

No. 1-10-1753

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VIRGINIA SURETY COMPANY, INC.,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County
)	
v.)	No. 09 CH 45355
)	
CERTAIN UNDERWRITERS AT LLOYD’S, LONDON,)	
)	Honorable
Respondents-Appellants.)	Nancy J. Arnold,
)	Judge Presiding.
)	

JUSTICE MURPHY delivered the judgment of the court.
Neville and Steele, JJ., concurred in the judgement.

ORDER

HELD: Circuit court did not err by vacating a portion of the arbitration award where it was procured by fraud and it was not necessary to remand the matter to an arbitration panel to clarify any alleged ambiguities in the award. Circuit court did not abuse its discretion by denying respondents’ motion for leave to file a reply in support of their cross-motion to remand and the motion itself where the evidence attached to the reply was not newly discovered evidence and the final arbitration award was not ambiguous.

Respondents, Certain Underwriters at Lloyd’s, London, appeal from orders of the circuit court of Cook County regarding an arbitration award issued in connection with a dispute between

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them and petitioner, Virginia Surety Company, Inc. Respondents contend that the court erred by vacating a portion of the arbitration award, failing to remand the matter to an arbitration panel, and denying their motion to file a reply memorandum and exhibit in support of their motion to remand. For the reasons that follow, we affirm.

BACKGROUND

In December 2007, petitioner demanded arbitration against respondents, alleging they had refused to pay amounts owed on motor vehicle extended warranty contractual liability reinsurance agreements for the periods of April 1, 1996, to May 31, 1997 (“1996 Treaty”), and January 1, 1998, to December 31, 1998 (“1998 Treaty”), in which they had agreed to reinsure petitioner’s risk on certain automobile extended warranty contracts. The arbitration panel (“Panel”) was comprised of two party-appointed arbitrators and an umpire chosen by “drawing lots.” Prior to the arbitration hearing, the umpire noted that the arbitration clauses in the agreements at issue did not require a reasoned award, and the parties then agreed that they would prefer the issuance of such an award if the panel would be willing to provide one.

An arbitration hearing was conducted from June 8 to 12, 2009. On the final day of the hearing, the parties entered into a written settlement agreement that resolved all issues regarding the 1996 Treaty. In doing so, the parties agreed that “[e]ach party will bear its own costs and attorneys’ fees arising out of disputed issues related to the 1996 [T]reaty in this arbitration or otherwise.” That day, counsel for respondents informed the Panel that “the parties have settled the 1996 Treaty issues fully. For the purposes of this arbitration, those claims are mutually dismissed at this point from the proceeding, so at this point, the case is 1998 only.”

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On July 1, 2009, the Panel issued an interim award, in which it unanimously determined that respondents relied on a material misrepresentation made by petitioner in underwriting the 1998 Treaty and were entitled to rescission of that treaty. The Panel ordered that respondents were “(a) relieved of any obligation for the payment of claims ceded under the [1998 Treaty]; and (b) directed to return to Petitioner the gross premium remitted with respect to the [1998 Treaty] in the principal amount of \$2,051,473.29,” plus interest. The majority of the Panel also issued an adverse award of costs and expenses against petitioner based on the course and manner of its dealings and directed respondents to submit “detailed billing and expense statements related to this matter” for *in camera* review.

On July 30, 2009, respondents submitted their detailed billing and expense statements to the Panel for *in camera* review and provided petitioner’s counsel with the cover letter that had accompanied those documents. In the cover letter, respondents asserted that the confidentiality of the contents of the *in camera* submission was protected by the attorney-client privilege and the work-product doctrine. On August 27, 2009, the Panel issued a final award, in which a majority determined that an adverse costs award of \$2 million was reasonable and appropriate. The Panel then ordered respondents to pay petitioner the difference between the gross premium with respect to the 1998 Treaty, plus interest, and the adverse costs award within ten days. On September 4, 2009, respondents paid petitioner \$759,237.05 pursuant to the Panel’s final award.

On November 13, 2009, petitioner filed a petition to vacate the arbitration award in part with the circuit court of Cook County, in which it asked the court to vacate the \$2 million adverse costs and expenses award issued by the Panel. Petitioner alleged that the Panel exceeded

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its powers as defined in the arbitration agreement because the adverse costs award was not permitted by law, appeared to be a punitive award, and appeared to include costs related to the 1996 Treaty. Petitioner further alleged that the Panel exceeded its powers by failing to provide a reasoned award, as was requested by the parties. Petitioner also asserted that the court should vacate the award if it was determined that respondents had committed a fraud on the Panel by seeking recovery of fees related to the 1996 Treaty and alleged that the Panel violated its rights to fundamental fairness and due process by failing to conduct a fair hearing on the issue of attorney fees. On January 28, 2010, respondents filed a cross-petition for an order confirming the arbitration award, in which it asserted that the Panel acted within its powers and exercised its discretion in issuing the arbitral award.

On March 16, 2010, petitioner filed a motion for limited expedited discovery, in which it requested the court enter an order requiring respondents to answer an interrogatory asking “whether the detailed billing and expense statements that [respondents] submitted to the Panel on July 30, 2009[,] included any attorney[] fees or costs related to the 1996 Treaty” and to produce those statements. Following argument, the court ordered respondents to answer petitioner’s interrogatory, but denied its request to produce the statements. In their answer, respondents stated that the expense statements they submitted to the Panel reflected “the fees and expenses incurred over the course of this matter for all issues presented by the 1996 and 1998 treaties.”

On May 17, 2010, the circuit court entered a memorandum opinion and order, in which it granted the petition to vacate the arbitration award in part, vacating paragraph one of the final award, and denied the cross-petition to confirm the award. In doing so, the court determined that

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the award must be vacated because respondents had committed fraud by including expenses related to the 1996 Treaty issues in its submission to the Panel without advising it that they had done so and that the parties had agreed that each side would bear its own fees and costs related to those issues. The court also decided that the award must be vacated because the Panel exceeded its powers by awarding respondents fees and costs related to the 1996 Treaty and by failing to provide a reasoned award. In addition, the court found that the arbitration proceedings were fundamentally unfair, noting that “[t]he award of fees and costs was based exclusively on documents never admitted into evidence and without any ability of the Petitioner to argue as to the reasonableness of any billing or expense item.”

On June 10, 2010, petitioner filed a motion to enforce the court’s memorandum opinion and order. On June 16, 2010, respondents filed a cross-motion and supporting memorandum for remand to an arbitration panel “for a determination of the amount of expenses and costs, including legal fees, recoverable by [respondents] in connection with arbitration proceedings relating to the [] 1998 Treaty” and to deny the motion to enforce. Respondents asserted that remand was necessary because the circuit court’s memorandum opinion and order rendered the Panel’s final award ambiguous, incomplete, and unenforceable. Petitioner subsequently filed a reply in support of its motion for enforcement and in opposition to respondent’s cross-motion for remand.

On July 8, 2010, respondents filed a motion for leave to file a reply memorandum in support of its cross-motion for remand and attached a copy of the billing and expense statements they had previously submitted to the Panel thereto. On July 16, 2010, the court denied

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respondents' motion for leave to file a reply memorandum, and also denied petitioner's request to strike that document from the record, stating that it should be included in the record because respondents had the right to appeal the denial of their motion. On August 10, 2010, the court denied petitioner's motion to enforce, finding that no such order was necessary because the final award issued by the Panel was enforceable on its own terms, and also denied respondents' cross-motion for remand.

ANALYSIS

I. Final Award

Respondents first contend that the circuit court erred in vacating the portion of the final award regarding adverse costs. This case was brought to the circuit court pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2008), which provides that a circuit court may vacate an arbitral award where it was procured by corruption, fraud, or undue means (*Id.* at § 10(a)(1)), or where the arbitrators exceeded their powers (*Id.* at § 10(a)(4)). In reviewing a circuit court's decision to vacate a portion of an arbitration award, this court will accept findings of fact that are not clearly erroneous and resolve questions of law *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49 (1995). A circuit court's finding is clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

A. Fraud

A circuit court may vacate an arbitration award on the basis of fraud where there is clear

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and convincing evidence of fraud, the fraud materially relates to an issue involved in the arbitration, and due diligence would not have prompted the discovery of the fraud during or prior to the arbitration. *International Brotherhood of Teamsters, Local 519 v. United Parcel Service, Inc.*, 335 F.3d 497, 503 (6th Cir. 2003); *Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995).¹

1. Clear and convincing evidence of fraud

Respondents assert that the circuit court committed clear error by finding that there was clear and convincing evidence of fraud. A party commits fraud when it knowingly misrepresents the truth or conceals a material fact to induce another to act in a detrimental manner. *People v. Montoya*, 373 Ill. App. 3d 78, 82 (2007); Black's Law Dictionary 731 (9th ed. 2009). In order for a court to vacate an arbitral award on the basis of fraud, there must be some nexus between the alleged fraud and the basis for the panel's decision. *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990).

In its memorandum opinion and order granting petitioner's motion to vacate, the circuit court stated that there was clear and convincing evidence of fraudulent conduct by respondents where they admitted that they "did not disclose to the [P]anel that the parties had agreed to bear their own fees and costs as to the 1996 Treaty" and they "submitted *all* [their] fees and costs, including those related to the 1996 Treaty, under cover of the *in camera* order."

¹ Due to the scarcity of Illinois cases applicable to the issues raised in this appeal, we have cited multiple decisions from the lower federal courts in this order. In doing so, we recognize that such decisions are not binding on this court and can be held to be no more than persuasive. *People v. Miller*, 107 Ill. App. 3d 1078, 1086 (1982).

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Respondents maintain that they did not commit fraud by failing to disclose to the Panel that the parties had agreed to bear their own fees and costs as to the 1996 Treaty. The record shows that respondents informed the Panel during the arbitration hearing that the parties had entered into a settlement agreement that resolved all issues regarding the 1996 Treaty and that only the dispute as to the 1998 Treaty was before it. In addition, the Panel specified in its interim award that the dispute regarding the 1998 Treaty was “the remaining subject of the instant matter” and ordered respondents to submit detailed billing and expense statements related to “this matter.” The record thus shows that although respondents did not specifically disclose that the parties had agreed to bear their own fees and costs as to the 1996 Treaty, they did inform the Panel that *all* issues regarding that agreement had been resolved, and that the Panel based its interim and final awards on the correct presumption that it could only award costs and fees related to the dispute as to the 1998 Treaty. As such, to the extent the circuit court concluded that respondents committed fraud by failing to disclose that each party had agreed to bear their own fees and costs regarding the dispute as to the 1996 Treaty, we determine that finding is clearly erroneous.

Respondents next maintain that they did not commit fraud by submitting their fees and costs related to both the 1996 and 1998 treaties to the Panel because they were merely following the Panel’s directions as set forth in the interim award when they did so. However, the Panel noted in its interim order that the dispute regarding the 1998 Treaty was the only matter before it and that respondents were to submit detailed billing and expense statements related to that matter. Thus, it is clear from the text of the interim order that respondents were directed to only

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include their fees and costs related to 1998 Treaty in their submission to the Panel and that respondents did not follow that direction when they submitted their fees and costs related to both treaties.

Respondents also maintain that the circuit court did not make a finding as to whether they acted with an intent to deceive the Panel and that no evidence of such an intent exists. However, it is clear from the court's findings that respondents violated their duty of candor to the Panel and "took advantage" of the *in camera* nature of their submission of costs and fees that it determined respondents intended to deceive the Panel when they submitted costs and fees related to both treaties.

A party's intent to deceive may be proved by circumstantial evidence. *Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 815 (1994). In this case, respondents admitted during the hearing on the petition to vacate that they submitted costs and fees arising from the disputes as to both the 1996 and 1998 treaties despite knowing that the parties had agreed to bear their own costs and fees as to the 1996 Treaty and that their submission "was over-inclusive to the extent that it included some of these bills for figures [sic] issues in the [1996 Treaty]." We determine that the circuit court could have reasonably inferred that respondents acted with an intent to deceive the Panel from the evidence showing that they submitted costs and fees related to both treaties without informing the Panel that they did so, even though they knew that each party had agreed to bear their own costs and fees as to the 1996 Treaty and the Panel had directed them to submit their costs and fees as to the

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1998 Treaty. As such, we also determine that the court's finding that respondents acted with such an intent is not clearly erroneous.

Respondents further maintain that there is no evidence that the Panel was deceived by their allegedly fraudulent conduct and that the circuit court ignored evidence suggesting that the Panel did not intend to award costs and expenses related to the 1996 Treaty. In its memorandum opinion and order, the circuit court found that the Panel had "expressly based the dollar figure of its Final Award on Respondent's *in camera* submission." As stated above, the record shows that the Panel directed respondents to submit a statement of their costs and fees as to the 1998 Treaty and that respondents then submitted their costs and fees related to both treaties without informing the Panel that they did so. The Panel then specified in the final award that the adverse costs award was based on the statement of costs and fees submitted by respondents. The evidence thus shows that the Panel relied on the billing and expense statements submitted by respondents, which included costs and fees related to the 1996 Treaty, in calculating the adverse costs award, and we therefore determine that the circuit court's finding to that effect is not clearly erroneous.

Respondents claim, nonetheless, that the record shows that the Panel based the adverse costs award solely on costs and fees related to the 1998 Treaty where they informed the Panel at the arbitration hearing that all issues regarding the 1996 Treaty had been resolved and the Panel specified in its interim award that its rulings and orders were made in connection with the 1998 Treaty. However, this evidence merely shows that the Panel intended to base the adverse costs award on the costs and fees related to the 1998 Treaty when it directed respondents to submit

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billing and expense statements as to that treaty, and not that it actually did so after respondents had disobeyed that direction by including expenses related to both treaties.

Respondents also claim that the fact that the adverse costs award was about \$300,000 less than the total amount of fees and costs they submitted to the Panel supports their assertion that the Panel disregarded the costs related to the 1996 Treaty in issuing the final award. However, respondents did not present the court with the billing and expense statements they submitted to the Panel until after it had granted the petition to vacate the arbitration award.

2. Due diligence

Respondents further assert that petitioner would have discovered the alleged fraud sooner had it exercised due diligence and maintain that petitioner should not now be allowed to object to the Panel's methodology in issuing the adverse costs award because it never objected to the Panel's order that the billing and expense statements be submitted *in camera*. We initially note that the circuit court's conclusion that the arbitration award must be vacated on the ground of fraud is separate and distinct from its conclusion that it must also be vacated because the arbitration proceedings were fundamentally unfair due to the *in camera* nature of the challenged submission. Thus, the issue at hand is whether petitioner would have discovered the fraud during or prior to the arbitration had it exercised due diligence (*International Brotherhood of Teamsters*, 335 F.3d at 503), and not whether it has waived its objection to the procedures employed by the Panel.

The record shows that the Panel ordered respondents to submit their billing and expense statements for *in camera* review and that respondents asserted in the cover letter to that

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submission that the contents contained therein were protected by the attorney-client privilege and the work-product doctrine. We thus determine that the circuit court's finding that petitioner could not have discovered the alleged fraud sooner by exercising due diligence is not clearly erroneous where it did not have an opportunity to review the content of respondents' submission before the Panel issued the final award.

Respondents do not contest the circuit court's finding that their fraudulent conduct materially relates to an issue involved in the arbitration in this appeal, and we therefore conclude that the court did not err in determining that the adverse costs award had been procured by fraud.

B. Remand

Respondents next contend that the circuit court erred by vacating the adverse costs award and refusing to remand the matter to the Panel. We review the circuit court's decision not to remand the matter to an arbitration panel for an abuse of discretion. *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 862 (4th Cir. 2010); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756 (11th Cir. 1993). An abuse of discretion occurs where no reasonable person would agree with the position adopted by the court. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997).

Respondents assert that the circuit court should have remanded the matter to the Panel to clarify whether it included fees related to the 1996 Treaty in the adverse costs award. A circuit court may remand a case to an arbitration panel in limited circumstances, such as where the panel will provide clarification as to an ambiguous award. *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 333-34 (1991). In this case, the Panel specified in the final award

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that the adverse costs award was based on the billing and expense statements submitted by respondents, which included costs and fees related to the 1996 Treaty. As such, we determine that the adverse costs award was not ambiguous and the court did not abuse its discretion by failing to remand the matter to the Panel for clarification.

In addition, to the extent respondents assert that the final award has been rendered ambiguous or incomplete by the court's order vacating the adverse costs award, we disagree. A term or provision is ambiguous when it is susceptible to more than one reasonable interpretation. *Carey v. Richard Building Supply Co.*, 367 Ill. App. 3d 724, 727 (2006). In paragraph 1 of the final award, the Panel stated that it had determined that an adverse costs award was appropriate against petitioner in the amount of \$2 million. In paragraph 2, it directed respondents to pay petitioner the difference between the gross premium with respect to the 1998 Treaty, plus interest, and the adverse costs award. Since the adverse costs award has been vacated, it is clear that the difference between it and the gross premium with respect to the 1998 Treaty is the entire gross premium with respect to the 1998 Treaty. We therefore determine that by vacating the adverse costs award, the circuit court has not created an ambiguity in the final award requiring remand.

Respondents also assert that the court should have remanded the matter to the Panel to determine the appropriate amount of costs and fees to which they were entitled pursuant to the interim award. However, as noted earlier, the circuit court is authorized to vacate an arbitration award when it is procured by fraud. 9 U.S.C. § 10(a)(1) (2008). While the court may also remand the matter to an arbitration panel in certain circumstances, (*Id.* at §10(b); *Colonial Penn*

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Insurance Co., 943 F.2d at 333-34; *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1386 (11th Cr. 1988)), it is not required to do so (*Cat Charter L.L.C. v. Schurtenberger*, 691 F. Supp. 2d 1339, 1345 (S.D.Fla. 2010)).

In this case, respondents submitted billing and expense statements related to both the 1996 and 1998 treaties to the Panel despite being directed to only submit costs and fees related to the 1998 Treaty. The Panel then based the adverse costs award on the information contained in that “over-inclusive” submission. Had the circuit court remanded the matter to an arbitration panel to determine the costs and fees incurred by respondents related to the 1998 Treaty and then modified the adverse costs award to reflect that amount, respondents would have received an award in the same amount as if it had properly submitted the costs and fees related to the 1998 Treaty in the first place. By doing so, the court would essentially be providing an incentive for respondents and similarly situated parties to engage in fraud in the future because that party would benefit financially if the fraud went undetected and would not incur any losses if it was discovered. Thus, given the circumstances present in this case, we cannot conclude that the circuit court abused its discretion by vacating the adverse costs award and failing to remand the matter to an arbitration panel.

Having concluded that the circuit court did not err by determining that the adverse costs award was procured by fraud and vacating the award on that basis, we need not also consider whether the court erred in determining that the adverse costs award must be vacated on the additional grounds that the Panel exceeded its powers and the proceedings were fundamentally unfair.

II. Motion for Leave to File a Reply

Respondents further contend that the circuit court erred by denying their motion for leave to file a reply memorandum in support of their cross-motion for remand. The record shows that following the circuit court's order vacating the adverse costs award, petitioner filed a motion to enforce the court's order, respondents filed a cross-motion and supporting memorandum for remand to an arbitration panel, and petitioner filed a reply in support of its motion to enforce and in opposition to respondent's cross-motion for remand. When the parties appeared before the court on June 23, 2010, it informed respondents' counsel that "[u]sually when I get a motion for reconsideration, I am given the opportunity as to whether or not I'll take briefs, but you didn't give me that opportunity." Respondents' counsel asserted that their cross-motion was not a motion for reconsideration, the court disagreed, and counsel responded "[w]e're not asking you to revisit any of your rulings. We're simply asking you to consider what the appropriate action is now that the final order's partially vacated." The court then stated that it was not going to hear any argument and would issue a ruling on August 10, 2010.

On July 8, 2010, respondents filed a motion for leave to file a reply memorandum in support of their cross-motion for remand and attached the billing and expense statements they had submitted to the Panel to that document. On July 16, 2010, the court denied respondents' motion for leave to file a reply in open court, stating "I have more than enough briefs. All these briefs were filed without my setting any briefing schedule. I am inundated with briefs. I've already ruled on this case, I think rather substantively, so denied." On August 10, 2010, the court denied petitioner's motion to enforce, and also denied respondents' cross-motion for remand.

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We initially note that the circuit court did not err by characterizing respondents' cross-motion for remand as a motion to reconsider. In all cases tried without a jury, any party may file a motion for a rehearing or retrial, to modify or vacate the judgment, or for other relief within 30 days after the entry of the judgment. 735 ILCS 5/2-103(a) (West 2008). Although respondents titled their motion a "cross-motion for remand," a motion is defined by its substance, rather than its heading. *Shutkas Electric, Inc. v. Ford Motor Co.*, 366 Ill. App. 3d 76, 81 (2006). In their "cross-motion," respondents sought a modification of the court's judgment by which the court would remand the matter to an arbitration panel instead of simply vacating the adverse costs award. The motion, therefore, was aimed at the judgment and sought a form of relief listed in section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203(a) (West 2008)). As such, we determine that the court did not err in characterizing it as a motion for reconsideration. *Langone v. Schad, Diamond and Shedden, P.C.*, No. 1-09-2079, slip op. at 18-19 (Ill. App. Jan. 18, 2011).

Respondents assert that the court abused its discretion by denying their motion for leave to file a reply in support of their cross-motion for remand because they were entitled to respond to the arguments raised by petitioner in its reply in support of its motion for enforcement and in opposition to their cross-motion for remand and they demonstrated in their reply that the court was unable to resolve the ambiguity it created in the final award by vacating the adverse costs award. We will not disturb a circuit court's denial of a motion to reconsider absent an abuse of discretion. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 928-29 (2007).

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Respondents asserted in their reply in support of their cross-motion for remand that the circuit court's order vacating the adverse costs award rendered the final award ambiguous and incomplete. Respondents attached a copy of the billing and expense statements they submitted to the Panel to the reply in support of their assertion that the final award was ambiguous and subject to more than one reasonable interpretation.

“The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law.” *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 65 (2001). Evidence is newly discovered where it was not available prior to the entry of judgment. *Id.*

For the reasons stated above, we have determined that the circuit court did not create any ambiguity in the final award by vacating the adverse costs award. In addition, the billing and expense statements respondents attached to their reply do not constitute newly discovered evidence because they were available to respondents throughout the entire proceedings. The interests of finality and efficiency require that the circuit court not consider such late-tendered evidentiary material, no matter its contents (*River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 493 (2009)), and we thus conclude that the court did not abuse its discretion by denying respondents' motion for leave to file a reply in support of their cross-motion for remand and the cross-motion for remand itself.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.