

[Cite as *Gonda & Assoc. v. Flynn*, 2010-Ohio-679.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93566

GONDA & ASSOCIATES

PLAINTIFF-APPELLANT

vs.

BONNIE FLYNN, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-684344

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED: February 25, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Diane M. Gonda
Gonda and Associates Co.
P.O. Box 595
Vermillion, Ohio 44089

ATTORNEY FOR APPELLEES

Alfred J. Fleming
400 City Center One
Youngstown, Ohio 44503

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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 court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Gonda & Associates (“the law firm”), appeals from a judgment of the trial court dismissing its complaint to modify an arbitration award. The trial court held that it lacked jurisdiction over the complaint because it was untimely filed under R.C. 2711.13. The law firm contends that the trial court erroneously calculated the statute of limitations from the time that the award was issued, as opposed to when the law firm received the award. We find that the trial court properly applied the date that the award had been delivered and affirm the decision of the trial court.

Procedural History and Facts

{¶ 2} The law firm represented defendants-appellees, Bonnie Flynn, Tia Hazinakis, Bonnie Lucic, and Christina Nichols (“the clients”), in an action against Trumbull County involving claims for sexual discrimination. Once the litigation was resolved, the law firm retained one-third of the settlement proceedings (i.e., \$143,491) despite never having executed a written contingency fee agreement with the clients. The clients subsequently filed complaints against the law firm with the Cleveland Metropolitan Bar Association’s Legal Fee Dispute Resolution Committee, which set the matter for arbitration. On November 7, 2008, a week following the arbitration, the committee mailed its written decision (by certified

and regular mail), finding that the clients were entitled to a refund in the total amount of \$29,281.80.

{¶ 3} On February 9, 2009, the law firm filed an application to modify the arbitration award (“the complaint”) in the Court of Common Pleas. Three days later, the law firm served a copy of the complaint upon the clients. On March 9, 2009, the clients filed an answer, asserting an affirmative defense that the court lacked jurisdiction because the application was not filed with the court or served on them within the statute of limitations. The clients also moved to dismiss the complaint on this basis. The trial court granted the clients’ motion, and from this decision the law firm appeals, raising a single assignment of error:

{¶ 4} “The trial court improperly began the statutory filing period on the date the arbitration award was issued rather than the date on which the arbitration award was delivered.”

Commencement of the Statute of Limitations

{¶ 5} In its sole assignment of error, the law firm argues that the trial court wrongly relied on the date that the arbitration award was *issued* as opposed to the date that it *received* the award. The law firm claims that there is no evidence in the record to support the trial court’s conclusion that the three- month statutory period for commencing the action had expired. We disagree.

{¶ 6} R.C. Chapter 2711 provides the exclusive statutory remedy that parties must use in appealing arbitration awards to the courts of common pleas.

Galion v. Am. Fedn. of State, Cty. & Mun. Emp., Ohio Council 8, AFL-CIO, Local 2243 (1995), 71 Ohio St.3d 620, 622, 646 N.E.2d 813, paragraph two of the syllabus. R.C. 2711.13 governs the statutory period for a party to file a motion in common pleas court for an order vacating, modifying, or correcting an arbitration award. The statute provides in relevant part:

{¶ 7} “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.

{¶ 8} “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.” *Id.*

{¶ 9} A party’s failure to comply with the three-month statutory period prescribed in R.C. 2711.13 deprives the common pleas court of jurisdiction to hear the appeal of the arbitration award. *Galion*, 71 Ohio St.3d at 622.

{¶ 10} Relying on this court’s decision in *Lockhart v. American Reserve Ins. Co.* (1981), 2 Ohio App.3d 99, 440 N.E.2d 1210, the law firm argues that the statute of limitations does not begin to run until the award is “delivered” to the parties in interest, which it maintains requires “literal receipt” of the award. Although we recognize that *Lockhart* stands for the proposition that constructive

delivery of an arbitration award is insufficient, we find that the law firm's reliance on *Lockhart* in this case is misplaced.

{¶ 11} The *Lockhart* case did not even address the issue of delivery of an arbitration award by mail for purposes of determining whether the statutory period has begun under R.C. 2711.13. Indeed, the facts of *Lockhart* are distinguishable from the instant case and address an entirely different "delivery" issue. In *Lockhart*, this court addressed a myriad of issues stemming from the arbitration panel's failure to deliver its written arbitration award and then later reconsidering its original order despite having no authority to do so. As a result of the "procedural aberrancy" in the case, this court ultimately ordered the trial court to instruct the parties to start the arbitration process anew. *Id.* at 102. Notably, as to the issue of delivery, and the court's recognition that "constructive delivery is held invalid in order to avoid bypassing the legitimate objectives served by literal delivery," the court specifically recognized that "[t]he effect of a failure of mail delivery is not in this case and is not decided." *Id.* The *Lockhart* case therefore does not interpret R.C. 2711.13 to require actual proof of receipt of the written arbitration award before the statutory period of limitations begins to run.

{¶ 12} Indeed, Ohio courts have consistently held that to decide when an arbitration decision has been *delivered* for purposes of R.C. 2711.13, the postmark date governs, not the date the decision was actually received. *CitiBank S. Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862

N.E.2d 576, ¶26, citing *Girard v. AFSCME Ohio Council 8, Local Union*, 11th Dist. No. 2003-T-0098, 2004-Ohio-7230; see, also, *MBNA Am. Bank, N.A. v. Everett*, 10th Dist. No. 04-AP-819, 2005-Ohio-988 (relying on a certification date on an arbitration award as the date the award was sent by first-class mail); *Fraternal Order of Police v. Perry Cty. Commrs.*, 6th Dist. No. 02-CA-14, 2003-Ohio-4038 (relying on the postmark date on an envelope to determine the delivery date of an award). Furthermore, courts do not use the “three-day rule” in Civ.R. 6(E), which would add time for mail delivery, because the time period specified in R.C. 2711.13 is considered jurisdictional. *Wood*, 2006-Ohio-5755, ¶26.

{¶ 13} Moreover, R.C. 2711.13 also specifies that the adverse party must be served with the motion to vacate within the three-month period, and failure to do so will likewise deprive the trial court of jurisdiction. *Cleveland v. Laborers Intl. Union Local 1099*, 8th Dist. No. 92983, 2009-Ohio-6313. As this court recently recognized, a party’s failure to serve an adverse party with notice of a motion to vacate within the three-month statutory period will deprive the trial court of jurisdiction even when the moving party timely filed the motion with the court and requested service by the clerk of courts. *Id.*

{¶ 14} Here, the record reveals that the written arbitration award was delivered by regular and certified mail on November 7, 2008 to all the parties of the arbitration. The record further reveals that the law firm did not file its motion to vacate the award until February 9, 2009 and did not serve the clients with

notice of its motion until February 12, 2009. The law firm failed to timely comply with (1) filing its application with the common pleas court within the three-month statutory time period, and (2) providing notice of the same to the opposing parties. Therefore, under R.C. 2711.13, the trial court lacked jurisdiction over its application to modify the arbitration award. Accordingly, the law firm's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR