2017 IL App (1st) 170818-U

No. 1-17-0818

Order filed September 28, 2017

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BURLING BUILDERS, INC. AN ILLINOIS CORPORATION; and BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRACT NO. 508 d/b/a CITY COLLEGES OF CHICAGO FOR THE USE AND BENEFIT OF BURLING BUILDERS, INC.,	)	
Plaintiffs	)	
v.	)	
CMO, A JOINT VENTURE, AN ILLINOIS PARTNERSHIP; CLARK CONSTRUCTION GROUP CHICAGO, LLC, AN ILLINOIS LIMITED LIABILITY COMPANY, MCKISSACK & MCKISSACK MIDWEST, INC., AND ILLINOIS CORPORATION, OLD VETERAN CONSTRUCTION, INC., AND ILLINOIS CORPORATION, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, A CONNECTICUT CORPORATION; FEDERAL INSURANCE COMPANY, AN INDIANA CORPORATION; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A MARYLAND CORPORATION, and ZURICH AMERICAN INSURANCE COMPANY, AND NEW YORK	)	Appeal from the Circuit Court of Cook County Nos. 15 CH 13853 15 CH 17941 Honorable Lisa R. Curcio, Judge Presiding.

CORPORATION,	)
	)
Defendants	)
	)
(Burling Builders, Inc.	)
	)
Plaintiff-Appellant	)
	)
v.	)
	)
CMO, a Joint Venture	)
	)
Defendant-Appellee).	)

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 Held: We affirm the judgment of the circuit court granting CMO's motion to stay the proceedings pursuant to Article 11 of the Subcontract over Burling's contentions that CMO failed to provide an adequate justification for the stay, that the Subcontract did not support the stay order, that CMO materially breached the Subcontract, and that CMO waived its right to seek the stay.

¶ 2 Defendant CMO, a Joint Venture (CMO) is an Illinois general partnership that was the general contractor for the construction of buildings on the campus of the Malcolm X College & School of Health Sciences in Chicago, Illinois (Project). CMO executed a subcontract with Plaintiff Burling Builders, Inc. (Burling) to perform excavation and earthwork for the Project (Subcontract). Burling filed suit against CMO alleging non-payment of more than $2 million for work performed under the Subcontract. After more than a year of litigation, CMO filed a motion to stay all of Burling's claims pursuant a provision in the Subcontract that provided for a stay in the event of arbitration proceedings between CMO and the Project owner, the Board of Trustees of Community College District 508 d/b/a City Colleges of Chicago (Owner). The trial court

granted CMO's motion for a stay with respect to all of Burling's contract-based claims. Burling filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. July 1, 2017) contending that the court erred in granting CMO's motion to stay where, *inter alia*, CMO did not meet its burden to establish a right to a stay and where the terms of the Subcontract did not warrant a stay. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Burling filed a complaint[1] in the circuit court of Cook County contending that CMO owed Burling more than $2 million for work performed for the Project. Burling contended that during the course of the Project, Burling performed additional work, at CMO's request, on behalf of itself or on behalf of the Owner, that was not provided for in the Subcontract, thus increasing the total value of the improvements made by Burling. Burling alleged that these additional improvements included removal of contaminated soils in excess of the quantities outlined in the Subcontract, removal of spoils[2] created by other contractors, and Change Requests for work ordered by CMO that was outside the scope of the Subcontract. Burling also alleged that it incurred additional expenses as a result of delays caused by factors wholly within the control of CMO.

¶ 5 Burling's six-count complaint alleged causes of action for 1) a lien claim under Section 23 of the Illinois Mechanics Lien Act (770 ILSC 60/23 (West 2014)); 2) a bond claim against the payment bond sureties under the Illinois Public Construction Bond Act (30 ILCS 550/1 *et seq* (West 2014)); 3) a breach of contract claim; 4) a *quantum meruit* claim; 5) a claim for violation of the Local Government Prompt Payment Act (50 ILCS 505/1 *et seq* (West 2014)); and 6) a

[1] All references are made to Burling's second amended complaint unless otherwise noted.

[2] Spoils refers to refuse heaps formed by the removal of excess surface materials.

claim against the partners of CMO for joint and several liability of the amount owed to Burling. CMO filed a counterclaim against Burling asserting claims for breach of contract and contractual indemnity.

¶ 6 CMO subsequently filed a motion to stay Burling's claims based on Article 11 of the Subcontract. Article 11.b of the Subcontract provides, in relevant part:

> "In case of any dispute between CMO and [Burling], in any way relating to or arising from any act or omission of the Owner or involving the Contract Documents, [Burling] agrees to be bound to CMO to the same extent that CMO is bound by the Owner, by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board or court so authorized in the Contract Documents or by law, whether or not [Burling] is a party to such proceedings. In case of such dispute, [Burling] will comply with all provisions of the Contract Documents allowing a reasonable time for CMO to analyze and forward to Owner any required communications or documentation. CMO will, at its option, (1) present to the Owner, in CMO's name, or (2) authorize [Burling] to present to the Owner, in CMO's name all [Burling's] claims and answer the Owner's claims involving [Burling's] work, whenever CMO is permitted to do so by the terms of the Contract Documents.***"

Article 11.c of the Subcontract provides, in relevant part:

> "To the extent not resolved under Article 11.b above, any dispute between CMO and [Burling] shall, at CMO's sole option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. *** If CMO notifies Subcontractor that CMO contends any arbitration or lawsuit brought under

this Article 11.c involves a controversy within the scope of 11.b, the dispute process shall be stayed until the procedures under Article 11.b are completed.***"

¶ 7 In its motion, CMO contended that it was involved in a dispute with the Owner that included, in part, certain additional costs that were incurred by Burling on the Project. CMO asserted that on November 11, 2016, it filed an arbitration demand against Owner seeking $23.8 million for various claims. CMO contended that Burling alleged against CMO a claim for additional undercutting work, which CMO was "passing along" to the Owner in arbitration. CMO asserted that the lawsuit initiated by Burling should therefore be stayed pursuant to Article 11.c of the Subcontract pending a resolution of the arbitration between CMO and Owner.

¶ 8 Burling filed a response in opposition to CMO's motion to stay the proceedings contending that CMO had not met the legal standard to warrant a stay, that CMO had waived any right to enforce the stay provision where it had participated in the litigation for more than a year, that certain of Burling's claims were exempt from the Subcontract's stay provision, and that it was inequitable for the court to grant the stay where only a small portion of CMO's claims against the Owner overlapped with Burling's claims against CMO. Following a reply from CMO, the court granted CMO's motion to stay with respect to Burling's contract claims, but denied the motion with respect to Burling's bond claim. Burling subsequently filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. July 1, 2017).

¶ 9 II. ANALYSIS

¶ 10 On appeal, Burling contends that the court erred in granting CMO's motion to stay the litigation where CMO failed to meet its burden to establish a right to a stay of the proceedings. Burling asserts that CMO has failed to provide adequate justification for the stay and failed to meet the requirements for injunctive relief. Burling also contends that the plain language of the

Subcontract does not authorize the stay and that CMO failed to comply with the terms of the Subcontract by presenting all of its claims to the Owner. Burling further asserts that the stay was improper where there was not a close relationship between the claims Burling asserted in the litigation and the claims CMO asserted against the Owner in its arbitration demand. Burling also contends that the stay was improper where the circuit court did not first determine whether CMO materially breached the Subcontract. Finally, Burling maintains that CMO waived its right to seek a stay under the Subcontract where it participated in the litigation with Burling for more than a year before invoking the stay provision.

¶ 11 A. Standard of Review

¶ 12 Initially, we observe that the parties disagree as to the standard of review to be applied on appeal. Burling contends that we should review the circuit court's ruling *de novo* where there are no disputed issues of fact and the sole issue is the legal interpretation of the dispute resolution provision in the Subcontract. CMO responds that the established precedent dictates that we should review the circuit court's ruling for abuse of discretion.

¶ 13 In support of its contention that we should apply a *de novo* standard of review, Burling relies on *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550 (2004). In *Household Finance,* the court found that although interlocutory appeals are normally reviewed for abuse of discretion, the standard of review should ultimately be determined by the nature of the issues decided by the trial court. *Id.* at 553. The court observed that where no disputed facts were presented to the court, the issue was purely a legal one. *Id.* Accordingly, the court in *Household Finance* concluded that it should review *de novo* the trial court's decision of whether the plaintiff waived its right to arbitration. *Id.*

¶ 14 Here, we find Burling's reliance on the reasoning in *Household Finance* misplaced. Setting aside the factual distinctions between this case and *Household Financial*, this court has repeatedly recognized that appeals brought pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. July 1, 2017) are typically reviewed only for abuse of discretion. See, *e.g.*, *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 423-24 (2007) (citing *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1094 (2001)); *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 67 (2007) (" 'The scope of review in an interlocutory appeal from an order granting a motion to stay proceedings is limited to a determination as to whether the trial court abused its discretion in granting the stay.' ") (quoting *Goodwin v. McHenry County Sheriff's Office Merit Comm'n*, 306 Ill. App. 3d 251, 257 (1999)). Moreover, we cannot say that Burling's contentions present purely legal questions as it suggests. Aspects of Burling's claims rely on whether there is sufficient intermingling between its claims against CMO and CMO's claims against the Owner such that the stay was warranted, whether the stayed claims arose from the Owner's "acts or omissions," and whether CMO, by its actions and conduct, waived its right to enforce the stay provision. See, *e.g.*, *In re Liquidation of Inter-American Insurance Co of Illinois*, 329 Ill. App. 3d 606, 619 (2002) ("Whether waiver has occurred is a question of fact when the material facts are in dispute or where reasonable minds might differ in the inferences to be drawn from undisputed facts."). Thus, Burling's contentions raised factual issues for the circuit court to determine. In *Schroeder*, the court recognized the circuit court may engage in a factual inquiry even where, as here, the court does not conduct an evidentiary hearing. *Schroeder*, 319 Ill. App. 3d at 1093. After considering the court's reasoning in *Schroeder*, *Glazer's*, and *Illinois Contract-I.C.I., Inc v. Storefitters, Inc.*, 397 Ill. App. 3d 798, 802 (2010), we find that an abuse of discretion standard is appropriate in this case and find the

reasoning in *Household Finance* distinguishable. We will find that the circuit court abused its discretion where no reasonable person could adopt the view taken by the circuit court. *Lake Environmental v. Arnold*, 2015 IL 118110, ¶ 16.

¶ 15 B. Adequate Justification for the Stay

¶ 16 Burling first contends that CMO failed to prove adequate justification for the stay. Burling asserts that CMO failed to establish that the hardship or inequity it will undergo if the stay is denied outweighs the harm to Burling if the stay is granted. Burling points out that it will undoubtedly suffer harm as a result of the stay as it will be unable to pursue its claims against CMO until the arbitration is concluded. CMO responds that because its motion to stay was based on the Subcontract, it was not required to meet the statutory requirements necessary for a stay.

¶ 17 In support of its contention that CMO was required to provide an adequate justification for the stay, Burling largely relies on this court's decision in *May v. SmithKline Beecham Clinical Labs, Inc.*, 304 Ill. App. 3d 242, 246 (1999). In *May*, defendant moved for a stay pursuant to section 2-619(a)(3) of the Code of the Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 1996)). *Id.* at 245. Section 2-619(a)(3) provides that a defendant may move for dismissal of an action "or other appropriate relief" if "there is another action pending between the same parties for the same cause." (735 ILCS 5/2-619(a)(3) (West 1996)). The circuit court denied defendant's motion and defendant appealed. On appeal, the court reasoned that "A motion under section 2-619(a)(3) is a matter that a court, in a sound exercise of its discretion, must decide, and in exercising its discretion, a court must weigh the prejudice resulting to the nonmovant against the public policy of avoiding duplicative litigation." *May*, 304 Ill. App. 3d at 246. The court also observed that the party seeking a stay bears the burden of proving adequate justification for it. *Id.* (citing *Kaden v. Pucinski*, 263 Ill. App. 3d 611, 615 (1994)).

¶ 18 In concert with the ruling in *May*, this court has also recognized that:

> "[A] party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative. [Citation.] Thus [the party seeking a stay] must 'make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.' " *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 595 (1991) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)).

¶ 19 CMO contends that it was not required to meet this standard because the cases requiring a party to show adequate justification for the stay order analyzed the issue in relation to the stay provision under section 2-619(a)(3) of the Code or other statutory stay provisions. CMO asserts that where it was relying on the Subcontract for the stay, it was not required to provide an adequate justification for the stay. Burling contends, however, that this court has consistently required parties to establish an adequate justification for the stay regardless of the authority on which the request for the stay is based. See, *e.g.*, *Kenny v. Kenny Industries, Inc.*, 406 Ill. App. 3d 56, 65 (2010); *Estate of Bass*, 375 Ill. App. 3d at 71 (holding that the circuit court in granting a stay pursuant to Supreme Court Rule 305 (eff. July 1, 2004) did not "exceed the bounds of reason and ignore recognized principles of law so substantial prejudice resulted.").

¶ 20 Here, we cannot say that the trial court "act[ed] arbitrarily" in granting the stay or "ignore[d] recognized principles of law so substantial prejudice resulted." *Estate of Bass*, 375 Ill. App. 3d at 71 (citing *Kaden*, 263 Ill. App. 3d at 615). Even if CMO were required to show adequate justification for the stay, a factor not provided for in the Subcontract, the hardship to CMO is apparent from the record. At least one of CMO's claims against the Owner is

intermingled with Burling's claims against CMO. Requiring CMO to argue the issue from both sides simultaneously in different venues would undoubtedly cause hardship. Although, as Burling points out, the overlapping claims represent a small portion of CMO's overall claims against the Owner, as discussed below, the value of the intermingled claims is irrelevant. In this case, it was within the circuit court's discretion to weigh the prejudice and hardship that would result to both parties. As in *Estate of Bass*, the prejudice to Burling is mitigated by the fact that Burling may continue to pursue its claims after the arbitration is completed and the stay is lifted. *Estate of Bass*, 375 Ill. App. 3d at 68-71. Moreover, this court has recognized that "[t]he trial court may stay proceedings as part of its inherent authority to control the disposition of cases before it and may consider factors such as the orderly administration of justice and judicial economy." *Kenny*, 406 Ill. App. 3d at 65. Here, we find that the circuit court did not abuse its discretion in granting the stay where it has the inherent authority to control the cases before it, there was adequate justification for the stay, and the prejudice to Burling in granting the stay was not substantially outweighed by the hardship that would have resulted to CMO if the court had denied the stay.

¶ 21 C. Injunctive Relief

¶ 22 We briefly address Burling's contention that the court erred in granting the stay because CMO failed to meet the requirements for injunctive relief. Burling asserts that "[b]ecause a stay order is considered injunctive relief, CMO should have been required to meet the legal standards required to obtain injunctive relief." Burling cites no authority for this proposition and our research has not revealed any such authority to support its position. Instead, we believe that Burling is misappropriating the principle that the denial of a motion to stay proceedings may be treated, for purposes of an interlocutory appeal as of right pursuant to Supreme Court Rule

307(a)(1), the same as a denial of a request for a preliminary injunction. See *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 216 (2001) (citing *Beard v. Mount Carroll Mutual Fire Insurance Co.*, 203 Ill. App. 3d 724, 727 (1990)). And the corollary that an order granting a stay is similarly appealable pursuant to Rule 307(a)(1). *Estate of Bass*, 375 Ill. App. 3d at 69-70. However, these principles merely concern a party's right to an interlocutory appeal under Rule 307(a)(1) and does not require parties who seek a stay to meet the requirements for injunctive relief as Burling suggests. Accordingly, we reject Burling's contention that CMO was required to meet the standards required for injunctive relief to justify the stay.

¶ 23 D. Plain Language of the Subcontract

¶ 24 Burling next contends that the dispute resolution provision of the Subcontract does not support the stay of Burling's claims because Burling's claims do not relate to or arise from an act or omission of the Owner as required by Article 11.b of the Subcontract. Article 11.b provides that "[i]n case of any dispute between CMO and [Burling], in any way relating to arising from any act or omission of the Owner or involving the Contract Documents, [Burling] agrees to be bound to CMO to the same extent that CMO is bound by the Owner ***." Burling asserts that its complaint is devoid of any allegations regarding errors or omissions by the Owner required for the application of this section.

¶ 25 Burling categorizes its claims as "[e]xtra work resulting from unforeseen conditions on the site," "[e]xtra removal of spoils created by utility excavations performed by other subcontractors," "[e]xtra removal of contaminated soil," "[a]dditional costs for 'impacts and delays resulting from factors wholly within CMO's control,' " and "[u]npaid [S]ubcontract balances, including over $400,000 in retainage." Burling asserts that these contentions do not assert any allegations regarding any errors or omissions by the Owner.

¶ 26 In its arbitration demand, CMO asserts that the Owner hired an engineer, as its agent, to analyze the soil conditions on the site of the Project in preparation for pouring the basement floor slab. The engineer's report "not[ed] the presence of very soft organic soil conditions in the northwestern corner of the Project site, [but] did not indicate similar soil conditions at other locations underlying the basement slab." CMO asserted that after Burling began excavation work, the engineer noted for the first time additional organic soils within the proposed excavation area. The engineer recommended additional excavation and soil enhancements to remediate the differing site conditions underneath the basement slab. This remediation required Burling to perform additional excavation work and soil reinforcements, which caused them to incur $207,000 in uncompensated material and labor costs. CMO contends that this claim for additional undercutting is related to "errors, inconsistencies, and omissions by [Owner's] geotechnical engineer."

¶ 27 Burling asserts CMO's arbitration demand does not characterize the need for additional undercutting as a result of the Owner's "errors, inconsistencies, or omissions," but instead attributes the oversight to "unforeseen subsurface conditions" and "differing site conditions," which are not "acts or omissions" of the Owner. We disagree with Burling's narrow interpretation of this provision. Article 11.b provides that the stay provision of Article 11.c will apply to "any dispute between CMO and [Burling], in any way relating to arising from any act or omission of the Owner or the Contract Documents." This broad provision clearly encompasses Burling's claim for additional undercutting. Here, the Owner's agent, through its act or omission, failed to discover the "unforeseen subsurface conditions" until after Burling had submitted its bid for the Project resulting in additional unforeseen undercutting and associated expenses. The broad language of the provision that it applies to "any dispute" in "any way relating to or arising

from any act or omission" by the Owner supports the circuit court's finding that the stay was warranted based on the Subcontract. Therefore, we cannot say that the circuit court abused its discretion in determining that the plain language of Article 11.b and 11.c justified a stay in this case where at least some of Burling's claims arose from or related to an act or omission of the Owner or its agent.

¶ 28 E. Stay of all of Burling's Claims

¶ 29 Burling next asserts that the court's stay order does not apply to its Section 23 mechanics lien claim, its *quantum meruit* claim, and its partner liability claim. Burling asserts that these claims arose independently from the terms of the Subcontract and do not fall under the stay provision in Article 11.b and 11.c. Article 11.c provides that "[i]f CMO notifies [Burling] that CMO contends any arbitration or lawsuit brought under this Article 11.c involves a controversy within the scope of 11.b, the dispute process shall be stayed until the procedures under Article 11.b are completed." Burling asserts that "dispute process" in this section refers only to disputes or controversies that are common between Burling's claims against CMO and CMO's claims against the Owner. Accordingly, Burling asserts that in this case, "dispute process" refers only to Burling's undercutting claim where there is no overlap with any of Burling's other claims against CMO and CMO's claim against the Owner. We find this narrow reading of the Subcontract unconvincing.

¶ 30 Article 11.c provides that the "dispute process" shall be stayed, not that only specific overlapping claims shall be stayed. Burling's claims in its complaint are the dispute, and the dispute process is the litigation Burling initiated against CMO to seek redress for those claims. To argue that "dispute process" refers only to specific claims from a complaint containing a series of related claims ignores the well-established rule that words used in a contract must be

given their " 'plain and ordinary meaning.' " *Hunt v. Farmers Insurance Exchange*, 357 Ill. App. 3d 1076, 1078 (2005) (quoting *Young v. Allstate Insurance Company*, 351 Ill. App. 3d 151, 158 (2004)). Here, we find the term "dispute process" unambiguously encompasses the entire litigation between Burling and CMO. Although Burling goes to great lengths in its briefs before this court to contest this plain and ordinary meaning, a contract term is not ambiguous merely because it is undefined in the contract, nor does an ambiguity arise " 'because the parties can suggest creative possibilities for its meaning.' " *Chatham Corp. v. Dann Insurance*, 351 Ill. App. 3d 353, 358 (2004) (quoting *Lapham–Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 529 (1995)). Accordingly, we cannot say that the trial court abused its discretion in granting CMO's motion for a stay with regard to all of Burling's contract-based claims, which includes its Section 23 mechanics lien claim, its *quantum meruit* claim, and its partner liability claim.

¶ 31 F. Presentation of All of Burling's Claims to Owner

¶ 32 Burling next contends that CMO failed to comply with Article 11.b by failing to present all of Burling's claims to the Owner. Article 11.b provides that "CMO will, at its option, (1) present to the Owner, in CMO's name, or (2) authorize [Burling] to present to the Owner, in CMO's name, all of [Burling's] claims and answer the Owner's claims involving [Burling's} work, whenever CMO is permitted to do so by the terms of the Contract Documents." Burling asserts that CMO has failed to comply with this provision of Article 11 and, therefore, has materially breached the Subcontract and cannot rely on Article 11 as a basis for the stay.

¶ 33 We observe, however, that Burling did not raise this issue before the trial court. It is well-established that an appellant may not raise an issue for the first time on appeal and that issues not raised below are considered waived. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI*,

Inc., 378 Ill. App. 3d 437, 456 (2007) (citing *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002)). Accordingly, we find that Burling has waived this issue and we may not consider it. Nonetheless, we would find Burling's argument unpersuasive where the Subcontract provides that CMO may "certify" Burling's claims to the Owner only if it can do so in "good faith." Where CMO contests the validity of Burling's claims, it cannot present them to the Owner in good faith.

¶ 34 G. CMO Materially Breached Subcontract

¶ 35 Burling next contends that the court erred in granting the stay without first determining whether CMO materially breached the Subcontract. Burling contends that its complaint raises allegations that CMO breached the Subcontract by failing to pay Burling for work performed. Burling asserts that where CMO materially breached the Subcontract, it should not have been permitted to rely on the stay provision of Article 11, a matter the court should have addressed before ruling on the motion for the stay.

¶ 36 We initially observe that Burling did not raise this issue in the circuit court. As discussed, *supra*, an appellant may not raise an issue for the first time on appeal and issues not raised below are considered waived. *Cambridge Engineering*, 378 Ill. App. 3d at 456 (citing *Robinson*, 201 Ill. 2d at 413. Nevertheless, we find Burling's argument unpersuasive. Burling essentially asks the court to rule on the validity of his claims in spite of the stay provision. Such a position would render Article 11 of the Subcontract meaningless. By its very nature, the stay provision applies only in the event of an ongoing dispute process between CMO and Burling. Such a dispute, "arising from any act or omission of the Owner or involving the Contract Documents" would invariably involve a claim that CMO breached the Subcontract. Burling essentially asks the court to determine the merits of its claims before enforcing the requirements of the stay provision. We

find this counterintuitive result unsupported by the circumstances before us or by relevant authority.

