In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00520-CV

SALLY LARUE ARTHUR, Appellant

V.

FIA CARD SERVICES, N.A. f/k/a MBNA AMERICA BANK, N.A., Appellee

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On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 07-12-12136-CV

MEMORANDUM OPINION

Appellant, Sally LaRue Arthur ("LaRue")[1] appeals a judgment confirming an arbitration award issued by the National Arbitration Forum. LaRue argues the trial court's judgment should be reversed because LaRue was served with the motion to confirm the award outside of the Federal Arbitration Act's one year statute of limitations. We

[1] We note that the appellant refers to herself as Sally Arthur LaRue or Sally LaRue. In accordance with the trial court's judgment we refer to her full name as Sally LaRue Arthur; however, for ease of reference hereinafter "Larue."

reverse the judgment of the trial court and remand for further proceedings.

Background

The National Arbitration Forum issued the arbitration award on April 27, 2007, in favor of MBNA America Bank, N.A. On December 5, 2007, FIA Card Services, N.A. fka MBNA America Bank, N.A. ("FIA") filed an action in state court to confirm the arbitration award. Although FIA timely filed suit within one year, LaRue was served after the one year period expired. On December 4, 2008, LaRue filed an Original Answer and Motion to Vacate. On August 17, 2009, the trial court issued a judgment confirming the arbitration award. No hearing was held on the petition to confirm the arbitration award. Additionally, LaRue did not request any findings of facts or conclusions of law following the court's judgment. This appeal followed.

Standard of Review

The parties do not dispute that the Federal Arbitration Act ("FAA") governs the agreement. *See* 9 U.S.C.A. §§ 1-16 (West 2009). We review a trial court's confirmation of an arbitration award under the FAA de novo. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 250 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). However, review of an arbitration award is "extraordinarily narrow." *Id.* (quoting *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172, 122 S. Ct. 1196, 152 L.Ed.2d 135 (2002)). All reasonable presumptions are indulged in favor of an arbitration award, which has the same effect as a judgment of a

court of last resort. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) (quoting *City of San Antonio v. McKenzie Constr. Co.*, 136 Tex. 315, 150 S.W.2d 989, 996 (1941)). An appellate court's review of an arbitration award is so narrow that the award may not be vacated even if there is a mistake of fact or law. *Vernon E. Faulconer, Inc. v. HFI, Ltd. P'ship*, 970 S.W.2d 36, 39 (Tex. App.—Tyler 1998, no pet.).

Statute of Limitations

In several issues, LaRue argues that FIA's petition to confirm the arbitration award was barred by limitations. Section 9 of the FAA provides as follows:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 U.S.C.S. §§ 10, 11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C.A. § 9.

LaRue argues that section 9 sets forth a one year statute of limitations for filing a

petition to confirm an arbitration award. *See id.* FIA filed its application for confirmation of the award within the one year period set forth in section 9. LaRue asserts that under Texas law, a timely filed suit does not interrupt the running of limitations unless a plaintiff exercises due diligence in the issuance and service of citation. LaRue argues that the trial court erred in confirming the arbitration award because FIA did not establish that it exercised due diligence in serving LaRue with the petition outside the limitations period established by the statute.

There is a split among the federal courts regarding whether section 9 sets forth a statute of limitations. *See FIA Card Servs., N.A. v. Gachiengu*, 571 F.Supp.2d 799, 803 (S.D. Tex. 2008) (Recognizing a division in circuits that have addressed this issue in depth and joining those courts concluding the one year limitation period is mandatory.); *Mauldin v. MBNA Am. Bank, N.A.*, No. 2-07-208-CV, 2008 WL 4779614, at *4 (Tex. App.—Fort Worth Oct. 30, 2008, no pet.) ("Federal courts of appeals are split as to whether section nine acts as a statute of limitations."); *see also Nations Personnel of Tex., Inc. v. Am. Med. Sec.*, No. CIV A 3:95-CV-3072-R, 2000 WL 626868, at *2 (N.D. Tex. May 15, 2000) (finding persuasive the Fourth Circuit's reasoning that the word "may" in section 9 makes the one year provision permissive and not mandatory). The Fifth Circuit has recognized the one year provision is mandatory. *See Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 731 (5th Cir. 1987). Without discussion, the Fifth Circuit in *Bernstein* stated regarding limitations, "[t]he complaint to enforce the arbitration award was filed within

one year as required by 9 U.S.C. § 9." *Id.*; *see also SmartPrice.com, Inc. v. Long Distance Servs., Inc.*, No. SA-07-CV-087-XR, 2007 WL 1341412, at *4 (W.D. Tex. May 4, 2007) ("The Application [to confirm the award] was timely filed in this Court within one year after the Award was made."). We conclude the one year limitation period set forth in section 9 is mandatory, not permissive. *See Bernstein*, 813 F.2d at 731; *see also Gachiengu*, 571 F.Supp.2d at 803.

When applying the FAA, Texas courts look to federal law to decide substantive issues, but apply state law to resolve procedural issues. *See Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271-72 (Tex. 1992). To bring suit within an applicable statute of limitations period, "a plaintiff must not only file suit within the applicable limitations period, but must also use diligence to have the defendant served with process." *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990); *see also Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) ("[A] timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation."). Texas law regarding tolling of the statute of limitations is procedural in nature and has been applied when analyzing the application of a federal statute of limitations in state court. *See generally Holstein v. Fed. Debt Mgmt., Inc.*, 902 S.W.2d 31, 34-35 (Tex. App.—Houston [1st Dist.] 1995, no writ).

In determining whether a plaintiff used due diligence in serving a defendant, Texas courts look to (1) whether the plaintiff acted as a person would act under the same or

similar circumstances; and (2) whether plaintiffs acted diligently up until the time the defendant was served. *Proulx*, 235 S.W.3d at 216; *see also Eichel v. Ullah*, 831 S.W.2d 42, 44 (Tex. App.—El Paso 1992, no pet.). Generally, a plaintiff's due diligence in effecting service is a question of fact. *Proulx*, 235 S.W.3d at 216. Once a defendant has pled limitations as an affirmative defense and has shown that service was effected after the limitations period expired, the burden shifts to the plaintiff to explain the delay in service. *Id*. If the plaintiff's explanation for the delay in service raises a material issue of fact, the burden shifts back to the defendant to conclusively show why the explanation is insufficient. *Id*.

In the present case, LaRue pled a statute of limitations defense and established that she was served after the applicable limitations period had passed. At that point the burden shifted to FIA to explain the delay in service of process. *See Proulx*, 235 S.W.3d at 216. FIA's response raised a fact issue on the limitations issue. LaRue requested an oral hearing on the motion to confirm the award and her asserted defense. However, the plaintiff's second motion for confirmation was set on the submission docket and ruled upon without a hearing.

Section 6 of the FAA states, "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." 9 U.S.C.A. § 6. "Thus, applications to confirm or vacate an arbitration award should be decided as other motions in civil cases; on notice and

an evidentiary hearing if necessary." *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 430 (Tex. App.—Dallas 2004, pet. denied). Montgomery County Local Rule 3.7 addresses hearings on pretrial motions. Montgomery County (Tex.) Dist. Ct. Loc. R. 3.7. The local rule provides that a motion or response may include a request for oral argument, which must be in writing and set forth the reasons for the necessity of a hearing. Montgomery County (Tex.) Dist. Ct. Loc. R. 3.7(D). Generally, it is within the discretion of the trial court to grant a request for argument. *Id*.

We recognize that a proceeding to confirm an arbitration award under section 9 is generally a summary proceeding. *See generally* 9 U.S.C.A. § 9; *see also D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2nd Cir. 2006). However, when disputed issues of material fact arise in a matter for which the legislature has prescribed summary disposition, the trial court still has a duty to hear evidence when necessary to resolve disputed fact issues. *See Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 958 (Tex. 1996) (citing *Jack B. Anglin Co.*, 842 S.W.2d at 269). In the present case, material fact issues necessary to determine whether the motion to confirm the arbitration award should be granted were in dispute, and LaRue requested a hearing on these issues prior to final judgment. Under these circumstances, the trial court abused its discretion in not conducting an evidentiary hearing on the disputed issues of fact regarding LaRue's statute of limitations defense. *See Gen. Motors Corp.*, 916 S.W.2d at 958; *see generally* 9 U.S.C.A. § 6; *Crossmark*, 124 S.W.3d at 430; *see also Jack B. Anglin Co.*, 842 S.W.2d at 269; *see also In re Washington*

Mut. Fin., L.P., 173 S.W.3d 189, 192-93 (Tex. App.—Corpus Christi 2005, orig. proceeding); *Rogers v. Maida*, 126 S.W.3d 643, 646 (Tex. App.—Beaumont 2004, no pet.).

We reverse the judgment and remand the cause to the trial court to conduct a hearing in accordance with our opinion herein.

REVERSED AND REMANDED.

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CHARLES KREGER
Justice

Submitted on November 18, 2010
Opinion Delivered March 10, 2011

Before Gaultney, Kreger, and Horton, JJ.