[Cite as *MBNA Am. Bank, N.A. v. Canfora*, 2007-Ohio-4137.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

MBNA AMERICA BANK, N.A. Appellant v. TABITHA CANFORA Appellee	C. A. No. 23588 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2006-03-3191

DECISION AND JOURNAL ENTRY

Dated: August 15, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Appellant, MBNA America Bank, N.A. ("MBNA") appeals the dismissal of its complaint to enforce an arbitration award and for money on account filed against Appellee Tabitha Canfora by the Summit County Court of Common Pleas. We reverse and remand.

{¶2} This case involves the enforcement of two arbitration awards in favor of MBNA related to two credit card accounts held by Appellee. After an arbitration hearing held on January 19, 2005, the National Arbitration Forum issued its awards in favor of MBNA on January 31, 2005, and March 22, 2005, in a total amount of $17,161.39. Appellee did not pay the arbitration award and on

July 22, 2005, MBNA filed a motion with the trial court, in Summit County case number 2005-06-3723, to confirm and enforce the arbitration awards pursuant to Chapter 2711 of the Ohio Revised Code ("first action"). Appellee responded to the motion to confirm the arbitration award, which the trial court considered as a motion to vacate the arbitration award. On December 19, 2005, the trial court dismissed MBNA's motion, sua sponte, and without prejudice, holding that MBNA failed to comply with R.C. 2711.14 by attaching the arbitration agreement to its motion thereby preventing the court from having subject matter jurisdiction over the case. On January 17, 2006, MBNA appealed the trial court's decision in the first action to this Court. We ordered MBNA to show cause as to why the trial court's entry in the first action, which dismissed the action without prejudice, was a final and appealable order. MBNA responded to the show cause order, but this Court was not convinced and dismissed the appeal on April 5, 2006.

{¶3} On May 19, 2006, MBNA filed a complaint in the Summit County Court of Common Pleas for common law enforcement of the arbitration award and for money on the underlying credit card accounts. Appellee did not respond to the complaint. On November 30, 2006, MBNA filed a motion for default judgment. On January 25, 2007, the trial court denied the motion for default judgment and dismissed MBNA's complaint, sua sponte, without prejudice. The trial court held that the agreement between the parties required resolution by binding arbitration. Therefore, the appropriate venue for MBNA's action would be solely through the

enforcement of the provisions of R.C. Chapter 2711. MBNA had failed again to comply with the statute because it did not seek to enforce the arbitration award within one year of the award as required by R.C. 2711.09 and did not establish good cause for its failure to do so.

{¶4} Appellant timely appealed the trial court's January 25, 2007 entry raising one assignment of error.

Assignment of Error

> "The trial court erred in denying Appellant's motion for default judgment and dismissing Appellant's complaint sua sponte."

{¶5} MBNA asserts that the trial court erred in dismissing its complaint for common law enforcement of the arbitration award and/or for money damages related to Appellee's non-payment of her credit card accounts. MBNA asserts that, while R.C. 2711.09 requires the holder of an arbitration award to file a motion to confirm and enforce that arbitration award within one year or show good cause, the one year rule is not mandatory. Moreover, MBNA asserts that it is entitled to enforce the arbitration awards under common law principles, which the trial court did not consider or address. Appellee did not file a brief with this Court.

{¶6} We begin by noting that while we found the trial court's entry in the first action not to be final and appealable because it was dismissed without prejudice, the entry in this appeal, also dismissed without prejudice, is final and appealable because it affects a substantial right that determines the action and

prevents judgment. The trial court's entry prevents MBNA from seeking enforcement of its arbitration award via R.C. Chapter 2711 or under common law principles.

{¶7} This Court has held:

> "'Generally, a court may dismiss a complaint on its own motion pursuant to Civ.R. 12(B)(6), * * *, only after the parties are given notice of the court's intention to dismiss and an opportunity to respond.' *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 106, 108, citing *Mayrides v. Franklin Cty. Prosecutor's Office* (1991), 71 Ohio App.3d 381, 383-84. *** The only instances of when a sua sponte dismissal of complaint without notice is appropriate is when the complaint is frivolous or the plaintiff cannot succeed on the facts stated in the complaint. *State ex rel. Peeples v. Anderson* (1995), 73 Ohio St.3d 559, 560." *Dunn v. Marthers*, 9th Dist. No. 05CA008838, 2006-Ohio-4923, at ¶11.

