[Cite as *Cleveland v. Laborers Internatl. Union Local 1099*, 2009-Ohio-6313.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92983

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

LABORERS INTERNATIONAL UNION LOCAL 1099

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-660660

BEFORE: Dyke, P.J., Celebrezze, J., and Jones, J.

RELEASED: December 3, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert J. Triozzi, Esq.
Director of Law
Theodora M. Monegan, Esq.
Chief Assistant Law Director
Steven Moody, Esq.
Assistant Director of Law
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Basil William Mangano, Esq.
Joseph Guarino, III, Esq.
Mangano Law Offices Co., L.P.A.
2245 Warrensville Center Road, Suite 213
Cleveland, Ohio 44118

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Plaintiff, the city of Cleveland, appeals from the trial court's order that denied its motion to vacate an arbitration award sustaining the grievance filed by Laborers International Union Local 1099 ("Local 1099" or "the union"). For the reasons set forth below, we affirm.

{¶ 2} Local 1099 is an entity whose workers maintain public parks and malls, and other public areas. On May 23, 2006, Local 1099 filed a grievance against the city, asserting that the city had violated the parties' collective bargaining agreement and prior settlement agreements by having a private contractor perform work traditionally performed by the union in areas designated by the city as a "Special Improvement District" pursuant to R.C. Chapter 1710. According to the union, the city is required to meet with the union and consider alternatives suggested by the union prior to subcontracting or privatizing services. In opposition, the city maintained that it had no contractual or agency relationship with the entity, the Downtown Cleveland Alliance and/or Block-By-Block ("DCA"), the work is not funded by the city as DCA is a non-profit organization, the work is conducted in private areas and/or areas in which the union does not traditionally work and is in addition to, and not in lieu of, work performed by the union.

{¶ 3} The arbitrator determined that the city did have a relationship with the private contractor based on the designation of the Special Improvement District, that services included work traditionally performed by the union, and that the city did not give the union an opportunity to submit an alternative proposal.

The arbitrator also awarded the union "reasonable and demonstrable back pay and overtime" pay. The decision was issued on February 29, 2008.

{¶ 4} On May 28, 2008, the city filed a motion to vacate the arbitrator's award. The city did not include a proof of service on this motion, but rather, instructed the clerk of courts to serve the union with the document. The union received the motion, via certified mail, on June 5, 2008.

{¶ 5} On June 6, 2008, the union filed an application to confirm the arbitrator's award. Also on this date, the union filed a motion to strike the city's motion to vacate, arguing that the city did not serve a copy of the motion as required pursuant to R.C. 2711.13 and that it did not receive the city's motion until June 5, 2008. In opposition, the city asserted that the motion was timely served and that service was complete on May 28, 2008, when the clerk of courts indicated on the court's docket that the city's motion was mailed to the union via certified mail.

{¶ 6} On February 12, 2009, the trial court issued an order denying the city's motion to vacate the arbitration award and also issued an order granting the union's motion to confirm the award.

{¶ 7} The city now appeals and assigns four errors for our review.

{¶ 8} In its first assignment of error, the city asserts that the trial court erred in denying the motion to vacate the arbitration award, claiming the arbitrator acted in manifest disregard of the law and violated the collective bargaining agreement. In its second assignment of error, the city asserts that the trial court

erred in denying the motion to vacate because the arbitrator exceeded his powers by passing upon issues of law. For its third assignment of error, the city maintains that the trial court erred in denying the motion to vacate because the arbitrator improperly determined that the city had a subcontract with DCA.

{¶ 9} Local 1099 insists that these interrelated assignments of error are without merit because the city did not follow the procedures set forth in R.C. 2711.13, thereby depriving the trial court of jurisdiction to vacate the award.

{¶ 10} R.C. 2711.09 governs orders confirming arbitration awards and states:

{¶ 11} "At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code."

{¶ 12} R.C. 2711.13 states:

{¶ 13} "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.

{¶ 14} **"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. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award." (Emphasis added.)

{¶ 15} In *Galion v. Am. Fedn. of State, Cty. & Mun. Emp., Ohio Council 8, AFL-CIO, Local 2243,* 71 Ohio St.3d 620, 622, 1995-Ohio-197, 646 N.E.2d 813, paragraph one of the syllabus, the Ohio Supreme Court held that "R.C. 2711.13 provides a three-month period within which a party must file a motion to vacate, modify, or correct an arbitration award under R.C. 2711.10 or 2711.11." The Court stated, "[I]n our view, the language of R.C. 2711.13 is clear, unmistakable and, above all mandatory." Id. If the application is not filed within that period, the trial court lacks jurisdiction to vacate, modify, or correct the award. Id.

{¶ 16} With regard to the start of the three-month period, the court in *Girard v. AFSCME Ohio Council 8, Local Union 3356,* Trumbull App. No. 2003-T-0098, 2004-Ohio-7230, held that the "three day rule" set forth in Civ.R. 6(E), which traditionally grants parties three additional days in order to account for the time during which an order is in the mail,[1] is inapplicable to motions filed pursuant to

[1]Here, the record indicates that the arbitration award was delivered via electronic mail on February 29, 2009.

R.C. 2711.13. Accord *Citibank South Dakota, N.A. v. Wood,* 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576.

{¶ 17} As to the requirement that the motion be "served" in this time period, it is clear that the motion must also be served within the three-month period. *Cuyahoga Falls v. Fraternal Order of Police, Ohio Labor Council, Inc.,* Summit App. No. 23870, 2007-Ohio-7060. The court explained:

{¶ 18} "An application to vacate or modify an arbitration award must be served 'as prescribed by law for service of notice *of a motion* in an action.'" R.C. 2711.13. Consequently, an application filed under R.C. 2711.13 does not require that the clerk of courts issue summons and perfect service. Instead, service must be perfected by service on the attorneys for the respective parties prior to filing the application, as explained by Civ.R. 5(D):

{¶ 19} "'All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service * * *. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11.'

{¶ 20} "See, e.g., *CitiBank S. Dakota, N.A. v. Wood,* 169 Ohio App.3d 269, 2006-Ohio-5755, at ¶8-9; *CACV of Colorado, L.L.C. v. Kogler,* 2d Dist. No. 021329, 2006-Ohio-5124, at ¶8-9 (both applying the requirements of Civ.R. 5 to applications filed under R.C. 2711.13). The emphasis of the service requirement

of R.C. 2711.13, when read in pari materia with Civ.R. 5, is notice to the party who prevailed at arbitration.

{¶ 21} "Neither the FOP nor Officer Quior **received** service --- and, therefore, notice --- until more than two weeks after the City filed its application and several days beyond expiration of the three-month requirement of R.C. 2711.13. Because the City did not serve its application in accordance with R.C. 2711.13, the trial court lacked jurisdiction to vacate or modify the arbitration award. The City's assignment of error is overruled, and the judgment of the trial court is affirmed." (Emphasis added.)

{¶ 22} We find *Cuyahoga Falls v. Fraternal Order of Police, Ohio Labor Council, Inc.,* supra, to be analogous to this matter. Herein, the city did not did not serve the motion to vacate as "prescribed for the service of a motion," i.e., pursuant to Civ.R. 5. The city did not include a proof of service, and the motion was not filed within three days of service. As explained by the court in *Cuyahoga Falls*:

{¶ 23} "The City filed its application on December 15, 2006, and the City argues that by filing the application in the trial court with instructions for service, the City timely served the application as of that date. In the alternative, the City maintains that service was timely made on December 27, 2007, when the docket reflects that summons issued. At a most basic level, however, neither the FOP nor Officer Quior had notice of the application as of December 27, 2007 ---the

latest possible three-month mark in this case, and a date twelve days after the application was filed."

{¶ 24} See, also, *Teamsters Loc. Union 293 v. Mannesmann Demag Corp*. (Nov. 21, 1985), Cuyahoga App. No. 49914. In that case, the employee received the disputed arbitration decision on November 26, 1983, the union filed its suit on February 27, 1984, and the employer received notice of the filing by service on March 6, 1984. This court rejected the argument that Civ.R. 3(A), which permits service within one year, could be applied despite the untimely receipt of notice of service. This court stated:

{¶ 25} "Civil Rule 3(A) does not extend the time for service beyond those seven days. The Civil Rules do not apply where they are 'clearly inapplicable * * * to procedure (1) upon appeal to review any judgment, order or ruling * * * [or] (7) in all other special statutory proceedings.' Civ.R. 1(C). Further, the Civil Rules cannot supercede substantive statutes, such as statutes of limitations. Cf. *State v. Waller* (1976), 47 Ohio St.2d 52, paragraph one of the syllabus (criminal rule increasing the state's right of appeal beyond statutory right invalidly affects substantive matters)."

{¶ 26} The city insists that, pursuant to Civ.R. 5, service must be deemed complete upon mailing, and the clerk's office indicated on May 28, 2009, or within the statutory time, that the motion would be mailed via certified mail. The city did not invoke this rule, however, as it did not include a proof of service and did not serve the union under the terms of this rule. Significantly, the city disregards

other language of this rule that indicates "[p]apers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed." Moreover, the court in *Cuyahoga Falls v. Fraternal Order of Police, Ohio Labor Council, Inc.,* supra, specifically rejected this claim. Further, we conclude that following the principles outlined in *Girard v. AFSCME Ohio Council 8, Local Union 3356,* supra, *Citibank South Dakota, N.A. v. Wood,* supra; and *Mannesmann Demag Corp*., supra, the Civil Rules cannot be applied to extend the statutory and jurisdictional limitations set forth in R.C. 2711.13, which specifically states that notice of the motion to vacate must be "served upon the adverse party or his attorney within three months[.]" In this regard, the statute may be contrasted with R.C. 4123.512, for example, which states that the filing of the notice is the only act required to perfect an appeal to the court of common pleas. Finally, to quote the *Cuyahoga Falls* court, "[a]t most basic level, however, neither the [union] nor [the officer] had notice of the application as of * * * the latest possible three-month mark in this case."

{¶ 27} In accordance with the foregoing, the trial court was without jurisdiction over the city's motion to vacate, and the first, second, and third assignments of error are therefore without merit.

{¶ 28} In its fourth assignment of error, the city complains that the trial court did not provide it with findings of fact and conclusions of law.

{¶ 29} This court in *FIA Card Services, N.A. v. Wey,* Cuyahoga App. No. 90072, 2008-Ohio-2353, rejected this argument and stated:

{¶ 30} “First, Civ.R. 52 specifically applies when questions of fact are tried by the court without a jury. Civ.R. 52 does not apply in cases of binding arbitration. *Bradley v. Tellom Leasing* (Aug. 26, 1996), Stark App. No.1995CA00321.

{¶ 31} “* * *

{¶ 32} “As the trial court's role in a proceeding involving an application to confirm an arbitration award is limited to granting an application for an order and entering judgment thereon, unless the award is vacated, modified, or corrected, a trial court is not required to file findings of fact and conclusions of law.”

{¶ 33} This assignment of error is therefore without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR