[Cite as *Brookdale Senior Living v. Johnson-Wylie*, 2011-Ohio-1243.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95129

BROOKDALE SENIOR LIVING

PLAINTIFF-APPELLEE

vs.

JOHNNIE MAE JOHNSON-WYLIE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-696780

BEFORE: S. Gallagher, J., Kilbane, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 17, 2011

ATTORNEY FOR APPELLANTS

Janet E. Burney
P.O. Box 605416
Cleveland, OH 44105

ATTORNEYS FOR APPELLEE

Robert H. Stoffers
250 Civic Center Drive
Suite 400
Columbus, OH 43215

John T. McLandrich
Thomas F. Naughton
Frank H. Scialdone
Mazanec, Raskin, Ryder & Keller Co., LPA
100 Franklin's Row
34305 Solon Road
Solon, OH 44139

SEAN C. GALLAGHER, J.:

{¶ 1} Defendants-appellants, Johnnie Mae Johnson-Wylie and Janet Burney, appeal the judgment of the Cuyahoga County Court of Common Pleas that confirmed an arbitration award and entered judgment pursuant to R.C. Chapter 2711. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} Johnson-Wylie lived in plaintiff-appellee Brookdale Senior Living's ("Brookdale") senior living facility. In December 2005, Burney, as Johnson-Wylie's power of attorney, signed the assisted living residency agreement with Brookdale.[1] A serious dispute arose between Brookdale and appellants around January 2007. At that same time, Johnson-Wylie stopped making monthly service payments to Brookdale.

{¶ 3} On July 3, 2008, Brookdale initiated the arbitration process pursuant to the residency agreement by sending notice to Burney's 4437 Archer Road, Cleveland, Ohio, address. The arbitration occurred on January 19, 2009, after neither Burney nor Johnson-Wylie appeared at any of the arbitration proceedings. The arbitrator held the hearing ex parte and issued an award on January 29, 2009, in Brookdale's favor in the principal amount of $87,309. This amount was to increase by $3,693 each month beginning February 1, 2009, and continuing until Johnson-Wylie vacated the premises. The award also included statutory interest on the principal, the costs of the arbitration, and attorney fees in the amount of $750.

---

[1] Although Brookdale references the residency agreement attached as Exhibit "A" to the complaint, no such agreement is in the record. The agreement authorizing the arbitration proceedings, the arbitration award, and all notices from the arbitration proceedings are required to be included along with Brookdale's application for confirmation. R.C. 2711.14. The record from the trial court does not contain any attachments to the complaint despite references being made to exhibits in the complaint. Appellants have not raised this issue on appeal, and a review of the residency agreement is not necessary for the disposition of the current appeal.

{¶ 4} On June 25, 2009, Brookdale filed its application to confirm the arbitration award in the trial court. Appellants filed an answer in response, in part alleging that they never received notice of the arbitration proceedings or award. The trial court held a hearing on the notice issue and thereafter confirmed the arbitration award. It is from that judgment of the trial court that appellants timely appeal.

{¶ 5} Appellants raise three assignments of error for our review. The first two assignments of error will be addressed together: "The trial court erred in confirming the arbitration award where Brookdale failed to give notice to Johnson [and Burney] of the arbitration hearing and arbitration decision." Appellants' first two assignments of error are not well taken.

{¶ 6} Judicial review of an arbitrator's decision is limited. A trial court may not evaluate the merits of an award. It reviews to determine whether the appealing party has established that the award is defective within the confines of R.C. Chapter 2711. Our review of the trial court's decision confirming arbitration is conducted under an abuse of discretion standard. *Miller v. Mgt. Recruiters Internatl., Inc.*, 180 Ohio App.3d 645, 651, 2009-Ohio-236, 906 N.E.2d 1162, _ 21. "Abuse of discretion connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." (Citations and

quotations omitted.) *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 342, 1998-Ohio-387, 695 N.E.2d 1140.

{¶ 7} R.C. Chapter 2711 provides a special statutory procedure authorizing a limited and narrow judicial review of the award. *Lake Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professional Assn. for the Teaching of the Mentally Retarded* (1994), 71 Ohio St.3d 15, 641 N.E.2d 180. It also sets forth specific statutory procedures to vacate, modify, correct, or confirm an arbitration award. Id. R.C. 2711.09 provides as follows: "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 [(motion to vacate)] and 2711.11 [(motion to modify)] of the Revised Code."

{¶ 8} Brookdale timely filed its application to confirm an arbitration award. The language of R.C. 2711.09 is mandatory; the court shall grant and enter judgment unless the defendant files a motion to modify or vacate the arbitration award and cause to modify or vacate is shown. R.C. 2711.09; *Warren Edn. Assn. v. Warren City Bd. of Edn.* (1985), 18 Ohio St.3d 170, 480 N.E.2d 456, syllabus. Appellants never filed a motion to vacate the award under R.C. 2711.13, which requires that notice of a motion to vacate be served

on the adverse party within three months of the arbitration award being delivered to the parties. Instead of filing a motion attacking the award, appellants filed an answer in response to Brookdale's application to confirm.

{¶ 9} The question then becomes whether orally raising the appellants' lack of notice of the arbitration proceedings will satisfy R.C. 2711.13. This court has previously held that "a counterclaim for damages in response to an application to confirm an arbitration award is not authorized by statute * * *." *Asset Acceptance LLC v. Stancik*, Cuyahoga App. No. 84491, 2004-Ohio-6912, at _ 15. In *Acceptance,* the defendant filed an answer and counterclaim in response to the plaintiff's application to confirm an arbitration award, in part raising issues that the arbitration award was fraudulently procured and the arbitrator engaged in misconduct — issues that would have been appropriate challenges to vacate or modify the award under R.C. Chapter 2711 if properly asserted. The *Acceptance* court held that a counterclaim for damages in response to an application to confirm an arbitration award is not authorized by statute and a defendant's only recourse in challenging the arbitration award was to timely file a motion to vacate under R.C. 2711.10. Id. at _ 15-16.

{¶ 10} R.C. Chapter 2711 creates a special proceeding to confirm arbitration awards and does not authorize an answer in response to the application. Id. Appellants never filed a motion to vacate or modify the

arbitration award in the manner provided by law. Raising the issues orally to the trial court was insufficient. See id. Appellants should have filed a motion to vacate or modify the arbitration award in order to challenge the arbitration award, and their first two assignments of error must be overruled on those grounds alone.

{¶ 11} Despite this procedural deficiency, the trial court addressed the merits of the claim and allowed both parties to litigate the notice issue. In effect, the trial court treated the affirmative defense raised in the answer as a motion to vacate the arbitration award.[2] In the trial court's final judgment entry dated April 16, 2010, the court found that the "arbitration award should be confirmed. There is a presumption of proper service when there is compliance with the applicable procedural rules." The trial court further stated that appellee complied with "commercial arbitration rule 39 by sending several notices to [appellants'] last known and current address." The commercial arbitration rules provide that all notices may be served on "a party by mail addressed to the party, or its representative at the last known address."

---

[2] There is some support for the trial court's actions in at least one other Ohio district. See *NCO Portfolio Mgt. v. Williams*, Montgomery App. No. 21306, 2006-Ohio-5396, ¶ 48 (holding that defendant's responses made to the trial court at a hearing constituted the functional equivalent of a motion to vacate).

{¶ 12} It was undisputed during the trial court proceedings that Burney represented Johnson-Wylie in other matters and, having the power of attorney for Johnson-Wylie, signed the residency agreement with appellee. Appellee therefore complied with the arbitration rules by sending notices to Burney directly. Appellee's prior attorney, Timothy Obringer, testified that he sent Burney the request for arbitration to her Archer Road address in July 2008. Burney admits receiving correspondence from Obringer in September 2008 on other matters at her Archer Road address. Obringer also testified to receiving a letter from the arbitrator addressed to both Burney at her Archer Road address and himself. Having heard evidence and weighing the credibility of the witnesses, the trial court determined that the notice of the arbitration proceedings was sufficient. Even if the trial court treated appellants' affirmative defense as a motion to vacate, we cannot say that the trial court abused its discretion in denying such motion. Appellants' first two assignment of errors are overruled.

{¶ 13} Appellants' third assignment of error is as follows: "The trial court erred in confirming the arbitration award since it failed to conduct a hearing on the application to confirm, as required by Revised Code Section 2711.09." Appellants' third assignment of error is not well taken for the following reason.

{¶ 14} Appellants argue that R.C. 2711.09 requires the trial court to hold a hearing on a plaintiff's application to confirm the arbitration award. R.C. 2711.09 states in relevant part

that "[n]otice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof."

{¶ 15} This court previously rejected the notion that a hearing is required before confirming an arbitration award under R.C. 2711.09. "These hearings are governed by Civ.R. 7(B), which is grounded on the premise that the parties should be given adequate notice and an opportunity to be heard. The law of this district is clear that where, as here, a party is provided ample opportunity to be heard through the pleadings process and pretrial conferences, a hearing is not required by R.C. 2711.09." *Strnad v. Orthohelix Surgical Designs, Inc.,* Cuyahoga App. No. 94396, 2010-Ohio-6161, _ 38.

{¶ 16} Appellants participated in the trial court proceedings by filing an answer, attending pretrial conferences and a hearing, and filing briefs in support of their position. The failure to file a motion to vacate or modify the arbitration award limited the trial court's scope of review. In fact, according to R.C. 2711.09, the trial court had to enter judgment upon the arbitration award. For these reasons the trial court did not abuse its discretion in forgoing a second hearing specifically on Brookdale's application to confirm the arbitration award. Appellants' third assignment of error is overruled.

{¶ 17} The judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR