

STATE OF MICHIGAN
COURT OF APPEALS

MBNA AMERICA BANK, N.A.,

Plaintiff-Appellee,

v

SCOTT A. FORSMARK,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 254073

Cheboygan Circuit Court

LC No. 03-007180-CK

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment confirming an arbitration award in favor of plaintiff. We vacate the judgment and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court impermissibly granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(7) as a sanction for defense counsel's failure to appear at the hearing, instead of considering the merits of the motion.

This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Tokar v Alberty*, 258 Mich App 350, 352; 671 NW2d 139 (2003), citing *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991). The trial court entered judgment for plaintiff on plaintiff's motion for summary disposition. This Court also reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defense counsel failed to appear at the hearing on plaintiff's motion for summary disposition. When the case was called, plaintiff's counsel entered his appearance, but no one was present for the defense. The trial court noted that defense counsel had filed a responsive brief. Plaintiff's counsel handed the court a proposed judgment and offered to telephone defense counsel. The proceedings were adjourned. Four hours later, the proceedings resumed. Plaintiff's counsel asked the trial court to return the copy of the proposed judgment and indicated that he would submit it under the seven-day rule. The following colloquy occurred on the record:

THE COURT: For the record, [defense counsel] is not here this morning. It was scheduled for 9:00. The messages were left that we can continue to 1:15, 1:30.

[PLAINTIFF'S COUNSEL]: Yes, Your Honor.

THE COURT: Have you heard anything from him?

[PLAINTIFF'S COUNSEL]: No and neither had your clerk.

THE COURT: My understanding is you'll just submit it by a seven day notice of presentment. If there is some good reason why he cannot be here today, we'll address it.

Although the trial court did not expressly state that it was rendering judgment for plaintiff based on defense counsel's failure to appear, the court's statements suggest that counsel's nonappearance was at least a factor, particularly, in light of the absence of any discussion of the merits of plaintiff's motion or the basis for the court's decision. A court may not grant summary disposition as a sanction for counsel's nonappearance. See *Brenner v Kolk*, 226 Mich App 149, 155; 573 NW2d 65 (1997) (MCR 2.116 "is not a rule of sanction.").

Plaintiff argues that, on the merits, it was entitled to summary disposition because the asserted defense rested solely on a challenge to the validity of the agreement to arbitrate, but defendant failed to take the necessary action to vacate, correct, or modify the arbitration award. In its reply to defendant's response to the motion for summary disposition, plaintiff argued that defendant was barred from contending that he did not agree to arbitration because he did not move to vacate the arbitration award within twenty-one days as required by MCR 3.602(J)(2). That rule states:

An application to vacate an award must be made within 21 days after delivery of a copy of the award to the applicant, except that it is predicated on corruption, fraud, or other undue means, it must be made within 21 days after the grounds are known or should have been known.

Although it is undisputed that defendant did not file an application to vacate the arbitration award within twenty-one days after the award, the time restriction in MCR 2.602 for bringing an application does not preclude a defendant from raising the defense of a lack of a valid agreement to arbitrate in response to a plaintiff's action to confirm the arbitration award. A defense attacking the validity of an agreement to arbitrate may be raised for the first time in an action to confirm the arbitration award. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 97; 323 NW2d 1 (1982). Analyzing provisions of former GCR 1963 769, which are substantially similar to MCR 3.602, our Supreme Court in *Arrow Overall Supply Co* rejected the argument that the defendant's challenge to the existence of an agreement to arbitrate was essentially an application to vacate the award and, therefore, subject to the time limit for filing an application to vacate the award. The Court explained:

The rule's time limitation binds the moving party, not one who opposes the motion. Here the defendant is not seeking to vacate the award, but simply

opposes its confirmation. Since the rule prescribes no time limitation on the interposition of defenses, it would appear proper to allow it whenever it be sought to confirm the award. [*Id.* at 101.]

Thus, pursuant to *Arrow Overall Supply Co*, defendant was not precluded from challenging the existence or validity of an arbitration agreement as a defense to this action.

Because defendant was not precluded from challenging the existence of an arbitration agreement as a defense to plaintiff's action to confirm the arbitration award, and because the record fails to disclose that the trial court addressed or decided the issue of the existence of an arbitration agreement, we remand this case to the trial court to address and resolve this issue initially. We note that the agreement submitted by plaintiff states that it was made in Delaware and that it is "governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws." The agreement also states that it "shall be governed by the Federal Arbitration Act (FAA), 9 USC §§ 1-16." To the extent that agreement may be applicable, the parties have not addressed the choice of law provision or the FAA, particularly § 4, which governs disputes concerning the making of an arbitration agreement. 9 USC 4.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Markey