¶ 37 H. Relationship Between Arbitration and Litigation

¶ 38 Burling next contends that the stay is improper because only a small portion of its claims against CMO are related to CMO's claims against the Owner in the arbitration. Burling points out, and CMO concedes, that there is only one overlapping claim between the two actions: Burling's claim for additional undercutting. Burling asserts that CMO's claims against the Owner total nearly $24 million while the claim for additional undercutting accounts for approximately $200,000 of that amount and Burling's remaining claims against CMO amount to approximately $1.8 million. Burling contends that it was therefore improper for the court to grant CMO's motion to stay the entire litigation where there is a large disparity between the value of Burling's undercutting claim, CMO's other claims against the Owner, and Burling's remaining claims against CMO. Burling asserts that such discrepancies show the unreasonableness and absurdity of the circuit court's stay order.

¶ 39 The plain language of Article 11 provides that "[i]f CMO notifies [Burling] that CMO contends any arbitration or lawsuit brought under this Article 11.c involves a controversy within the scope of 11.b, the dispute process shall be stayed until the procedures under Article 11.b are completed." As discussed, *supra*, the "dispute process" is the litigation between CMO and Burling. There is no indication in the Subcontract that the value, intermingling of claims, or overlap of claims is relevant to whether the dispute process should be stayed. The provision provides that the dispute process shall be stayed in the event of *any* arbitration or lawsuit brought under Article 11.c. Here, the arbitration between Owner and CMO falls under that provision and

we find no ambiguity suggesting that the value of claims is relevant to a determination of whether the entire dispute process shall be stayed or whether only certain overlapping claims shall be stayed. Burling asserts that such a result is inequitable, but the record indicates that both parties entered into this contract freely and knowingly, with full awareness of its terms. See *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 584 (1990) ("[C]ourts should not interfere with the right of two parties to contract with one another if they freely and knowingly enter into the agreement."). If Burling sought a value threshold for this provision or other restrictions on its application, it could have negotiated to have these stipulations in the contract. As it stands, we will not read a provision into a contract that is not evidenced by its plain terms.

¶ 40 We likewise find Burling's reliance on *Iser Electric Co., Inc. v. Fossier Builders, Ltd.*, 84 Ill. App. 3d 161 (1980) unpersuasive. Burling contends that "[i]n *Iser*, the court held that a subcontractor's claim was not sufficiently intermingled and dependent upon a controversy between a general contractor and owner, and therefore should not be stayed pending arbitration between the owner and general contractor." We believe Burling misapplies the reasoning of the court's ruling in *Iser* to the facts of the case at bar.

¶ 41 In *Iser*, a general contractor entered into a contract with the owners for the construction of a home. *Id.* at 162. The contract contained a clause which provided that "all claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract, Documents or the breach thereof ***, shall be decided by arbitration ***." *Id.* at 162. The general contractor subcontracted the electrical work on the home to Iser Electric Company, Inc. (Iser). *Id.* Iser also entered into a separate contract with the owners. *Id.* at 163. After the owner terminated the contract, Iser brought a claim against both the general contractor

and the owners seeking damages for breach of contracts which each of them had with Iser. *Id.* The general contractor answered the complaint and filed a counterclaim against the owners seeking damages for their breach of the contract by wrongfully terminating it. *Id.* The owners filed a motion for an order to sever the counterclaim or, in the alternative, to stay its prosecution pending arbitration as provided for in their contract with the general contractor, and to require the general contractor to proceed by arbitration with its claim against the owners. *Id.* The trial court denied the owners' motion finding that "it would be counter-productive to enforce the arbitration agreement between [the general contractor] and the [owners] as, under the circumstances of this case, that would not result in economy of litigation and would create the possibility of conflicting findings by an arbitrator and the court." *Id.* The court observed, however, that Iser would not be bound by the arbitration agreement between the owner and the general contractor. *Id.*

¶ 42 On appeal, this court found that it was clear that the issues between the general contractor and the owner were within the scope of their arbitration agreement. *Id.* at 164. The court recognized that Section 2(d) of the Uniform Arbitration Act (Ill. Rev. Stat 1977, ch. 10 par. 102(d), now 710 ILCS 5/2(d)) provides that "[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section or, if the issue is severable, the stay may be with respect thereto only." *Id.* The court observed that the issues in the case before it were not sufficiently intermingled where Iser was seeking to enforce separate contracts against the general contractor and the owner, and the general contractor was seeking to recover damages against the owners based on a separate contract between the two of them. *Id.* at 164-65. The court found that Iser was not bound by the arbitration clause between the general contractor and the owner and that the general

contractor could not avoid the terms of the arbitration clause simply by being a defendant in a related action brought by a third party. *Id.* at 165. Accordingly, the court concluded that the trial court erred in not granting the owner's motion and that the court should have directed the general contractor to proceed in arbitration, while Iser's claims against both parties could proceed in the trial court. *Id.* at 166.

¶ 43 Here, the considerations at issue in this case are entirely distinct from those at issue in *Iser*. Notably, both Burling's claims against CMO and the basis for the stay pending arbitration are premised on the same clause in the same contract unlike in *Iser* where Iser's claims were based on separate contracts than the contract between the owners and the general contractor, which contained the arbitration clause. Moreover, the court's decision in *Iser* was less focused on the intermingled claims of the parties, and more concerned with the general contractor's attempt to circumvent the arbitration clause in its contract with the owners. Burling points out that the court in *Iser* observed that the decision of the arbitrator resolving the general contractor's claims against the owners would not bind Iser in its claims against both parties, and contends that the same circumstances would apply in this case regarding its claims. However, we believe this misstates the issue before us. As discussed above, the Subcontract does not provide for a value threshold or in any way suggest that the stay provision applies only where CMO's claims against the Owner are sufficiently intermingled with Burling's claims against CMO. Rather, by its plain terms, the Subcontract provides that where there is a pending dispute between CMO and Burling within the scope of Article 11, and CMO maintains any arbitration against the Owner, the dispute process between Burling and CMO shall be stayed pending the resolution of that arbitration. Thus, the issue is not whether the claims are intermingled, overlapping, or related, but whether they fall under Article 11 such that the stay provision applies. We find that the stay

provision in Article 11 does apply and that the circuit court did not abuse its discretion in granting the stay.

¶ 44 I. Waiver

¶ 45 Burling finally contends that CMO waived its right to enforce the stay provision by acting in a manner inconsistent with the right to enforce the provision. Burling asserts that CMO participated in the litigation for more than a year and never raised the arbitration provision as a defense before filing its motion to stay. Burling points out that arbitration rights can be waived where a party acts inconsistently with the right to arbitrate. Burling contends that such circumstances are present here.

¶ 46 We initially observe that the cases cited by Burling in support of this contention discuss a party's right to compel arbitration. Nonetheless, we find Burling's contentions unpersuasive. Although Burling consistently points out that CMO participated in the litigation for more than a year and a half before seeking the stay, the record shows that CMO filed its arbitration demand against the Owner on November 11, 2016. CMO then filed its motion to stay on December 13, 2016. Accordingly, we find Burling's contentions regarding the amount of time elapsed during the entire litigation unpersuasive where there was no basis for CMO to seek to enforce the stay provision until it filed its arbitration demand against the Owner. Although we are cognizant of the well-established precedent cited by Burling that a party may waive a contract term by acting in a manner inconsistent with its intention to assert that right, we cannot say that the trial court abused its discretion in finding that CMO did not waive its right to enforce the stay provision where only one month elapsed between when CMO filed its arbitration demand, a necessary prerequisite for the application of Article 11, and filed for a stay of the litigation with Burling.

We further observe that there is no other evidence in the record to suggest that CMO acted inconsistently with its right to enforce the provision such that waiver would apply. Accordingly, we find that the circuit court did not abuse its discretion in finding that CMO did not waive its right to enforce the stay provision.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 49 Affirmed.