

No. 1-12-1837

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

J. ROGAN BECKMAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois.
)	
)	
)	No. 2008 L 12648
v.)	
)	
ART DEVELOPMENT GROUP LTD.,)	Honorable
)	Ronald F. Bartkowicz
Defendant-Appellee.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ *1 Held:* The arbitrator did not exceed his authority: (1) by finding plaintiff's notice of termination did not conform to the parties' contract and therefore was inadequate; (2) by awarding defendant \$113,462 after making adjustments for repairs to be made and amounts paid in excess by plaintiff, which also indicated arbitrator's impartiality; and (3) by disregarding plaintiff's claim of breach of implied warranty of habitability. Also, defendant fulfilled a condition precedent of the parties' contract by eventually submitting to arbitration.

¶ 2 BACKGROUND

¶ 3 Plaintiff J. Rogan Beckman appeals from the judgment of the circuit court affirming an arbitration award of \$113,462 for defendant Art Development Group, Ltd. The following facts are not in dispute. Plaintiff bought a historic home in 2005 and on or about November 17, 2006, contracted with the defendant to renovate and remodel the home. The contract provided that if any dispute arose between the parties, they would attempt to resolve it through mediation, and, if unsuccessful, they would proceed to arbitration. After finding fault with defendant's work, plaintiff sent an e-mail on April 11, 2007 to defendant stating that if the work was not corrected, the contract would be terminated. In the email, plaintiff complained that there was lack of proper blocking and bracing for the plumbing and plaintiff wanted defendant to acquire a documented letter from the manufacturer that defendant had reinforced the trusses correctly. Plaintiff also indicated that if these problems persisted he had the right to break the contract. On May 14, 2007, plaintiff sent a letter to defendant terminating the contract.

¶ 4 Article 11 deals with termination of the contract.

"11.2 By the owner for cause: 11.2 (a) If the contractor persistently fails to perform any of its obligations under this contract, the owner may, at the owner's sole option, after seven days prior written notice to the Contractor... the owner may undertake to perform such obligations through another contractor; (b) Upon seven days' prior written notice to the Contractor, the Owner may terminate this contract for any of the following reasons *

* * If the contractor fails to cure within the seven days, the owner, without prejudice to any other rights or remedy, may take possession of the project site and complete the work utilizing any reasonable means. In this event, the contractor shall not have a right to

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further payment until the work is completed and all payments by owner for costs of completion of the work including but not limited to recording and reasonable attorneys fees, costs, and expenses have been deducted from the balance due contractor.

11.3 By the owner without cause: The owner may terminate this contract or any reason other than as set forth in article 11.2. Upon termination the owner shall pay the contractor for all work executed and for any proven loss, cost or expense in connection with the work, plus all proven demobilization costs ('termination payment'). In the event the owner terminates the agreement under this section the contractor shall provide a detailed accounting of any such costs, incurred by the contractor. In such event, to the extent of any amount due from contractor shall be credited to the owner's account at the time of termination and any remaining unpaid balance of the termination payment shall be paid to the contractor within 30 days after owner's termination."

¶ 5 Pursuant to their contract, the parties first proceeded to mediation in September 2007, which was unsuccessful. In March 2008, plaintiff made a demand for arbitration, also pursuant to their contract, with the American Arbitration Association (AAA). In May 2008, an arbitrator was appointed. In June 2008, plaintiff filed an amended demand for arbitration. The arbitrator ordered defendant to file its answer and counterclaim by June 29, 2008. Defendant eventually filed its answer and counterclaims on September 2, 2008.

¶ 6 On September 26, 2008, AAA billed plaintiff and defendant for fees and expenses associated with the arbitrator's study and preparation time and for the arbitration itself. Plaintiff paid the fees. Defendant did not pay the invoice. On October 14, 2008, AAA sent a letter to

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plaintiff and defendant suspending the arbitration due to defendant's failure to pay the invoice.

¶ 7 On November 12, 2008, plaintiff filed a breach of contract claim in the circuit court against defendant alleging failure to properly install structural joists and subfloors, failure to install the HVAC system in accordance with plans and specifications, improperly performed masonry work and numerous other errors. Defendant failed to file an appearance in the case and an order of default was entered on January 5, 2009. On January 14, 2009, defendant moved to vacate the default, which the court granted, and began litigating the case.

¶ 8 On March 2, 2011, plaintiff filed a motion for summary judgment claiming that defendant should be barred from asserting a counterclaim or maintaining a defense because defendant had not participated in arbitration. On August 8, 2011, the trial court did not rule on the motion but sent the parties to arbitration. The case was stayed pending arbitration.

¶ 9 On December 16, 2011, the parties engaged in an arbitration hearing. On January 10, 2012, in a written award, the arbitrator found deficiencies in defendant's work, but he also found inadequacies in plaintiff's notice of termination and found that plaintiff terminated the contract without cause. The arbitrator found that plaintiff's email of April 11, 2007 did not satisfy the requirements of the contract as a seven-day notice for termination for cause under article 11.2.b of the contract and therefore the termination was found to be pursuant to article 11.3, By the owner without cause. The arbitrator specifically found deficiencies in the notice for the following reasons: (1) it was not identified as a seven days notice; (2) it did not indicate that the contractor has seven days to cure; (3) it did not identify what defects needed to be cured; and (4) it was not proper under article 16.1 of the contract, which governed notices and written communications

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between the parties. That section provides:

" All notices or other written communication hereunder shall be deemed to have been properly given and shall be effective (I) upon delivery (or attempted delivery, if delivery is refused), if delivered in person or by facsimile transmission with receipt acknowledged by the recipient thereof and confirmed by telephone by sender, (ii) one day after having been deposited for overnight delivery with any reputable overnight courier service, or (iii) the earlier of actual delivery (or attempted delivery if delivery is refused) or three days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal service and sent by registered or certified mail, postage prepaid, return receipt requested, addressed to Borrower or Lender, as the case may be, at the addresses set forth below."

¶ 10 The arbitrator found that the evidence presented by both sides in support of their respective damage claims and in opposition to the other's claims was very limited. In calculating defendant's damages, the arbitrator relied upon a detailed accounting of costs, dated May 7, 2007. He awarded damages to defendant in the amount of \$113,462 after reducing the award for payments made by plaintiff in excess of the work completed. Specifically, the arbitrator computed defendant's damages as follows: the claimed amount of \$239,462 minus (i) \$28,000 for improperly installed HVAC ductwork, and (ii) \$28,000 for an improperly installed joist system, and (iii) \$70,000 as a credit to the claimant for funds that it had paid in advance to the defendant prior to termination of the contract. The award was in full settlement of all claims and counterclaims submitted to the arbitration. All claims and counterclaims not expressly granted

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were denied.

¶ 11 On February 23, 2012, plaintiff filed a motion in the circuit court to vacate the award. In plaintiff's memorandum in support of his motion to vacate, he contends the arbitrator exceeded his authority by basing the award and calculating damages on terms not included in the contract. He also alleged that the arbitrator was not impartial in refusing to consider plaintiff's breach of implied warranty of habitability claim. Subsequently, defendant filed its motion to affirm the award. On May 31, 2011, the trial court denied plaintiff's motion, granted defendant's, and thereby entered a judgment in favor of defendant for \$113,462. From that order this appeal was filed.

¶ 12 ANALYSIS

¶ 13 On appeal, plaintiff first contends that the arbitrator exceeded his authority by not following the unambiguous terms of the contract in finding that plaintiff's notice of termination was not in conformity with the parties' contract. Second, he contends that the arbitrator exceeded his authority by providing an award based on an uncertified bill. Third, plaintiff contends that the arbitrator was not impartial when he failed to consider plaintiff's breach of warranty claim. Finally, plaintiff argues defendant did not fulfill the parties' contract by failing to arbitrate their dispute until the trial court ordered the parties to arbitration.

¶ 14 Initially, we focus on plaintiff's argument in his reply brief that the court erred by denying his motion for summary judgment and referring the parties to arbitration because defendant waived his right to defend by not participating in earlier arbitration proceedings. However, the trial court never actually ruled upon plaintiff's motion for summary judgment. Instead, the trial

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court ordered the parties to arbitration, as per the terms of their contract. Also, plaintiff has forfeited his claim of waiver by failing to include it in his appellant's brief and raising it for the first time in his reply brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 502 (2010).

¶ 15 The parties' contract provides that any and all disputes arising out of the contract will be submitted to arbitration. Thus, the arbitrator was empowered to consider all issues before him and make an award which completely resolved the dispute before him. Review of an arbitration award is more limited than review of a trial court's decision. *Galasso v. KNS Companies Inc.*, 364 Ill. App. 3d 124, 130 (2006) (citing *Equity Insurance Managers of Illinois, LLC v. McNichols*, 324 Ill App. 3d 830, 835 (2001)). Where parties have agreed to settle their dispute via an arbitrator, they have agreed to accept the arbitrator's view, and thus, a reviewing court should not overrule an award simply where its interpretation differs from that of the arbitrator. *Id.* (citing *Everen Securities, Inc. v. A.G. Edwards & Sons Inc.*, 308 Ill. App. 3d 268, 273 (1999)).

¶ 16 Thus, as the Supreme Court stated in *Burchell v. Marsh*, 58 U.S. 344, 349 (1854):

"Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary

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course would be a substitution for the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end of litigation."

¶ 17 The limited circumstances under which this court may modify or vacate an arbitration award are set forth in the Uniform Arbitration Act (Act) (710 ILCS 5/1 et seq. (West 2002)). *Galasso*, 364 Ill. App. 3d at 131. Under section 12(a) of the Act sets forth limited circumstances under which a reviewing court may modify or vacate an arbitration award: (1) the award was maintained by corruption or fraud; (2) the arbitrator was not impartial; (3) the arbitrator exceeded his authority; (4) the arbitrator unreasonably refused to postpone the hearing or hear material evidence; or (5) there was no arbitration agreement. (710 ILCS 5/12(a) (West 2002))

¶ 18 A presumption exists that the arbitrator did not exceed his authority, and as a reviewing court, we should construe his award, if possible, so as to uphold its validity. *Id.* at 130. (citing *Equity Insurance*, 324 Ill. App. 3d at 835). A court has no power to determine the merits of the award simply because it strongly disagrees with the arbitrator's contract interpretation. *Galasso*, 364 Ill. App. 3d at 130. (citing *Herricane Graphics, Inc. v. Blinderman Construction Co.*, 354 Ill. App. 3d 151, 156 (2004)). Further, we can not set aside an award on the ground that it is illogical or inconsistent. *Galasso*, 364 Ill. App.3d at 130. (citing *Herricane Graphics, Inc.*, 354 Ill. App. 3d at 156). In fact an arbitrators award will not even be set aside because of errors in judgment or mistake of law or fact. *Galasso*, 364 Ill. App. 3d at 130.. (citing *Herricane Graphics, Inc.*, 354 Ill. App. 3d at 156). If the arbitrators interpret the contract and issues submitted to them, then the parties are bound by that decision as long as the interpretation is "a reasonably possible one."

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Hedrich, 266 Ill. App. 3d at 28 (quoting *Rauh*, 143 Ill. 2d at 392.)

¶ 19 We can, however, set aside an award if the arbitrator's errors in judgment are apparent on the face of the award. *Shearson Lehman Brothers, Inc v. Hedrich*, 266 Ill App. 3d 24, 28 (1994) (citing *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 393 (1991)). "The arbitrators' authority is limited by the unambiguous contract language." *Hedrich*, 266 Ill. App. 3d at 29 (citing *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (1988)). As such, the arbitrators do not have the authority to ignore the plain language of the contract and to alter the agreement, as the ultimate award must be "grounded on the parties' contract." *Hedrich*, 266 Ill. App.3d at 29. (quoting *Inter-City*, 845 F.2d at 187-88). A party can also complain if the arbitrators exceed their authority and do not interpret the contract, "that is, if they disregard the contract and implement their own notions of what is reasonable and fair." *Id.* (quoting *Hill v. Norfolk & Western Ry. Co.*, 814 F. 2d 1192, 1195 (1987)).

¶ 20 Plaintiff first contends the notice provision of the contract was fulfilled and the arbitrator is ignoring the language of the contract and requiring more of the plaintiff than the contract does. Plaintiff argues that the arbitrator based the award on the wrong provisions of the parties' contract, namely, article 11.3, which covers notices of termination and article 16.1, which covers when a notice is deemed effective. Plaintiff further argues that under article 5, on the owner responsibilities, and specifically, article 5.2, on notices of defect, the contract only requires plaintiff to issue a written notice to defendant. The relevant portions of the contract are as follows.

¶ 21 Article 5.2, which the plaintiff argues is controlling, states as follows:

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"Notice of Defect. If the Owner becomes aware of any error, omission or other inadequacy in the Contract Documents or of the Contractor's failure to meet any of the requirements of the Contract Documents, of any other fault or defect in the Work, the Owner shall give prompt written notice to the Contractor. If the contractor becomes aware of any error, omission or other inadequacy in the contract Documents, or of any other fault or defect in the Work, the Contractor shall give prompt written notice to the Owner. "

¶ 22 Article 11 deals with termination of the contract. The arbitrator based his decision on article 11.2 and 11.3 which state in pertinent parts:

"11.2 (a) *** after seven days prior written notice to the Contractor * * * the owner may undertake to perform such obligations through another contractor; (b) Upon seven days' prior written notice to the Contractor, the Owner may terminate this contract."

"11.3 By the owner without cause: The owner may terminate this contract or any reason other than as set forth in article 11.2. Upon termination the owner shall pay the contractor for all work executed and for any proven loss, cost or expense in connection with the work, plus all proven demobilization costs("termination payment"). In the event the owner terminates the agreement under this section the contractor shall provide a detailed accounting of any such costs, incurred by the contractor. In such event, to the extent of any amount due from contractor shall be credited to the owner's account at the time of termination and any remaining unpaid balance of the termination payment shall be paid to the contractor within 30 days after owner's termination."

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¶ 23 Plaintiff argues that the notice provision was fulfilled by the email and the passing of 33 days before plaintiff terminated the contract. Plaintiff argues it was gross error for the arbitrator to ignore the simple language of the contract and require something more of plaintiff, and that the letter did meet the notice requirement. However, the arbitrator found under the notice provision found in the parties contract that the email did not meet the delivery requirements.

When the notice is deemed to be delivered is found in the contract under article 16.1.

"Notices. All notices or other written communication hereunder shall be deemed to have been properly given and shall be effective (i) upon delivery (or attempted delivery, if delivery is refused), if delivered in person or by facsimile transmission with receipt acknowledged by the recipient thereof and confirmed by telephone by sender, (ii) one day after having been deposited for overnight delivery with any reputable overnight courier service, or (iii) the earlier of actual delivery (or attempted delivery if delivery is refused) or three days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal service and sent by registered or certified mail, postage prepaid, return receipt requested, addressed to Borrower or Lender, as the case may be, at the addresses set forth below. * * * "

¶ 24 Plaintiff further argues that the seven day cure period is simply the amount of time the owner must give the contractor to remedy the defects before terminating the contract. Plaintiff contends that since he did not terminate the contract until May 14, 2007, when 33 days had passed since his email of April 11, 2007, he more than fulfilled this requirement. However, the arbitrator found plaintiff did not follow the terms of the contract, specifically the type of notice

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required by the contract between the parties. We agree.

¶ 25 Under the general rules of contract construction, contracts are to be interpreted as a whole, giving meaning and effect to each provision of the contract. *Mayfair Construction Company v. Waveland Associates Phase I Lt. Partnership*, 249 Ill. App. 3d 188, 200 (1993) (citing *Srivastava v. Russell's Bar-B-Q, Inc.*, 168 Ill App. 3d 726, 730 (1988)). In construing a contract, it is presumed that all provisions were inserted for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions. *Id.* (citing *Bruno Benedetti & Sons, Inc. v. O'Malley* 124 Ill. App. 3d 500, 506 (1984)). Applying these rules, we conclude that the arbitrator's interpretation of the contract did not exceed his authority and was not gross error.

¶ 26 In the award dated January 10, 2012, the arbitrator found the email of April 11, 2007 was not in compliance with the terms of the contract. The arbitrator found the contents of plaintiff's notice did not satisfy the requirements as a seven-day notice for termination for cause under article 11.2.b of the contract. The arbitrator found that the contract was terminated by the termination letter of May 14, 2007 and thus was found to be termination by the owner without cause pursuant to article 11.3. The arbitrator found from the evidence and testimony that it was an invalid termination for cause and therefore he treated the termination as one without cause. We find the arbitrator heard the testimony, saw the evidence and reasonably found the notice insufficient.

¶ 27 Plaintiff further argues, even if he did breach the contract, the breach was not material. Plaintiff relies on *Bloom Township High School v. Illinois Commerce Commission*, 309 Ill. App.

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3d 163, 180 (1999), for the proposition that the failure to give written notice pursuant to the contract was not a material breach. In *Bloom*, the issue was whether a utility tariff, Rider 30 required printed notice of a curtailment. The appellate court found Rider 30 merely states that ComEd "shall notify" certain customers of a curtailment and the availability of buy-through energy at least four hours before curtailment becomes effective. 309 Ill. App. 3d at 180. It does not require that the notice be in writing, nor does it mention the manner in which the notice is delivered. *Id.* The *Bloom* court held that even if they were to assume for the sake of analysis that ComEd did not strictly comply with the notice provision of Rider 30 or its contract with Marshall Field, the fact remained that Marshall Field received actual notice of the curtailment within the time provided under the utility tariff. *Id.* The purpose of a notice provision in either a contract or statute is to ensure that a party is actually informed. see *Rogers v. Balsley*, 230 Ill. App. 3d 1005, 1011 (1993); *Shipley v. Stephenson County Electoral Board*, 130 Ill. App. 3d 900, 903-04 (1985). The distinguishing factor is that in the case at bar, the provisions appeared in the contract between the parties, not the interpretation of a utility tariff which has the force of law and is not a contract. Also, in *Bloom*, there was no requirement that the notice be in writing and in what manner notice was to be given, unlike the case at bar, which had specific provisions on the subject of notice.

¶ 28 The primary objective when construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301 (2006) (citing *K's Merchandise Mart, Inc.*, 359 Ill. App. 3d 1142). The plain language used in the contract is generally the best indication of the parties intent. *Gallagher*, 367

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Ill. App. 3d at 301 (citing *K's Merchandise Mart, Inc.*, 359 Ill. App. 3d at 1142). A written contract is presumed to include all material terms agreed upon by the parties. *Gallagher*, 367 Ill. App. 3d at 301 (citing *K's Merchandise Mart Inc.*, 359 Ill. App. 3d at 1142. A presumption exists against provisions that easily could have been included in the contract but were not. *Gallagher*, 367 Ill. App. 3d at 301 (citing *Lee v. Allstate Life Insurance Co.*, 361 Ill. App. 3d 970, 979 (2005)). Further, a contract purports on its face to be a complete expression of the entire agreement, courts will not add another term about which the agreement is silent. *Gallagher*, 367 Ill. App. 3d at 301-302 (citing *Pritcher v. Asbestos Claims Management Corp.*, 332 Ill. App. 3d 890, 897 (2002)). Under the circumstances of the instant case, including the written submissions of the parties and the scope of evidence presented at the arbitration hearing, we find the arbitrator did not exceed his powers in considering the parties agreement as a whole and determining plaintiff's notice violated the contract.

¶ 29 Turning to the monetary award, plaintiff argues the arbitrator exceeded his authority by calculating damages on an untimely-filed and unsigned document that did not meet the requirements included in the contract. The arbitrator found the document submitted by defendant dated May 21, 2007 was a detailed accounting of costs as required under article 11.3 of the parties' contract. However, plaintiff has forfeited his challenges to the document by failing to cite to any supporting authority in his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 109 (2009)). Moreover, even if we were to consider plaintiff's argument, we disagree, as plaintiff readily admits in his brief that arbitrators are not bound by the rules of evidence. As noted by the Supreme Court concerning evidentiary matters in arbitration

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hearings, "[a]rbitrators are not bound by the rules of evidence." *Generica Limited v.*

Pharmaceutical Basics, Inc., 125 F.3d 1123 (1997) (quoting *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-04 (1956)). Thus, we find the arbitrator did not exceed his authority or commit gross error in considering the document submitted.

¶ 30 Further, plaintiff argues that when the arbitrator reduced the net amount of damages that it awarded to the defendant, rather than awarding the full amount listed in that document, the arbitrator implicitly found the statement to be false. We disagree. The arbitrator never called the statement false, but made adjustments in calculations and reduced the award to defendant for payments made by plaintiff in excess of work completed, thus showing his impartiality. It is apparent from the record that after the hearing, the arbitrator considered all of the evidence and fairly calculated the net amount due defendant, crediting plaintiff for excess funds plaintiff had paid to defendant.

¶ 31 Next, we turn to plaintiff's argument that the arbitrator was not impartial when he failed to consider plaintiff's breach of warranty claim and therefore prejudiced the rights of plaintiff. Plaintiff argues defendant performed work that contained latent material defects, namely, the ductwork and the joist system, which rendered the home uninhabitable and thus violated the implied warranty of habitability. Defendant responds that it was fired before the construction was finished and the implied warranty of habitability therefore is not applicable.

¶ 32 The implied warranty of habitability is a creature of public policy to protect purchasers of new houses when latent defects are discovered. *Petersen v. Hubschman Construction Co., Inc.*, 76 Ill. 2d 31, 41 (1979). Further, the implied warranty of habitability is an implied covenant that

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the house is reasonably suited for its intended use. *Id.* Plaintiff relies on *Petersen* for the proposition that the primary reason for the warranty is the unusual dependant relationship between the vendee and vendor. In *Petersen*, plaintiffs contracted with defendant, a construction company, for the purchase of a piece of land and for the construction of a new home on that land. *Id.* at 35. The parties agreed to an offset from the contract price for work to be done by plaintiffs. *Id.* Later, the plaintiffs became dissatisfied with the construction, and defendant agreed to repair or correct numerous items on a "punch list" but it failed to satisfactorily carry out this agreement. *Id.* The plaintiffs sued for the return of the earnest money and for the value of labor and materials they supplied. *Id.* at 35-36. The trial court found there were defects in substance in the construction and defendant had not substantially performed. *Id.* at 36. The trial court held that implied in the contract for sale from the builder-vendor to the vendees is a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use. This implied warranty, of course, extends to the latent defects which interfere with this legitimate expectation. *Id.* at 42. The court held plaintiffs were entitled to recover the earnest money and the value of the labor and materials provided. *Id.* The appellate court affirmed. *Id.* at 35. The supreme court granted leave to appeal and affirmed. *Id.* at 45.

¶ 33 In distinguishing *Petersen* from the case at bar, here the arbitrator found plaintiff did not give proper notice to defendant and terminated the contract before defendant could repair the defects. Moreover, the arbitrator did not consider plaintiff's breach of warranty claim because the trial briefs were not submitted at the arbitration hearing, but post hearing, at which time they were not authorized and were stricken and not reviewed. The arbitrator acknowledged there

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were defects, specifically finding:

"There was credible evidence that the ductwork had to be replaced and that the joist system had to be modified or replaced. Thus, the amounts of \$28,000 for each item will be deducted from the claimed amount. In addition, each party corroborated that Art Development was advanced \$70,000. That amount will also be deducted from the claimed amount as a credit to the claimant owner."

¶ 34 Thus, the arbitrator found defects requiring replacement and repair and reduced defendant's award accordingly. Therefore, we find the arbitrator did not exceed his authority.

¶ 35 Lastly, we turn to plaintiff's argument that defendant did not fulfill a condition precedent, namely not initially participating in arbitration. Plaintiff relies on *Mayfair*, 249 Ill. App. 3d at 206, for the proposition that by not initially entering into arbitration, defendant should be barred from raising any defenses and counterclaims because he did not fulfill a condition precedent of the contract. We disagree. Defendant did partake in the hearing with the arbitrator on December 12, 2011, thus fulfilling the condition precedent.

¶ 36 In *Mayfair*, Mayfair Construction Company, ("contractor") and Waveland Associates Phase I Limited Partnership, ("owner") entered an agreement which required the parties to first submit disputes to an architect for decisions on disputes before being able to assert disputes in circuit court. *Id.* at 192. During the course of the project, disputes arose between the contractor and the owner regarding a number of issues. *Id.* at 194. When the contractor submitted disputes to the architect, the owner's attorney notified the architect and stated that the owner did not want the architect to make any decisions on the project, and that the owner would sue him if he made

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any such decisions. *Id.*

¶ 37 The trial court found that the submission of the parties' dispute to the architect was a condition precedent to litigating in the circuit court and barred the owner from asserting any defenses to claims raised by the contractor which should have been decided by the architect. *Id.* at 191. On appeal, the appellate court upheld the trial court and also reasoned a proper remedy was that defendant may not assert counterclaims against the contractor that should have been initially decided by the architect, but were not. *Id.* at 209. We find *Mayfair* inapposite. In *Mayfair*, the appellate court found defendant refused to fulfill a condition. In the case at bar, defendant did not refuse to partake, but paid the fees in an untimely manner, which resulted in a suspension of the arbitration hearing to a later date.

¶ 38 CONCLUSION

¶ 39 After reviewing the record, we find that the arbitrator's interpretation of the parties' contract is a reasonably possible one that can seriously be made within the context in which the parties entered the contract. Further, we do not find that all fair and reasonable minds would agree that the arbitrator's award was not possible under a fair interpretation of the contract.

¶ 40 Gross errors of judgment in law or gross mistake of fact are not grounds for vacating an award unless mistakes or errors are apparent upon the face of the award. *Rauh*, 143 Ill. 2d at 392 (citing *White Star Mining Co. v. Hultberg*, 220 Ill. 578 (1906)) *Garver v. Ferguson*, 76 Ill. 2d 1, 9-10 (1979). We do not find any gross errors of judgment in law or gross mistakes of facts on the face of the award, and for the other reasons stated above, we find no grounds for vacating the arbitrator's award.

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¶ 41 Affirmed.