THIRD DIVISION
May 11, 2011

No. 1-10-2759

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FOUNDERS INSURANCE COMPANY, as Subrogee of Jimmie and Millie Perteete, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
v.	)	No. 10 L 1861
FATHER & SON HOME IMPROVEMENT II, INC., an Illinois Corporation, Defendant-Appellee.	)	HONORABLE DRELLA C. SAVAGE, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: The circuit court did not err in dismissing the complaint brought by plaintiff Founders Insurance Company against defendant Father & Son Home Improvement II, Inc. as time-barred by a one-year limitation clause in the contract between Father & Son and Founders' subrogors, Jimmie and Millie Perteete.

Plaintiff, Founders Insurance Company (Founders), as subrogee of Jimmy and Millie Perteete (the Perteetes), appeals an order of the circuit court of Cook County dismissing its suit against defendant Father & Son Home Improvement II, Inc. (Father & Son) as time-barred by a

one-year limitation clause in the contract between Father & Son and the Perteetes. For the following reasons, we agree that Founders' complaint is time-barred and affirm the circuit court.

BACKGROUND

The record on appeal discloses that on February 11, 2010, Founders filed a complaint containing the following allegations. Founders' subrogors, the Perteetes, owned real estate and improvements at 1258 East 169th Street in South Holland, Illinois. On or about November 26, 2007, the Perteetes contracted with Father & Son to perform remodeling and construction work on their home under the terms of a written contract attached to the complaint. Subsequently, on July 18, 2008, a fire originated in a dumpster Father & Son placed on the driveway of the premises to collect debris, construction materials and miscellaneous items used or obtained during the course of the project.

Count I of the complaint charged Father & Son with a series of negligent acts or omissions that resulted in the fire and its spread, which destroyed real and personal property and left the Perteetes' home uninhabitable. Count II of the complaint also sounded in negligence, under the theory of *res ipsa loquitur*. Count III of the complaint claimed Father & Son breached an implied warranty that its work and services would be performed in a good, safe and workmanlike manner. Founders paid $254,712.47 for the repair, replacement and expenses of the Perteetes' home and related costs under an insurance policy issued to the Perteetes by Founders. Pursuant to the insurance policy, the Perteetes subrogated their claims to Founders.[1]

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[1] Founders, as the subrogee of the Perteetes, "steps into their shoes" and may enforce the

Father & Son filed a motion to dismiss pursuant to section 2-619(a)(5) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2008)), arguing the action was not commenced within the time limited by law. Father & Son noted that section 11.4 of its contract with the Perteetes (attached as an exhibit to the motion) states:

> "11.4 Waiver of Statute of Limitations. The Owner [the Perteetes] agrees that any action at law, equity or otherwise by the Owner arising out of the Contract and/or alleging defects in workmanship or labor must be filed within one (1) year of the date on which the alleged cause of action arose, or the same will be time barred. The Owner hereby waives all otherwise applicable Statutes of Limitations and agrees the foregoing time period shall apply instead."

Founders filed a response to the motion to dismiss, arguing that neither section 11.4 of the contract nor any other section of the "General Conditions of Contract" on the back of the original form presented to the Perteetes was specifically acknowledged by the Perteetes' signatures or initials. Founders noted section 11.3 of the contract, providing for a waiver of jury trial, is designed to be accepted or rejected by the initials of the owner. Founders also argued the contract does not specifically address the use of a dumpster or the management and removal of debris and other materials. Founders thus argued that the vagueness of the contract should be construed against Father & Son, which drafted the agreement.

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rights the Perteetes could enforce. See *e.g.*, *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Co.*, 379 Ill. App. 3d 771, 780 (2008).

Founders, asserting unequal bargaining power between the Perteetes as homeowners and Father & Son as a professional contractor, further maintained that section 11.4 of the contract was "deep in the boiler plate language on the back of the contract that was not presented to the homeowners." Founders attached affidavits from the Perteetes, both stating: "At no point before I signed the document entitled **'CONTRACT'** was I presented with the **'GENERAL CONDITIONS OF CONTRACT'** which was on the back of the **'CONTRACT'**." (Emphases in original.)[2]

Father & Son filed a reply, noting that section 2.1 of the contract, which described the project in general and appeared on the front of the contract, refers to the **"General Conditions of Contract printed on the reverse side of this Contract."** (Emphasis in original.) Father & Son also noted that section 4.0 of the contract, again appearing on the front page, states that the **"General Conditions of Contract on the reverse side of this Contract"** are a part of the contract. (Emphasis in original.) Father & Son further noted the last paragraph on the front of the contract and above the signature lines states: "I/WE agree to the above terms and those in the **General Conditions of Contract on the reverse side** and demonstrate my/our agreement to this Contract by signing below." (Emphasis in original.) Father & Son added that section 13.7 of the contract is an integration clause providing that the contract superseded all prior written agreements.

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[2] The response also contained an argument based on the Home Repair and Remodeling Act (815 ILCS 513/1 *et seq*. (West 2006)), which is not at issue in this appeal.

On August 20, 2010, after hearing argument, the circuit court entered an order granting Father & Son's motion to dismiss. On September 16, 2010, Founders filed a timely notice of appeal to this court.

DISCUSSION

A motion to dismiss under section 2-619 of the Code "admits the legal sufficiency of the plaintiff's claim but asserts 'affirmative matter' outside of the pleading that defeats the claim." *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). The purpose of a section 2-619 dismissal "is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369. When reviewing a section 2-619 motion to dismiss, this court "'must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *Czarobski*, 227 Ill. 2d at 369 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our standard of review under section 2-619 of the Code is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006).

In this case, Father & Son relies on the provision of its contract with the Perteetes limiting the time for filing a lawsuit "arising out of the Contract" to one year. Under Illinois law, a contractual provision that limits the time within which to file a lawsuit is enforceable. *E.g.*, *1000 Condominium Ass'n v. Carrier Corp.*, 180 Ill. App. 3d 467, 470 (1989); *Village of Lake in the Hills v. Illinois Emcasco Insurance Co.*, 153 Ill. App. 3d 815, 817 (1987). A suit filed after the contractual period has expired is barred unless the party seeking to enforce the contractual limit has, by some conduct or representation, waived the requirement. See *Mathis v. Lumbermen's*

Mutual Casualty Insurance Co., 354 Ill. App. 3d 854, 858 (2004); *Village of Lake in the Hills*, 153 Ill. App. 3d at 817. The insured may demonstrate a waiver by showing facts from which it would appear that enforcement of the provision would be unjust or unconscionable. *Village of Lake in the Hills*, 153 Ill. App. 3d at 817.

Founders argues a genuine issue of material fact exists based on the affidavits it submitted from the Perteetes, both of which state they were not presented with the terms of the "General Conditions of Contract" contained on the back of the contract. Generally, where facts asserted in an affidavit are uncontradicted, they must be taken as true over contrary unsupported allegations. *Graham v. Hyundai Motor America*, 367 Ill. App. 3d 617, 624 (2006). However, the affidavits from the Perteetes concede the "General Conditions of Contract" were on the back of the contract and claim only that those terms were not "presented" to them.[3]

Founders also argues the limitations clause was procedurally unconscionable. Procedural unconscionability consists of " 'some impropriety during the process of forming the contract depriving a party of meaningful choice.' " *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 23

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[3] On appeal, Founders notes that the copy of the contract attached to the complaint contained only the front page and not the reverse side. Founders suggests that no evidence exists that Perteetes "received" the contract intact. Notably, the Perteetes' affidavits failed to state they received a partial copy of the contract. Moreover, a party who does not raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal. *E.g.*, *In re Marriage of Culp*, 399 Ill. App. 3d 542, 550 (2010).

(2006) (quoting *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989–90 (1980)). Factors considered in determining whether an agreement is procedurally unconscionable include whether each party had the opportunity to understand the terms of the contract, whether important terms were " 'hidden in a maze of fine print,' " and all of the circumstances surrounding the formation of the contract. *Id*. However, in *Kinkel*, which involved a cellular telephone service agreement and upon which Founders heavily relies, the Illinois Supreme Court stated:

> "Plaintiff did sign the front page of the service agreement and she did initial an acknowledgment provision on the front of the form, stating that she had read the terms and conditions on the back. There is no dispute that the terms and conditions were in her possession and she either read them or could have read them if she had chosen to do so.
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> The Cingular service agreement is a contract of adhesion. The terms, including the arbitration clause and the class action waiver therein, are nonnegotiable and presented in fine print in language that the average consumer might not fully understand. Such contracts, however, are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable." *Kinkel*, 223 Ill. 2d at 26.

The *Kinkel* court concluded there was a degree of procedural unconscionability in the service agreement because it did not inform the plaintiff she would have to pay any amount towards

arbitration costs. However, the court did not find this degree of procedural unconscionability sufficient to render the challenged class action waiver unenforceable.[4] *Kinkel*, 223 Ill. 2d at 27.

In contrast to *Kinkel*, the agreement here consists of only two pages. Although the typeface of the limitations clause was not large, it was legible and of the same-size print as the other contract terms on both sides of the agreement. Moreover, on the front page of the agreement above the signature line is the sentence "I/WE agree to the above terms and those in the **General Conditions of Contract on the reverse side** and demonstrate my/our agreement to this Contract by signing below." (Emphasis in original.)

Founders asserts that Father & Son did not show that the limitation was brought to the Perteetes' attention. However, the Perteetes' affidavits do not establish they did not have the opportunity to read both sides of the contract before signing it. Moreover, it is not the duty of one party to a contract to inform another of the duties or obligations assumed under the contract. *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 915 (2010); *Schoonover v. American Family Insurance Co.*, 214 Ill. App. 3d 33, 43 (1991). Rather, a party has a general duty to read documents before he or she signs them; the failure to do so will not render the document invalid. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 117 (2010). Consequently, the Perteetes are presumed to have read, understood, and agreed to be bound by

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[4] The degree of procedural unconscionability was a factor considered in combination with the court's findings on the question of substantive unconscionability (*Kinkel*, 223 Ill. 2d at 27), but substantive unconscionability was not raised as an issue in this case.

its terms. See, *e.g.*, *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 93 (2007); *Kubisen v. Chicago Health Clubs*, 69 Ill. App. 3d 463, 465 (1979).

Lastly, Founders argues the limitation clause is "in the nature of an exculpatory clause" that is inapplicable to the negligence claims in this case. Contractual provisions releasing parties from future liability, commonly referred to as exculpatory clauses or disclaimers, are not favored in Illinois and are strictly construed against the party which they benefit. *Chicago Steel Rule & Die Fabricators Co. v. ADT Security Systems, Inc.*, 327 Ill. App. 3d 642, 645 (2002). However, such a provision will be enforced if: (1) it clearly spells out the parties' intention; (2) the social relationship between the parties does not militate against enforcement; and (3) it does not violate public policy. *Id.* "Such clauses must spell out the intention of the parties with great particularity and will not be construed to defeat a claim which is not explicitly covered by their terms." *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986). However, an exculpatory clause is not inoperable merely because it is broadly worded. See *Harris v. Walker*, 119 Ill. 2d 542, 549 (1988).

Father & Son argue the limitation clause is not an exculpatory clause, as it merely limits the time for bringing suit rather than releasing Father & Son from liability. The parties do not cite any Illinois case law directly on point, although Father & Son's argument has been accepted in Wisconsin. See *Keiting v. Skauge*, 198 Wis. 2d 887, 894-95 (Wis. App.1995). We need not resolve the question, as contractual limitations on suit are similarly disfavored by our courts; thus, where any ambiguity exists, such provisions are construed strictly against the drafter. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 665 (2007). However,

like exculpatory clauses, contractual time limits on bringing suit against a party are not automatically invalid as a matter of law. When time limitation clauses are clear on their face, they may be strictly enforced. *Id.*

In this case, Founders notes the limitation clause does not specifically refer to negligent acts. Founders also asserts the contract does not refer to the use of a dumpster or the management and removal of debris. Yet Father & Son notes that section 6.2 of the contract does contemplate obtaining a permit for a dumpster. However, the language of the clause at issue, while broad, clearly imposes a one-year limitation period on any action "arising out of the Contract" or alleging defects in workmanship or labor. Accordingly, the limitation clause, however characterized, is enforceable.

CONCLUSION

In sum, the circuit court did not err in dismissing Founders' complaint. The Perteetes' affidavits did not create a genuine issue of material fact regarding their notice of the limitation clause in the contract. The limitation clause is not procedurally unconscionable and is clear in its intent. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.