FIRST DIVISION
April 18, 2016

No. 1-15-1813
2016 IL App (1st) 151813-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INNOVATIVE MECHANICAL GROUP, INC.,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 14 CH 20574
FITNESS INTERNATIONAL, LLC, C.E.	)	
GLEESON CONSTRUCTORS, INC., PNC BANK,	)	
NATIONAL ASSOCIATION, PR II	)	Honorable
WILLOW/SANDERS ROAD JV, LLC and	)	Lewis Michael Nixon,
Unknown Owners and Non-Record Claimants,	)	Judge Presiding.
	)	
	)	
Defendants-Appellees.	)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it granted defendants' motion to compel arbitration where the terms of the subcontract were ambiguous and the extrinsic evidence in the record supported plaintiff's contention that it never agreed to arbitration because the arbitration clause contained in a separate document of terms and conditions was not incorporated by reference; reversed and remanded.

¶ 2 This case arises from a subcontract agreement between plaintiff, Innovative Mechanical Group, Inc., and defendant, C.E. Gleeson Constructors, Inc. (CEG), pursuant to which plaintiff was to furnish labor, materials, and installation of a HVAC system in a fitness facility. Plaintiff

appeals from the trial court's order that granted defendants' motion to compel arbitration in Michigan, arguing that the trial court erred because plaintiff never agreed to arbitrate. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 In November 2013, CEG contracted with the owner of the property at issue, co-defendant Fitness International, LLC, to construct an LA Fitness facility in Glenview, Illinois. On November 12, 2013, CEG entered into a subcontract agreement with plaintiff, whereby plaintiff was to provide labor, materials, and the installation of a HVAC package in exchange for $535,000. Thereafter, a dispute arose between the parties and this litigation ensued. On December 24, 2014, plaintiff filed a complaint in the circuit court of Cook County to foreclose its mechanic's lien and for other relief against defendants, Fitness International, LLC, CEG, PNC Bank, National Association, and PR II Willows/Sanders Road JV, LLC (defendants). Plaintiff alleged that although it furnished all labor and materials required by the subcontract, the sum of $339,814.45 plus interest still remained due for the labor and materials under the subcontract. Additionally, plaintiff alleged that it had performed $22,165 of extra work that CEG had agreed to pay for, including hiring a helicopter to make additional trips to and from the worksite to install rooftop units, hiring trucking companies to transport rooftop units, and labor costs associated with re-mobilizing employees to install rooftop units. Plaintiff further alleged that despite receiving the benefit of the work performed and notice of the amounts due, all defendants failed or refused to pay. The complaint stated that on December 23, 2014, plaintiff filed its subcontractor's lien with the recorder of deeds.

¶ 5 Attached to plaintiff's complaint was a seven-page document titled "C.E. Gleeson Constructors, Inc. Subcontract Agreement" (subcontract). Each page of the subcontract was numbered sequentially. Paragraph five of the subcontract stated:

> "Subcontract. This subcontract consists of this subcontract agreement, the Contract between [Fitness International, LLC] and [CEG], and all drawings, specifications, bulletins, addenda and modifications. The following is a list of additional documents, schedules and attachments, and Subcontract General Terms and Conditions, which are all incorporated by reference:
>
> * * *
>
> With the following additions or deletions:"

The omission above denotes an approximately three-page list of documents, schedules, and attachments. No additions or deletions were listed in the subcontract. The last page of the subcontract was signed by Charles E. Gleeson II on behalf of CEG and Brad Marvin on behalf of plaintiff.[1]

¶ 6 On January 28, 2015, defendants filed a motion to compel arbitration and dismiss. In their motion, defendants argued that the parties agreed to arbitrate any disputes that arose. As support for their contention, defendants attached, *inter alia*, an eight-page document titled "C.E. Gleeson Constructors, Inc. Subcontract General Terms and Conditions" (terms and conditions). Paragraph 57 of the terms and conditions reads:

> "Arbitration Provision. Any dispute arising out of or relating to this Agreement or breach thereof by and between [CEG], [Fitness International, LLC], Architect and/or

[1] We note that the copy of the subcontract that was attached to plaintiff's complaint only bears Marvin's signature on behalf of plaintiff. However, a copy of the subcontract bearing both signatures was attached to CEG's motion to compel arbitration, which we discuss in detail later in this order and was therefore made part of the record on appeal.

