

IN THE COURT OF APPEALS OF IOWA

No. 1-101 / 10-1341
Filed April 27, 2011

BASIK FIVE TRUST and BRUCE POPKEN,
Plaintiffs-Appellants,

vs.

WEST PLAINS COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Howard County, Margaret Lingreen (order on motion to compel arbitration and stay proceedings) and Richard D. Stochl (orders confirming arbitration award), Judges.

Basik Five Trust and Bruce Popken (Basik Five) appeal from the district court's order confirming an arbitration award in favor of West Plains Company.

AFFIRMED.

Lawrence H. Crosby of Crosby & Associates, Saint Paul, Minnesota, and Mark B. Anderson of Mark B. Anderson, P.C., Cresco, for appellants.

Christopher S. Wendland and Emily C. Bartekoske of Clark, Butler, Walsh & Hamann, Waterloo, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Bruce Popken on behalf of Basik Five Trust entered into an agreement to sell seven railcars of organic corn to the West Plains Company. In accordance with this contract, on January 29, 2007, Basik Five loaded a railcar with corn, which it was to deliver to a company in New York on behalf of West Plains. Approximately 493 bushels of corn leaked out during transit through a hopper at the bottom of the railcar because of improper loading.

Because West Plains believed Basik Five was responsible for the corn lost during transit, it made payment for only the amount of corn that was delivered. Upon receiving this payment, Basik Five notified West Plains that it considered the inadequate payment to be a breach of contract and that it would not supply any other corn under the contract. West Plains purchased corn from another supplier at an additional cost to West Plains of \$11,610.08.

On May 14, 2007, Basik Five filed a petition at law for a declaratory judgment and at equity for unjust enrichment alleging the parties' contract was void and unenforceable because West Plains did not have a valid Iowa grain dealer's license at the time of contracting, as required by Iowa law.¹ Basik Five sought a money judgment against West Plains equal to the value of the organic corn loaded into the railcar.

On October 25, 2007, West Plains filed a motion to compel arbitration and stay proceedings. The parties' contract contained a clause stating, "The parties agree that the remedy for any resolution of disagreements or disputes arising

¹ West Plains conceded that it did not have a grain dealer's license.

from this contract shall be through arbitration proceedings before the National Grain and Feed Association (NGFA) under NGFA Arbitration Rules.” Basik Five filed a resistance to the motion to compel arbitration and a motion for judgment on the pleadings or alternatively, summary judgment. Basik Five again asserted West Plains’ failure to have a grain dealer license rendered the contract, including the arbitration provision, unenforceable. Basik Five also asked again that the court enter a money judgment in favor of Basik Five under a theory of unjust enrichment.

On December 10, 2007, the district court sustained West Plains’ motion to compel arbitration and stay proceedings. The court noted,

With the staying of proceedings, the Court takes no action to schedule for hearing Plaintiffs’ “Motion for Judgment on the Pleadings or Alternatively Summary Judgment” filed in this cause. Upon completion of arbitration, Plaintiff may renew its motion, if appropriate.

The matter was heard before three arbitrators, who awarded West Plains damages in the full amount of \$11,610.08, on the basis that risk of loss had not passed to West Plains under the contract and NGFA Trade Rules. The record suggests Basik Five received notice of the arbitration award on October 26, 2009. Basik Five did not dispute this before the district court.

On February 10, 2010, West Plains filed a motion to confirm arbitration award. On February 22, 2010, Basik Five filed a resistance to motion to confirm the arbitration award and motion to hold the award unenforceable, reasserting its earlier claims. On February 25, 2010, West Plains filed a reply to Basik Five’s resistance, asserting that under Iowa Code chapter 679A (2007), the district

court must confirm the arbitration award, given Basik Five's lack of application to modify or correct the award within statutory time limits.

On July 12, 2010, the district court filed an order confirming the arbitration award pursuant to Iowa Code section 679A.11. The district court found,

More than 90 days have passed since the date of the arbitration award entered and delivered to the parties. Plaintiffs failed to timely raise any grounds to modify or vacate the arbitration award and their right to do so now is barred by statute.

Basik Five appeals, arguing the district court erred in confirming the award and in failing to find the contract unenforceable.

On appeal, our review is for errors of law. *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 514 (Iowa 1992).

II. Confirmation of Arbitration Award

Basik Five argues the arbitration provision of a contract cannot be enforced where the underlying contract itself is void and unenforceable. Basik Five presented its claims regarding the validity and enforceability of the contract in its original petition at law for declaratory judgment and at equity for unjust enrichment. Basik Five again presented its arguments in its resistance to motion to arbitrate and at the hearing on the matter held pursuant to Iowa Code section 679A.2(2). The district court sustained West Plains' motion to compel arbitration.

Basik Five could not and did not appeal from the district court's order sustaining West Plains' motion to compel arbitration. See Iowa Code § 679A.17 (enumerating orders from which appeal may be taken). Rather, to contest the arbitration award, Basik Five was statutorily required to file an application to vacate, modify, or correct the award pursuant to Iowa Code sections 679A.12

and 679A.13. Absent an application to vacate, modify, or correct the award, the district court was required to confirm the award upon receipt of an application to confirm the award. See *id.* § 679A.11 (“[T]he district court shall confirm an award, unless within the time limits imposed under sections 679A.12 and 679A.13 grounds are urged for vacating, modifying, or correcting the award . . .”).

Basik Five did not file an application to vacate, modify, or correct the award within ninety days of delivery of a copy of the award, as required by Iowa law. See *id.* §§ 679A.12(3), .13(1). Accordingly, the district court was obligated to confirm the award pursuant to Iowa Code section 679A.11. See *\$99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691, 694 (Iowa 1999) (“Iowa Code section 679A.11 clearly imposes a duty upon the district court to confirm an arbitration award upon application of a party unless a timely ground to vacate or correct the award has been filed.”). We disagree with Basik Five that the requirements to apply to vacate, modify, or correct an award are tantamount to a preclusion of judicial relief; rather, the requirements provide a path to judicial relief not taken by Basik Five.

Basik Five asserts the claims made in its untimely resistance to motion to confirm arbitration award were identical to claims timely raised in its original petition. It asserts that it never abandoned these claims, which remained at issue throughout the arbitration process, and therefore the district court retained jurisdiction to consider these claims upon completion of arbitration. We disagree. The district court’s order sustaining West Plains’ motion to compel arbitration specifically stated Basik Five would have to renew its motion, if appropriate, upon

completion of arbitration. Further, we conclude sections 679A.12 and 679A.13 contemplate that a party would file an application to vacate, modify, or correct an award *after* the arbitrators make the award. It is impossible to vacate, modify, or correct an award that does not yet exist.

Basik Five also raises arguments relating to adhesion contracts, lack of proof of service, use of publication rather than issuance date of arbitration award, and lack of mutuality of assent necessary for a binding arbitration clause. Because none of these issues were raised before the district court, we decline to address them on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“[I]ssues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”)

We conclude the district court properly and necessarily confirmed the arbitration award absent a timely application from Basik Five to vacate, modify, or correct the award.

AFFIRMED.