[Cite as *Corrado v. Lowe*, 2015-Ohio-1993.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

DAVID A. CORRADO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2014-G-3239
- vs -	:	
STUART LOWE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 13 M 1123.

Judgment: Affirmed in part, reversed in part, and remanded.

David A. Corrado, pro se, Skylight Office Tower, 1660 West Second Street, Suite 410, Cleveland, OH 44113 and *Robert E. Somogyi,* Skylight Office Tower, 1660 West Second Street, Suite 660, Cleveland, OH 44113 (For Plaintiff-Appellant).

Joseph J. Triscaro, DeMarco & Triscaro, LTD., 30505 Bainbridge Road, Suite 110, Solon, OH 44139 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, David A. Corrado, appeals the October 23, 2014 Decision of the Geauga County Court of Common Pleas, confirming an arbitration award and denying other claims. The issues before this court are whether a claim for defamation may be raised as part of a motion to vacate an arbitration award; whether a transcript of an arbitration hearing is necessary to support a motion to vacate the award; whether a court of common pleas has jurisdiction to modify an arbitration award from

another county; and whether an arbitration award draws its essence from a contract when the award contradicts the terms of an underlying contingent fee agreement. For the following reasons, we affirm in part and reverse in part the decision of the court below and remand for further proceedings.

{¶2} On December 20, 2013, Corrado filed a Complaint to Vacate or Modify an Arbitration Award and a Motion to Vacate or, in the Alternative, Modify Arbitration Award in the Geauga County Court of Common Pleas.

{¶3} On February 18, 2014, Corrado filed an Amended Complaint. In Count One, Corrado, an attorney, alleged that he had entered into a Fee Agreement for Legal Services with defendant-appellee, Stuart Lowe. Following completion of the legal services, Corrado and Lowe negotiated a reduced legal fee, memorialized in a document entitled Disbursement of Settlement Proceeds, in the amount of $65,000. Thereafter, Lowe filed a petition with the Cleveland Metropolitan Bar Association regarding the legal fee. Corrado and Lowe agreed to arbitrate the dispute before a panel selected by the Bar Association. The arbitration panel issued a ruling that Corrado should return $18,265.27 to Lowe. Corrado contended that the award did not draw its essence from the Fee Agreement.

{¶4} In Count Two, Corrado alleged that there were material miscalculations in the arbitration panel's award.

{¶5} In Count Three, Corrado alleged Lowe defamed him and sought compensatory, consequential, and punitive damages.

{¶6} In Count Four, Corrado sought a restraining order and temporary and permanent injunctions to prevent Lowe from making defamatory statements about him.

{¶7} In Count Five, Corrado alleged that Lowe owed him compensatory and consequential damages based on a claim of promissory estoppel.

{¶8} On February 20, 2014, Lowe filed a Motion to Dismiss Plaintiff's Complaint (filed December 20, 2013).

{¶9} On February 26, 2014, Corrado filed his Opposition to the February 20, 2014 Motion to Dismiss.

{¶10} On March 3, 2014, Lowe filed an Answer and Counterclaim to Plaintiff's Amended Complaint (seeking confirmation of the award and judgment in the amount of $18,265.27), Partial Motion to Dismiss Plaintiff's Amended Complaint (Counts One and Two), and Partial Motion for Summary Judgment (Count Five).

{¶11} On March 13, 2014, Corrado filed his Opposition to the Motion to Dismiss the Amended Complaint.

{¶12} On April 1, 2014, Corrado filed his Opposition to the Partial Motion for Summary Judgment.

{¶13} On April 21, 2014, Corrado filed his Answer to the Counterclaim.

{¶14} On October 23, 2014, the trial court issued a Judgment, denying Corrado's Motion to Vacate or, in the Alternative, Modify Arbitration Award, and "[a]ll other motions and claims." The court further confirmed the arbitration award and entered judgment in the amount of $18,265.27 against Corrado.

{¶15} In a separately issued Decision, the trial court explained that "[a]pplications to vacate or modify an arbitration award are special statutory proceedings" in which "[g]eneral claims cannot be resolved." The court further explained that "Corrado failed to provide any record of [the] arbitration proceedings,"

such as a transcript or agreed statement of facts, and that, "[w]ithout such a record, the Court cannot vacate the arbitration award." Finally, the court stated that "[m]odification can be sought only in the county where the arbitration award is issued," in this case Cuyahoga County, and thus the "[c]ourt cannot modify the arbitration award."

{¶16} On November 19, 2014, Corrado filed a Notice of Appeal. On appeal, Corrado raises the following assignments of error:

{¶17} "[1.] The trial court clearly erred in dismissing the defamation claim that appellant David Corrado ('Corrado') plead[ed] in Count Three of the Amended Complaint."

{¶18} "[2.] The trial court erred by refusing to vacate the arbitration award because it is clear from documents in the record that the arbitrators exceeded their powers by making an award that did not draw its essence from the contingent fee contract between Corrado and appellee Stuart Lowe ('Lowe')."

{¶19} "[3.] The trial court erred in refusing to decide the merits of Corrado's request to vacate the arbitration award because there was no transcript of the arbitration hearing since documents in the record before the trial court such as the contingent fee agreement, the disbursement settlement sheet, and the arbitration award were sufficient to enable the trial court to determine that the award of the arbitrators did not draw its essence from the contingent fee contract between Corrado and Lowe."

{¶20} "[4.] The trial court erred in concluding that it did not have subject matter jurisdiction over Corrado's request to vacate the arbitration award."

{¶21} In the first assignment of error, Corrado contends that the trial court erred in dismissing his claim for defamation. Although not explicitly stated in the Decision, the

following appears to be the basis on which the court dismissed the defamation claim: "General claims cannot be resolved in a special proceeding to confirm, modify or vacate an arbitration award. *See*, R.C. Chapter 2711."

{¶22} We will review the trial court's dismissal of the defamation claim de novo – the standard typically applied for dismissals based on failure to state a claim for which relief may be granted. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. We note that Lowe did not include the defamation claim in his Partial Motion to Dismiss Plaintiff's Amended Complaint. However, "[a] court may dismiss a complaint sua sponte and without notice when the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." *State ex rel. Brooks v. O'Malley*, 117 Ohio St.3d 385, 2008-Ohio-1118, 884 N.E.2d 42, ¶ 5.

{¶23} The procedures for confirming, vacating, or modifying an award in an arbitration proceeding are contained in Ohio's Arbitration Act, R.C. Chapter 2711. The Act has been recognized as creating a special statutory proceeding, to which the Rules of Civil Procedure are generally inapplicable. *State ex rel. S.W. Communications, Inc. v. Bd. of Cty. Commrs.*, 11th Dist. Portage Nos. 95-P-0137 and 95-P-0138, 1996 Ohio App. LEXIS 4117, 7, fn. 4 (Sept. 20, 1996), quoting *Gerl Constr. Co. v. Medina Cty. Bd. of Commrs.*, 24 Ohio App.3d 59, 67, 493 N.E.2d 270 (8th Dist.1985) ("[t]he Ohio Arbitration Act, R.C. Chapter 2711, is a special statutory proceeding which contains specific provisions for the enforcement and/or vacation of awards in arbitration proceedings"); *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 22, 540 N.E.2d 266 (1989) ("[s]everal * * * chapters in R.C. Title 27 have been designated special proceedings or special statutory proceedings[,]" citing *Gerl Constr.*); Civ.R. 1(C)

(the Civil Rules, "to the extent that they would by their nature be clearly inapplicable, shall not apply to * * * special statutory proceedings").

{¶24} According to the Arbitration Act, applications to confirm, vacate, or modify an arbitration award "shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise expressly provided in such sections." R.C. 2711.05. With respect to such applications, "[t]he applicable civil rule provisions are those pertaining to motions, rather than those pertaining to commencement of an action." *MBNA Am. Bank, N.A. v. Anthony*, 5th Dist. Tuscarawas No. 05AP090059, 2006-Ohio-2032, ¶ 13; *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Hts. Local School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 11AP-173, 2011-Ohio-5063, ¶ 15.

{¶25} "After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code." R.C. 2711.13.

{¶26} "Any party to a proceeding for an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding shall, at the time the application is filed with the clerk of the court of common pleas, also file * * * with the clerk * * * (A) The agreement * * *; (B) The award; (C) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application." R.C. 2711.14.

{¶27} "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered

to the parties in interest, as prescribed by law for service of notice of a motion in an action." R.C. 2711.13.

{¶28} Thus, an action to confirm, modify, or vacate an arbitration award does not require the filing of a complaint, nor "that the clerk of courts issue summons and perfect service." *Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, ¶ 18; *Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 18 (8th Dist.) ("in general, proceedings to confirm or vacate an arbitration award involve neither pleadings nor insufficient claims in pleadings").

{¶29} In the present case, Corrado initiated the action by filing a Complaint and a Motion to Vacate or, in the Alternative, Modify Arbitration Award, both of which were duly served upon Lowe with summons by certified mail. While the procedure was irregular, the requirements of R.C. 2711.13 and Civil Rule 5 (governing the service of "other papers") were satisfied. The Motion to Vacate or Modify was properly before the court. *Mun. Constr.* at ¶ 20 ("there is authority that permits the challenge to an arbitration award by 'complaint'"). The question is whether the defamation claim was properly before the court.

{¶30} The original Complaint did not contain a claim for defamation, which cause of action was first raised in the Amended Complaint. Arguably, if Corrado had initiated this action by simply filing an application as provided for in R.C. 2711.13, he would not have been able to subsequently amend the application to include the defamation claim without complying with the procedures for commencing a civil action, set forth in Civil Rule 3. Since the rules for commencing a civil action were followed, we find no

justification for the dismissal of the defamation action merely because it was raised in a statutory proceeding to vacate or modify an arbitration award. We acknowledge some difficulty in having the Civil Rules apply unequally to the proceeding to vacate or modify and the defamation action, however, this court is aware of no authority that prohibits the prosecution of a statutory proceeding in conjunction with a regular civil action. As the defamation action was duly commenced in accordance with the Civil Rules, and in the absence of authority for its dismissal, the trial court erred by sua sponte dismissing the claim for defamation.

{¶31} The first assignment of error is with merit.

{¶32} In the second assignment of error, Corrado argues the trial court erred by not vacating the arbitration award on the grounds that it did not draw its essence from the contract between Corrado and Lowe.

{¶33} "[T]he court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if * * * [t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." R.C. 2711.10(D).

{¶34} "It is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Campbell v. Automatic Die & Prods. Co.*, 162 Ohio St. 321, 329, 123 N.E.2d 401 (1954).

{¶35} "Given the presumed validity of an arbitrator's award, a reviewing court's inquiry into whether the arbitrator exceeded his authority, within the meaning of R.C. 2711.10(D), is limited." *Bd. of Edn. of Findlay City School Dist. v. Findlay Edn. Assn.*,

49 Ohio St.3d 129, 551 N.E.2d 186 (1990), paragraph one of the syllabus. "Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end." *Id.* at paragraph two of the syllabus; *Queen City Lodge No. 69 v. Cincinnati*, 63 Ohio St.3d 403, 406, 588 N.E.2d 802 (1992), citing *United Steelworkers of Am. v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) ("[t]he arbitrator's award will not be vacated so long as the award 'draws its essence from the collective bargaining agreement'").

{¶36} "An arbitrator's award departs from the essence of a collective bargaining agreement when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement." *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Emps. Assn.*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991), syllabus.

{¶37} In the present case, the arbitration award stated: "After reviewing the testimony and other evidence submitted by the parties, the Panel found that the reasonable value of services rendered [by Corrado] was $46,743.73. Given the $65,000 fee paid, the Panel ruled that $18,265.27 shall be returned to Stuart Lowe."

{¶38} Corrado contends that "the arbitrators based their award on their determination of the 'reasonable value of [his] legal service,'" thus "totally ignor[ing] the fundamental fact that Corrado and Lowe entered into a contingent fee agreement." Appellant's brief at 7. "In so doing, the arbitrators completely disregarded the clear

terms of the * * * contingent fee contract, and created a new contract for legal fees between Corrado and Lowe." Appellant's brief at 7. We disagree.

{¶39} The principal Ohio Supreme Court cases defining the arbitrator's powers by the terms or essence of the underlying contract all dealt with collective bargaining agreements, a fact that has been, at least tacitly, recognized by some appellate courts. *Hugenberg v. Huntington Bancshares, Inc.*, 7th Dist. Columbiana No. 11 CO 31, 2012-Ohio-3344, ¶ 17; *BIGResearch, L.L.C. v. PENN, L.L.C.*, 10th Dist. Franklin Nos. 11AP-855 and 11AP856, 2012-Ohio-2992, ¶ 22. The fact that the underlying agreement between Corrado and Lowe was a contingent fee agreement, however, is material. Unlike a collective bargaining agreement, a contingent fee agreement is subject to the prohibition against clearly excessive fees contained in the Rules of Professional Conduct: "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee." Prof.Cond.R. 1.5(a); *also* 1.5(c) ("[a] fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law"); *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, 965 N.E.2d 268, ¶ 24 ("[t]he prohibition against clearly excessive fees is a reasonable restriction of the freedom of contract that permits attorneys to charge a fee for their services, while also preserving the integrity of the legal profession").

{¶40} Thus, the argument that the arbitrators departed from the essence of the contingent fee agreement by determining the reasonable value of the services rendered is not sufficient to vacate the award. It was within the arbitrators' powers to fashion an

award based on the reasonable value of the services rendered as the contingent fee agreement was subject to the Rules of Professional Conduct. *Queen City*, 63 Ohio St.3d at 407, 588 N.E.2d 802 ("[a]n arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement"). The award is not subject to review on this ground. *Trumbull Career and Technical Ctr. Bd. of Edn. v. Trumbull Career and Technical Ctr. Edn. Assn.*, 11th Dist. Trumbull No. 2012-T-0034, 2012-Ohio-5838, ¶ 30 ("[t]he substantive merits of the original arbitration award are not reviewable on appeal absent evidence of material mistake or extensive impropriety") (citation omitted).

{¶41} The second assignment of error is without merit.

{¶42} In the third assignment of error, Corrado argues the trial court erred by holding that, without a record of the arbitration proceedings, "the Court cannot vacate the arbitration award." Corrado cites to authority that, under the Arbitration Act, "a transcript of an arbitration hearing is not required in a proceeding to vacate an award." *Cincinnati v. Queen City Lodge No. 69*, 164 Ohio App.3d 408, 2005-Ohio-6225, 842 N.E.2d 588, ¶ 19 (1st Dist.).

{¶43} Strictly speaking, Corrado is correct that the statute does not require "a transcript of the arbitration hearing * * * in order for the common pleas court to vacate an award." *Buchholz v. W. Chester Dental Group*, 12th Dist. Butler No. CA2007-11-292, 2008-Ohio-5299, ¶ 35. "However, without the transcript of the proceedings before the arbitrator, it is increasingly difficult for the common pleas court to determine if the arbitrator's award should be vacated." *Id.* This court has stated that, "[i]n ruling on a motion to vacate an arbitration award, a common pleas court must base its decision on

the record of the arbitration proceeding, including a transcript of the arbitration hearing." *Samber v. Mullinax Ford E.*, 173 Ohio App.3d 585, 2007-Ohio-5778, 879 N.E.2d 814, ¶ 56 (11th Dist.). In the absence of such a transcript, "[a]n appellate court has nothing to pass on * * * and such court has no choice but to presume the validity of the lower court's proceedings." *Id.* at ¶ 55.

{¶44} Corrado asserts that a transcript was unnecessary in the present case in that the "[d]ocuments before the trial court show conclusively that the award by the arbitrators did not draw its essence from the [contingent fee] contract between Corrado and Lowe." Appellant's brief at 12.

{¶45} We find no error. For the reasons explained in the second assignment of error, the arbitrators' powers were not limited to merely enforcing the contingent fee agreement between the parties, but encompassed consideration of the reasonableness of the value of the services rendered. Without a transcript, the trial court was wholly unable to consider whether the arbitrators so imperfectly executed their powers that a mutual, final, and definite award upon the subject matter was not made.

{¶46} The third assignment of error is without merit.

{¶47} In the fourth and final assignment of error, Corrado argues the trial court erred in concluding that it did not have jurisdiction to vacate the arbitration award. Corrado qualifies this argument, however, by acknowledging that "[t]he trial court's judgment refusing to vacate the arbitration award indicates that the trial court might have found it did not have the subject matter jurisdiction necessary to set aside [the] arbitration award." Appellant's brief at 12. A fair reading of the trial court's Decision demonstrates that the court never denied its jurisdiction to vacate the award.

{¶48} The trial court did properly conclude it lacked the ability to modify the arbitration award as "Mr. Corrado failed to file his motion to modify in the proper court."

{¶49} A trial court's authority to vacate or modify an arbitration award is set forth in R.C. 2711.10 and 2711.11 respectively. *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173, 480 N.E.2d 456 (1985) ("[t]he jurisdiction of the courts to review arbitration awards is thus statutorily restricted"); *Lake Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professional Assn. for the Teaching of the Mentally Retarded*, 71 Ohio St.3d 15, 17-18, 641 N.E.2d 180 (1994) ("R.C. Chapter 2711 describes the circumstances under which the common pleas court may vacate (R.C. 2711.10) or modify (R.C. 2711.11) an arbitration award").

{¶50} The trial court may modify an arbitration award "in the county wherein an award was made." R.C. 2711.11. No such restriction appears in R.C. 2711.10, governing the vacation of an award. *Compare* R.C. 2711.16 ("[j]urisdiction of judicial proceedings provided for by sections 2711.01 to 2711.14, inclusive, of the Revised Code, is generally in the courts of common pleas, and actions and proceedings brought under such sections shall be brought either in the court of common pleas of the county designated by the parties to the arbitration agreement * * *, or * * * in the court of common pleas of any county in which a party in interest resides or may be summoned").

{¶51} In the present case, the trial court only asserted, consistent with R.C. 2711.11, its inability to ***modify*** the award which was issued in Cuyahoga County. The court's Decision never disclaimed its ability to vacate or confirm the award.

{¶52} The fourth assignment of error is without merit.

{¶53} For the foregoing reasons, the Decision of the Geauga County Court of Common Pleas is reversed with respect to the dismissal of Corrado's claim for defamation, and affirmed in all other respects. The case is remanded for further proceedings consistent with this opinion. Costs to be divided between the parties equally.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.