> any other Subcontractors, shall be resolved through binding Arbitration through the American Arbitration Association ('AAA') in accordance with the construction industry arbitration rules. Judgment upon the award may be rendered by the arbitrator(s) and may be entered in the Oakland County Circuit Court. For purposes of this Agreement any and all Arbitration proceedings involving [CEG], [Fitness International, LLC], Architect and/or any of [CEG's] subcontractors shall be held in the American Arbitration Association offices in Oakland County, Michigan. The parties by signing below recognize that the venue for resolution of disputes will not be in Glenview, [Illinois] and/or in the State of Illinois."

There were no signatures underneath paragraph 57.

¶ 7 Defendants argued that the terms and conditions were incorporated by reference into the subcontract based on the following language in the subcontract: "[t]he following is a list of additional documents, schedules and attachments, and Subcontract General Terms and Conditions, which are all incorporated by reference." Defendants asserted that because the parties agreed to arbitrate, the circuit court did not have jurisdiction over plaintiff's complaint for foreclosure of mechanic's lien. Additionally, defendants pointed to paragraph 50 of the terms and conditions, which stated,

> "Dispute Resolution. Subcontractor agrees to accept, and incorporate herein by reference, any arbitration provision or other alternative dispute resolution agreement entered into by [CEG] and [Fitness International, LLC], including any agreement that an award rendered by an arbitrator shall be final and judgment entered thereon in any court having jurisdiction. Subcontractor agrees that all claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, except for

> claims which have been waived, shall be decided in the same forum and in the same action as any similar or related claim or dispute between [CEG] and [Fitness International, LLC]."

Defendants argued that paragraph 50 of the terms and conditions was further evidence that plaintiff had agreed to submit any dispute to binding arbitration, and that the language of the terms and conditions was "broad" and therefore encompassed the non-payment dispute at issue.

¶ 8 Plaintiff filed its opposition to defendants' motion to compel arbitration on April 22, 2015. Plaintiff argued that it never agreed, in writing or verbally, to arbitrate any dispute with CEG or any other defendant. Plaintiff asserted that it never received or agreed to the terms and conditions. Plaintiff stated that the terms and conditions were not attached to the seven-page subcontract that plaintiff received and signed, and that plaintiff only received the terms and conditions after the instant lawsuit was filed. To support its arguments, plaintiff attached a verification from Bradley Marvin, its president and signatory on the subcontract. In his affidavit, Marvin stated that the seven-page "[s]ubcontract is the identical [s]ubcontract attached to [plaintiff's] complaint that was filed against CEG. [Plaintiff] did not receive any other agreement from CEG." Marvin further attested, "[plaintiff] never agreed, verbally or in writing, that it would arbitrate any dispute with CEG. In fact, the [s]ubcontract ***, does not contain any provision for arbitration of disputes. The [s]ubcontract was drafted by CEG." Additionally, "[plaintiff] never agreed to or received 'C.E. Gleeson Constructors, Inc. Subcontract General Terms and Conditions.' In fact, [plaintiff] never signed any such document."

¶ 9 Further, plaintiff asserted that the subcontract that Marvin received and signed expressly included the contract between CEG and the property owner, Fitness International, LLC, and that CEG and Fitness International, LLC never agreed to arbitrate their disputes as evidenced by their

responses to plaintiff's first requests to admit. Plaintiff emphasized that even if any provision of the subcontract was ambiguous, any ambiguity should be resolved against the drafter, CEG. Plaintiffs also argued that defendants' motion should be denied because it was not supported by an affidavit.

¶ 10 In their reply that was filed on May 1, 2015, defendants argued that the subcontract unambiguously incorporated the terms and conditions, which contained an arbitration provision. Defendants also asserted that plaintiff's argument that it had not received the terms and conditions until this lawsuit was filed was disingenuous, and pointed to an email dated August 21, 2014, that was sent to plaintiff wherein CEG's senior project manager, Brad Baker, wrote that CEG provided a 24-hour notice of default "pursuant to [p]aragraph 44 of the General Conditions of the Subcontract." Defendants did not provide a counter-affidavit, but argued that one was not necessary because "[p]ursuant to [] 735 ILCS 5/2-606, a copy of a written instrument that a defense is founded upon serves the same purpose as an affidavit and constitutes part of the pleading."

