

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

CAPITAL ONE BANK (USA), NA,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-090
- vs -	:	<u>OPINION</u>
	:	12/19/2011
JAMES WESLEY COLLINS,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY AREA II COURT  
Case No. 10-CVF-00700

Weltman, Weinberg & Reis, Co., L.P.A., Jill A. Keck, 525 Vine Street, Suite 800, Cincinnati, Ohio 45202, for plaintiff-appellee

James Wesley Collins, 6815 Lakota Pointe Lane, Liberty Township, Ohio 45044, defendant-appellant, pro se

**HENDRICKSON, J.**

{¶1} Defendant-appellant, James Wesley Collins, appeals the decision of the Butler County Court of Common Pleas granting summary judgment in favor of Capital One Bank (Capital One). We find merit to his appeal and reverse and remand the case for further proceedings.

{¶2} Collins opened a credit card account with Capital One. The account was subject to a written agreement, the Customer Agreement (Agreement). This agreement

contained an arbitration provision which provided that if Collins or Capital One elected to arbitrate a claim, then neither party would have the right to pursue such a claim in court. On June 28, 2010, Capital One filed a complaint against Collins alleging he had defaulted on the account. Attached to the complaint was a copy of the Agreement. Collins answered, generally denying all allegations. On July 22, 2010, Collins filed a "Motion to Dismiss or in the Alternative Motion to Stay pending Arbitration with Motion to Compel Arbitration." Capital One responded, stating it did not object to arbitration "if this suit is stayed pending the arbitration." Capital One also attempted to place conditions on the arbitration, such as requiring Collins to initiate arbitration within 30 days and using the American Arbitration Association or the National Arbitration Forum for the arbitration. Collins filed a response suggesting Capital One's conditions on arbitration were contrary to the Agreement. He asserted that the Agreement allowed him to also initiate arbitration at Judicial Arbitration & Mediation Services (JAMS) and Capital One did not have the right to set a deadline for initiating arbitration.

{¶13} The trial court never ruled on Collins' motion. Instead, in a Civil Hearing Status Entry it noted: "Defendant to set up arbitration meeting. Upon filing the proof of the arbitration the court will set the pre-trial out three more months." The court then ordered a pretrial hearing set for December 3, 2010. On November 19, 2010, Collins filed a "Motion for Continuance for Good Cause" stating that he had initiated arbitration with JAMS. In response, the court filed a Notice of Hearing Entry noting "Pre-Trial continued from December 3, 2010 to February 11, 2011 at the request of Defendant." There was no mention of arbitration in this entry. At the February pretrial hearing, the court seemingly provided Capital One with leave to file summary judgment. The Civil Status Hearing Entry for that date noted, "plaintiff has leave to file summary judgment if arbitration issued resolved." Capital One subsequently filed its motion for summary judgment. After responding to the

motion for summary judgment, Collins filed a second motion to stay pending arbitration on May 3, 2011. On May 6, 2011, the trial court granted Capital One's motion for summary judgment. The second motion to stay was also never ruled on by the trial court. Collins timely appeals and asserts three assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE [TRIAL COURT] ERRED IN NOT RULING ON THE MOTION FOR STAY PURSUANT TO O.R.C. §2711.02(B)."

{¶6} Assignment of Error No. 2:

{¶7} "THE JUDGE ERRED IN RULING ON PLAINTIFF'S [MOTION] FOR SUMMARY JUDGMENT BY CIRCUMVENTING HIS MAGISTRATE'S ORAL CONFERENCE WITH THE PARTIES TO HAVE DEFENDANT ADMINISTER COSTS AS PER THE ARBITRATION AGREEMENT WITHIN THREE WEEKS."

{¶8} Assignment of Error No. 3:

{¶9} "THE [TRIAL] COURT ERRED IN RULING FOR PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BY INFAC TO NULLIFYING THE ARBITRATION AGREEMENT IN THE CUSTOMER AGREEMENT BY WAY OF ACCEPTING AND RULING ON A LEGAL PLEADING THAT SHOULD HAVE BEEN BARRED PENDING THE OUTCOME OF THE ARBITRATION PER THE AGREEMENT."

{¶10} In his first assignment of error, Collins asserts the trial court erred when it failed to rule on the motions to stay pending arbitration. He argues he properly demonstrated that the claim was referable to arbitration under the Agreement and he was not in default in proceeding with arbitration, as required by R.C. 2711.02(B). He further argues that because the case should have been stayed pursuant to R.C. 2711.02(B), the trial court erred by allowing Capital One to file its motion for summary judgment.

{¶11} Collins initially filed a "Motion to Dismiss or in the Alternative Motion to Stay

Pending Arbitration with Motion to Compel Arbitration." In this motion, he sought to dismiss Capital One's collection action or alternatively, to stay the proceedings and compel arbitration.<sup>1</sup> Collins reiterated his desire to arbitrate by filing a second motion to stay pending arbitration pursuant to R.C. 2711.02. The Ohio General Assembly, in R.C. Chapter 2711, has expressed a strong policy favoring arbitration of disputes. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶25. "A party seeking to enforce an arbitration provision may choose to move for a stay under R.C. 2711.02, or to petition for an order for the parties to proceed to arbitration under R.C. 2711.03, or to seek orders under both statutes." *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, ¶8. Collins assigns as error only the trial court's failure to rule on the portion of the motion which requested a stay of the proceedings pursuant to R.C. 2711.02.

{¶12} R.C. 2711.02 regulates the procedure for staying an action during arbitration. R.C. 2711.02(B) states: "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, *shall* on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration." (Emphasis added.) R.C. 2711.02(B). The legislature's use of the word "shall" indicates that the statute is mandatory. *Dorrian v. Scioto Conservatory Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus ("In statutory construction, \* \* \* the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a

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1. Although Collins did not specify in this motion that he was moving to dismiss under Civ.R. 12 or that he was moving for a stay pursuant to R.C. 2711.02 and seeking an order to compel arbitration pursuant to R.C. 2711.03, he did request the type of relief authorized by both R.C. 2711.02 and R.C. 2711.03.

construction other than ordinary usage"). Thus, under R.C. 2711.02, the trial court is required to make only two determinations prior to granting a stay of proceedings pending arbitration. First, the court must be satisfied that the issue involved in the action is referable to arbitration under a valid agreement in writing for arbitration. Second, the court must determine that the applicant for the stay is not in default in proceeding with arbitration. R.C. 2711.02; *Juhasz v. Costanzo* (2001), 144 Ohio App.3d 756, 765. Once these conditions are met, a stay is required. *Id.* at 765. Any order either granting or denying a motion for stay of trial pending arbitration is a final appealable order. R.C. 2711.02(C).<sup>2</sup>

{¶13} The record is clear. Collins applied for a stay of the proceedings based on the arbitration provision in the Agreement. Capital One did not object to the arbitration.<sup>3</sup> Accordingly, the trial court was required to comply with R.C. 2711.02(B) and rule on Collins' motion to stay. By failing to rule on the motion to stay and instead granting the motion for summary judgment, the trial court effectively abrogated Collins' right to appeal any decision on the motion to stay. Therefore, the trial court erred by ruling on the motion for summary judgment before it addressed Collins' repeated motions to stay.

{¶14} Capital One argues that the court below effectively granted the motion to stay by continuing the pretrial from December 2010 to February 2011, and that such stay was limited to Collins providing proof of filing the arbitration by December 3, 2010. "Ohio law directs trial courts to grant a stay of litigation in favor of arbitration pursuant to a written agreement on application of one of the parties, in accordance with R.C. 2711.02(B)." *Taylor*

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2. R.C. 2711.02(C) states: "Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code."

3. It appears from the record that the parties agreed the issue involved in the action was referable to arbitration under their agreement. However, the issue of whether Collins was in default "in proceeding with arbitration" was still before the court.

*Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶28. A stay is "a postponement or halting of a proceeding, judgment or the like." Black's Law Dictionary (8<sup>th</sup> Ed. 2004) 1453. "[A] stay ceases activity on a case." *Comm. First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, ¶28. By simply continuing the pre-trial hearing, the case was still active and pending. As a result, the parties were free to conduct activities in furtherance of the litigation. The trial court's act of continuing the pretrial hearing was not the equivalent of a stay, and therefore did not comply with the mandates R.C. 2711.02.

{¶15} Capital One also asserts that the trial court implicitly denied the motion to stay by granting its motion for summary judgment. While it is a general principle of law that any pending motion not expressly ruled upon by the trial court is deemed overruled once final judgment is entered; such principle does not apply in this instance. See *American Business Mtge. Services, Inc. v. Barclay*, Franklin App. No. 04AP-68, 2004-Ohio-6725, ¶8. As explained above, the court was required to rule on the motion to stay such that Collins had the opportunity to appeal that decision. The trial court could not rely on an implicit ruling on the motion to stay through its decision to grant the motion for summary judgment. Instead, the trial court was required, pursuant to R.C. 2711.02(B), to either grant or deny Collins' motion to stay. Because the trial court had yet to determine whether a stay was necessary in this proceeding, Capital One's motion for summary judgment was not properly before the court.

{¶16} Accordingly, Collins' first assignment of error is sustained.

{¶17} In the remaining two assignments of error, Collins argues that the trial court erred in ruling on the motion for summary judgment. In light of our holding regarding Collins' first assignment of error, it is unnecessary to determine the issues presented in Collins' second and third assignments of error. Collins' second and third assignments of error are therefore rendered moot.

{¶18} We find that the trial court's failure to rule on Collins' motions to stay pending arbitration was reversible error. When faced with a motion to stay pending arbitration pursuant to R.C. 2711.02, a trial court must determine whether the applicant for stay has complied with the requirements of R.C. 2711.02 and grant or deny the motion before it moves forward on the underlying claim. The trial court erred in permitting Capital One to file its motion for summary judgment and in granting the motion for summary judgment prior to ruling on the undecided motions to stay pending arbitration. Because the trial court has yet to reach the merits of appellant's motion for a stay, we reverse the trial court's decision granting summary judgment and remand for further proceedings. On remand, the trial court is to comply with the mandates of R.C. 2711.02 and issue a final ruling on Collins' motions to stay. The trial court is instructed to make its determination on Collins' motions to stay prior to taking any further action on Capital One's underlying claim.

{¶19} Judgment reversed and remanded to the trial court for further proceedings consistent with this opinion.

POWELL, P.J., and PIPER, J., concur.