

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

UNITED OHIO INSURANCE CO.	:	CASE NO. 10-CV-00545
	:	
Plaintiff,	:	
	:	
vs.	:	JONATHAN P. HEIN,
	:	Judge by Assignment
	:	
CENTRAL MUTUAL INSURANCE CO. :	:	JUDGMENT ENTRY: Plaintiff's
	:	Motion to Vacate Arbitration Award;
Defendant.	:	Defendant's Motion to Affirm Award

This matter came before the Court pursuant to the following motions: (1) the Plaintiff's motion filed July 21, 2010 to vacate the arbitration award, and (2) the Defendant's motion filed August 24, 2010 to affirm the arbitration award. The Plaintiff is represented by John P. Petro, Esq. and Susan S.R. Petro, Esq. The Defendant is represented by Sam A. Benson, Esq. and James B. Hamilton, Esq.

The parties have fulfilled the requirements of the Scheduling Order filed August 27, 2010 which set forth deadlines for the submission of briefs. The Court does not see the need for oral arguments, and the matter is adjudicated on the briefs.

Case Facts

The Plaintiff and Defendant are both corporations licensed to conduct business in the State of Ohio and which issue insurance contracts that cover claims based on property damage. In an effort to resolve claims between the companies' insured parties in an extra-judicial manner, both

parties participate in a practice known as “inter-company arbitration” where the dispute is submitted to binding arbitration by an agreed arbitrator. In this matter, the Defendant submitted a claim against Plaintiff to arbitration with Arbitration Forums, Inc. (which describes itself as “Industry created. Membership driven.”)

The claim which Defendant presented to arbitration involved a loss in the amount of \$71,547.99 (\$66,547.99 owed to the Defendant and \$5,000 owed to the insured because of its deductible). The loss arose out of the defective installation of a roof by the Plaintiff’s insured. [See Exhibit C of the Complaint.] After the claim was submitted, Plaintiff submitted a response in which it claimed that the loss was not insured under its policy and, therefore, that coverage was denied. [See Exhibit D of the Complaint.] Further, as a result of the denial of coverage, Plaintiff asserts that Arbitration Forums, Inc. did not possess jurisdiction to determine the claim. After a hearing was conducted, Arbitration Forums, Inc. entered an award in favor of Defendant in the amount of \$76,547.99 [\$71,547.99 for Defendant and \$5,000 for the insured].

The Plaintiff filed this action to set aside the arbitration award. Defendant answered and also moved for the award to be affirmed.

Legal Analysis

The parties voluntarily entered into an agreement wherein the common practice of inter-company insurance arbitration occurred. Eventually, the decision of the arbitrator resulted in an extra-judicial decision. Such decision is not final until the provisions of Chapter 2711 of the Ohio Revised Code are applied. Certain provisions of this Chapter should be accentuated:

2711.09 Application for order confirming award.

At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award

is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code. Notice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof.

2711.10 Court may vacate award.

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:

- (A) The award was procured by corruption, fraud, or undue means.
- (B) There was evidence partiality or corruption on the part of the arbitrators, or any of them.
- (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.
- (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.

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.

2711.11 Court may modify award.

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:

- (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;
 - (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;
 - (C) The award is imperfect in matter of form not affecting the merits of the controversy.
- The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

2711.13 Motion to vacate, modify, or correct an award - notice, service.

After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

A summary of relevant case authority regarding Chapter 2711 was succinctly set forth in *Jackson Cty. Sheriff v. Fraternal Order of Police Ohio Labor Council, Inc.*,

2004-Ohio-3535:

{¶17} As a matter of policy, the law favors and encourages arbitration. *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 84, 488 N.E.2d 872, quoting *Campbell v. Automatic Die & Prod. Co.* (1954), 162 Ohio St. 321, 329. Accordingly, courts will make every reasonable indulgence to avoid disturbing an arbitration award. *Id.* See, also, *Stehli v. Action Custom Homes, Inc.* (2001), 144 Ohio App.3d 679, 682, 761 N.E.2d 129. Arbitration awards are presumed valid and a reviewing court may not substitute its judgment for that of the arbitrator. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 132, 551 N.E.2d 186. See, also, *Marra Constructors, Inc. v. Cleveland Metroparks Sys.* (1993), 82 Ohio App.3d 557, 562, 612 N.E.2d 806.

Case Analysis

The language of the arbitration agreement that is the primary source of contention is as follows:

“2-4 The parties must raise and support affirmative pleadings or defenses in the *Affirmative Defenses / Pleadings* section of the Contentions Sheet or they are waived. If a denial of coverage is being pled (see denial of coverage definition), a copy of the denial of coverage letter to the party seeking coverage for the loss must be provided as part of the evidentiary material submitted. If provided, the case will be administratively closed as lacking jurisdiction. If not provided or where the issue concerns concurrent coverage (Article First (b), Special Arbitration Agreement), the case will proceed to hearing wherein the arbitrator(s) will consider and rule on the coverage defense.

From a review of the pleadings, the Plaintiff clearly raised the “affirmative defense” of denial of coverage. This defense was acknowledged by the three arbitrators on page three of their decision dated April 21, 2010. Further, the arbitrators acknowledged that the denial of coverage letter had been provided. Accordingly, the Court finds that the arbitrators acted contrary to law when they failed to dismiss the arbitration for lack of jurisdiction. Such error invokes the duty of this Court to vacate the arbitration award pursuant to R.C. 2711.10(D).

Regarding the interpretation that the Plaintiff was required to provide supporting evidence regarding the denial of coverage, such interpretation of section 2-4 is inconsistent with the overall reading of such section. Clearly, once denial of coverage was raised by the Plaintiff, and a copy of the denial letter was provided, there was to be no further arbitration. The Defendant's assertion that supporting evidence be presented would require the arbitrators to conduct a hearing on the merits of the denial – thereby rendering meaningless the language that “the case will be administratively closed as lacking jurisdiction.”

The Court notes that the provisions of section 3-9 of the arbitration Rules are not applicable. This section discusses the procedures to follow when an affirmative defense has not been asserted in advance of the hearing. Clearly, section 3-9 is not applicable.

Further, the Court finds that the decision of the arbitrators was contrary to the evidence when it rendered an award of \$76,547.99 when a demand was made for only \$71,547.99. The Plaintiff concedes this error and explains that the arbitrators mistakenly twice awarded the deductible. However, this mistake cannot be merely explained away by one party. In the absence of a complete record, and without motion from the Defendant, this Court refrains from modifying the award such that it conforms to the supposed evidence at the hearing. And such error further calls into question the jurisdiction of the arbitrators to grant an award in excess of the amount claimed.

Conclusion

The Court concludes that the arbitrators erred as a matter of law in failing to dismiss the arbitration for lack of jurisdiction when the Plaintiff properly raised the denial of coverage as a

defense. The award of \$76,547.99 was contrary to the evidence.

IT IS THEREFORE ORDERED AND DECREED that the decision of the arbitrators is vacated. The arbitration award is vacated. Pursuant to the spirit of the “Industry created. Membership driven.” arbitration agreement, costs shall be equally divided. **FINAL APPEALABLE ORDER.**

Jonathan P. Hein, Judge

cc: John P. Petro / Susan S.R. Petro, Attorneys for Plaintiff (via fax)
Sam A. Benson / James B. Hamilton, Attorneys for Defendant (via fax).

jph/research/arbitration/ins contracts