¶ 11 On May 5, 2015, plaintiff filed an emergency motion to stay arbitration proceedings initiated by CEG and the following day defendants filed their response, objecting to the motion. On May 7, 2015, the court entered an order entering and continuing plaintiff's motion to stay arbitration and taking under advisement defendants' motion to compel arbitration and dismiss.

¶ 12 On May 21, 2015, in a written order, the trial court granted CEG's motion to compel arbitration. The court wrote that the principal issue before it was whether plaintiff had agreed to arbitrate at the inception of the subcontract agreement. Specifically, the court pointed out:

> "In looking at the 'Subcontractor Agreement' between [CEG] and [plaintiff], paragraph 5 lists certain 'drawings, specifications, addenda & modifications.' Paragraph

> 5 also states *** 'the following is a list of additional documents ***' etc. and that list of additional documents ends with the 'Subcontract General Terms & Conditions, which are all incorporated by reference.' Page 7 includes the signatures of Charles E. Gleeson II for [CEG] and Brad Marvin for [plaintiff]. Therefore it is clear that by signing the 'Subcontract Agreement' [plaintiff] agreed to the arbitration clause(s) in the 'Subcontract General Terms & Conditions.' " (Emphasis in original.)

The court concluded the following: (1) plaintiff agreed to arbitrate, (2) the arbitration was to take place in Oakland County, Michigan before the AAA, (3) the AAA could determine whether it had jurisdiction based on the contract, and (4) the court would stay plaintiff's mechanic's lien action in Cook County rather than dismiss it. Plaintiff filed its timely notice of interlocutory appeal on June 22, 2015.

¶ 13 ANALYSIS

¶ 14 Initially, we note that on November 30, 2015, plaintiff filed a motion to strike portions of defendants' brief and argument and defendants subsequently filed a response thereafter. On December 8, 2015, this court ordered that plaintiff's motion to strike be taken with the case. Upon review of the motion, the response thereto, the record on appeal, and the parties' briefs, plaintiff's motion to strike is hereby denied. Although we find it proper to deny plaintiff's motion and proceed with the merits of the case, we will disregard any inappropriate or unsupported statements in reviewing this matter. *Greers v. Brichta*, 248 Ill. App. 3d 398, 400 (1993).

¶ 15 As an order granting a stay of proceedings and compelling arbitration is analogous to an injunction (*Atkins v. Rustic Woods Partners*, 171 Ill. App. 3d 373, 377 (1988)), we have jurisdiction to review this appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Feb. 26, 2010), which "permits appeal of an interlocutory order granting an injunction [citation] ***." *Id.*

"The only question before us on an appeal of this type is whether there was a sufficient showing to sustain the order of the trial court granting or denying the relief sought." *Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program*, 372 Ill. App. 3d 104, 107 (2007).

¶ 16 The parties agree that our standard of review is *de novo*. Where the trial court does not hold an evidentiary hearing and its decision is based on a purely legal analysis, our review is *de novo*. *Id.* Similarly, the interpretation of any contract is a question of law and is subject to *de novo* review on appeal. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2011).

¶ 17 Plaintiff asserts the trial court erred when it improperly considered the terms and conditions because they were not plainly incorporated by reference into the subcontract, they were not attached to the subcontract and were not received by plaintiff, and they were not authenticated. In order for a contract to incorporate another document by reference, the contract must show an intent to incorporate the other document and make it part of the contract itself. *Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill. App. 3d 417, 421 (1989).

¶ 18 Paragraph five, the primary provision of the subcontract at issue here, reads:

> "Subcontract. This subcontract consists of this subcontract agreement, the Contract between [Fitness International, LLC] and [CEG], and all drawings, specifications, bulletins, addenda and modifications. The following is a list of additional documents, schedules and attachments, and Subcontract General Terms and Conditions, which are all incorporated by reference:
>
> * * *
>
> With the following additions or deletions:"

We reiterate that the omission denoted above consists of a nearly three-page itemized list of documents that were incorporated by reference. Plaintiff argues that the terms and conditions are

not incorporated by reference because they are not listed as an item in the nearly three-page list of documents that follows the above-referenced subcontract language. Also, plaintiff asserts that the trial court's ruling is not supported by the plain and ordinary language of the subcontract because the subcontract unambiguously requires that any additional documents, schedules and attachments, and subcontract terms and conditions be contained in the list. Defendants contend that the terms and conditions are plainly and unambiguously incorporated by reference due to words "Subcontract General Terms and Conditions" being listed in the language of paragraph five prior to the nearly three-page list. The trial court did not make an express finding that the terms and conditions were incorporated by reference, but stated in its May 21, 2015, order that "it is clear that by signing the [subcontract] [plaintiff] agreed to the arbitration clause(s) in the [terms and conditions]."

¶ 19 We disagree with the trial court, and find that the subcontract term that purportedly incorporates the terms and conditions by reference is ambiguous. "A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *Clarendon America Insurance Co. v. 69 West Washington Management LLC*, 374 Ill. App. 3d 580, 585 (2007). A contract is not considered ambiguous if a court can ascertain its meaning from the contract's general language. *Id.* Legal documents that are ambiguous are strictly construed against the party who prepared them. *Turner Construction Co.*, 187 Ill. App. 3d at 421-22.

¶ 20 We depart from the trial court's decision because we find the language of paragraph five of the subcontract to be capable of being interpreted in more than one way. Contrary to defendants' contention, we do not believe that the subcontract "clearly" incorporates the terms and conditions by reference. The subcontract reads "[t]he following is a list of additional

documents, schedules and attachments, and Subcontract General Terms and Conditions, which are all incorporated by reference." We believe that language does not have a plain and ordinary meaning and could be interpreted in at least two ways. One way to interpret this language is to find, as defendants suggest, that the terms and conditions were incorporated by reference because the words "Subcontract General Terms and Conditions" were listed in paragraph five. Conversely, the other way to interpret this language is to find, consistent with plaintiff's argument, that the terms and conditions were not incorporated by reference because they are not listed as an item within the nearly three-page list of documents that follows the above-referenced language in the subcontract. The trial court agreed with the former and we find convincing plaintiff's argument in support of the latter, thus evidencing the subcontract's ambiguity. We construe this ambiguity against CEG, the drafter. See *Turner Construction Co.*, 187 Ill. App. 3d at 421-22.

¶ 21 Where language of a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Gallagher*, 226 Ill. 2d at 233. We turn to the extrinsic evidence in the record to determine the parties' intent. Plaintiff asserts that it never received the terms and conditions at the time the subcontract was entered into, and attached the affidavit of its president and signatory to the subcontract, Bradley Marvin, in support of its response to defendants' motion to compel arbitration. Defendants contend that correspondence sent to plaintiff acts as evidence that plaintiff received the terms and conditions. "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) [of the Illinois Code of Civil Procedure] to dismiss based on the exclusive remedy of arbitration. [Citation.] Such a motion admits the legal sufficiency of the plaintiff's complaint but interposes some affirmative matter that prevents the lawsuit from going forward. [Citation.]" *Griffith v. Wilmette Harbor*

Association, Inc., 378 Ill. App. 3d 173, 180 (2007). The right to arbitration is treated as affirmative matter that defeats the claim. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101 (2009). "If the 'affirmative matter' asserted in a section 2-619 is not apparent on the face of the complaint, the motion must be supported by affidavit." *Id.* (citing *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). "In order to establish that the motion is unfounded, a counteraffidavit or other proof is necessary to refute the evidentiary facts properly asserted by the affidavit supporting the motion." *Id.* at 1102.

¶ 22 Here, plaintiff sufficiently refuted defendants' motion to compel arbitration and dismiss by providing Marvin's affidavit. In Marvin's affidavit, he attests that the subcontract he received from CEG and signed is the seven-page subcontract that was attached to plaintiff's complaint filed against CEG. Marvin also attests that "[plaintiff] did not receive any other agreement from CEG" and "[plaintiff] never agreed, verbally or in writing, that it would arbitrate any dispute with CEG. In fact, the [s]ubcontract ***, does not contain any provision for arbitration of disputes. The [s]ubcontract was drafted by CEG." Additionally, Marvin states, "[plaintiff] never agreed to or received 'C.E. Gleeson Constructors, Inc. Subcontract General Terms and Conditions.' In fact, [plaintiff] never signed any such document."

¶ 23 Defendants contend that plaintiff's argument that it did not receive the terms and conditions is "unsubstantiated." We find defendant's contention to be confusing because plaintiff clearly substantiated its argument with Marvin's affidavit. We also find unconvincing defendants' assertion that plaintiff failed to refute that on August 21, 2014, Brad Baker of CEG sent plaintiff an email which referenced the terms and conditions. The August 21, 2014, email stated that "[CEG] has provided a twenty four (24) hour notice of default dated July 1, 2014 pursuant to [p]aragraph 44 of the General Conditions of the Subcontract." We do not find this

argument compelling because the email merely makes reference to the terms and conditions. There is no attachment to the email that includes a copy of the terms and conditions. Thus, defendants still have not refuted plaintiff's assertion that it never received the terms and conditions. Merely making reference to a document that plaintiff claims it never received does not achieve the same purpose as refuting plaintiff's contention with evidence that plaintiff, in fact, received the terms and conditions.

¶ 24 Defendants further assert that plaintiff failed to refute that it was sent correspondence dated July 1, 2014, July 15, 2014, and July 28, 2014, that provided a 24-hour notice to correct default. Upon review of these three letters, we find no reference to any specific paragraph of the terms and conditions, or the terms and conditions in general. Rather, the July 28 letter generically references "the contract" and the July 1 and July 15 letters make no reference to the contract. None of these letters refute Marvin's assertion that plaintiff never agreed to, and was not tendered, the terms and conditions. Thus, we find defendants' arguments regarding these documents to be unconvincing.

¶ 25 Defendants also reference a November 6, 2014, email that allegedly mentioned the terms and conditions. However, defendants do not provide any record citation to this email and we are unable to locate it in the record on appeal. Thus, defendants have not provided sufficient evidence to support their position that plaintiff received the terms and conditions.

¶ 26 Defendants had the opportunity to provide the trial court with an affidavit or counteraffidavit, but did not. Rather, defendants make the misplaced argument that pursuant to section 2-606 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-606 (West 2012)), "a copy of a written instrument that a defense is founded upon serves the same purpose as an

affidavit and constitutes part of the pleading." Defendants' contention misconstrues the language and purpose of section 2-606 of the Code, which reads:

> "If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit constitutes a part of the pleading for all purposes." 735 ILCS 5/2-606 (West 2012).

Section 2-606 of the Code clearly does not stand for the proposition that defendants suggest. See *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 298 (2010) ("The exhibits to which section 2-606 applies generally consist of instruments being sued upon, such as contracts.") We do not read section 2-606 of the Code to allow a party to substitute a counteraffidavit with a written instrument that the opposing party objects to ever receiving, as is the case here. Defendants have not cited to any cases which reach such a conclusion and we refuse to do so here.

¶ 27 We believe the extrinsic evidence before this court, namely, Marvin's affidavit and the lack of any evidence refuting Marvin's statements or showing that plaintiff ever received the terms and conditions, supports plaintiff's position that it did not agree to arbitrate. While it is true that our supreme court recognizes that "arbitration promotes the economical and efficient resolution of disputes" (*Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 59 (2011)), our supreme court has also consistently held that "an agreement to arbitrate is a matter of contract, and the parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as

shown by the clear language of the agreement and their intentions expressed in that language." *Royal Indemnity Co.*, 372 Ill. App. 3d at 110. After reviewing the extrinsic evidence and construing the ambiguous language of the subcontract against CEG, the drafter, we find the trial court erred in granting defendants' motion to compel arbitration. See *Turner Construction Co.*, 187 Ill. App. 3d at 421-22.

¶ 28 CONCLUSION

¶ 29 Based on the foregoing, we find that the trial court erred when it granted CEG's motion to compel arbitration. We therefore reverse the judgment of the trial court and remand this matter for further proceedings consistent with this order.

¶ 30 Reversed and remanded.