IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARY ANN GUZY, Petitioner, v. MARK GUZY, Respondent.	§ § § § § § § § §	1:17-cv-228-RP

ORDER

Before the Court is the motion of Respondent Mark Guzy to dismiss Petitioner Mary Ann Guzy's application to confirm an arbitration award. (Dkt. 5). For the reasons that follow, the Court finds that the motion should be granted.

BACKGROUND

The parties are siblings and former limited partners of Arbor Financial Corporation. Prior litigation among the parties, the corporation, and the other limited partners resulted in a settlement agreement providing that disputes arising under or relating to the settlement agreement "shall be resolved by expedited binding arbitration, with William Sherman, Esq. acting as sole arbitrator," (Settlement Agreement, Dkt. 1-1, § XIII(H)), and that a judgment upon any arbitral award "may be entered in the Ninth Judicial District, Douglas County, Nevada, or any other court of competent jurisdiction." (*Id.*). Nevada substantive and procedural governs the agreement. (*Id.* § XIII(A)).

A dispute later arose, which the parties submitted to binding arbitration before William Sherman in San Francisco, California. The arbitrator issued an award in Petitioner's favor on April 11, 2014. Respondent thereafter moved to vacate the award in the Ninth Judicial District Court of Nevada. That court denied Respondent's motion to vacate the award in an order dated August 21, 2015, which also provided that "the above referenced portions of [the arbitral award] are, therefore,

confirmed[.]" (Order, Dkt. 1-3, at 5); *see also* Nev. Rev. Stat. § 38.241(4) ("If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending."). Respondent appealed the order and the matter is currently pending before the Nevada Supreme Court.

Petitioner filed her current application to confirm the arbitral award pursuant to 9 U.S.C. § 9 on March 13, 2017.

DISCUSSION

Respondent moves to dismiss the Petitioner's application on three grounds. First, he argues that this Court lacks jurisdiction to grant it. Second, he asserts that the application is time-barred. He finally argues that this Court is the improper venue for Petitioner's application. The Court first considers Respondent's jurisdictional arguments, as it must, before proceeding.

Respondent argues that the Nevada Arbitration Act, which he argues governs the agreement, confers exclusive jurisdiction on the Nevada district courts to confirm arbitral awards. *See* Nev. Rev. Stat. § 38.244(2). That statute provides that "[a]n agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award[.]" The statute is inapplicable, however, because the arbitration agreement at issue here did not provide for arbitration in Nevada. (*See* Settlement Agreement, Dkt. 1-1, § XIII(H)). Rather, it provided for arbitration before William Sherman, which ultimately took place in California. The Court therefore concludes that jurisdiction is not exclusive in the Nevada courts in this case. As Petitioner points out, and Respondent does not dispute, the conditions of diversity jurisdiction are otherwise satisfied.

The Court next turns to Respondent's argument that Petitioner's application is time-barred. The Federal Arbitration Act ("FAA") imposes a one-year statute of limitations on applications to confirm arbitral awards. 9 U.S.C. § 9. The award her was issued on April 11, 2014. Petitioner filed

her application before this Court in March 2017, nearly three years later. The relief she seeks under the FAA is therefore presumably no longer available.

Petitioner argues that the pendency of Respondents Nevada appeal tolls the statute of limitations. As the sole support for her argument, Petitioner cites a district court case from the Southern District of Texas. *See FIA Card Servs., N.A. v. Gachiengdu*, 571 F. Supp. 2d 799 (S.D. Tex. 2008). In *Gachiengdu*, the award was entered in 2005, petitioner filed its application to confirm the award at some point in 2007. *Id.* at 800. The petitioner had previously filed a timely action to confirm its award, but that suit had been dismissed for want of prosecution. *Id.* The respondent resisted confirmation of the award on the ground that the statute of limitations had run. *Id.* at 801. The court followed the weight of authority concluding that the FAA's provision of one year to confirm an award was a mandatory statute of limitations. The court then quickly rejected the petitioner's argument that its prior action tolled the limitations period, simply noting the well established principle that a suit dismissed for want of prosecution does not toll a limitations period. *Id.* at 804.

The case does support Petitioner's position. It did not hold that tolling was available under 9 U.S.C. § 9. Indeed, it did not need to address the issue in light of its conclusion that the petitioner's prior suit could not justify tolling in any case. *See id.* Petitioner here has pointed to no other authority supporting her position and the Court has found none. On the contrary, the plain language of the statute includes no exception to the limitations period. *See* 9 U.S.C. § 9; *see Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 438 (5th Cir. 2011) ("[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language.") (quoting *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010)). Additionally, other courts that have addressed the issue have found that there are no exceptions to the FAA's limitations periods for confirming or vacating arbitral awards. *See, e.g.*, *Fairmount Minerals,*

Ltd. v. Mineral Serv. Plus, LLC, No. 14-cv-400-bbc, 2014 WL 6389588 at *2–3 (W.D. Wisc. Nov. 14, 2014) (finding equitable tolling inapplicable and collecting authority); *IKON Global Mkts., Inc.*, No. C11-53RAJ, 2011 WL 9687842, at *2 (W.D. Wash. July 28, 2011) (noting strict construction courts have given to timing requirements of 9 U.S.C. § 12).

Although the doctrine of equitable tolling is generally read into every federal statute of limitations, *Torabi v. Gonzales*, 165 F. App'x 326, 330 (5th Cir. 2006) (citing *Holmby v. Ambrecht*, 327 U.S. 392, 397 (1946)), Petitioner has not explained why it should be applicable here, to the extent is applies at all.[1] A court may have discretion to equitably toll a statute of limitations in situations where extraordinary circumstances have prevented the petitioner from pursuing her rights despite her diligence. *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016). Petitioner has managed to file her application before this Court notwithstanding the pendency of Respondent's appeal. This fact amply demonstrates that the appeal has not prevented her from pursuing her rights. This matter is therefore a poor candidate for equitable tolling, assuming it is available under 9 U.S.C. § 9.

The burden is on Petitioner to establish an exception to the limitations period. *See Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007) ("Once it is established that the statutory limitations period has run, the plaintiffs have the burden to prove that some exception to the prescription applies."). She has not carried this burden. Accordingly, the Court finds that Petitioner's application must be dismissed as untimely. It is therefore unnecessary to consider Respondent's remaining argument concerning venue.

[1] Application of the doctrine is not universal; it will not be read into a statute if congressional intent is to the contrary. *See In re Armstrong*, 206 F.3d 465, 469–70 (5th Cir. 2000) (citing *United States v. Brockamp*, 519 U.S. 347, 350–353 (U.S. 1997)). In an opinion concluding that 9 U.S.C. § 9 imposed a mandatory one-year limitations period, the Second Circuit found that Congress intended the remedies provided under the FAA to "streamline the process [of confirming an award] and eliminate certain defenses." *Photopaint Techs., LLC v. Smartlens*, 335 F.3d 152, 159 (2d Cir. 2003). Thus, a petitioner had to act within the specified time period to enjoy the benefits of a summary proceeding. *Id.* at 159–60. Outside the limitations period, the petitioner is limited to seeking analogous remedies under state law that may afford the respondent greater opportunities to defend against the award. *See id.* There is therefore some reason to doubt that equitable tolling is available under 9 U.S.C. § 9.

CONCLUSION

For the foregoing reasons the Court **GRANTS** Respondent's motion. (Dkt. 5). **IT IS THEREFORE ORDERED** that Plaintiff's Application to Confirm Arbitration Award is hereby **DISMISSED WITH PREJUDICE**.

SIGNED on July 17, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE