[Cite as *FIA Card Servs., N.A. v. Kitchen,* 2009-Ohio-6623.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FIA CARD SERVICES, N.A., FKA MBNA AMERICA BANK	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-0065
WOODROW WILSON KITCHEN	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 2008-CV-00942
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	December 8, 2009

APPEARANCES:

For Plaintiff-Appellee:

LISA M. MICHAELS
6100 Oak Tree Blvd.
Suite 200
Independence, OH 44131

For Defendant-Appellant:

WOODROW WILSON KITCHEN
659 Keltonhurst Dr.
Pataskala, OH 43062

Delaney, J.

{¶1} Defendant-Appellant Woodrow Wilson Kitchen appeals the April 17, 2009 decision of the Licking County Court of Common Pleas to grant the Motion to Confirm Arbitration filed by Plaintiff-Appellee, FIA Card Services, N.A. f.k.a. MBNA America Bank, N.A.

STATEMENT OF THE CASE AND THE FACTS

{¶2} On February 27, 2003, Appellant opened a credit card account with Appellee. When Appellant opened the credit card account, the parties entered into a credit card Agreement ("Agreement"). Appellant subsequently defaulted on the account. Pursuant to the Agreement, Appellee submitted its claim to the National Arbitration Forum ("NAF") pursuant to the terms of the arbitration and litigation provision in the Agreement. Appellant filed a motion to dismiss for lack of jurisdiction with the NAF, arguing that the Agreement he received from Appellee did not contain an arbitration provision; therefore, the NAF was without jurisdiction to conduct the arbitration. On March 21, 2008, the NAF entered an arbitration award in favor of Appellee as against Appellant in the amount of $7,486.82.

{¶3} Appellant filed a motion to vacate the arbitration award with the Municipal Court for Licking County, Ohio on May 2, 2008.

{¶4} On May 5, 2008, Appellee filed a motion and application to confirm the arbitration award in the Licking County Court of Common Pleas pursuant to R.C. 2711.09. Appellant opposed Appellee's application to confirm arbitration award on June 5, 2008. Appellant again argued that arbitration was inappropriate because the Agreement did not contain an arbitration provision. By judgment entry filed July 15,

2008, the trial court granted Appellee's motion to confirm arbitration award. In its entry confirming the arbitration, the trial court found that Appellant did not file a motion to modify, vacate or correct pursuant to R.C. 2711.10 and/or R.C. 2711.11.

{¶5} In the municipal court case, Appellee filed a motion to dismiss Appellant's motion to vacate. The municipal court granted Appellee's motion on July 23, 2008.

{¶6} Appellant then filed a motion for relief from judgment with the common pleas court. The trial court denied the motion on August 12, 2008.

{¶7} Appellant filed an appeal of the trial court's decision, specifically arguing the trial court failed to consider his opposition to Appellee's motion and application to confirm the arbitration award. In *FIA Card Services v. Kitchen*, 181 Ohio App.3d 557, 2009-Ohio-1295, 910 N.E.2d 9, we determined that Appellant's opposition was a timely filed motion to modify, vacate or correct an arbitration award pursuant to R.C. 2711.10 and/or R.C. 2711.11. We found the trial court failed to address Appellant's motion in its July 15, 2008 judgment entry because the trial court explicitly found that Appellant did not file such a motion. Id. at ¶40. The matter was reversed and the cause remanded for the trial court to consider Appellant's motion under R.C. 2711.10 and R.C. 2711.11. If appropriate, the trial court could proceed to confirmation under R.C. 2711.09. Id. at ¶41.

{¶8} On April 17, 2009, the trial court issued its judgment entry on Appellant's motion to modify, vacate or correct and Appellee's motion to confirm arbitration award. The trial court considered Appellant's argument that the Agreement did not contain an arbitration provision and found that Appellant's argument did not meet the requirements

of R.C. 2711.10 or R.C. 2711.11. The trial court went on to grant Appellee's motion to confirm arbitration award.

{¶9} It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶10} Appellant raises four Assignments of Error:

{¶11} "I. THE TRIAL COURT'S NEGLECT OR REFUSAL TO RULE ON APPELLANT'S TACIT MOTION TO VACATE ARBITRATION AWARD CONSTITUTES AN ABUSE OF DISCRETION.

{¶12} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPOSING AN EVIDENTIARY BURDEN UPON APPELLANT THAT WAS IMPOSSIBLE TO SATISFY.

{¶13} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ITS FAILURE AGAIN TO CONSIDER ADMISSIBLE EVIDENCE OFFERED BY APPELLANT THAT THERE WAS NO AGREEMENT TO ARBITRATE BETWEEN THE PARTIES. APPELLANT HAS PRESENTED 2 CONFLICTING VERSIONS AND DOESN'T KNOW NOR CAN THEY PROVE WHICH VERSION GOVERNED.

{¶14} "IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY BELIEVING THAT IT HAD NO DISCRETION BUT TO GRANT APPELLEE'S MOTION TO CONFIRM THE AWARD. THEREFORE THE NEGLECT OR REFUSAL TO REVIEW THE EVIDENCE PRESENTED BY THE APPELLANT (AGAIN) CONSTITUTES AN ABUSE OF DISCRETION."

I.

