[Cite as *Strnad v. Orthohelix Surgical Designs, Inc.*, 2010-Ohio-6161.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94396

LEE STRNAD

PLAINTIFF-APPELLANT

vs.

ORTHOHELIX SURGICAL DESIGNS, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-637850

BEFORE: Kilbane, P.J., Cooney, J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 16, 2010

ATTORNEYS FOR APPELLANT

Jeffrey M. Embleton
John F. Burke, III
Mansour Gavin Gerlack & Manos
55 Public Square
Suite 2150
Cleveland, Ohio 44113-1994

ATTORNEYS FOR APPELLEE

Kathleen M. Portman
Jeffrey J. Wedel
Squire, Sanders & Dempsey
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Lee Strnad ("Strnad"), appeals the trial court's denial of his application to vacate or modify an arbitration award rendered in favor of appellee, OrthoHelix Surgical Designs, Inc. ("OrthoHelix"), and the sua sponte confirmation of that award although no application to confirm was pending. After a careful review of the facts and the law, we affirm.

Factual and Procedural History

{¶ 2} On March 5, 2005, Strnad entered into a four-year employment agreement with OrthoHelix to serve as its senior development manager. His

job duties were set forth in an exhibit attached to his employment agreement and included 18 specific responsibilities. As relevant to this appeal, his responsibilities included: managing records and testing protocols in preparation for FDA approval; managing and coordinating product development and engineers; supervising and conducting testing of OrthoHelix's implants and instruments; supervision of the regulatory consultant in developing quality control procedures; developing inspection drawings and specifications as well as other quality control documentation; and ensuring the supervision and maintenance of design history files, device master records, all development records, and all development work and documentation per the design control procedure.

{¶ 3} In this capacity, Strnad earned a base salary, a signing bonus, and could also receive performance-based bonuses and stock options. Part of Strnad's compensation came in the form of a $40,000 loan from OrthoHelix, to be repaid in four annual installments.

{¶ 4} During his tenure with OrthoHelix, Strnad worked on two products — the MaxLock Plate & Screwdriver Removal System ("MaxLock") and the DR Lock Volar Plate & Screw System ("DR Lock" or "DR Lock System"). The MaxLock System was launched on July 27, 2005. By November 1, 2005, OrthoHelix recalled the MaxLock system after the pilot tip of the MaxLock screwdriver repeatedly broke off during surgical procedures.

No one from OrthoHelix reported this problem to the FDA.

{¶ 5} From January 10 through January 31, 2006, the FDA conducted an onsite inspection of OrthoHelix, after which it issued a Form 483 to Strnad, reporting its inspection findings. In all, nine observations were reported, all of which were related to deficiencies in OrthoHelix's internal reporting of its testing and design procedures relative to the MaxLock System. None of these problems were reported to the FDA.

{¶ 6} On March 28, 2006, OrthoHelix released the DR Lock. From July 12, 2006 through August 12, 2006, OrthoHelix received three complaints from surgeons that the DR Lock screws were passing through the distal plate radius.

{¶ 7} On April 24, 2006, an article was published in Crain's Cleveland Business magazine ("Crain's magazine") reporting the Maxlock recall. The article stated that "OrthoHelix has been rebuked by the Food and Drug Administration for failing to notify the agency when the company issued a recall for a surgical device" and "[t]he FDA also cited five examples of the medical device maker's failures to follow good manufacturing processes, which it deemed serious violations of the law."

{¶ 8} On October 3, 2006, Strnad prepared a Healthy Hazard Evaluation form on behalf of Orthohelix for the DR Lock.

{¶ 9} From November 14 through November 17, and December 13 and

14, 2006, the FDA performed a second inspection at OrthoHelix. As a result of this inspection, the FDA issued a second Form 483 to OrthoHelix, this time to Richard Kovach ("Kovach"), President of OrthoHelix. The inspection noted four deficiencies in OrthoHelix's reporting, design, and lack of correction of the design for the DR Lock screws, despite its internal knowledge that the screws did not meet their established specification.

{¶ 10} On November 21, 2006, OrthoHelix issued a product recall for the DR Lock.

{¶ 11} On April 3, 2007, OrthoHelix terminated Strnad. Prior to his termination, the company experienced high turnover and internal upheaval in the wake of the FDA's issuance of class II and III[1] recalls for the MaxLock and the DR Lock System.

{¶ 12} Strnad's employment agreement provided that he could only be terminated for cause. The term "for cause" is found at Section 5(a) of Strnad's employment agreement and presents ten instances of conduct that allow employees to be fired for cause. Pertinent to this appeal is Section 5(a)(x), which states that an employee may be terminated for cause for "engagement in any act (including, but not limited to, unlawful discriminatory conduct) that results in substantial injury to the reputation of

[1]Devices manufactured by OrthoHelix are regulated by the FDA and are classified according to risk levels. Differing levels of risk require different levels of control. The higher the classification, the more stringent the control.

the Company or which, subjects the Company to public ridicule or embarrassment."

{¶ 13} On October 4, 2007, Strnad filed a complaint in the common pleas court, seeking to compel OrthoHelix to participate in arbitration as required by his employment agreement. Eventually the parties agreed to arbitration without further intervention of the common pleas court and mutually agreed upon the arbitrator. Strnad did not raise any breach of contract claims with the trial court, based upon the arbitration provisions in his employment agreement.

{¶ 14} On April 21, 22, and 23 and May 18, 2009, the parties arbitrated their dispute. Strnad contended he was not terminated for cause, since he was not responsible for reporting the issues with the MaxLock and DR Lock to the FDA. OrthoHelix contended that the problems all developed under Strnad's supervision, and the majority of the deficiencies the FDA discovered were Strnad's direct responsibilities.

{¶ 15} On July 21, 2009, the arbitrator issued her award in a 24-page memorandum finding in favor of OrthoHelix and against Strnad on the breach of contract claim he advanced at arbitration. Specifically, the arbitrator found that Strnad was directly responsible for the issues relating to the FDA recall, and that:

> **"The greater weight of the evidence established that Strnad's acts and omissions as senior development manager resulted in OrthoHelix's first two products being recalled and this caused substantial injury to the reputation of OrthoHelix and subjected the company to embarrassment. Therefore, OrthoHelix had cause to terminate Strnad under the Agreement." (Arbitrator's Memorandum at 20.)**

{¶ 16} The arbitrator further found that "[g]iven the overwhelming corroborative evidence of Strnad's responsibility for the FDA inspection and OrthoHelix's responses to the FDA's complaints, Strnad's testimony during the arbitration that he had no responsibility relative to the regulatory and quality issues is just not credible or reasonable." Id. at 21.

{¶ 17} The arbitrator also found in favor of OrthoHelix on its claim for money damages under a cognovit note for $22,560, which was the balance of a $40,000 loan it gave Strnad during his employment.

{¶ 18} On October 21, 2009, Strnad filed an application to modify and/or vacate the arbitration award.

{¶ 19} On November 18, 2009, the trial court denied Strnad's application and sua sponte confirmed the arbitration award in favor of OrthoHelix.

{¶ 20} On December 17, 2009, Strnad appealed, asserting two assignments of error.

{¶ 21} On July 19, 2010, after this court took jurisdiction to hear the appeal, OrthoHelix filed a petition for confirmation of arbitration award and entry of judgment thereon.

{¶ 22} Strnad's first assignment of error states:

> **"The trial court erred in denying appellant's application to modify and/or vacate the arbitration award."**

Standard of Review

{¶ 23} R.C. 2711.09 through 2711.14, inclusive, "* * * provide the only procedures for post-award attack or support of an arbitration decision. However, an appeal may be taken 'from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from a judgment entered upon an award.' But the review is confined to the order. The original arbitration proceedings are not reviewable." *Lockhart v. Am. Res. Ins. Co.* (1981), 2 Ohio App.3d 99, 101, 440 N.E.2d 1210. (Internal citations omitted.)

{¶ 24} "[V]acation, modification or correction of an arbitration award may only be made on the grounds listed in R.C. 2711.10 and 2711.11 * * *. The jurisdiction of the courts to review arbitration awards is thus statutorily restricted; it is narrow and it is limited." *Warren Edn. Assoc. v. Warren Bd. of Edn.* (1985), 18 Ohio St.3d. 170, 480 N.E.2d 456.

{¶ 25} With respect to the standard of review in appeals of arbitration

awards, the court recently noted that "[v]oluntary termination of legal disputes by binding arbitration is favored by the law. * * * For this reason, courts have very limited authority to review arbitration awards. * * * R.C. 2711.10 allows the court to review an arbitration award only for fraud, corruption, misconduct, or improprieties of the arbitrator." *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, 8th Dist. No. 92982, 2009-Ohio-6223. (Internal citations omitted.)

{¶ 26} Strnad argues that the arbitrator's decision was in violation of Ohio law since the evidence at arbitration showed that Strnad was terminated without cause, as that term is defined under his Employment Agreement with OrthoHelix. He argues that this decision departed from the essence of his contractual agreement. He further argues that the arbitrator exceeded her power under R.C. 2711.10(D) by incorrectly placing the burden of proof upon Strnad as opposed to OrthoHelix at arbitration in contravention of Ohio law. We find these arguments without merit.

Strnad's Employment Agreement

{¶ 27} Strnad's employment agreement expressly provides that "cause" means:

{¶ 28} "engagement in any act* * * that results in substantial injury to the reputation of the Company, or which subjects the Company to public ridicule."

The Arbitrator's Authority

{¶ 29} R.C. 2711.10 states in pertinent part: "In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if: * * * (D) The 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).

Analysis

{¶ 30} While Strnad argues that the trial court was required to correct or modify the arbitrator's decision, there is no dispute that the trial court may only modify or correct an arbitrator's decision for the reasons enumerated in the statutes cited above. See *Internatl. Bhd. of Elec. Workers.* None of those statutory factors from R.C. 2711.10(D) are present in this case. A review of the record, including the arbitrator's memorandum, shows that the award was not procured by corruption, fraud, or misconduct of any kind as cited in R.C. 2711.10. There was no miscalculation in the award, the arbitrator did not exceed her powers, nor was the award decided upon matters not submitted to the arbitrator or imperfect on a matter not affecting the merits of the controversy.

{¶ 31} To the contrary, the arbitrator's memorandum determined that OrthoHelix did not breach its contract in terminating Strnad under Section

5(a)(x) of his Employment Agreement. In support of this, the memorandum outlined a litany of evidence showing that Strnad did not ensure OrthoHelix's compliance with the FDA's quality system regulations as they relate to the DR Lock System and the MaxLock Plate Removal System, particularly at joint exhibit 12, which is an email from Strnad to an OrthoHelix employee where Strnad acknowledges that the screws in some of the plates of the devices do not fit correctly. The record shows that after the email, months passed without Strnad taking action. (Arbitrator's Memorandum at 22.)

{¶ 32} The record also shows that the company endured significant embarrassment after the FDA issued recalls for these products, including the article in Crain's magazine. The trial court did not err in denying Strnad's application to modify or vacate the arbitration award, but properly confirmed the award as required by statute. See R.C. 2711.09.

{¶ 33} Strnad's first assignment of error is overruled.

{¶ 34} Strnad's second assignment of error states:

> **"The trial court erred in issuing an order confirming the arbitration award when no party submitted a request to confirm the award."**

{¶ 35} At issue in this assignment of error is whether a trial court errs by sua sponte confirming an arbitration award, when no application to confirm is pending, after it denies a motion to modify or vacate. Strnad

argues that the trial court erred in sua sponte adopting the magistrate's decision and then confirming the arbitration award when no party had yet moved to confirm the award. He also argues that the trial court erred in failing to conduct a hearing before confirming the award. We disagree.

{¶ 36} As mentioned above, arbitration procedures are governed by R.C. 2711. R.C. 2711.09 provides for the confirmation of an arbitration award and states in pertinent part:

> **"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."**

{¶ 37} Ordinarily, "[w]hen a motion is made pursuant to R.C. 2711.09 to confirm an arbitration award, the court must grant the motion * * * unless a timely motion for modification or vacation has been made and cause to modify or vacate is shown." *Warren Edn. Assn.* R.C. 2711.15 allows an appeal to be taken only "from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding." Trial courts are not required to conduct hearings before confirming arbitration awards.

> **Whether a Hearing was Required Before Confirmation of the Arbitration Award.**

{¶ 38} This court has long 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. See *Cleveland Police Patrolmen's Assn. v. Cleveland* (July 28, 1994), 8th Dist. No. 65874. When we review the arguments Strnad makes in his application to vacate and/or modify, it becomes clear that any argument he could make in opposition to an application for confirmation are identical to those he makes in the motion already before the court. His due process rights were therefore not violated, as all the pertinent information the court needed for its ruling was contained in Strnad's application per Civ.R. 7(B). Strnad's arguments on this point are not well taken.

{¶ 39} In this case, the issues are not so much substantive as they are procedural: OrthoHelix's application to confirm the arbitration award was not filed until July 19, 2010 — approximately eight months after Strnad's appeal was filed. The trial court, however, confirmed the arbitration award on November 18, 2009, before the application was even filed.

Whether the Trial Court's Order Constitutes a Final, Appealable Order

{¶ 40} In the instant case, we must first decide whether the trial court's denial of Strnad's application to vacate would constitute a final, appealable order even if it had not sua sponte confirmed the arbitration award. We find that it is.

{¶ 41} Most recently, the Tenth District held in *Geiger v. Morgan Stanley DW, Inc.*, 10th Dist. No. 09 AP-608, 2010-Ohio-2850, that: "* * * [t]o require a party to obtain confirmation of an objectionable arbitration award

before appealing a denial of a motion to modify that award * * * does not serve the overarching goals of the arbitration act codified at R.C. Chapter 2711. * * * [A] trial court's denial of an R.C. 2711.11 motion to modify constitutes a final, appealable order even in the absence of a confirmation of an award rendered by the trial court under R.C. 2711.09."

{¶ 42} In so holding, the *Geiger* court clarified a split in authority in Ohio between *Binns v. Sterling Jewelers, Inc.*, 9th Dist. No. 24522, 2009-Ohio-3359 and *FIA Card Servs., N.A. v. Wood*, 7th Dist. No. 08-JE-13, 2009-Ohio-1513. *Binns* held that an order of the court of common pleas denying modification of an arbitration award is not a final, appealable order, reasoning that the trial court's order, although rendered in a special proceeding, did not foreclose appropriate relief in the future since the award could be confirmed and then appealed. Id. at ¶16. See, also, *Geiger* at ¶11. According to the *Geiger* court, "[*Wood*] considered the case of a party appealing from a denial of a confirmation order under R.C. 2711.09. Even though this form of order is not one of the enumerated outcomes that required the court of common pleas to enter judgment under R.C. 2711.12, or that permitted an appeal under R.C. 2711.15, the Seventh District reasoned that it affected a substantial right nonetheless and could form the basis for an appeal." Id. at ¶12. We agree with this holding.

{¶ 43} In following the holding of *Wood*, the *Geiger* court reasoned that:

> **"[R]equir[ing] a party to obtain confirmation of an objectionable arbitration award before appealing a denial of a motion to modify that award serves neither the interest of reaching the merits of the case nor that of judicial economy, * * * [and injects] * * * a vain and superfluous procedural step, one which, moreover, introduces awkward paradox into the judicial process." Id. at ¶13.**

{¶ 44} In the instant case, the trial court's further action in confirming the arbitration award erases any argument that the order being appealed from is not a final, appealable order under R.C. 2711.15. Indeed, the real issue is whether the trial court's sua sponte confirmation of the arbitration award with no application pending constitutes reversible error after it denied appellee's motion to vacate or modify.

Whether the Trial Court Erred in Sua Sponte Confirming the Arbitration Award

{¶ 45} R.C. 2711.12 contemplates that after confirming, modifying, correcting, or vacating an arbitration award, the court "must enter judgment in conformity therewith." There is no provision in any of the governing statutes for a trial court to sua sponte confirm an arbitration award when an application to confirm is not pending; it is therefore error for a court to do so. However, in this specific instance, the trial court's error was harmless. Though premature in the absence of a pending application to confirm, the trial court's order did not affect any of Strnad's substantial rights in any way since he was still able to appeal the case on its merits. Strnad has not

demonstrated that he was prejudiced by that error. All of Strnad's possible arguments were made in his application to vacate and/or modify. In light of the fact that the trial court had already denied Strnad's application and that denial was a final, appealable order, the trial court's confirmation of the arbitration award was therefore harmless error. Under Civ.R. 61, harmless errors are to be disregarded. There was no other action the trial court could take but to confirm the arbitration award.

{¶ 46} Strnad argues that he was not given the opportunity to be heard, since he could not oppose an application to confirm that was not pending. However, the trial court had already considered the substance of any argument against confirming the award in his application to vacate or modify.

{¶ 47} R.C. 2711.09 requires trial courts to confirm arbitration awards in the absence of the situations prescribed in R.C. 2711.10 and 2711.13. Strnad's application to modify or vacate addressed these exact statutory sections. After the trial court denied Strnad's application, the only reasonable recourse left to Strnad was to appeal on the merits, regardless of whether there was an application to confirm pending. See R.C. 2711.12. Strnad did so by filing the instant appeal. Any error by the trial court in confirming the arbitration award after denying the application to vacate or modify was harmless.

{¶ 48} Strnad's second assignment of error is overruled.

Judgment 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 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
JOSEPH J. VUKOVICH, J.,* CONCUR

*(SITTING BY ASSIGNMENT: JUDGE JOSEPH J. VUKOVICH OF THE SEVENTH DISTRICT.)