duty to defend. Pursuant to that sentence, appellant's duty to indemnify, to defend, and to hold respondent harmless are interconnected.[11] However, because the litigation was ongoing at the time of the award, the arbitrator could not yet determine whether appellant would be required to indemnify respondent. Thus, the arbitrator rationally retained jurisdiction to decide any disputes that might arise in the future with respect to indemnity.[12]

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arbitrator. In addition, appellant admitted in its Response to Petition to Confirm Arbitration, "the parties in their respective demand and cross-claim sought an award determining the right of [respondent] to indemnity from [appellant]."

[11] Appellant admitted in its Response to Petition to Confirm Arbitration, "the issues of a defense and indemnity are inextricably interwoven in this matter such that, if [respondent] has no right to indemnity, it has no right to a defense."

[12] Appellant argues that the trial court erred in stating that "the only issues to be determined concerned the duty to defend." We interpret this statement as a practical assessment of the issues that the arbitrator was able to determine at the time of these proceedings. The court explained: a "duty to defend means to pay legal costs, while indemnify means to pay damages if liability is found." Because the litigation is ongoing and the issue of indemnification cannot be decided until after litigation is concluded, the trial court was correct in stating that only a duty to defend could be determined in the arbitration. The trial court did not state that the issue of indemnity had not been *submitted* to the arbitrator. The issue was submitted, by appellant's own

We reject appellant's suggestion that the arbitration award is not a final award under section 1283.4 because the arbitrator did not determine the issue of indemnity. Having determined that appellant has a duty to defend respondent in the litigation, the arbitrator necessarily determined that appellant also has a duty to indemnify respondent in this litigation, should the issue of indemnification arise. Pursuant to the contract, the duties are coextensive.

The cases cited by appellant are distinguishable. In *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, the Court of Appeal determined that a trial court order vacating an arbitrator's construction of an arbitration clause in its award was not an appealable judgment or order. The case does not support appellant's suggestion that the arbitration award at issue is not final under section 1283.4. *Elliott & Ten, supra*, 57 Cal.App.4th 495, involved the question of whether a sitting judge, who heard and decided a case as an arbitrator, had the authority to issue a supplemental decision. It also does not support appellant's argument here.

The arbitrator acted within reason in determining that he had the authority to retain jurisdiction on the issue of indemnity. The trial court did not err in determining that the arbitrator did not exceed his powers. Appellant has failed to convince us that reversible error occurred.

V. Alteration of the language of the award

Appellant's final argument is that the trial court impermissibly changed the award when entering judgment. The arbitration award required that appellant pay respondent's "reasonable attorneys' fees and costs incurred in the Underlying Action from February 1, 2015 and onward, as they are incurred,

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admission, and jurisdiction was retained for future determination, if necessary.

within thirty days of receipt by [appellant] of MSK's invoices." The court, however, ordered that appellant pay respondent's "reasonable attorneys' fees and costs incurred in the [underlying] action from February 1, 2015 and onward, as they are incurred, within 30 days of receipt by [appellant] of [respondent's] invoices." Thus, the words "MSK's invoices" were replaced with the words "[respondent's] invoices."[13]

Appellant argues that the award was clear: appellant was to pay MSK's invoices. Appellant argues that the alteration was error, because a court must enter judgment as the award was written. (*Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 89 ["[a]n arbitration award may only be enforced as written"].)

The issue raised here was not raised before the trial court. Appellant generally objected that the language of the judgment varied from the language of the arbitration award. However, the hearing transcript reveals that despite the court's repeated questioning as to the precise variance between the language of the two documents, appellant never revealed this particular discrepancy. In fact, appellant confirmed that there was only one variance -- a typographical error in the respondent's name.

The court first asked counsel, "What's the variance?" A few moments later, the court inquired again, "So what are the variances? How does -- how does the proposed judgment vary from the award?" Appellant's counsel responded, "The language. The one I have doesn't say what the award says." The court inquired again, "In what way?" Then noted, "It's not identical, but what's the difference?"

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[13] The trial court referred to respondent as "petitioner," since it was respondent that petitioned the trial court for confirmation of the arbitration award. We use the term "respondent" here for consistency.

Counsel for respondent stepped in and stated, "the only difference between the Amended Proposed Judgment and the Original Proposed Judgment was there was a typographical error in the respondent's name in the judgment, not on the caption."

Appellant's counsel pointed out no other specific discrepancies, but noted that "the trouble spots are paragraph 2 varies the language from what paragraph D says and paragraph E."

The court again tried to get further clarification, stating "Tell me what the differences are between 3 and E, aside from describing the -- using the term 'respondent' in the place of 'EHM' -- I mean, in place of Starline?" Counsel for appellant merely replied, "Well, . . . instead of that, why doesn't it just say what the award says?"

The court then asked, "Is that the only variance?" Appellant responded: "Yes. We believe the language needs to be the same as the order."

Appellant had ample opportunity to express to the trial court its present argument that the term "MSK" was substituted out and the term "petitioner" was substituted in. Errors in a trial court judgment must be specifically raised in the trial court. (*In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1027-1030 [wife's general assertion that judgment contained "clerical errors" that needed to be corrected insufficient where she "did not bring these supposed 'errors' to the court's attention when she had the opportunity to do so *before* the statement of decision was finalized"].)

A reviewing court will generally not consider a challenge to a judgment if an objection could have been but was not made in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) There is no question that appellant had ample opportunity to bring this issue to the trial court's attention. Our discretion to excuse such

forfeiture should be exercised rarely (*ibid.*), and we decline to exercise it here.

Further, the parties do not elaborate on the issue of whether MSK is still involved in the litigation. Because such factual questions are within the realm of the trial court, we have no way of ascertaining prejudice to either party from the alleged error. "An appellant has the burden to overcome the presumption of correctness and show prejudicial error." (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) By failing to raise the issue in the trial court, appellant has failed to establish any facts showing prejudice. Under the circumstances, we decline to find error.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHANEY