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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DOGAN GREGORY,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-SC-6206
)	
SUPER ONE DEVELOPMENT, INC.,)	
d/b/a Cass Ave. Motors, and)	
JASON SAMHAN,)	Honorable
)	Peter W. Ostling,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Holding:* The trial court properly granted defendants' section 2-619(a)(9) motion to dismiss plaintiff's complaint: the arbitration provision in the parties' limited warranty agreement served as an affirmative matter to defeat the claim.

¶ 2 This case arises from a dispute concerning the refund of a limited warranty agreement following its cancellation. In February 2013, plaintiff, Dogan Gregory, purchased a vehicle from defendant, Cass Avenue Motors. Plaintiff also entered into a limited warranty agreement for \$2,290. Plaintiff thereafter canceled his warranty agreement and was to receive a prorated refund of \$1,980.20. The refund was transmitted to defendant, but defendant did not deliver it to

plaintiff. Plaintiff filed a small claims action against defendants, Super One Development, Inc., d/b/a Cass Avenue Motors, and Jason Samhan. Plaintiff alleged causes of action for conversion (count 1); a violation of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2012)) (count 2); a breach of fiduciary duty (count 3); and a violation of the Magnuson-Moss Warranty Act (15 U.S.C. § 2310(d)) (count 4). Defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(9) (West 2012)), asserting that the arbitration clause contained in the warranty agreement defeated plaintiff's claims. Following a hearing, the trial court agreed with defendants and granted their motion to dismiss plaintiff's complaint, with prejudice. Plaintiff filed a timely notice of appeal, challenging the trial court's ruling. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Attached to plaintiff's complaint were the first page of the buyer's order reflecting the purchase of the vehicle; the first page of the limited warranty agreement at issue; a receipt reflecting plaintiff's credit card payment of \$2,290 to Cass Avenue Motors; an email correspondence reflecting plaintiff's cancellation of the warranty agreement and Cass Avenue's processing of the refund check; a web page of Cass Avenue; and a web page of a corporate file detail report from the Illinois Secretary of State's Office reflecting that defendants' corporation was not in good standing.

¶ 5 In January 2014, defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code. Defendants noted that plaintiff attached only the first page of the three-page limited warranty agreement. Defendants argued that the complete warranty agreement contained both a mandatory arbitration clause and a forum selection clause requiring any controversy or claim to be settled by binding arbitration in Arizona. Defendants attached the three-page limited warranty

agreement and the affidavit of defendant Samhan. Section 10 of the limited warranty agreement attached provided as follows:

“Any controversy or claim arising out of or relating to this limited warranty or the breach thereof will be settled by binding arbitration in accordance with the Arbitration Rules of the American Arbitration Association. THE PARTIES SPECIFICALLY AGREE TO THE BINDING NATURE OF THE ARBITRATION. You may opt out of this requirement for arbitration by notifying AutoLife Rx in writing via certified mail at the address below within 30 days after signing this Agreement.”

¶ 6 Also in January 2014, defendant, Jason Samhan, filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code. Samhan attached his own affidavit and records from the Illinois Secretary of State reflecting that Cass Avenue Motors was a corporation in good standing, and he argued that the affidavit and records affirmatively defeated plaintiff’s claim against him individually.

¶ 7 On January 30, 2014, plaintiff filed a response to defendants’ dismissal motion. In his response, plaintiff characterized it as “a case about \$900.” Plaintiff also requested leave to file cross-motions for sanctions. Plaintiff argued that litigating in Arizona over \$900 was unconscionable and that forum selection clauses were unconscionable as a matter of law. Plaintiff argued that the arbitration clause covered different parties. Plaintiff noted that the arbitration clause from page 3 of the warranty agreement designated the American Arbitration Association (AAA) as the arbitration provider. Plaintiff argued that the AAA’s own rules allowed the parties to “retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.”

¶ 8 Plaintiff further provided for his response that, he agrees to arbitration in Illinois, he “triple-dog dares [d]efendants to agree to an arbitration with the AAA in this \$900 case.” Plaintiff requested leave to file three cross-motions for sanctions. In his first, plaintiff asserted that “[d]efendants’ lawyers can’t be so stupid as to attach a contract between different parties without realizing it is between different parties”; “obviously they did it deliberately, attempting to perpetrate fraud upon [p]laintiff and the Court.” The second requested sanctions because the small claims issue had been settled for more than a decade. The third addressed defendants’ purported motivation, that is, if defendants were to “weasel their way out of arbitration, this will conclusively demonstrate that their Motion was filed in bad faith.”

¶ 9 On May 11, 2011, the trial court conducted a hearing on the two motions to dismiss, and plaintiff’s response and cross-motions for sanctions. In addition to the arguments the parties presented in their motions, plaintiff argued that the AAA rules provided that the arbitration proceeding should be conducted at a location that was reasonably convenient for both parties. Following the arguments of the parties, the trial court presented its findings and ruling. The trial court quoted from paragraph 10 of the contract at issue: “Any controversy or claim arising out of or relating to this limited warranty or breach thereof will be settled by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The parties specifically agree to the binding nature of the arbitration.” The trial court noted that the language was in bold print and portions were underlined as well, and portions were also capitalized. The trial court found that defendants brought a proper motion to dismiss under section 2-619(a)(9) of the Code. The trial court found that plaintiff made the following admissions: he bought a service contract from defendant for \$2,290; defendant Cass Avenue entered into the service contract; and defendants were obligated under the service contract. The

trial court rejected plaintiff's assertion that the case was "about \$900." The trial court found that plaintiff's complaint, as filed, sought damages of \$4,999. The trial court also noted that plaintiff attached only the first page of the three-page complaint, with the third page "happening to contain[] language involving the mandatory or otherwise binding or exclusive arbitration language." The trial court further noted plaintiff's assertion of unconscionability to litigate in Arizona over a \$900 claim, but the complaint as filed sought just under \$5,000.

¶ 10 The trial court continued that courts have recognized that litigation clauses were valid and enforceable, including forum selection language, "all of which here is in *** bold print, underlined in part and capitalized in part." The trial court found no evidence suggesting bad faith or overreaching on the part of the parties, particularly the defendants. With respect to plaintiff's argument that the arbitration clause covered different parties, the trial court found that plaintiff's own representations in his complaint reflected that plaintiff bought the service contract from defendant; the defendant entered into that service contract, and defendant was obligated under the contract. The trial court granted defendants' motion and dismissed plaintiff's complaint with prejudice "pursuant to the provisions of that mandatory arbitration clause, as it relates to the defendant, Super One Development, Inc. doing business as Cass Avenue Motors." The trial court further found that the four counts were dismissed with prejudice based on the mandatory arbitration language. The trial court further found as to the first count, that plaintiff failed to state a cause of action as it related to the corporate defendant, Super One, and dismissed it without prejudice. Plaintiff requested, though, that the trial court dismiss the entire complaint with prejudice with respect to both defendants; the trial court allowed plaintiff's request.

¶ 11 Plaintiff filed a timely notice of appeal.

¶ 12

II. ANALYSIS

¶ 13 In support of his contention that the trial court erred when it granted defendants' motion to dismiss, plaintiff presents six arguments: (1) the arbitration clause is not "other affirmative matter avoiding the legal effect of or defeating the claim," and therefore the trial court should not have dismissed it under section 2-619(a)(9) of the Code; (2) the trial court should have followed the procedure established in both the federal and Illinois arbitration acts, both of which contemplate staying the case pending arbitration; (3) the arbitration contract itself excepted small claims from arbitration; (4) "the arbitration clause in a three-party contract between a consumer, a service contractor, and a selling dealer, is only between the consumer and a service contractor, and therefore there is no arbitration agreement between the consumer and the selling dealer"; (5) "requiring two Illinois parties to go to Arizona to arbitrate a small claims case is patently unconscionable, violates due process, and also violates the incorporated rules of the arbitration provider itself"; and (6) the trial court should not have dismissed the conversion claim *sua sponte* for failure to state a cause of action because neither party invoked section 2-615 of the Code; there was no notice to plaintiff, and plaintiff had no opportunity to respond.

¶ 14 The trial court dismissed plaintiff's complaint pursuant to section 2-619(a)(9) of the Code. A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of a plaintiff's claim but asserts certain defects or defenses outside the pleading that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "The purpose of a section 2-619 motion to dismiss is to dispose of a case on the basis of issues of law or easily proved issues of fact." *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 160 (1994). Whether the trial court erred in dismissing the complaint as barred by affirmative matter are questions of law that we review *de novo*. *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 116 (1993).

¶ 15 With respect to plaintiff's second and fourth arguments, we decline to address them because plaintiff failed to present them to the trial court for its consideration. See *Huang v. Brenson*, 2014 IL App (1st) 123231 (noting that the failure to raise an issue in the trial court generally results in forfeiture of that issue on appeal; issues raised on appeal must be at least commensurate with those raised before the trial court). More important, though, we can affirm the section 2-619 dismissal on any proper basis supported by the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (noting, on review of section 2-619 motion, that the court "can affirm *** on any basis present in the record").

¶ 16 An "agreement to arbitrate a dispute is a matter of contract, and the parties to such a contract are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the language of the agreement." *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 337 Ill. App. 3d 714, 717 (2003). The interpretation of a contract presents a question of law subject to *de novo* review. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277, 285 (2007). "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) to dismiss based on the exclusive remedy of arbitration." *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002). Moreover, reviewing courts have considered the existence of a forum selection clause as an "affirmative matter" that may warrant dismissal under section 2-619(a)(9) of the Code. See, e.g., *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 131 (2008); *Dace International, Inc. v. Apple Computer, Inc.*, 275 Ill. App. 3d 234, 237 (1995). We reject plaintiff's first argument because reviewing courts have consistently allowed a trial court to dismiss a cause of action under section 2-619(a)(9) of the Code.

¶ 17 Turning to the merits in the present case, the plain language of section 10 of the limited warranty agreement required binding arbitration to resolve “[a]ny controversy or claim arising out of or relating to this limited warranty or the breach thereof.” The plain language was conspicuous in that the arbitration provision was in bold font and underscored, and portions of it were capitalized. By signing the limited warranty agreement, the parties manifested an intent to be bound by its terms. See *Just Pants v. Wagner*, 247 Ill. App. 3d 166, 173-74 (1993) (noting that the law has consistently interpreted “signed” to embody not only the act of subscribing a document, but also anything which can reasonably be understood to symbolize or manifest the signer’s intent to adopt a writing as his or her own and be bound by it). Moreover, at oral argument, plaintiff’s counsel conceded “that we have a binding arbitration contract.” The trial court properly granted defendants’ dismissal motion because the parties expressly agreed to arbitrate any claim concerning the limited warranty agreement.

¶ 18 With respect to plaintiff’s third argument, we reject it as first, outside the scope of the plain language of the warranty agreement, and second, as premature. If the language in the agreement is clear and unambiguous, the trial court must determine the intention of the parties solely from the plain language of the agreement and “may not consider extrinsic evidence outside the ‘four corners’ of the document itself.” *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). Here, the plain language provides that the present claim “will be settled by binding arbitration in accordance with the Arbitration Rules of the American Arbitration Association.” The plain language does not incorporate any particular rule or rules of the AAA into the agreement. The plain language of the warranty agreement, however, allows plaintiff to “opt out” of the requirement for arbitration by notifying AutoLifeRx in writing within 30 days after signing the agreement. The maxim of construction *inclusio unius est exclusio*

alterius means that the inclusion of one thing implies the exclusion of another. *City of St. Charles v. Illinois Labor Relations Bd.*, 395 Ill. App. 3d 507, 509 (2009). A court will not rewrite a contract to suit one of the parties, but will enforce the terms as written. *Klemp v. Hergott Group, Inc.*, 267 Ill. App. 3d 574, 581 (1994). Accordingly, we decline to include another exception to the requirement of binding arbitration. Second, whether the arbitration agreement excepts small claims cases from arbitration is a matter for the arbitrator to decide. See *Village of Carpentersville v. Mayfair Construction Co.*, 100 Ill. App. 3d 128, 133 (1981) (stating that procedural questions often cannot be resolved without construing the arbitration agreement as a whole and were thus best answered by the arbitrator, “who presumably will hold the parties to the essence of their bargain”).

¶ 19 With respect to plaintiff’s fifth argument concerning unconscionability, we reject it as well. In its ruling, the trial court noted plaintiff’s assertion that it was unconscionable to litigate a \$900 claim in Arizona, but corrected the assertion, pointing to plaintiff’s complaint in which he sought just under \$5,000. The trial court further found no evidence suggesting bad faith or overreaching on the part of the parties, particularly the defendants.

¶ 20 Plaintiff’s argument presents little more than a claim that forcing the parties to “arbitrate a small claims case in Arizona (!) is absurd.”

“Unconscionability has two components: procedural and substantive. A contract provision is procedurally unconscionable if some impropriety in the formation of the contract leaves a party with no meaningful choice in the matter. A provision is substantively unconscionable if it is overly harsh or one-sided. In order to be unconscionable, a contract provision must be both procedurally and substantively unconscionable.” *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 562 (2005).

¶ 21 Plaintiff's argument is undermined by the warranty agreement's opt-out language allowing him to decline the arbitration requirement by merely writing AutoLife Rx within 30 days and sending the notification by certified mail to the address provided in the agreement. A review of the record on appeal reflects that plaintiff failed to take advantage of the opt-out provision. Plaintiff had a meaningful choice in the matter, that is, to opt out of binding arbitration, and therefore failed to establish the first component of unconscionability. See *Kinkel*, 357 Ill. App. 3d at 562.

¶ 22 Plaintiff's final argument concerns the propriety of the trial court's finding that plaintiff failed to state a cause of action for conversion as it related to the corporate defendant, Super One, and dismissed it. Plaintiff's argument focuses on the trial court's authority rather than on the substantive content of the pleading. Plaintiff admits in his appellate brief, "Courts have the power to dismiss pleading[s] *sua sponte*, but this power is circumscribed by due process considerations."

¶ 23 In support of his argument, plaintiff relies on *Peterson v. Randhava*, 313 Ill. App. 3d 1 (2000). In *Peterson*, the plaintiff argued the trial court erred by *sua sponte* changing the defendant's motion for sanctions into a motion for summary judgment. *Id.* at 13. On appeal, the reviewing court reversed, determining that the trial court's procedure failed to comply with Cook County Circuit Court Rule 2.1(e). *Id.* Contrary to the circumstances in *Peterson*, the trial court in the present case gave plaintiff the opportunity to replead and only dismissed the conversion count with prejudice at plaintiff's request. Plaintiff asserts that he was given no notice to respond, but the transcript of the hearing and his admission at oral argument belie his assertion. The trial court initially dismissed the count without prejudice, but it was plaintiff who requested the dismissal of the entire complaint with prejudice with respect to both defendants. Plaintiff's

brief fails to explain why he did not avail himself of an opportunity to respond to the court's action, but at oral argument, plaintiff informed the court it was a strategic decision. Plaintiff's argument lacks merit, and we therefore, reject it.

¶ 24 We affirm the trial court's dismissal of plaintiff's complaint pursuant to section 2-619(a)(9) of the Code based on the arbitration and forum selection clauses and the trial court's dismissal of the conversion count pursuant to section 2-615 of the Code. In so holding, we note that nothing in this disposition precludes any arguments the parties may wish to make at the arbitration proceedings.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 27 Affirmed.