

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LIZABETH BINNS

C. A. No. 24522

Appellant

v.

STERLING JEWELERS, INC.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 06 08 5439

Appellee

DECISION AND JOURNAL ENTRY

Dated: July 8, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Lizabeth Binns sued Sterling Jewelers Inc. for wrongful termination, but the trial court stayed the case pending arbitration. After the arbitrator dismissed Ms. Binns’s claim as untimely, Ms. Binns moved the court to vacate or modify the arbitrator’s decision. The court denied her motion. Ms. Binns has attempted to appeal from the trial court’s order denying her motion to vacate or modify, but this Court dismisses the attempted appeal because the court’s order is not a final, appealable order.

FACTS

{¶2} Ms. Binns worked for Sterling from 1981 to 2005. In 1998, Sterling adopted an alternative dispute resolution program that required any claims by employees involving discrimination, harassment, retaliation, or breach of contract to be resolved by arbitration. After Sterling terminated Ms. Binns, she filed a complaint against it in common pleas court, alleging

wrongful termination, age discrimination, breach of implied contract, promissory estoppel, and intentional infliction of emotional distress. The trial court stayed the action pending arbitration under the alternative dispute resolution program.

{¶3} The arbitrator dismissed Ms. Binns’s claim because it determined that she had not filed it in time. Three months later, Ms. Binns moved the trial court to vacate or modify the arbitrator’s decision under Section 2711.13 of the Ohio Revised Code. The court denied her motion because it concluded that she had not established that the decision should be vacated under the criteria listed in Section 2711.10 of the Ohio Revised Code or modified under the criteria listed in Section 2711.11 of the Ohio Revised Code. Ms. Binns has attempted to appeal from the order denying her motion to vacate or modify the arbitrator’s decision.

ARBITRATION

{¶4} Section 2711.01(A) of the Ohio Revised Code provides that “any agreement in writing between two or more persons to submit to arbitration any controversy . . . between them . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity . . .” If an action is brought that is “referable to arbitration,” the court may stay the action and direct the parties to arbitrate the matter under the agreement. R.C. 2711.02(B); 2711.03(A).

{¶5} If a party wants to contest the arbitrator’s decision, Section 2711.13 provides that it may move the trial court “for an order vacating, modifying, or correcting the [arbitrator’s] award” The court is required to vacate the arbitrator’s decision if the party establishes one of the circumstances listed in Section 2711.10. R.C. 2711.10. The court is required to modify or correct the arbitrator’s decision if the party establishes one of the circumstances identified in Section 2711.11. R.C. 2711.11.

{¶6} On the other hand, if “any party” wants the trial court to confirm the arbitrator’s decision, it “may apply to the court . . . for an order confirming the award” under Section 2711.09. After a party moves the court to confirm the arbitrator’s decision, “the court shall grant such an order and enter judgment” unless it vacates, modifies, or corrects the decision under Section 2711.10 or 2711.11. R.C. 2711.09.

{¶7} “Upon the granting of an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding, the court must enter judgment in conformity” with that order. R.C. 2711.12. “The judgment . . . shall be docketed as if rendered in an action[, and] . . . shall have in all respects the same effect as . . . a judgment in an action.” R.C. 2711.14. Section 2711.15 provides that a party may appeal “from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award.”

JURISDICTION

{¶8} The Ohio Constitution restricts an appellate court’s jurisdiction over trial court decisions to the review of final orders. Ohio Const. Art. IV, § 3(B)(2). Section 2505.02(B)(2) of the Ohio Revised Code provides the requirements under which “[a]n order is a final order” Reading Section 2505.02 in conjunction with Section 2711.15, the Ohio Supreme Court has concluded that “an order made pursuant to R.C. 2711.15 must satisfy the requirements of R.C. 2505.02 in order to be a final appealable order” *Stewart v. Midwestern Indem. Co.*, 45 Ohio St. 3d 124, 126 (1989).

{¶9} Section 2505.02 provides, in part, that “[a]n order is a final order . . . when it is . . . [a]n order that affects a substantial right made in a special proceeding” R.C. 2505.02(B)(2). It defines a “[s]pecial proceeding” as “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.”

R.C. 2505.02(A)(2). “[A]n order confirming an arbitration award is one rendered in a special proceeding as defined by [Section] 2505.02(A)(2).” *Buyer’s First Realty Inc. v. Cleveland Area Bd. of Realtors*, 139 Ohio App. 3d 772, 782 (2000). “Arbitration actions qualify as special proceedings because arbitration was not recognized at common law or equity, and was legislatively provided for in . . . Chapter 2711.” *Kelm v. Kelm*, 93 Ohio App. 3d 686, 691 (1994).

{¶10} Section 2505.02(A)(1) defines a “[s]ubstantial right” as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” The Ohio Supreme Court has determined that “an order qualifies as one that ‘affects a substantial right’ if it satisfies a two-pronged test.” *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210, 2008-Ohio-6197, at ¶6. First, in accordance with the definition of substantial right under Section 2505.02(A)(1), “the order must implicate ‘a right’ that ‘a statute [or other law] . . . entitles a person to enforce or protect.’” *Id.* (quoting R.C. 2505.02(A)(1)). Second, an order only “affects” a substantial right “when it is an order that ‘if not immediately appealable, would foreclose appropriate relief in the future.’” *Id.* at ¶7 (quoting *Southside Cmty. Dev. Corp. v. Levin*, 116 Ohio St. 3d 1209, 2007-Ohio-6665, at ¶7).

{¶11} The trial court’s order denying Ms. Binns’s motion to vacate or modify the arbitrator’s award is not a final order because it did not affect a substantial right of hers. Specifically, under the second prong of the Supreme Court’s test, the order is not one that, “if not immediately appealable, would foreclose appropriate relief in the future.” *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210, 2008-Ohio-6197, at ¶7 (quoting *Southside Cmty. Dev. Corp.*, 2007-Ohio-6665, at ¶7).

{¶12} Under Section 2711.12, the trial court is directed to enter judgment “[u]pon the granting of an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding.” The statute’s language is unusual. Ordinarily, a court would either grant a motion or enter an order, not grant an order. The meaning of the section, however, is clear. Section 2711.12 provides that, if a court enters an order that confirms, modifies, corrects, or vacates an arbitrator’s decision, it must also enter judgment in accordance with that order.

{¶13} The trial court in this case did not confirm, modify, correct, or vacate the arbitrator’s decision, it merely denied Ms. Binns’s motion to vacate or modify that decision. The denial of a motion to modify, vacate, or correct an arbitration award is not the equivalent of a confirmation of the award. See *Ayers v. R.A. Murphy Co.*, 163 Ohio App. 3d 497, 2005-Ohio-4993, at ¶7. Because the trial court did not confirm, modify, vacate, or correct the arbitrator’s decision, the trial court had no obligation to enter judgment under Section 2711.12.

{¶14} It may appear that Ms. Binns has no recourse because Section 2711.15 provides that she may only appeal “from an order confirming, modifying, correcting, or vacating an award . . . or from judgment entered upon an award,” and the trial court has refused to vacate or modify the arbitrator’s decision. That problem is illusory, however, because Section 2711.09 provides that “any party” may move to confirm an arbitrator’s award, including Ms. Binns. If she moves the court to confirm the arbitrator’s decision under Section 2711.09, it must do so and enter judgment accordingly. See *State ex rel. R.W. Sidley Inc. v. Crawford*, 100 Ohio St. 3d 113, 2003-Ohio-5101, at ¶22 (“A court has no discretion under R.C. 2711.09 and 2711.12 when the arbitration award is not vacated, modified, or corrected.”). While Section 2711.09 provides that a party may move to confirm an arbitrator’s award within one year, this Court has held that the

court may consider a motion filed outside the one-year period. *NCO Portfolio Mgmt. Inc. v. Lewis*, 9th Dist. No. 06CA009001, 2007-Ohio-3965, at ¶6.

{¶15} Although it may be counterintuitive for Ms. Binns to move to confirm a decision that she believes was incorrect, that is the procedure that the General Assembly has provided if the trial court has declined to modify, vacate, or correct an arbitrator's decision and no other party has moved to confirm it. After the court has entered judgment, Ms. Binns may file an appeal under Section 2711.15. She may raise the arguments she has made regarding the court's denial of her motion to vacate or modify at that time. See *Grover v. Bartsch*, 170 Ohio App. 3d 188, 2006-Ohio-6115, at ¶9 ("Interlocutory orders . . . are merged into the final judgment . . . [t]hus, an appeal from the final judgment includes all interlocutory orders merged with it.").

{¶16} Because Ms. Binns may move the trial court to confirm the arbitrator's decision, the order denying her motion to vacate or modify the arbitrator's order is not one that, "if not immediately appealable, would foreclose appropriate relief in the future." *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210, 2008-Ohio-6197, at ¶7 (quoting *Southside Cmty. Dev. Corp. v. Levin*, 116 Ohio St. 3d 1209, 2007-Ohio-6665, at ¶7). Accordingly, the order did not affect a substantial right of hers. Consequently, because the order denying Ms. Binns's motion to vacate or modify the arbitration award did not affect a substantial right, it is not a final order under Section 2505.02(B)(2) and this Court does not have jurisdiction to review it at this time. See *DR Transp. v. Shimell*, 8th Dist. No. 90952, 2008-Ohio-5133, at ¶14 ("Because the trial court did not reduce the arbitration award to judgment, all the claims have not been disposed of . . . [and] there is no final appealable order."); *Ayers v. R.A. Murphy Co.*, 163 Ohio App. 3d 497, 2005-Ohio-4993, at ¶9.

CONCLUSION

{¶17} The trial court’s order does not meet the requirements of a final order under Section 2505.02 and Article IV Section 3(B)(2) of the Ohio Constitution. Ms. Binns’s appeal is dismissed.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶18} I respectfully dissent. The majority argues the trial court order denying the motion to vacate or modify the arbitration award does not affect a substantial right of Ms. Binns. R.C. 2505.02(A)(1) defines a “[s]ubstantial right” as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2711.15 states that, “[a]n appeal may be taken from an order

confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award.” While I agree that the law requires R.C. 2505.02 and 2711.15 to be read in concert, I disagree with the majority’s interpretation and application of R.C. 2711.15. In paragraph sixteen, the majority cites two Eighth District decisions in support of its reasoning that the trial court’s denial of Ms. Binns’ motion to modify or vacate the arbitration is not equivalent to a confirmation of the award and, therefore, is not a final, appealable order. See *Ayers v. R.A. Murphy Co.*, 163 Ohio App.3d 497, 2005-Ohio-4993, at ¶7; *DR Transp. v. Shimell*, 8th Dist. No. 90952, 2008-Ohio-5133, at ¶15. I find this reasoning unpersuasive.

{¶19} Rather, I would follow the reasoning of the Seventh District. In *FIA Card Servs., N.A. v. Wood*, 7th Dist. No. 08-JE-13, 2009-Ohio-1513, at ¶45, the Seventh District held that a trial court’s decision to overrule the application of a party affected the substantial rights of the party and “*effectively* determined the action and prevented a judgment in its favor.” (Emphasis in original.) In reaching this conclusion, the Court noted that “R.C. 2711.15’s language is permissive, not mandatory.” *Id.* at ¶28. The Court further stated that, “just because the trial court’s order did not confirm, modify, correct, or vacate the arbitration award does not mean that the order may still not qualify as a final, appealable order.” *Id.* In this case, I would hold that the substantial rights of Ms. Binns were affected because the denial of the motion effectively terminated the opportunity to obtain future relief.

{¶20} Sterling Jewelers, as a defendant in a civil case, has no motivation to move the trial court to confirm the arbitration award because it merely dismisses Ms. Binns’ claims as untimely. Ms. Binns would not benefit from moving the trial court to confirm the arbitration award because the arbitration award dismissed her claims. Ms. Binns attempted to seek relief by filing a motion to vacate, or in the alternative, motion to modify the arbitration award with the

trial court. The trial court denied the motion. Therefore, Ms. Binns is trapped in a position where she cannot pursue her claims. I would hold that the denial of the motion affected her substantial rights.

{¶21} Ms. Binns' predicament is further complicated by the fact that R.C. 2711.09 requires a party to apply for confirmation within one year of the arbitration award being made. More than a year has passed since the arbitrator dismissed the case on March 20, 2008. I note, however, that this Court has held that "it is within the discretion of the trial court to permit a motion to confirm an arbitration award outside the one-year period if filed within a reasonable time, for good cause shown and if no prejudice occurs to the opposing party due to the late filing." *NCO Portfolio Mgt. Inc. v. Lewis*, 9th Dist. No. 06CA009001, 2007-Ohio-3965, at ¶6, citing *Russo v. Chittick* (1988), 48 Ohio App.3d 101, 104.

{¶22} For the aforementioned reasons, I would address the case on the merits.

APPEARANCES:

ERIC D. HALL, attorney at law, for appellant.

STEPHEN S. ZASHIN, and BRITT JASON ROSSITER, attorneys at law for appellee.