{¶15} Appellant argues in his first Assignment of Error that the trial court erred by failing to rule on Appellant's motion to vacate the arbitration award. We find this argument to be without merit as the trial court explicitly ruled on Appellant's motion in its April 17, 2009 judgment entry as ordered by this Court's reversal and remand. In its judgment entry, the trial court considered Appellant's argument and found Appellant's argument to be not well taken.

{¶16} Appellant's first Assignment of Error is overruled.

II., III., IV.

{¶17} Appellant's second, third, and fourth Assignments of Error involve interrelated matters and will be considered together. The crux of Appellant's arguments is that the original Agreement between the parties as to the credit card account did not contain an arbitration provision; therefore, the NAF was without jurisdiction to conduct the arbitration and grant an award to Appellee. It has been held that absent statutory authority, a party to a lawsuit cannot be compelled to arbitrate a dispute that it has not agreed in writing to arbitrate. *Teramar Corp. v. Rodier Corp*. (1987), 40 Ohio App.3d 39, 40. Appellant states that he never agreed in writing to arbitrate a credit card account dispute.

{¶18} In *FIA Card Services I*, we remanded the matter to the trial court to consider Appellant's motion to vacate the arbitration award under the requirements of R.C. 2711.10 and R.C. 2711.11. R.C. 2711.10 states as follows: "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:

{¶19} "(A) The award was procured by corruption, fraud, or undue means.

{¶20} "(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

{¶21} "(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

{¶22} "(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.

{¶23} "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators."

{¶24} R.C. 2711.11 states as follows: "In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order modifying or correcting the award upon the application of any party to the arbitration if:

{¶25} "(A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

{¶26} "(B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

{¶27} "(C) The award is imperfect in matter of form not affecting the merits of the controversy.

{¶28} "The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

{¶29} In Appellee's motion to confirm arbitration award, Appellee attached a copy of the Agreement, which contains an arbitration provision. The portion of the Agreement entitled "Arbitration and Litigation" states in pertinent part:

{¶30} "Any claim or dispute ('Claim') by either you or us against the other, or against the employee, agents, or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties, or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration and Litigation section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration."

{¶31} Appellee asserts the Agreement containing the arbitration provision was sent to Appellant when Appellant opened the credit card account on February 27, 2003. Appellee submitted this Agreement to the NAF as part of the arbitration proceedings and attached the Agreement to the motion to confirm arbitration award. In response to Appellant's motion to vacate, Appellee provided evidence of the contract language as found on the back of the credit card issued to Appellant. The language reads, "By signing or using this card, issued by MBNA America Bank, N.A., pursuant to a license from Visa U.S.A., Inc., the Customer agrees to the terms of the issuing bank's credit card agreement."

{¶32} A review of the record before us shows that Appellant has made conflicting statements regarding his understanding of the terms of the Agreement. In his brief before this Court, Appellant states that he never received an Agreement. However, Appellant conversely stated in his motion to dismiss for lack of jurisdiction filed with the NAF and made a part of the record in the present case, that the original Agreement he entered into with Appellee did not contain any provision of arbitration. Appellant has not produced the original Agreement that he states does not contain an arbitration provision.

{¶33} We find that upon the evidence presented to the trial court, the trial court did not err when it denied Appellant's motion to vacate the arbitration award upon consideration of Appellant's jurisdictional arguments. There was sufficient evidence to find that an Agreement existed between the parties and the Agreement contained a binding arbitration provision.

{¶34} We further find the trial court did not err in confirming the arbitration award pursuant to R.C. 2711.09. On appellate review, the court of appeals is confined to an evaluation of the order issued by the court of common pleas, and may not pass on the substantive merits of the arbitration award except in matters of material mistake or extensive impropriety. *Fraternal Order of Police v. Perry County Com'rs.,* 5th Dist. No. 02-CA-14, 2003-Ohio-4038, at ¶ 13. The statutorily limited scope of judicial review makes it clear that an arbitrator's award is presumed valid. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 551 N.E.2d 186, paragraph one of the syllabus. Any other substantive merits of the arbitration award cannot be addressed on appeal. Id. at 449, 551 N.E.2d 186, 78 Ohio App.3d 448, 605 N.E.2d

408. "The overriding policy reason for this limited form of review is founded upon the principle that when parties voluntarily agree to submit their dispute to binding arbitration, they agree to accept the result regardless of its legal or factual accuracy." *Ford Hull-Mar Nursing Home, Inc. v. Marr Knapp Crawfish & Assoc., Inc.* (2000), 138 Ohio App.3d 174, 179, 740 N.E.2d 729. *Isiah's Wings, L.L.C. v. Siberian Tiger Conservation Assn*., Knox App. No. 07CA000009, 2008-Ohio-2147, ¶30.

{¶35} Appellant's arguments on this matter have been limited to the question of jurisdiction. Appellant has not argued that the arbitration award of $7,486.82 in favor of Appellee upon Appellant's default of the account was in error. Upon our review, we find the trial court did not abuse its discretion in confirming the arbitration award.

{¶36} Accordingly, Appellant's second, third, and fourth Assignments of Error are overruled.

{¶37} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

PAD:kgb

[Cite as *FIA Card Servs., N.A. v. Kitchen,* 2009-Ohio-6623.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FIA CARD SERVICES, N.A. FKA MBNA AMERICA BANK, N.A.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WOODROW WILSON KITCHEN	:	
Defendant-Appellant	:	Case No. 09-CA-0065

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE