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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MECHANICAL CONTRACTORS ASSOCIATION,)	Appeal from the Circuit Court of Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09—L—547
)	
VETERANS BLVD. INVESTORS, LLC,)	Honorable
)	Joseph S. Bongiorno,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: We affirmed the trial court's grant of defendant's motion to compel arbitration, because the parties had an agreement containing an arbitration clause, and they agreed to have an arbitrator decide disputes concerning what issues should be submitted to binding arbitration.

Plaintiff, Mechanical Contractors Association (MCA), purchased a building from defendant, Veterans Blvd. Investors, LLC (Veterans). After allegedly discovering defects in the concrete floor, MCA notified Veterans that it was responsible for the defective conditions but, due to the urgency of the situation, MCA would have remedial work performed and expected reimbursement. Veterans subsequently denied MCA's written request for reimbursement, and MCA brought suit alleging

breach of contract, breach of implied warranty of workmanship, and breach of implied warranty of habitability. Veterans filed a motion to compel arbitration under the parties' contract, and the trial court granted the motion. Plaintiff challenges this ruling, arguing that: (1) the purchase agreement did not contain a valid waiver of the implied warranties of habitability and workmanship; (2) the Limited Warranty attached to the parties' purchase agreement, which contains the arbitration provision, is not a part of the purchase agreement; and (3) its claims are not subject to the arbitration provision. We affirm.

I. BACKGROUND

MCA and Veterans are both Illinois companies with their principle places of business located in Illinois. On July 5, 2007, the parties entered a real estate purchase agreement in which MCA agreed to buy a newly-constructed building from Veterans. The purchase price, as amended, was \$1,651,550. The agreement includes terms regarding the then-remaining construction to be completed on the building. Regarding warranties, the agreement states in paragraph 9:

“Seller agrees to deliver to Purchaser at Closing, an express Limited Warranty as set forth in **Exhibit ‘D’** attached hereto.

SELLER DISCLAIMS ANY AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS AS TO THE PROPERTY, AND IN PLACE OF SUCH WARRANTIES, WHETHER ARISING FROM CUSTOM, USAGE, COURSE OF TRADE, STATUTORY OR CASE LAW OR OTHERWISE, IS THE BUILDER'S LIMITED WARRANTY. SELLER ALSO SPECIFICALLY DISCLAIMS AND PURCHASER BY INITIALING HEREUNDER AND SIGNING THIS CONDOMINIUM REAL ESTATE PURCHASE AGREEMENT SPECIFICALLY WAIVES THE

‘IMPLIED WARRANTY OF HABITABILITY’ AS PROVIDED BY LAW AND AGREES THAT THE ONLY WARRANTY EXISTING IS THAT WHICH IS ATTACHED HERETO AS EXHIBIT ‘D.’ The provisions of this paragraph shall survive the closing and delivery of the Deed to Purchaser.”

The purchase agreement further states, under the heading “**DEFAULT**” that if “either party fails to perform any obligation under this Agreement,” and the breaching party does not cure the breach within the defined period, the “non-breaching party shall be permitted to pursue any remedy available at law or equity.”

Under the heading “**MISCELLANEOUS**,” the contract states that if “any legal action” is commenced by a party to enforce any provisions of the contract, the prevailing party is entitled to costs and attorney fees. It further provides: “Except as herein expressly otherwise provided, no agreement, representation, or warranty herein contained shall survive the Closing and, except as herein expressly otherwise provided, all agreements, representations and warranties shall be merged in such Closing.”

Exhibit D, as amended, is entitled “**Express Limited Warranty**” and contains the following relevant provisions:

“Binding Arbitration will be the sole remedy for resolving disputes between **YOU** [MCA] and **US** [Veterans] that arise from or relate to this **BUILDER’S LIMITED WARRANTY. *****

Any disputes between **YOU** and **US** related to or arising from this **BUILDER'S LIMITED WARRANTY** will be resolved by binding arbitration. Disputes subject to binding

arbitration include but are not limited to:

A. **WE** do not agree with **YOU** that a **DEFICIENCY** or **DEFINED STRUCTURAL ELEMENT FAILURE** is covered by this **BUILDER'S LIMITED WARRANTY**;

* * *

F. Disputes concerning the issues that should be submitted to binding arbitration.

* * *

This **BUILDER'S LIMITED WARRANTY** is separate and independent of the contract between **YOU** and **US** for the construction and / or sale of **YOUR BUILDING**. The provisions of this **BUILDER'S LIMITED WARRANTY** shall in no way be restricted by anything contained in the construction and / or sales contract between **YOU** and **US**."

On September 20, 2007, the parties closed on the sale of the property. The following allegations come from MCA's complaint. Soon after the closing, MCA discovered cracking and uneven settlement of the concrete floor. It advised Veterans of these conditions and stated that it would seek to determine the cause and possible remedies for the condition. MCA engaged a material testing company which found numerous deficiencies. MCA informed Veterans of these findings. MCA commenced and paid for remedial work due to the "exigency" of the situation, but it informed Veterans that it expected reimbursement. On December 24, 2008, MCA made a written demand for

\$51,319.04 for the cost of remedial work. Veterans refused reimbursement, and MCA filed suit on January 13, 2009.

MCA initially filed suit in Cook County, but venue was transferred to Du Page County on Veterans' motion. On July 30, 2009, Veterans filed a motion to compel arbitration, which the trial court granted on December 9, 2009. On March 12, 2010, the trial court denied MCA's motion to reconsider and dismissed the complaint with prejudice. MCA timely appealed.

II. ANALYSIS

“A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2—619(a)(9) to dismiss based on the exclusive remedy of arbitration.” *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002). A trial court's decision to grant or deny a motion to compel arbitration is subject to *de novo* review where, as here, it makes the decision as a question of law, without any factual findings. *Fosler v. Midwest Care Center II, Inc.*, 391 Ill. App. 3d 397, 401 (2009). Further, the interpretation of a contract presents a question of law subject to *de novo* review. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007).

Arbitration's main purpose is to resolve a dispute faster and with less expense than litigating in court. *Sloan Electric v. Professional Realty & Development Co.*, 353 Ill. App. 3d 614, 620 (2004). Under Illinois's Uniform Arbitration Act, a party to an arbitration agreement who is brought into court may, if the opposing party refuses to arbitrate, obtain an order from the court staying the proceedings and compelling arbitration. 710 ILCS 5/2 (West 2008). However, an “agreement to arbitrate a dispute is a matter of contract, and the parties to such a contract are bound to arbitrate only

those issues they have agreed to arbitrate, as shown by the language of the agreement.” *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 337 Ill. App. 3d 714, 717 (2003).

A. Whether Paragraph 9 Effectively Disclaims Implied Warranties

We first address MCA’s argument that paragraph 9 of the purchase agreement is ineffective as a disclaimer of the implied warranties of workmanship and habitability because it fails to state the consequences of waiving those warranties.¹ In order for a contract to disclaim the implied warranty of habitability, there must be: (1) a conspicuous provision (2) which fully discloses the consequences of its inclusion (3) that was the agreement of the parties. See *Board of Managers of Chestnut Hills Condominium Ass’n v. Pasquinelli, Inc.*, 354 Ill. App. 3d 749, 758 (2004) (*Chestnut Hills*). The disclaimer must also use the words “implied warranty of habitability” and bring them to the purchaser’s attention. *Id.* The requirements to disclaim the implied warranty of habitability are more stringent than those to disclaim other implied warranties. See *Mitsch v. General Motors Corp.*, 359 Ill. App. 3d 99, 105 (2005).

Here, regarding conspicuousness, paragraph 9 is clearly set off from other contract provisions and uses bold, italics, and uppercase lettering in its disclaimer, making the provision very conspicuous. The disclaimer also satisfies the requirement that it disclose the consequences of its inclusion, because it states that the “***ONLY WARRANTY EXISTING IS THAT WHICH IS ATTACHED HERETO AS EXHIBIT ‘D.’***” The purchase agreement also states in its miscellaneous provisions that “except as herein expressly otherwise provided *** no warranty herein contained shall survive the Closing.” *Cf. Breckenridge v. Cambridge Homes, Inc.*, 246 Ill. App. 3d

¹MCA argues in its reply brief that while Veterans asserts in its brief that the implied warranties of habitability and workmanship were waived by virtue of paragraph 9, this argument was not raised in the trial court and should not be considered. However, MCA raised this argument in its own initial brief, and as it is relevant to the issues on appeal, we address it.

810, 818 (1993) (consequences adequately disclosed where provision stated that the result of the warranty disclaimer was that the purchaser's sole warranty would be the builder's warranty). For the third requirement, the disclaimer is a part of the parties' agreement because it is contained in the purchase agreement, to which MCA agrees that it was a signatory. MCA further initialed paragraph 9. Finally, the disclaimer uses the words "implied warranty of habitability" in the same conspicuous lettering. MCA argues that the disclaimer does not mention the implied warranty of workmanship, but as Veterans points out, only the implied warranty of habitability is required to be specifically mentioned. *See Chestnut Hills*, 354 Ill. App. 3d at 758; *cf. Mitsch*, 359 Ill. App. 3d at 105 (contract did not need to contain the term "merchantability" in order to disclaim the implied warranty of merchantability). Further, the disclaimer clearly points out that the only warranty will be the builder's Limited Warranty contained in exhibit D.

B. Whether MCA is Bound by Limited Warranty in Exhibit D

MCA next argues that it is not bound by the arbitration language contained in exhibit D's Limited Warranty. MCA points out that the purchase agreement, exclusive of exhibit D, does not require arbitration, and that the only language requiring arbitration is in the Limited Warranty. MCA states that it is not an express party to exhibit D, and that although paragraph 9 of the purchase agreement refers to exhibit D, that paragraph does not contain any language incorporating the exhibit into the purchase agreement. MCA contrasts paragraph 9 to paragraph 7(A) of the purchase agreement, which states that certain exhibits "are attached to and made a part of" the purchase agreement. MCA maintains that its acknowledgment in connection with paragraph 9 that the builder's Limited Warranty shall substitute for the implied warranty of habitability cannot be

interpreted as an agreement by MCA that all of the terms of exhibit D are incorporated into the purchase agreement, in particular the terms requiring arbitration.

MCA analogizes this case to *Chestnut Hills*. There, the plaintiff was a condominium association, and the defendant was the developer who had sold the condominium units to individual owners. *Chestnut Hills*, 354 Ill. App. 3d at 750. The purchase contract stated:

“ ‘PURCHASER HAS READ AND UNDERSTOOD THE TERMS OF THE SAMPLE COPY OF THE LIMITED WARRANTY, INCLUDING ANY PROVISION THAT MAY REQUIRE ALL DISPUTES THAT ARISE UNDER THE RWC LIMITED WARRANTY TO BE SUBMITTED TO BINDING ARBITRATION.’ ” *Id.* at 751.

The limited warranty referenced in the purchase contract required binding arbitration to resolve disputes regarding “ ‘warranted common elements.’ ” *Id.* at 751-52. The plaintiff brought suit against the defendant for breach of implied and express warranties and breach of contract based on alleged defects in design, material, and workmanship. *Id.* at 752. The defendant sought to compel arbitration of the claims under the limited warranty’s provisions. *Id.*

The plaintiff argued that its claims arose out of the purchase contract rather than the limited warranty, and that the purchase contract did not incorporate the limited warranty. The appellate court stated that in order for a contract to incorporate another document by reference, the reference must show the parties’ intent to incorporate the document and make it part of the contract. It further stated that “[c]laims arising out of one agreement are not subject to an arbitration clause contained in a separate agreement.” *Id.* at 755. The court agreed with the plaintiff that the purchase contract did not incorporate the limited warranty, because the purchase contract referred only to the existence of the limited warranty, and the limited warranty specifically stated that it was “ ‘separate and apart

from’ ” the purchase contract. *Id.* Instead, the parties entered into two separate agreements. *Id.* at 756. Accordingly, any claims made under the purchase contract, which did not contain an arbitration clause, were not subject to binding arbitration. *Id.* The court further concluded that the plaintiff’s allegations sought redress for defects not defined as “ ‘common elements’ ” under the limited warranty, meaning that the plaintiff’s claims fell under the purchase contract and were not subject to arbitration. *Id.* at 757.

MCA argues as follows. Like the purchase contract in *Chestnut Hills*, the purchase agreement here does not require arbitration. Although paragraph 9 refers to “an express Limited Warranty,” it does not specifically incorporate the Limited Warranty into the agreement. Similar to *Chestnut Hills*, the limited warranty specifically states that it “is separate and independent of the contract between [MCA] and [Veterans] for the construction and / or sale of [the property].” The Limited Warranty, although an exhibit to the purchase agreement, is a separate undertaking that was not incorporated into the purchase agreement. MCA argues that, as in *Chestnut Hills*, we “should similarly conclude that the Builder’s Limited Warranty was a separate agreement and that the language contained in the Builder’s Limited Warranty was not incorporated into the purchase agreement.”

Veterans takes the position that the Limited Warranty was incorporated into the purchase agreement. Veterans cites *Shugan v. Colonial View Manor*, 107 Ill. App. 3d 458, 465 (1982), for the proposition that “[w]here a contract consists of several documents it is necessary that the signed writing refer to the unsigned writing or that the several writings be so connected, physically or otherwise, that it may be determined by internal evidence that they relate to the same contract.” Veterans notes that it is the parties’ intent that controls. *Chestnut Hills*, 354 Ill. App. 3d at 755.

Veterans points out that the purchase agreement references exhibit D by name and states that the exhibit is “attached” to it; paragraph 9 of the purchase agreement states that the “***ONLY WARRANTY EXISTING IS THAT WHICH IS ATTACHED HERETO AS EXHIBIT ‘D.’***” Paragraph 9 also states that the “provisions of this paragraph shall survive the closing and delivery of the Deed to Purchaser.” Accordingly, Veterans argues, it was clearly the parties’ intent that the Limited Warranty be considered as part of the same contract. Veterans maintains that this case is distinguishable from *Chestnut Hills* because there, the contract stated that the buyer had read only a sample copy of the warranty, which was not attached, and the contract said that the warranty only “may require” the arbitration of disputes. *Id.* at 751.

Regarding MCA’s argument that exhibit D contains language stating that it is separate from the contract, Veterans maintains that such language was included to allow the warranty to survive after the closing, because otherwise a contract for a sale of real estate is merged into the deed when it is delivered to the buyer at closing. See *Ollivier v. Alden*, 262 Ill. App. 3d 190, 195 (1994). Veterans states that this is why the purchase agreement provides in its miscellaneous provisions that: “Except as herein expressly otherwise provided, no agreement, representation, or warranty herein contained shall survive the Closing and, except as herein expressly otherwise provided, all agreements, representations and warranties shall be merged in such Closing,” and that paragraph 9 states “that provisions of this paragraph shall survive the closing and delivery of the Deed to Purchaser.”

We note that Veterans’ explanation of the merger doctrine does not recognize that when merger occurs, the “prior contract is superseded only as to such of its provisions as are covered by the conveyance made pursuant to its terms.” *Peterson v. Hubschman Construction Co.*, 76 Ill. 2d

31, 39 (1979). Therefore, executory agreements for the performance of separate and distinct contract provisions that are not fulfilled by the deed's delivery are not merged into the deed. *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 412 (2002). For example, warranties that are collateral to the delivery of the deed are not affected by merger. *Id.* Therefore, exhibit D did not need to be a separate contract in order to survive the closing.

In any event, we are left with the parties' contract as written. We agree with MCA to the extent that exhibit D was not incorporated into the purchase agreement in the strict sense. Contrary to Veterans' argument, the *Chestnut Hills* court did not rely on the fact that the purchase contract there said that the buyer had read only a sample copy of the warranty or that the contract said that the warranty only "may" require the arbitration of disputes. Instead, the purchase agreement in *Chestnut Hills* referred to the existence of the limited warranty without incorporating it, and the warranty specifically stated that it was " 'separate and apart from' " the purchase contract. *Chestnut Hills*, 354 Ill. App. 3d at 755. As in *Chestnut Hills*, here paragraph 9 refers to the Limited Warranty but does not specifically incorporate it into the purchase agreement, and the Limited Warranty states that it "is separate and independent of the contract between [MCA] and [Veterans] for the construction and / or sale of [the property]." Thus, MCA is not bound to arbitrate claims falling under the purchase agreement. However, it does not follow that the arbitration language in exhibit D is not binding upon MCA for claims falling under the Limited Warranty. Under the terms of the purchase agreement, MCA agreed that all otherwise implied warranties were waived and the only warranty that would be in effect was the Limited Warranty contained in exhibit D. Thus, as in *Chestnut Hills*, by signing the purchase agreement, the parties manifested an intent to effectively enter into two separate agreements (*see Id.* at 756), and claims under the Limited Warranty are

subject to arbitration. *See also CC Disposal Inc. v. Veolia ES Valley View Landfill, Inc.*, No. 4—10—0230 slip op. at 3 (Ill. App. Dec. 22, 2010) (even though contract did not have language incorporating attached exhibit, the exhibit was part of the agreement, and the parties were bound by its terms).

C. Whether MCA's Claims Fall Under the Limited Warranty

We now turn to MCA's argument that its claims are not subject to arbitration because they do not fall under the Limited Warranty. Veterans maintains that MCA has forfeited this argument by failing to raise it in the trial court. *See In re Marriage of Culp*, 399 Ill. App. 3d 542, 550 (2010) (a party who does not raise an issue in the trial court forfeits the issue and may not raise it on appeal). However, given that MCA continuously took the position that it was not required to arbitrate its claims and specifically argued in its motion to reconsider that the claims did not fall under the Limited Warranty, we decline to find its argument forfeited.

MCA argues that its claims of breach of contract, breach of implied warranty of workmanship, and breach of implied warranty of habitability arose out of the purchase agreement rather than the Limited Warranty, and therefore are not subject to arbitration. However, we have already determined that paragraph 9 effectively disclaimed the implied warranties of workmanship and habitability. Therefore, only the breach of contract claim remains at issue.

MCA argues that Veterans breached the express warranty in paragraph 7(A), that the building "has been constructed in accordance with the architectural plans prepared by Argosy Architectural Consultants dated July 18, 2006," by failing to construct the concrete floor properly and according to the plans. MCA also argues that Veterans breached the express warranty in paragraph 13(A)(x), that the building would be constructed according to applicable laws, ordinances, and codes, because

Veterans neglected to test the soil, improperly installed fill beneath the concrete floor, failed to compact backfill in the footing walls, and failed to check for water pipes. Finally, MCA argues that Veterans breached the representation in paragraph 13(A)(iii), that fulfillment of the contract would not result in a breach of any agreement or applicable law, by failing to meet standard building requirements due to an uneven floor, improper backfill, and soil separation. MCA argues that these alleged breaches relate to representations made by Veterans in clauses wholly separate from paragraph 9 of the purchase agreement.

Veterans argues that the breaches of contract alleged in the complaint fall within the Limited Warranty and therefore require binding arbitration. Specifically, Veterans argues that allegations that the concrete floors were uneven and that a lack of soil testing caused a separation below the floor are covered by the Limited Warranty's statement that concrete floors will not have "pits, depressions, or raised surfaces," and that Veterans would repair such defects. Veterans argues that the allegations regarding the backfill not being compacted in the footing walls is covered by the Limited Warranty's standards for footings and walls. Veterans also argues that allegations regarding a water pipe below the floor are similarly covered by the Limited Warranty's provision that Veterans would repair any leaks in drains or water pipes and any sewers and drains that were clogged because of construction defects. Veterans further notes that the Limited Warranty states that "disputes subject to binding arbitration include but are not limited to *** disputes concerning the issues that should be submitted to binding arbitration." Veterans also quotes our supreme court's statement that "when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of [the] arbitration agreement, the question of substantive arbitrability should initially be

decided by the arbitrator.” *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 447-48 (1998).

MCA counters that the Limited Warranty does not explicitly provide that the question of arbitrability must be submitted to an arbitrator, and even otherwise, it is manifestly apparent that its claims do not fall within the scope of the claims covered by the arbitration language. MCA argues that this is a case about the failure to comply with codes and plans, representing breaches of the purchase agreement, rather than about defective workmanship. MCA argues that nothing in the Limited Warranty requires the arbitration of its claims.

Whether an agreement to arbitrate exists between the parties is a question to be determined by the court rather than an arbitrator. *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 463 (2003). However, if there is an arbitration agreement but it is not clear whether the subject matter of the dispute falls within the arbitration agreement’s scope, the question of substantive arbitrability should initially be decided by the arbitrator. *Id.* Further, parties are free to agree to submit the question of arbitrability itself to arbitration. *Bahuriak*, 337 Ill. App. 3d at 719.

Here, we have decided that there was a valid agreement between the parties to arbitrate claims falling under the Limited Warranty. Contrary to MCA’s argument, the Limited Warranty’s provision that “disputes subject to binding arbitration include *** disputes concerning the issues that should be submitted to binding arbitration” is a clear agreement to submit a dispute about the arbitrability of an issue to arbitration. *Cf. Id.* (provision stating that “ [t]he term “dispute” also includes any question regarding whether a matter is subject to arbitration under this Arbitration Agreement’ ” was an agreement to arbitrate the issue of arbitrability). Accordingly, it is the

arbitrator's role to determine whether MCA's claims fall under the Limited Warranty, meaning that the trial court did not err in granting Veterans' motion to compel arbitration.

III. CONCLUSION

For the reasons stated, we affirm the judgment of the Du Page County circuit court.

Affirmed.