

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1442

STACIA O'NEIL

vs.

MARISA BERQUIST & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Stacia O'Neil, brought this action seeking to vacate an arbitration award. A Superior Court judge allowed the defendants' motion for summary judgment, concluding that O'Neil's claims were untimely under the Uniform Arbitration Act for Commercial Disputes (act), G. L. c. 251, and that, even if timely, the claims failed on their merits. We affirm.

Background. The essential facts are undisputed. In May 2015 defendant Marisa Berquist was driving her vehicle with O'Neil seated in the passenger seat. Another vehicle struck Berquist's, causing both Berquist and O'Neil to sustain injuries.

¹ Commonwealth Mediation & Conciliation, Inc.; and Travelers Indemnity Company of CT. See note 5, infra. As is our usual practice, we take the defendants' names from the plaintiff's complaints.

Berquist filed suit against the other driver, Robert Perryman, who was insured by defendant Travelers Indemnity Company of Connecticut (Travelers). In October 2017 Berquist, O'Neil, Perryman, and Travelers, along with their respective counsel, attended a mediation. Travelers agreed at the mediation to pay \$979,176.32, representing the balance of its policy limits, to Berquist and O'Neil. All of the parties then signed an agreement (titled "Settlement Memorandum") in which Berquist and O'Neil agreed to release Travelers and Perryman from any claims arising out of the accident. The agreement further provided that "the allocation of [the \$979,176.32 payment] is to be determined through agreement, or failing same, binding arbitration between Marisa Berquist and Stacia O'Neil which shall occur on a date prior to 12/25/17 with Judge Suzanne V. DelVecchio."

When Berquist and O'Neil could not agree on how to divide the payment, the matter was arbitrated on December 20, 2017, before Judge DelVecchio. Judge DelVecchio issued her award on March 22, 2018, allocating \$900,000 of the funds to Berquist and \$79,176 to O'Neil. O'Neil initiated this action on May 29, 2018.

Discussion. The act provides that an application to vacate an arbitrator's award "shall be made within thirty days after delivery of a copy of the award to the applicant, but, if such

application is predicated upon corruption, fraud, or other undue means, it shall be made within thirty days after such grounds are known or should have been known." G. L. c. 251, § 12 (b). O'Neil does not contest that she failed to bring this action within thirty days of receipt of the award, nor does she argue that she has evidence of corruption, fraud, or other undue means that would justify an extension of the act's limitations period. Instead, she argues that the limitations period is not applicable because the act governs only disputes that are commercial in nature, which, she says, this dispute is not.

We agree with the defendants that O'Neil waived this argument by not raising it in the Superior Court. In fact, at several points in the Superior Court proceeding, O'Neil made statements to the effect that the act applied. The issue is thus waived and "may not be argued for the first time on appeal." Century Fire & Marine Ins. Corp. v. Bank of New England-Bristol County, N.A., 405 Mass. 420, 421 n.2 (1989).²

O'Neil further argues that there was no binding agreement to arbitrate and that the arbitrator therefore lacked jurisdiction to issue the award. But contrary to her assertion, challenges to an arbitrator's jurisdiction are not exempt from the thirty-day filing requirement of G. L. c. 251, § 12 (b).

² The applicability of a statute of limitations is not a jurisdictional issue and can be waived. See Silvestris v. Tantasqua Regional Sch. Dist., 446 Mass. 756, 765 n.16 (2006).

See Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 397 Mass. 426, 431 (1986) (analyzing cognate labor arbitration provision). In addition, this argument is likewise waived because O'Neil did not raise it in the Superior Court.³ We disagree with O'Neil's assertion that she preserved the issue by alleging in her original complaint that the "[p]laintiff did not form a legal contract with CMCI [Commonwealth Mediation & Conciliation, Inc.,]"⁴ and that the "arbitration was invalid due to voidable contract and should be strck [sic] as void." Putting aside that the original complaint was superseded by an amended complaint, these allegations did not suffice to preserve the issue, as they refer to the purported absence of a contract with CMCI, and not to the agreement with Berquist.⁵ Moreover, O'Neil did not fairly raise the issue at summary judgment, and it is evident from the judge's decision that he was not on notice of it. We note also that O'Neil represented to the arbitrator that she did "not

³ The issue does not go to the subject matter jurisdiction of the court. See Local 589, Amalgamated Transit Union, 397 Mass. at 431. Indeed, the act specifically enables a Superior Court judge to vacate an arbitration order based on a claim that the arbitrator exceeded her authority. See G. L. c. 251, § 12 (a) (3).

⁴ CMCI is the company that provided the arbitrator.

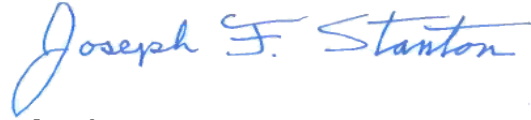
⁵ The original complaint was brought against Berquist and CMCI, but O'Neil later voluntarily dismissed CMCI and moved to add Travelers as a defendant.

dispute that the arbitration agreement between herself and Berquist is valid."

Although the judge did not err in dismissing the complaint as untimely, we have considered O'Neil's remaining argument, which is that the arbitrator abused her discretion in denying O'Neil's request for a ninety-day continuance of the December 20, 2017, arbitration hearing. Berquist opposed the continuance partly on the ground that the arbitration agreement required that the arbitration occur before December 25, 2017. The arbitrator did not abuse her discretion in determining that O'Neil failed to show sufficient cause to deviate from the terms of the agreement and denying O'Neil's request for a continuance.

Judgment affirmed.

By the Court (Massing, Shin & Ditkoff, JJ.⁶),



Clerk

Entered: June 1, 2020.

⁶ The panelists are listed in order of seniority.