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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-403

GERALD G. ELSNER and LINDA L. ELSNER APPELLANTS V. KALOS FINANCIAL SERVICES, INC. and CLEMENT FINANCIAL SERVICES APPELLEES	**Opinion Delivered** November 7, 2012 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CV 2012-91-4] HONORABLE JOHN R. SCOTT, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

The issue in this appeal is whether an unconfirmed arbitration award should be given preclusive effect. In this case, the Benton County Circuit Court gave preclusive effect to a prior arbitration award in favor of appellants Gerald and Linda Elsner and dismissed their complaint seeking damages from appellees Kalos Financial Services, Inc. (Kalos), and Clement Financial Services (CFS). This appeal challenges that decision. We affirm.

In November 2007, the Elsners began an investment relationship with Kalos and CFS. After those investments declined, the Elsners filed a claim in November 2010 with the Financial Industry Regulatory Authority, Inc. (FINRA), seeking to arbitrate the dispute. Named as respondents in the arbitration proceeding were CFS, Roger Clement, Proequities, Inc., and Jeffrey Reeves.[1] The Elsners asserted causes of action for unsuitability,

[1]Roger Clement is president of CFS.

misrepresentation, and negligence relating to the respondents' alleged failure to disclose the nature and extent of the risks involved in the Elsners' investments. CFS did not voluntarily appear in the arbitration proceeding, and the arbitrators made a finding that CFS was not a member or associated person of FINRA that was required to arbitrate the dispute. As a result, the arbitrators did not determine the Elsners' claims against CFS. The arbitrators issued a decision dated November 25, 2011, awarding the Elsners $62,899.24 in compensatory damages, along with filing and hearing fees.

On January 19, 2012, the Elsners sued "Kalos Financial Group, Inc., d/b/a Clement Financial Services," claiming they had been damaged in the sum of $144,000 by bad investment advice given by Kalos. The complaint asserted that the investments were unsuitable for the Elsners and constituted negligence and a breach of contract by Kalos. The complaint referenced the prior arbitration proceeding and further alleged that the "defendant" chose not to be included in the proceeding. The complaint sought compensatory and punitive damages.

On February 21, 2012, Kalos filed a motion to dismiss. It claimed, in the alternative, that the complaint should be dismissed because Arkansas does not recognize a claim for unsuitability and that the claims for fraud and negligence were barred by the statute of limitations. Kalos also argued that the Elsners' claims were barred under the doctrines of res judicata and claim preclusion because of the award from the arbitration proceeding.

The Elsners then filed an amended complaint that named Kalos and CFS as separate defendants. The substantive allegations were the same. Kalos and CFS again moved to dismiss the amended complaint for the reasons stated in the prior motion. The Elsners responded to the motion, arguing that CFS did not voluntarily submit to the arbitration and that Kalos was

not even discussed in the arbitration proceeding.

After a hearing, the circuit court ruled from the bench and granted the motion to dismiss the Elsners' complaint. The court reasoned that an arbitration award did not have to be confirmed in order to be valid and final. The court cited the supreme court's decision in *Ruth R. Remmel Revocable Trust v. Regions Financial Corporation*[2] for the proposition that res judicata applies to valid and final arbitration awards to the same extent as a court's judgment. The court's written order was entered on April 6, 2012, and dismissed the Elsners' complaint "without prejudice."[3] On April 25, 2012, the Elsners filed their notice of appeal.

In their single point for reversal, the Elsners argue that the circuit court erred when it dismissed their complaint based on a conclusion that an unconfirmed arbitration award against other persons and entities was res judicata of the issues raised in the complaint. Their argument is that, without confirmation of the arbitration award, there is no valid and final judgment to which res judicata can attach and give preclusive effect to.

We review a circuit court's conclusion that a suit was barred by the application of res judicata as a question of law. *Davis v. Little Rock Sch. Dist.*, 92 Ark. App. 174, 211 S.W.3d 587 (2005). When a complaint is dismissed on a question of law, this court conducts a de novo review. *Dollarway Patrons for Better Schs. v. Morehead*, 2010 Ark. 133, 361 S.W.3d 274. Accordingly, the circuit court's ruling is given no deference on appeal. *Ark. Dep't of Health & Human Servs. v. Storey*, 372 Ark. 23, 269 S.W.3d 803 (2007).

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[2]369 Ark. 392, 255 S.W.3d 453 (2007).

[3]The word "out" was handwritten into the order and initialed by the judge.

As noted above, the circuit court dismissed the Elsners' complaint based on res judicata. The concept of res judicata has two facets, one being claim preclusion and the other issue preclusion. *McWhorter v. McWhorter*, 2009 Ark. 458, 344 S.W.3d 64. Under claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim. *Id*. Claim preclusion (res judicata) bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated. *Id*. Where a case is based on the same events as the subject matter of a previous lawsuit, claim preclusion will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id*. Under issue preclusion (collateral estoppel), a decision by a court of competent jurisdiction on matters which were at issue, and which were directly and necessarily adjudicated, bars any further litigation on those issues by the plaintiff or his privies against the defendant or his privies on the same issue. *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000). The true reason for holding an issue to be barred is not necessarily the identity or privity of the parties, but instead to put an end to litigation by preventing a party who has had one fair trial on a matter from relitigating the matter a second time. *Francis v. Francis*, 343 Ark. 104, 111, 31 S.W.3d 841, 845 (2000).

As the circuit court noted, the Arkansas Supreme Court has held that a valid and final award by an arbitrator has the same effect under the rules of res judicata as the judgment of a court. *Ruth R. Remmel Revocable Trust v. Regions Fin. Corp.*, 369 Ark. 392, 255 S.W.3d 453 (2007); *Riverdale Dev. Co. v. Ruffin Bldg. Sys., Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). The Elsners, however, argue that *Ruth R. Remmel Revocable Trust* is distinguishable from the case

at bar because the arbitration award in *Ruth R. Remmel Revocable Trust* was confirmed by a court while the arbitration award in the present case was not. The Elsners are putting more emphasis on the lack of confirmation than it can bear.

This court, in *Davis v. Little Rock Sch. Dist.*, *supra*, has held that an unconfirmed arbitration award is entitled to preclusive effect. However, neither party cites *Davis*, probably because *Davis* does not specifically discuss confirmation or the lack thereof in reaching its decision. We held that Davis had a full and fair opportunity in the arbitration proceeding to litigate the matters he raised in the subsequent lawsuit. The *Davis* Court cited with approval the earlier decision of *McLeroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987), where we discussed the conclusive nature of an arbitration award as follows:

> In Arkansas, arbitration is strongly favored by public policy and is looked upon with approval by courts as a less expensive and expeditious means of settling litigation and relieving congested court dockets. The decision of the arbitration board on all questions of law and fact is conclusive, and *the award shall be confirmed unless grounds are established to support vacating or modifying the award*.
>
> The fact that parties agree to submit their disputes to arbitration implies an agreement to be bound by the arbitration board's decision, and every reasonable intendment and presumption is in favor of the award; it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. Unless the illegality of the decision appears on the face of the award, courts will not interfere merely because the arbitrators have mistaken the law, or decided contrary to the rules of established practice as observed by courts of law and equity.

21 Ark. App. at 295, 731 S.W.2d at 791 (emphasis added, citations omitted). Under both the federal and Arkansas arbitration acts, a party has ninety days after an arbitration award has been delivered to make a motion to vacate, modify, or correct the award. *See* 9 U.S.C. § 12 (2000); Ark. Code Ann. §§ 16-108-222, 16-108-223(b) (Supp. 2011). Here, more than ninety days

have passed since the entry of the arbitration award and neither the Elsners nor the respondents have moved to vacate, modify, or correct the award. The Elsners had no reason to seek confirmation because, under FINRA rules, the award was to be promptly paid, thereby negating the need to have the award confirmed in order to execute on the award.

Confirmation of an arbitration award does not add significant weight to the validity of the award. An arbitration panel's decision is afforded considerable deference. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001). Under both the federal arbitration act and the Arkansas act, confirmation of an award is a summary proceeding that makes what is already a final arbitration award a judgment of the court. *See Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011); *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006). As a final ruling from the arbitration panel, it therefore follows that unless the award is vacated, modified or corrected, issues decided in arbitration are foreclosed by the determinations made by the arbitrator. *Hart*, *supra*; *Dean Witter Reynolds, Inc. v. Deislinger*, 289 Ark. 248, 711 S.W.2d 771 (1986).

Other courts have held that the doctrine will have application whether or not the award rendered in the first proceeding has been confirmed as a judgment. *See Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261 (2d Cir. 1997); *Behrens v. Skelly*, 173 F.2d 715 (3d Cir. 1949); *Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166 (8th Cir. 1989); *Monmouth Pub. Sch. Dist. No. 38 v. Pullen*, 489 N.E.2d 1100 (Ill. App. Ct. 1985); *Beal v. Allstate Ins. Co.*, 989 A.2d 733 (Me. 2010); *Bailey v. Metro. Prop. & Liab. Ins. Co.*, 505 N.E.2d 908 (Mass. App. Ct. 1987); *Murakami v. Wilmington Star News, Inc.*, 528 S.E.2d 68 (N.C. Ct. App. 2000); *Fisher v. Allstate Ins. Co.*, 961 P.2d 350 (Wash. 1998).

The Elsners rely on two unreported federal district court cases in support of their argument. *PRM Energy Systems, Inc. v. Primenergy, L.L.C.*, No. 04-6157, 2005 WL 3783414, (W.D. Ark. Nov. 15, 2005); *Walzer v. Muriel Siebert & Co., Inc.*, Civ. No. 04-5672, 2010 WL 3174458, (D.N.J. Aug. 10, 2010). *Walzer* is inapposite because the basis for the denial of preclusive effect was based on a federal statute that the Supreme Court had construed as not applying to unconfirmed arbitration awards. *PRM Energy* does not help the Elsners because the court in that case remanded certain claims to arbitration in the first instance.

The fact that Kalos and Clement were not before the arbitration panel is also no hindrance to the application of res judicata to bar the Elsners' suit against them. The Elsners rely on *Young v. Metropolitan Prop. & Cas. Ins. Co.*, 758 A.2d 452 (Conn. App. Ct. 2000), in making their privity argument. However, the Arkansas Supreme Court in *Riverdale*, *supra*, rejected a similar reliance on *Young* for two reasons: first, *Young* involved an offensive use of collateral estoppel, while the case before them involved the defensive application of the doctrine; and second, unlike *Young*, the party sought to be bound had an opportunity to litigate the issues raised in its proceeding before the arbitrator. *Riverdale*, 356 Ark. at 99, 146 S.W.3d at 856–57. Instead, the *Riverdale* court relied on *Bailey* in holding that a party not involved in a prior arbitration may use the award in that arbitration to bind his opponent if the party to be bound, or a privy, was before the arbitrator; had a full and fair opportunity to litigate the issue; and the issue was actually decided by the arbitrator or was necessary to his decision. *Riverdale*, 356 Ark. at 104, 146 S.W.3d at 860.

Thus, the question becomes whether these elements have been satisfied in the case before us. Clearly, the Elsners, as the parties to be bound, were before the arbitrator. The

arbitration hearing lasted for four days, during which time both the Elsners and the respondents put on extensive testimony and other evidence. The issues raised and addressed in the arbitration proceedings were the same as those alleged in the circuit court complaint, concerning the suitability of the investments, negligence, and misrepresentation. The circuit court complaint also raised the issues of breach of contract and fraud that were not addressed by the arbitrators. However, res judicata will apply even if the subsequent lawsuit raises new legal issues. *Winrock Grass Farm, Inc. v. Affiliated Real Estate Appraisers of Ark., Inc.*, 2010 Ark. App. 279, 373 S.W.3d 907. The arbitrators addressed the Elsners' claims as to both the REIT and variable annuities and concluded that the Elsners were entitled to recover damages in the amount of $62,899.24. The arbitrators denied the claims for punitive damages and attorney's fees. Thus, it is apparent that the Elsners were before the arbitrators, that they had a full and fair opportunity to litigate the issues they raised, and that those issues were actually decided by the arbitrators and were necessary to the decision. Accordingly, the circuit court correctly ruled that the Elsners' lawsuit was barred by res judicata.

Affirmed.

PITTMAN and MARTIN, JJ., agree.

Ogles Law Firm, P.A., by: *John Ogles*, for appellants.

Millar Jiles, LLP, by: *Gary D. Jiles* and *Matthew K. Brown*, for appellees.