

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-410

Filed: 15 November 2016

Mecklenburg County, No. 13 CVS 19878

KAREN W. FLYNN, individually and in her representative capacity as trustee for: 2002 IRREVOCABLE TRUST FOR FAMILY OF MARTHA P. WILSON; and her capacity as account custodian for: BRYNLEY ELIZABETH WYLDE, JAKE WILLIAM FLYNN, JEFFREY E. FLYNN III, JESSICA J. FLYNN, JOSHUA R. FLYNN, KEEGAN B. WALL, MAKENNA KATHLEEN WYLDE, and RILEY PAGE WALL; Plaintiff,

v.

DAVID WAYNE SCHAMENS; PILIANA MOSES SCHAMENS, individually and in her capacity as a Member of Invictus Asset Management, LLC; INVICTUS ASSET MANAGEMENT, LLC, individually and in its capacity as the General Partner of Invictus Capital Growth & Income Fund, LLP, and Invictus Income Fund, LLP; INVICTUS FUNDS, LLC; and TRADEDESK FINANCIAL GROUP, INC. d/b/a TRADESTREAM ANALYTICS, LTD.; Defendants.

Appeal by plaintiff from order entered 27 January 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2016.

Garella Law, P.C., by C. Kiel Garella, for plaintiff-appellant.

No brief filed for defendants-appellees.

ELMORE, Judge.

Plaintiff argues on appeal that the trial court erred in failing to confirm an arbitration award upon plaintiff's motion. We agree. The trial court's order is

reversed and the case remanded for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

I. Background

Karen W. Flynn (plaintiff) sued David Shamens, Piliana Schamens, Invictus Asset Management, LLC, Invictus Capital Growth & Income Fund, LLP, Invictus Income Fund, LLP, and Tradedesk Financial Group, Inc., (collectively, defendants) for alleged misconduct and misrepresentations related to investments made by plaintiff and the trust she managed into funds managed and controlled by defendants. The parties agreed to submit all claims to binding arbitration and stay court proceedings pending a resolution. In its decision and final award, the arbitrator found defendants jointly and severally liable to plaintiff for common law fraud, breach of fiduciary duty, and constructive fraud. Plaintiff was awarded damages totaling \$2,107,090.79, plus interest.

Plaintiff subsequently moved for confirmation of the award and entry of judgment in Mecklenburg County Superior Court. Defendants, in turn, filed a motion to vacate the award. On 27 January 2016, the trial court entered an order denying defendants' motion to vacate and, without explanation, declaring "moot" plaintiff's motion to confirm. Plaintiff moved to correct the order but the court ultimately declined to hear the motion because notice of the hearing was not timely.

Plaintiff filed notice of appeal on 25 February 2016. On the hearing date, defendants moved to dismiss plaintiff's appeal, contesting jurisdiction based on improper service of the notice of appeal. After reviewing the record, we conclude that notice was properly given within the time and in the manner prescribed by our Rules of Appellate Procedure. We deny defendants' motion and address the merits of plaintiff's appeal.

II. Discussion

Plaintiff has the right to appeal the trial court's order pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2015) because the order "in effect determines the action, and prevents a judgment from which an appeal might be taken," or otherwise "discontinues the action." *See also* N.C. Gen. Stat. § 1-569.28(a)(3) (2015) ("An appeal may be taken from . . . [a]n order confirming or denying confirmation of an award.").

On appeal, plaintiff argues that the trial court was required to confirm the arbitration award following the denial of defendants' motion to vacate. When reviewing a trial court's decision to confirm or vacate an arbitration award, "we accept findings of fact that are not 'clearly erroneous' and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48, 131 L. Ed. 2d 985, 996 (1995)); *see also First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005).

Upon a party's motion, a trial court must issue an order confirming an arbitration award unless the award is modified, corrected, or vacated. N.C. Gen. Stat. §§ 1-569.22, .23(d), .24(b) (2015). If and when the trial court issues an order confirming, modifying, or vacating an arbitration award, it must also "enter a judgment in conformity with the order." N.C. Gen. Stat. § 1-569.25(a) (2015). Case law interpreting the prior versions of these statutes has reached the same conclusion. *See, e.g., Carteret Cnty. v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) ("[T]he court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists." (citation omitted)); *FCR Greensboro, Inc. v. C & M Invs. of High Point, Inc.*, 119 N.C. App. 575, 577, 459 S.E.2d 292, 294 (1995) ("[T]he trial court must confirm the award unless grounds exist to either vacate or modify the award." (citation omitted)). And although the statutes were repealed and replaced by Session Law 2003-345, their substance has not changed. *Compare* N.C. Gen. Stat. § 1-569.22 (2015) ("Upon motion of a party for an order confirming the award, the court shall issue a confirming order unless the award is modified or corrected . . . or is vacated"), *with* N.C. Gen. Stat. § 1-567.12 (2001) ("Upon application of a party, the court shall confirm an award, unless . . . grounds are urged for vacating or modifying or correcting the award"); N.C. Gen. Stat. § 1-569.23(d) (2015) ("If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award . . . is pending."),

with N.C. Gen. Stat. § 1-567.13(d) (2001) (“If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.”); N.C. Gen. Stat. § 1-569.24(b) (2015) (“If a motion [to modify or correct the award] is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.”), *with* N.C. Gen. Stat. § 1-567.14(b) (2001) (“If the application [to modify or correct the award] is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.”).

In this case, plaintiff filed a motion to confirm the arbitration award. Defendants in turn filed a motion to vacate, which was denied by the trial court. Defendants did not move to modify or correct the award, and there were no such motions pending before the court when it entered its order. If the court had granted defendants’ motion to vacate, then plaintiff’s motion to confirm would have been moot—but not *vice versa*. See *In re Arbitration Between State and Davidson & Jones Constr. Co.*, 72 N.C. App. 149, 152–53, 323 S.E.2d 466, 469 (1984). Upon denying defendants’ motion to vacate, therefore, the trial court was required to enter an order confirming the arbitration award and a judgment in conformity with the order.

III. Conclusion

FLYNN V. SCHAMENS

Opinion of the Court

We reverse the trial court's order and remand for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

REVERSED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.