As there is nothing in the record to indicate that the parties received notice of the court's intent to dismiss the action, resolution of MBNA's assignment of error thus requires that we determine whether its complaint is frivolous or it obviously cannot prevail on the facts alleged.

{¶8} Here, the trial court dismissed the complaint and denied MBNA's motion for default judgment because it found that MBNA was required to resolve its dispute with Appellee and enforce its arbitration awards solely via R.C. Chapter 2711 and that MBNA had failed to comply with the requirements of R.C. Chapter 2711 by failing to enforce the arbitration award within one year of the award. We find that the trial court effectively held that MBNA failed to state a claim upon which relief could be granted.

{¶9} A trial court may dismiss a complaint for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle that plaintiff to relief. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. The analysis is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 547. The trial court must accept the factual allegations as true and make every reasonable inference in favor of the plaintiff. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. Therefore, accepting these facts as true, an appellate court reviews the dismissal de novo, as a question of law. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶5. An erroneous dismissal of a complaint based upon failure to state a claim upon which relief can be granted requires a remand to that court for further proceedings. *State ex rel. Natl. Emp. Benefit Serv., Inc. v. Court of Common Pleas of Cuyahoga Cty.* (1990), 49 Ohio St.3d 49, 50-52, fn.1.

{¶10} A trial court's decision to grant or deny a motion for default judgment is reviewed for an abuse of discretion. *McEnteer v. Moss*, 9th Dist. No. 22201, 22220, 2005-Ohio-2679, at ¶6, citing *Nat'l City Bank v. Shuman*, 9th Dist. No. 21484, 2003-Ohio-6116, at ¶6.

{¶11} In its entry, the trial court states that MBNA's complaint seeks to "enforce both arbitration awards and also, alternatively, for common law enforcement of arbitration award and action on account." The trial court then

dismisses MBNA's complaint based solely on an analysis of R.C. Chapter 2711 as applied to the facts. We disagree with the trial court that MBNA's complaint seeks common law enforcement of its arbitration awards as an alternative remedy. MBNA seeks only common law enforcement of its arbitration awards and does not seek any remedy that R.C. Chapter 2711 may provide.

{¶12} The Supreme Court of Ohio addressed this issue in *Warren Educ. Ass'n. v. Warren City Bd. of Educ.* (1985), 18 Ohio St.3d 170, stating that,

> "The party desiring legally to enforce an award makes a motion to confirm. This motion must be granted by the court, unless cause is shown for its modification or vacation; and the motion to confirm must be made within one year after the award is rendered. After that time the remedy would be by a suit on the award." *Warren Educ. Ass'n.* at 172-73, quoting R.C. 2711.09, editorial comment, Page's Revised Code Annotated.

{¶13} While R.C. 2711.09 does not have an express provision for a party who moves to confirm an arbitration award beyond the one-year period provided by the statute, the comment to R.C. 2711.09 does suggest a party with an arbitration award can obtain a judgment on the award after one year:

> "This is the section of the statute which enables the parties to an arbitration to obtain satisfaction of the award. The party desiring legally to enforce an award makes a motion to confirm. This motion must be granted by the court, unless cause is shown for its modification or vacation; and the motion to confirm must be made within one year after the award is rendered. After that time the remedy would be by a suit on the award."

{¶14} Sua sponte dismissals "prejudice appellants as they deny any opportunity to respond to the alleged insufficiencies." *McMullian v. Borean*, 6th

Dist. No. OT-05-017, 2006-Ohio-861, at ¶16, citing *Mayrides v. Franklin Cty. Prosecutor's Office* (1991), 71 Ohio App.3d 381, 384. "[A]ppellate review is frustrated when a trial court offers no explanation or reasoning for a sua sponte dismissal." *McMullian* at ¶16. Here, although the trial court's entry offers some basis for its dismissal, it fails to address the claims alleged in MBNA's complaint, i.e., common law claims to enforce the arbitration award. Accordingly, we find that the trial court's sua sponte dismissal, without notice to MBNA, of its intent to dismiss was erroneous because its order does not establish that MBNA's claims for common law enforcement of its arbitration awards were frivolous and/or that MBNA could not prevail on such claims.

{¶15} Moreover, we find that Appellant's complaint has stated a claim upon which relief can be granted, making dismissal on these grounds improper. We must accept the factual allegations as true and make every reasonable inference in favor of the plaintiff. In this case, it is particularly simple to do so as the facts as set forth by MBNA are undisputed that it was awarded two arbitration awards against Appellee, which awards were not paid by Appellee. Given this and the fact that Appellant may seek enforcement of its arbitration award after one year by pursuing common law claims pursuant to *Warren Educ. Ass'n*, we find that Appellant has stated a claim upon which relief can be granted and dismissal was improper.

{¶16} Because MBNA has stated a claim upon which relief can be granted, we also find that the trial court abused its discretion in denying MBNA's motion for default judgment on the grounds set forth in its judgment entry. It is undisputed that Appellee did not answer the complaint and MBNA is entitled to pursue default judgment under Civ. R. 55(A).

{¶17} Appellant's assignment of error is sustained and this matter is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed
and cause remanded

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

LYNN C. SLABY
FOR THE COURT

BAIRD, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶18} I respectfully disagree with the majority's conclusion that appellant may proceed outside of the Ohio Arbitration Act to confirm its award. Accordingly, I dissent.

{¶19} In support of its conclusion, the majority cites to *Warren Edn. Assn. v. Warren City Bd. of Edn*. (1985), 18 Ohio St.3d 170, 172-73 which quotes the editorial comment to R.C. 2711.09. I do not dispute that the comment purports to allow a "suit on award" when a party has failed to timely confirm the award under R.C. 2711.09. However, *Warren* did not adopt this provision, not was it at issue under the facts of *Warren*. In fact, the *Warren* Court relied upon the editorial comment for another purpose altogether, to demonstrate that the "purpose of this section of the statute is to enable parties to an arbitration to obtain satisfaction of the award." *Warren*, 18 Ohio St.3d at 172. As such, the editorial comment to R.C. 2711.09 has not been adopted by the Ohio Supreme Court, nor is it binding on this Court.

{¶20} Moreover, language appearing later in *Warren* undermines the notion that suits may be brought under the common law.

> "As was recognized in *Lockhart v. American Res. Ins. Co*. (1981), 2 Ohio App.3d 99, 101, R.C. 2711.09 through 2711.14, inclusive, provide the only procedures for post award attack *or support* of an arbitration decision." (Alterations and quotations omitted, emphasis added.) Id. at 173.

Accordingly, the sole procedure for supporting (i.e., confirming) an arbitration award must be contained in the above referenced statute. On its face, R.C. 2711.09 does not provide for a common law suit.

{¶21} The majority's approach is also inconsistent with this Court's prior interpretation of R.C. 2711.09. As the majority correctly notes, R.C. 2711.09's time limitation is permissive. Thus, a motion to confirm that is filed beyond one year may be ruled upon under the correct circumstances, i.e., good cause had been shown and the opposing party has not been prejudiced. In contrast, the editorial comment relied upon by the majority states that after the one year period found in R.C. 2711.09 has expired, "the remedy would be by a suit on the award." I do not believe that these avenues of relief can co-exist. This Court's prior interpretation that a party can move to confirm an award beyond the one year period is directly at odds with the language used by the editorial comment which would require that a separate suit be filed. As the comment is in conflict with the plain language of the statute, it cannot be relied upon to alter the meaning of the statute and must be disregarded.

{¶22} Furthermore, the Ohio Supreme Court has declined to permit parties to proceed outside of Revised Code Chapter 2711. In *Galion v. Am. Fedn. of State, Cty., and Mun. Employees* (1995), 71 Ohio St.3d 620, the Court held that R.C. Chapter 2711 provides a "special statutory remedy." Id. at 623. In its holding, the Court found that permitting an action for a declaratory judgment regarding the scope of the arbitrator's authority would allow a party to "bypass the stringent requirements" of R.C. Chapter 2711. Id. As such, the Court found that such an action was improper. The majority's opinion likewise permits appellant to avoid the stringent requirements of the Ohio Arbitration Act. If filed under R.C. 2711.09, appellant would have the burden of demonstrating good cause for its untimely filing and would have the burden of demonstrating that appellee suffered no prejudice from the delay. The majority's approach alleviates this requirement in its entirety.

{¶23} As the majority's opinion violates the purpose of the Ohio Arbitration Act to provide an exclusive mechanism for confirming awards, I respectfully dissent.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

WILLIAM MCCANN, Attorney at Law, for Appellant.

TABITHA CANFORA, pro se, Appellee.