No. 1-10-3326

FIRST DIVISION
FILED: March 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE HEARTLAND CONSTRUCTION GROUP, INC.,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
v.	)	No. 09 CH 42475
PETER J. BRENNAN and LINDA BRENNAN,	)	HONORABLE LEWIS M. NIXON, JUDGE PRESIDING.
Defendants-Appellants.	)	

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

HELD: Interlocutory appeal was properly filed pursuant to Supreme Court Rule 307(a)(1), and the circuit court did not err in staying proceedings and referring to an arbitrator the issue of whether the appellee had waived its right to arbitration.

The defendants, Peter J. Brennan and Linda Brennan (collectively, the Brennans) brought this interlocutory appeal, pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), challenging the circuit court's decision to refer to an arbitrator

the question of whether certain of the claims asserted against them by the plaintiff, Heartland Construction Group, Inc. (Heartland), are subject to arbitration under the construction contract entered into by the parties. For the reasons that follow, we affirm the decision of the circuit court.

The pleadings, motions, and supporting documents establish the following relevant facts. Heartland is an Illinois corporation engaged in the business of performing general contracting services on construction projects. The Brennans are owners of the real estate located at 1130 Franklin Avenue, River Forest, Illinois. On or about December 14, 2006, Heartland and the Brennans entered into a construction contract, which included a provision for alternative dispute resolution, including mediation and arbitration, to settle claims arising under the contract. In particular, the contract provides that disputed claims must be submitted for resolution by the architect designated in the contract, whose final and binding decision is an express condition precedent to arbitration before the American Arbitration Association (AAA). The contract further provides that a demand for arbitration shall be made within 30 days of the architect's decision and shall be filed in writing with the other party to the contract, the AAA, and the architect. In addition, the contract states that the failure to demand arbitration within thirty days "shall result in the Architect's

decision becoming final and binding upon the Owner and Contractor."

On February 8, 2008, the architect designated in the contract issued a final and binding decision resolving 56 claims by Heartland and 20 claims by the Brennans. On February 27, 2008, Heartland served a demand for arbitration upon the designated architect and the Brennans, but not with the AAA. Heartland subsequently filed a request for mediation with the AAA on April 21, 2008. The Brennans refused to participate in both mediation and arbitration on the basis that the architect's determination was no longer subject to these alternative dispute resolution procedures.

Heartland initiated this action in the circuit court on October 29, 2009. Heartland's complaint, as finally amended, consisted of four counts, which sought enforcement of a mechanics lien, to compel arbitration, enforcement of the construction contract, and payment for additional work under the theory of *quantum meruit*. The Brennans moved to dismiss the amended complaint, asserting, *inter alia*, that Heartland is barred from any relief because it failed to demand arbitration with the AAA within 30 days of the architect's final decision. Heartland responded to the Brennans' motion to dismiss and filed a motion to compel arbitration of the substantive claims asserted in the complaint.

The circuit court determined that the question of whether

Heartland had waived the right to arbitrate based on its failure to file a demand for arbitration with the AAA within 30 days was a question that should be decided by the arbitrator in the first instance. Consequently, the court entered an order requiring Heartland to commence arbitration proceedings before the AAA and requiring the Brennans to respond to and participate in those proceedings for the sole purpose of obtaining a decision by the arbitrator on the issue of timeliness. The circuit court's order provided, in relevant part:

> "3. That the Arbitrator *** shall only consider and decide the issues raised by the Motion to Dismiss The Amended Complaint [Counts] I, II and III and the Response thereto, including issues of timeliness. Such decision shall be by a written decision. The Arbitrator shall take no further action without further order of this Court.
>
> 4. That the parties shall file the written decision by the Arbitrator with the Clerk of the Court and in addition shall deliver a copy thereof to the Court's chambers within 15 days after receiving a copy of such decision. ***
>
> 5. These proceedings are stayed pending the filing of such decision of the Arbitrator with the Clerk of this

Court."

In issuing this ruling, the circuit court stated that the arbitrator was to decide the issue of timeliness in the first instance, but subject to the court's *de novo* review. The order was entered over the Brennans' objection, and they have filed this interlocutory appeal challenging that order.

We initially address Heartland's argument that this appeal should be dismissed for lack of jurisdiction. In support of its contention, Heartland asserts that the circuit court's interlocutory order does not constitute an injunction and, therefore, is not subject to review under Supreme Court Rule 307(a)(1). We disagree.

Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) specifically allows interlocutory appeals from judgments involving the grant, denial, dissolution, or modification of an injunction. The issue of whether an order constitutes an injunctive order that is reviewable under Rule 307(a)(1) must be determined from its substance rather than its form. *Burns v. Celotex Corp.*, 225 Ill. App. 3d 200, 202, 587 N.E.2d 1092 (1992). Actions of the circuit court having the force and effect of injunctions are appealable even if they are labeled as something else. *In re A Minor*, 127 Ill. 2d 247, 260, 537 N.E.2d 292 (1989). Yet, not every nonfinal order of a court is subject to immediate review, even if it compels

a party to do or not do a particular thing. *In re A Minor*, 127 Ill. 2d at 260-62. Orders of the circuit court that can be characterized as "ministerial" or "administrative" because they simply regulate the procedural details of the litigation before the court cannot be the subject of an interlocutory appeal. *In re A Minor*, 127 Ill. 2d at 262. Examples of such orders include subpoenas, discovery orders, and orders relating to the control of the court's own docket. *In re A Minor*, 127 Ill. 2d at 262. Such orders do not affect the relationship of the parties in their everyday activity apart from the litigation, and they are therefore distinguishable from traditional forms of injunctive relief. *In re A Minor*, 127 Ill. 2d at 262.

In this case, the circuit court's order accomplished two distinct things. First, it stayed the judicial proceedings, which had the effect of preventing, at least temporarily, a decision on the Brennans' motion to dismiss the action in its entirety. Second, it effectively compelled arbitration on a distinct aspect of the controversy in that it required the parties to participate in the arbitration process by submitting to an arbitrator the question of whether Heartland's substantive claims could be arbitrated. We find that the circuit court's order is injunctive in nature and cannot be fairly characterized as "ministerial" or "administrative." Consequently, we conclude that we have

jurisdiction pursuant to Supreme Court Rule 307(a)(1) and reject Heartland's assertion that the appeal should be dismissed.

We next consider the Brennans' argument that the circuit court committed reversible error in referring to an arbitrator the issue of whether Heartland's claims are subject to arbitration. The appropriate standard of review is to be determined based on the nature of the question presented to the circuit court. *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1001, 796 N.E.2d 633 (2003). Generally, the proper standard of review for an appeal brought under Rule 307(a)(1) is whether the circuit court abused its discretion. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1092, 746 N.E.2d 294 (2001). However, where, as here, the facts are undisputed and the circuit court is called upon to decide whether a claim is arbitrable as a matter of law, our review is *de novo*. See *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550, 553, 814 N.E.2d 997 (2004); *LAS, Inc.*, 342 Ill. App. 3d at 1001.

In determining whether to grant or deny a motion to compel arbitration, the court is confronted with the issue of whether there is an agreement to arbitrate the subject matter of a particular dispute. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 444, 530 N.E.2d 439 (1988). Thus, the arbitrability of a dispute refers to (1) whether a valid agreement

to arbitrate exists under the contract, and if so, (2) whether the dispute sought to be arbitrated falls within the scope of the arbitration agreement. See *Donaldson*, 124 Ill. 2d at 444-45.

Where the language of the arbitration agreement is clear and it is apparent that the dispute sought to be arbitrated falls within or outside the scope of the arbitration clause, the court should decide the arbitrability issue. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 9, 761 N.E.2d 724 (2001). Yet, " 'when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of [the] arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator.' " *Salsitz*, 198 Ill. 2d at 9, quoting *Donaldson*, 124 Ill. 2d at 447-48. In cases where an arbitrator decides the question of arbitrability in the first instance, the circuit court is still required to review the arbitrator's decision *de novo*. *Salsitz*, 198 Ill.2d at 13-14; *Donaldson*, 124 Ill. 2d at 448 (recognizing that initially deferring to the arbitrator in unclear cases may occasionally hinder some of the reasons for arbitration, such as speed and saving of expenses). If this were not so, "a party would be bound by the arbitration of disputes he has not agreed to arbitrate and would be left with only a court's deferential review of the arbitrator's decision on the question of arbitrability." *Salsitz*, 198 Ill. 2d at 14.

In cases involving the issue of who should decide the arbitrability of a dispute, Illinois courts have distinguished between express conditions precedent to arbitration and general procedural provisions defining or limiting the circumstances under which an agreement to arbitrate may be triggered. A condition precedent is one which must be performed either before a contract becomes effective or which is to be performed by one party to an existing contract before the other party is obligated to perform. *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of the Regional Transportation Authority*, 262 Ill. App. 3d 334, 338, 634 N.E.2d 469 (1994). It has been repeatedly held that, although the existence of an express condition precedent to arbitration is a question for the court to decide, procedural issues are best resolved by an arbitrator who would construe the contract as a whole in light of the customs and practice of the industry and would hold the parties to the essence of their bargain, a task peculiarly within the competence of the arbitrator. See *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 464, 793 N.E.2d 221 (2003); *Amalgamated Transit Union, Local 900*, 262 Ill. App. 3d at 340-41; *Village of Carpentersville v. Mayfair Construction Co.*, 100 Ill. App. 3d 128, 132-33, 426 N.E.2d 558 (1981). Questions involving timeliness, the sufficiency of a demand, and waiver are procedural issues that should be

decided, in the first instance, by the arbitrator. *Menard County Housing Authority*, 341 Ill. App. 3d at 464-65; *Amalgamated Transit Union, Local 900*, 262 Ill. App. 3d at 340-41; *Village of Carpentersville*, 100 Ill. App. 3d at 132-33.

In this case, the language of the construction contract clearly indicates that a final and binding decision of the designated architect is an express condition precedent to arbitration. However, the contract terms prescribing the time limitations and the method of initiating arbitration proceedings do not make those provisions express conditions precedent. Consequently, any questions relating to the sufficiency of Heartland's demand for arbitration, the timeliness of that demand, and Heartland's alleged waiver of arbitration constitute procedural issues that should be decided by the arbitrator, subject to *de novo* review by the circuit court. See *Salsitz*, 198 Ill.2d at 13-14; *Menard County Housing Authority*, 341 Ill. App. 3d at 464-65; *Amalgamated Transit Union, Local 900*, 262 Ill. App. 3d at 340-41; *Village of Carpentersville*, 100 Ill. App. 3d at 132-33.

In arguing that the circuit court erred in referring the issue of arbitrability to an arbitrator, the Brennans rely primarily on *Brookfield-North Riverside Water Comm'n v. Abbott Contractors, Inc.*, 250 Ill. App. 3d 588, 621 N.E.2d 153 (1993), and *Sarnoff v. De Graf Brothers, Inc.*, 196 Ill. App. 3d 535, 554 N.E.2d 335

(1990), both of which held that where a party has failed to demand arbitration in a timely manner, the right to arbitrate has elapsed and the underlying claim is no longer arbitrable. *Brookfield-North Riverside Water Comm'n*, 250 Ill. App. 3d at 595-96; *Sarnoff*, 196 Ill. App. 3d at 543. We note, however, that neither of these cases specifically addressed the issue of whether the circuit court or an arbitrator should decide the question of arbitrability, nor did they consider whether the time limitations applicable to a demand for arbitration constituted an express condition precedent or a procedural matter. Consequently, *Brookfield-North Riverside Water Comm'n* and *Sarnoff* do not govern the case at bar.

For the foregoing reasons, the circuit court's order staying the action and requiring the parties to submit to an arbitrator the issue of whether Heartland's claims are subject to arbitration is affirmed.

Affirmed.