UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

PROTECTIVE INSURANCE COMPANY,

***Plaintiff*,**

v. **Case No. 1:16cv38-MW/GRJ**

STATE FARM GENERAL INSURANCE COMPANY,

Defendant.
_____/

ORDER CONFIRMING ARBITRATION AWARD

Plaintiff moves to confirm an arbitration award. ECF No. 12. For the reasons that follow, that motion is **GRANTED**.

I. *Facts*

In May 2011, John Rodda and Sharon Hurst got into a car accident in Alachua County, Florida, resulting in injuries to Ms. Hurst. ECF No. 1-2, at 1. At the time of the accident, Ms. Hurst was engaged in the course of her employment. ECF No. 12, at 3. Consequently, Plaintiff (Ms. Hurst's workers' compensation carrier) paid out $128,540.53 in workers' compensation benefits to Ms. Hurst for her injuries. *Id.*

Mr. Rodda's automotive-liability insurer at the time of the accident was State Farm Mutual Automobile Insurance Company ("State Farm Mutual"). ECF No. 33, at 2–3. Starting in July 2011, Plaintiff began sending subrogation notices to State Farm[1] informing it of Plaintiff's lien on any potential damages Ms. Hurst might recover from State Farm. ECF No. 18-1.

On February 28, 2014, Plaintiff initiated arbitration against State Farm General Insurance Company ("State Farm General") through Arbitration Forums, Inc.[2] ECF Nos. 12-4, 12-7. Plaintiff's contentions at arbitration were as follows:

> This is a claim where the Respondent Carrier has accepted liability. This is a damages dispute which involves a motor vehicle accident in which the Respondent lost control and entered the Applicant driver's lane of travel and caused a collision. The injured Applicant sustained serious bodily injury as well as a significant period of disability
>
> . . . .
>
> . . . The Applicant seeks 100% recovery of the damages paid as a result of this accident in the amount of $128,540.53.

ECF No. 12-7, at 2–3.

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[1] Notices sent in July 2011 and May 2012 were addressed to "State Farm Insurance." ECF No. 18-1, at 2–3. Notices sent in July and October 2013 were addressed to "State Farm." *Id.* at 4–5.

[2] It is undisputed that Plaintiff and State Farm General "were signators [sic] to intercompany arbitration through Arbitration Forums." ECF No. 1-2, at 1; ECF No. 20, at 2. *See also* ECF No. 12-2.

State Farm General participated actively throughout the arbitration. For instance, in April 2014 it requested to reschedule the final hearing because "[t]his case has pending litigation[3] and the workers comp lien amount is a part of that dispute." ECF No. 12-6; ECF No. 12-7, at 7. Moreover, in June 2014 it responded to Plaintiff's contentions:

> As the Applicant states, liability is not at issue. However, damages are in dispute.
>
> . . .
>
> While the Respondent may owe what is being claimed by the Applicant, without having the opportunity to review the medical records and medical documentation, we cannot be sure. Proof of payments only show what was paid. It does not mean it was reasonable and actually owed. Because Mr. Hurst and Mrs. Hurst are represented by an attorney, the Respondent has never received any of the medical documentation or wage loss information.
>
> The Litigation process will allow the Respondent to obtain all the necessary documentation and information to determine what is reasonable and necessary and actually owed.
>
> The Applicant is asking for over $116,568 in wage loss, which seems on its face to be excessive.
>
> The Respondent asked that you grant the deferrment [sic] and allow the legal process to run its course.

ECF No. 12-7, at 4.

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[3] It is unclear what pending litigation State Farm General was referring to. Ms. Hurst had filed an action in North Carolina in September 2011 but that case was dismissed in December 2011. ECF No. 12-7, at 4. Ms. Hurst also filed an action in Florida but that was not until May 27, 2014. *See Thomas Hurst & Sharon Hurst v. John Rodda*, 01-2014-CA-001854 (Fla. 8th Cir. Ct. 2014).

State Farm General also had the opportunity to assert any affirmative defenses. The only affirmative defense it raised was that "[l]itigation has been filed and pends in this matter." *Id.* The arbitrator denied that defense, finding that pending litigation was "not a bar to jurisdiction."[4] *Id.* at 5.

The arbitrator published its award on March 5, 2015, finding that State Farm General is required to pay $128,540.53 to Plaintiff. ECF No. 12-10. Subsequently, both Plaintiff and Arbitration Forums sent requests to State Farm General asking it to comply with the award, ECF Nos. 12-11, 12-12, 12-13, 12-14, but State Farm General failed to make any payment, ECF No. 12, at 6–7.

On August 1, 2016, Plaintiff filed an action in state court seeking damages for State Farm General's failure to pay the arbitration award. EFC No. 1-2. State Farm General moved to dismiss the complaint. ECF No. 1-6. State Farm General later removed the case to this Court, ECF No. 1, and filed a memorandum in support of its earlier motion to dismiss, ECF No.

[4] The Arbitration Forums rules provide that "Workers' Compensation subrogation cases do not require a settlement" of the underlying lawsuit. *See* ECF No. 12-5 at 9.

3. In that memorandum, State Farm General suggested for the first time that it was not a proper party to the action because it had not issued Mr. Rodda's automotive-liability policy (rather, State Farm Mutual had). ECF No. 3, at 2 n.1.

II. *Discussion*

Plaintiff moves to confirm the March 5, 2015 arbitration award entered in its favor.[5] ECF No. 12. Because this action involves interstate commerce, Plaintiff's motion is governed by the Federal Arbitration Act ("FAA").[6] *See* 9 U.S.C. § 2 (2017); *Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1303 (11th Cir. 2014). Confirmation under the FAA is governed by 9 U.S.C. § 9, which provides in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the

[5] The motion is actually titled "Plaintiff's Motion to Enforce Plaintiff's Petition Confirming the Arbitration Award," ECF No. 12, at 1, and this Court's docket describes the motion as a "Motion for Judgment as a Matter of Law." Nonetheless, it is clear from the substance of the motion that Plaintiff seeks to confirm its arbitration award. As such, this Court will treat the motion accordingly. *Cf. Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1299 (11th Cir. 2015) (noting that "the Federal Rules are liberal, such that 'an erroneous nomenclature does not prevent the court from recognizing the true nature of a motion'" (quoting *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 746 (11th Cir. 1988))).

[6] It is undisputed that this action involves interstate commerce and that the FAA applies. *See* ECF No. 32, at 11 n.1.

> court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Thus, three things are required for confirmation: (A) the parties agreed that the award would be subject to confirmation, (B) confirmation was sought within one year, and (C) the award is not vacated, modified, or corrected.

A. *Whether the Award is Subject to Confirmation*

Most courts have held that "an explicit agreement between the parties providing for judicial confirmation of an award is not an absolute prerequisite to section 9 authority to enter judgment on the award." *Booth v. Hume Publi'g, Inc.*, 902 F.2d 925, 930 (11th Cir. 1990). For instance, the Eleventh Circuit held that confirmation was possible (even though no explicit agreement for confirmation existed) because a party fully participated in arbitration pursuant to an agreement that provided arbitration would be final and binding. *Id.* Here, the parties' agreement provides that the arbitrator's decision "is final and binding," ECF No. 12-2, at 2. Moreover, State Farm General fully participated in the arbitration. Accordingly, the March 5, 2015 arbitration award is subject to confirmation.

B. *Whether Confirmation was Timely Sought*

This Court recognizes that Plaintiff has not sought confirmation within the one-year time period mentioned in 9 U.S.C. § 9.[7] But courts disagree about whether that period is restrictive, *see generally* Matthew R. Kissling, *"A Sure and Expedited Resolution of Disputes": the Federal Arbitration Act and the One-Year Requirement for Summary Confirmation of Arbitration Awards*, 60 Case W. Res. L. Rev. 889 (2010), and the Eleventh Circuit has not issued a clear holding on this question.[8] Moreover, even if the time period is restrictive, it is clear that it would function as a statute of limitations rather than a jurisdictional bar. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) ("[T]ime prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004))); *cf. also id.* at 515–16 ("If the Legislature clearly

[7] The award was published on March 5, 2015. ECF No. 12-10. Plaintiff did not file its complaint in state court until August 1, 2016. ECF No. 1-2.

[8] The only Eleventh Circuit case on point is an unpublished decision noting that "a party has a year from the date of the final judgment of the arbitrator to apply for confirmation." *Musnick v. King Motor Co. of Fort Lauderdale*, 213 F. App'x 807, 808 (11th Cir. 2007) (citing 9 U.S.C. § 9). The decision does not address whether the one-year period is restrictive. Moreover, because the decision is unpublished it is not binding precedent. *Stephens v. DeGiovanni*, 852 F.3d 1298, 1327 n.31 (11th Cir. 2017).

states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." (citation and footnote omitted)).

Accordingly, because the section 9 confirmation period is not jurisdictional, State Farm General has waived the issue by failing to raise it in its pleadings. *See Davenport Recycling Assocs. v. C.I.R.*, 220 F.3d 1255, 1260 (11th Cir. 2000) ("Expiration of a statute of limitations is an affirmative defense that must be pleaded; it is not jurisdictional."). Indeed, several courts have recognized that this issue is waivable. *See Davis v. Producers Agric. Ins. Co.*, 5:12-CV-92(MTT), 2015 WL 7195714, at *7 (M.D. Ga. Nov. 16, 2015); *Markowski v. Atzmon*, No. 92-2865 (LFO), 1994 WL 162407, at *1 (D.D.C. Apr. 19, 1994); *Maidman v. O'Brien*, 473 F. Supp. 25, 27 (S.D.N.Y. 1979). Furthermore, even if State Farm General had not waived the issue Plaintiff could still seek confirmation under Florida law. *Cf., e.g.*, *In Re Consol. Rail Corp.*, 867 F. Supp. 25, 32 (D.D.C. 1994) ("Since § 9 was meant to supplement and not preclude other remedies, confirmation under

§ 9 is not mandatory and as such a party is not prevented from using either state law or common law procedures to confirm [an] award."). Confirmation under the Florida Arbitration Code is not subject to a one-year time period. *See* § 682.12, Fla. Stat. (2017).

C. *Whether the Award can be Vacated, Modified, or Corrected*

Under the FAA, when a party moves for an order confirming an arbitration award, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C.] sections 10 and 11." 9 U.S.C. § 9 (2017). Here, the award has not been vacated, modified, or corrected as prescribed in sections 10 and 11. Indeed, it is too late for such relief because State Farm General has failed to apply for it within the three-month deadline. *See* 9 U.S.C. § 12 (2017) ("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 filed or delivered."); *see also Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F. 2d 851, 854 (11th Cir. 1989) ("[T]he failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the [FAA] bars him from raising the alleged invalidity of the award as a defense in

opposition to a motion brought under section 9 of the [FAA] to confirm the award.").

State Farm General attempts to avoid the three-month deadline by arguing that the deadline does not apply when a party disputes that an agreement to arbitrate exists. ECF No. 32, at 12 n.2. Indeed, a few courts have held as much. *See, e.g.*, *MCI Telecomms. Corp. v. Exalon Indus., Inc.*, 138 F.3d 426, 430 (1st Cir. 1998) ("We find no indication that Congress intended for a party to be found to have waived the argument that there was no written agreement to arbitrate if that party failed to raise the argument within the time period established by section 12."). However, even those courts acknowledge that if a party participates in arbitration they are bound by section 12's three-month deadline. *See id.* at 430–31 ("It seems reasonable to conclude that participation in the litigation on the merits of a controversy before an arbitration panel, at the very least binds the party to the procedural requirements that emanate from that process."); *cf. also Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003) ("A party may waive its objection to the jurisdiction of the arbitrators by acquiescing in the arbitration with knowledge of the possible defect.").

State Farm General is not entitled to a proverbial second bite of the apple. It actively participated in arbitration without raising any of the arguments it now presents. Moreover, after arbitration was over, State Farm General slept on its rights and failed to move to vacate the arbitration award within the time-period afforded by section 12. For State Farm General to now ask this Court to consider its waived and unpreserved[9] arguments would defeat the entire purpose of arbitration and the FAA. The Supreme Court has explained that "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of . . . disputes." *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249 (1970). And the Eleventh Circuit has explained that "confirmation of an arbitration award is intended to be summary in nature." *Booth*, 902 F. 2d at 932. State Farm General's arguments run counter to these important principles.

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[9] State Farm General's arguments are unpreserved according to caselaw, *cf., e.g.*, *Titan Tire Corp. of Bryan v. United Steelworkers of Am., Local 890L*, 656 F.3d 368, 373 n.3 (6th Cir. 2011) ("[A]rguments not presented to an arbitrator generally cannot be raised for the first time on review in federal court . . . ."), and also according to the Arbitration Forums rules. For instance, Rule 2-4 provides that "parties must raise and support affirmative pleadings or defenses in the *Affirmative Pleadings/Defenses* section or they are waived." ECF No. 12-5, at 2. Moreover, Rule 2-10 provides that "[a]n affirmative defense is waived if it is available when [a] deferment request is made but is not asserted." *Id.* at 4. State Farm General requested a deferment during arbitration and the only affirmative defense it had raised at the time was that "litigation is pending." ECF No. 12-7, at 4, 7.

III. *Conclusion*

Plaintiff and State Farm General arbitrated a dispute, and the arbitrator ruled in Plaintiff's favor. Plaintiff is entitled to have the arbitration award confirmed because State Farm General's arguments to the contrary are waived and unpreserved. Moreover, because State Farm General failed to pay the award within the time periods provided by the Arbitration Forums rules, Plaintiff is entitled to statutory interest on the award and the legal fees and costs it has incurred in pursuing this action.[10]

Accordingly,

IT IS ORDERED:

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[10] Arbitration Forums rule 5-2 provides:

> When a party(ies) does not honor the award within thirty (30) calendar days after publication
> (a) The prevailing company's local representative must immediately send a written request for payment to the adverse company's local senior representative, addressing him/her by name.
> (b) If the award remains unpaid thirty (30) calendar days after written request for payment, the company should send a copy of the letter to AF requesting assistance with the award payment.
> (c) AF will notify the non-paying company.
> (d) If the award remains unpaid for an additional thirty (30) calendar days, the company may seek legal recourse in pursuit of collection and is entitled to statutory interests and all legal fees and costs incurred in pursuing collection until the award is paid.

ECF No. 12-5, at 6. It appears that Plaintiff has complied with the requirements of rule 5-2. ECF Nos. 12-11, 12-12, 12-13, 12-14.

1. Plaintiff's motion to confirm the arbitration award, ECF No. 12, is **GRANTED**.
2. State Farm General's motion for summary judgment, ECF No. 32, is **DENIED**.
3. This Court reserves jurisdiction to enter final judgment and to determine the statutory interest on the award and the amount of legal fees and costs Plaintiff is entitled to.
4. On or before August 21, 2017, Plaintiff shall file a motion outlining the statutory interest and the amount of legal fees and costs it seeks. State Farm General shall file a response, if opposes the motion in whole or in part, on or before August 29, 2017.

SO ORDERED on August 9, 2017.

s/Mark E. Walker
United States District Judge