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Carla Bender
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Court, IL

2017 IL App (4th) 160709-U

NO. 4-16-0709

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE BOARD OF EDUCATION OF LINCOLN ELEMENTARY SCHOOL DISTRICT #27, Plaintiff, v. MELOTTE-MORSE-LEONATTI, LTD.; and FANNING HOWEY ASSOCIATES, INC., Defendants, and MELOTTE-MORSE-LEONATTI, LTD., Defendant and Third-Party Plaintiff, v. HYMANS ENGINEERING, INC., Third-Party Defendant and THE BOARD OF EDUCATION OF LINCOLN ELMENTARY SCHOOL DISTRICT #27, Assignee of Melotte-Morse-Leonatti, Ltd., Defendant and Third-Party Plaintiff Appellant, v. HYMANS ENGINEERING, INC., Third-Party Defendant-Appellee.	)	Appeal from Circuit Court of Logan County No. 08L7 Honorable Thomas W. Funk, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in (1) dismissing the third-party complaint under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)) or (2) denying the motion to reconsider that dismissal.

¶ 2 In February 2001, plaintiff, the Board of Education of the Lincoln Elementary School District #27 (Board), entered into a contract with defendants, Melotte-Morse-Leonatti, Ltd. (Melotte) and Fanning Howey Associates, Inc. (Fanning), where Melotte and Fanning agreed to perform architectural and engineering services for the design and specification for the construction of a junior high school and an elementary school in Lincoln, Illinois. In April 2001, third-party plaintiff, Melotte entered into a subcontract with third-party defendant, Hymans Engineering, Inc. (Hymans), where Hymans agreed to provide the design of the heating, ventilation, and air conditioning (HVAC) systems for both schools. After later occupying the structures for use, the Board observed several deficiencies in both schools, including defective HVAC systems in the junior high school.

¶ 3 In April 2008, the Board filed a complaint against Melotte and Fanning, alleging claims of breach of contract. In June 2008, Melotte filed a third-party complaint against Hymans, seeking to recover any amount shown to be due to the Board as a result of the defective design of the HVAC systems in the junior high school.

¶ 4 In March 2016, the Board, Melotte and Fanning reached a settlement, part of which included the assignment of Melotte's third-party complaint to the Board. In May 2016, Hymans filed a motion to dismiss the third-party complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)), arguing Melotte, and therefore the Board as its assignee, forfeited the only remedy available under the subcontract by failing to timely demand mediation or arbitration. Following a June 2016 hearing, the trial court granted Hymans' motion to dismiss. The Board later filed a motion to reconsider, which the court denied.

¶ 5 The Board appeals, arguing the trial court erred by (1) denying its motion to reconsider on the basis the issue of arbitrability was a legal theory not previously raised; and (2) dismissing its third-party complaint where (a) an order granting a stay was previously granted, and (b) genuine issues of material fact existed as to the affirmative matter asserted. We affirm.

¶ 6 I. BACKGROUND

¶ 7 A. The Board's Complaint

¶ 8 In April 2008, the Board filed a complaint against Melotte and Fanning, alleging claims of breach of contract. In relevant part, the Board sought to recover an amount in excess of $50,000 for the damages caused by the improperly designed and defective HVAC systems installed in the junior high school.

¶ 9 B. Melotte's Third-Party Complaint

¶ 10 In June 2008, Melotte filed a third-party complaint against Hymans, alleging a claim of breach of contract. Melotte sought to recover any amount shown to be due to the Board as a result of the defective design of the HVAC systems installed in the junior high school.

¶ 11 C. Hymans' 2008 Motion To Dismiss

¶ 12 On August 1, 2008, Hymans filed a combined motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)). In relevant part, Hymans moved the court to dismiss the third-party complaint under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2008)) because Melotte was "not authorized [under its subcontract] to avail itself of a remedy *** by way of an action in the [trial] court, but [rather] only through mediation and arbitration." In support, Hymans highlighted its subcontract provided:

"Any claim, dispute[,] or other matter *** shall be subject to

> mediation as a condition precedent to arbitration in accordance with the Construction Industry Mediation Rules of the American Arbitration Association [(AAA)] currently in effect. *** Claims, disputes[,] and other matters that are not resolved by mediation shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the [AAA] currently in effect unless the parties mutually agree otherwise."

Hymans also noted: "Contemporaneous with the filing of this [m]otion, [Hymans] has served upon [Melotte] a demand for mediation and arbitration with respect to any and all claims and disputes set forth in the third[-]party complaint."

¶ 13 D. Melotte's Response to Hymans' 2008 Motion To Dismiss

¶ 14 On August 13, 2008, Melotte filed a response to Hymans' combined motion to dismiss. With respect to Hymans' request for dismissal under section 2-619(a)(9), Melotte acknowledged its subcontract contained a standard arbitration clause but indicated it filed its third-party complaint "based on the assumption, apparently mistaken, that Hymans did not want to arbitrate the dispute." Melotte asserted, setting aside its mistaken assumption, Hymans was not entitled to have the third-party complaint dismissed.

¶ 15 Melotte highlighted, under section 2(d) of the Illinois Uniform Arbitration Act (Uniform Arbitration Act) (710 ILCS 5/2(d) (West 2008)), the proper procedure where a party is seeking to compel another party to arbitrate issues raised in a lawsuit is to move to stay the lawsuit. Melotte suggested the reason the Uniform Arbitration Act required staying rather than dismissing an action was because it more effectively protected the parties' interests and the

interests of justice. Melotte asserted a stay was more appropriate in the present matter because (1) "if Hymans should elect to waive its right to arbitrate, [it] could return to its chosen forum—the courts—without fear of having its claims barred by the applicable statute of limitations"; (2) "while it may be unlikely, if the arbitration panel found that certain claims were not subject to arbitration, [it] could return to court without having to worry about statute of limitations issues"; and (3) the "[c]ourt would have jurisdiction over the parties and, therefore, would be an available forum to enforce any arbitration awards or for appeal purposes."

¶ 16 Melotte requested, "[i]f [the trial court] is inclined to grant what in effect is Hymans' motion to compel arbitration, *** it should stay the [t]hird[-][p]arty [c]omplaint, rather than dismiss it."

¶ 17 E. Hearing on Hymans' 2008 Motion To Dismiss

¶ 18 Following an August 15, 2008, hearing, the trial court denied Hymans' combined motion to dismiss and stayed the third-party complaint. A transcript from the hearing or a bystander's report is not included in the record on appeal. In its written order, the court specifically provided "the [t]hird[-][p]arty [c]omplaint shall be stayed pending mediation and arbitration between [Melotte] and [Hymans] pursuant to the parties' contract."

¶ 19 F. Settlement and Assignment

¶ 20 In March 2016, the trial court entered an agreed order dismissing the Board's complaint against Melotte and Fanning as the parties had reached a settlement. The order noted the settlement had no impact on any claims against Hymans.

¶ 21 In April 2016, the Board filed a notice of assignment, which indicated Melotte had assigned its third-party complaint against Hymans to the Board.

¶ 22 G. Hymans' 2016 Motion To Dismiss

¶ 23 In May 2016, Hymans filed a motion to dismiss under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). Hymans alleged any deficiencies with the HVAC systems at the junior high school were known by at least May 2004, as evidenced by correspondence attached to its motion. The correspondence was addressed to Melotte and highlighted issues with the "closing of dampers" and "size of [the] outside air intakes" in the junior high school's HVAC systems. Hymans also alleged, following the trial court's entry of its 2008 order staying proceedings on the third-party complaint, Melotte (1) "did not make a demand for mediation or arbitration"; and (2) "failed and refused to engage in mediation and/or arbitration with [it], abandoning all efforts to do so, and deferring instead to engage for years in litigation and settlement negotiations with [the Board]."

¶ 24 Hymans stated its subcontract provided:

> "Demands for mediation and arbitration may be filed simultaneously and shall be filed in writing with the other party to this Agreement and with the [AAA]. A demand for mediation or arbitration shall be made within a reasonable time after the claim, dispute[,] or other matter in question has arisen. In no event shall the demand for mediation or arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute[,] or other matter in question would be barred by the applicable statute of limitations."

Hymans also highlighted the applicable statute of limitations for a written contract (735 ILCS

5/13-206 (West 2004)) was 10 years from the date the cause of action accrued.

¶ 25 Hymans argued dismissal was appropriate because Melotte, and therefore the Board as its assignee, forfeited the only remedy available under the subcontract by failing to make a timely demand for mediation or arbitration.

¶ 26 H. The Board's Response to Hymans' 2016 Motion To Dismiss

¶ 27 On June 10, 2016, the Board filed a response to Hymans' motion to dismiss. The Board alleged, following the issuance of the trial court's 2008 order staying proceedings on the third-party complaint, Melotte expressed to Hymans a desire to include the Board as a voluntary party in its mediation. Hymans objected to the Board's participation unless Melotte could obtain the participation of certain contractors and the project construction manager. The Board attached to its response correspondences which supported these allegations.

¶ 28 Unable to ultimately satisfy Hymans' requirements, the Board alleged, on December 8, 2008, Melotte filed what the Board described as a "Demand for Mediation" with the AAA. The Board attached to its response the mediation demand. The demand, which was titled "ONLINE FILING DEMAND FOR ARBITRATION/MEDIATION FORM," indicated: "This claim has been filed for: mediation."

¶ 29 After the filing of the demand, the Board alleged, both Melotte and Hymans received correspondence regarding the administration of the mediation by the AAA. The Board attached to its response correspondence supporting this allegation. The Board further alleged, "[u]pon information and belief, the mediation did not proceed as [Hymans] repeatedly demanded additional parties participate which were not provided for in the mediation/arbitration provision of the contract."

¶ 30 The Board initially asserted the date the action accrued was "a factual determination as [Hymans] consistently argued [the design of the HVAC systems] was not in error, and therefore discovery of the actual date would be in question." Regardless, the Board asserted, both "a demand for mediation" by Melotte and "a demand for mediation and arbitration" by Hymans were made within 10 years from May 2004. Specifically, the Board asserted (1) Melotte "made a demand for mediation on December 8, 2008"; and (2) Hymans alleged in its 2008 motion to dismiss it made a demand " 'for mediation and arbitration' " contemporaneously with the filing of its motion. Finally, the Board argued, Hymans "waived" any right to assert the applicable statute of limitations as an affirmative matter, as it "pursued a course of conduct in which it actively acknowledged the filing of a demand for mediation within the applicable limitations period, had actual knowledge of the applicable limitations period, participated in the administration of such mediation by the [AAA], claimed to have filed for mediation and arbitration itself, and acted with conduct inconsistent with any other intention than to waive the applicable statute[-]of[-]limitations defense."

¶ 31 I. Hearing on Hymans' 2016 Motion To Dismiss

¶ 32 On June 14, 2016, the trial court held a hearing on Hymans' motion to dismiss. Hymans acknowledged, on July 31, 2008, it sent a letter to Melotte regarding mediation and arbitration. Hymans introduced a copy of its letter, which indicated, "we are herewith making demand for mediation and arbitration of any and all claims and disputes arising from [the subcontract] (including those set forth in [the third-party complaint)." Hymans asserted, however, its letter did not constitute a formal demand for mediation and arbitration.

¶ 33 Hymans further acknowledged (1) the discussions as to whether additional parties

should have been included as part of the mediation; (2) Melotte filed a formal demand for mediation with the AAA; and (3) both parties received correspondence from the AAA, which advised of its six-month policy to administer mediation and repeatedly inquired into the status of the matter. Hymans further alleged, in January 2010, the AAA sent a letter indicating it had received no status updates and was closing the matter, and Melotte thereafter did not take any further action to initiate mediation or arbitration. Hymans asserted it did not respond to the AAA letters as it was Melotte's obligation to pursue its claim.

¶ 34 Hymans argued it did not waive its statute-of-limitations defense and reiterated, multiple times throughout the hearing, any cause of action had accrued by 2004. Hymans further argued mediation was a "condition precedent" to arbitration under its subcontract, that is, Melotte could not apply for arbitration unless mediation was completed or waived. Hymans contended Melotte did not proceed with the mediation and no evidence existed of an implied waiver. Hymans further asserted, even if the trial court found both parties abandoned or waived mediation, Melotte did not make a demand for arbitration with either it or the AAA, to which the court inquired as follows:

> "THE COURT: So let's say [Melotte] did [file an arbitration demand with the AAA], do you think that it's likely that the [AAA] would have said, well, you haven't completed mediation?
>
> [HYMANS' COUNSEL]: I don't know what they'd say under those circumstances. I think what the [AAA] would say—or arbitrator, and maybe that's—I came here because is it an arbiter's

> decision as to that statute of limitation issue or is it to the courts? I think, in the first instance, it's probably the court's, because there's a contract provision that clearly shows that arbitration isn't warranted at this point because the clear language of the contract indicates that there had to have been a demand for such, two-step demand done within the statute of limitations period, and there hasn't been one. [The Board's counsel] cannot stand before this court, number one, and say that [Melotte] made any demand for arbitration in this case, just simply can't do it, because it didn't happen."

Hymans requested the court grant its motion to dismiss because Melotte, and therefore the Board as its assignee, forfeited the only remedy available under its subcontract by failing to make a demand for arbitration within the requisite 10-year period.

¶ 35 In response, the Board asserted it was clear mediation and arbitration was demanded within a reasonable time. The Board asserted an arbitration demand was evidenced by (1) Hymans' July 31, 2008, letter demanding "mediation and arbitration"; (2) Melotte's online filing demand; and (3) Melotte's and Hymans' expression of a general intention to arbitrate. As to Melotte's online filing demand, the Board asserted the form indicated Melotte simultaneously filed a demand for "mediation/arbitration," to which the trial court noted the demand only indicated it was being filed for mediation. The Board also suggested, on inquiry by the court, Melotte did not proceed with the mediation or arbitration because it was in the process of fixing the deficiencies in the school buildings and it would not have known the damages until all of the

deficiencies were corrected. Finally, the Board argued the correspondence between Hymans and Melotte was evidence of some agreement, waiver, or relinquishment of the right to raise a statute-of-limitations defense.

¶ 36 The trial court questioned the Board as to the appropriate actions had Hymans in fact refused to participate in mediation. The Board indicated: "If the parties failed to meditate, then I guess, technically, the next step is to go for arbitration." The court inquired as to whether Melotte could have compelled arbitration, to which the Board indicated:

> "They would have to move the court to do so, but I think the question here is *** we have dueling mediation provisions. There was the demand made by [Hymans] for mediation and arbitration, and there was the demand made, jointly, I guess, would be the best way to ascribe it to, with the AAA."

The court questioned whose duty it was to move forward once a demand was filed, to which the Board responded:

> "That's a great question because [Hymans' counsel] says it's not his client's duty, but yet he has filed a demand for mediation and arbitration, so I believe he's also got an obligation to move this forward too. It's not like either party can technically forget about it."

Following this inquiry, Hymans suggested the appropriate action was for Melotte to have filed a motion to compel arbitration, which would have allowed the court to either compel the parties to mediate or consider mediation waived.

¶ 37 The trial court granted Hymans' motion to dismiss. The court found (1) the subcontract called for mediation and arbitration as the exclusive remedy for a breach of contract; (2) Melotte's initial demand for mediation was made within a reasonable time; (3) Melotte and Hymans became embroiled in a dispute about which other parties would be permitted to participate in the mediation, causing the mediation to stall; and (4) Melotte did not take any actions to force Hymans to mediate or arbitrate. The court determined the subcontract placed the burden on Melotte to move forward with mediation and arbitration, and its failure to do so resulted in eight years of inactivity. The court concluded the Board, as Melotte's assignee, was bound by Melotte's failure to either demand or compel arbitration for the alleged breach of the written contract within the requisite 10-year period. The court also noted the Board failed to demonstrate Hymans had waived its defense.

¶ 38 On June 27, 2016, the court entered a written order, which was prepared by Hymans and sent to the Board for acceptance as to form, granting Hymans' motion to dismiss and reiterating its findings.

¶ 39 J. The Board's Motion To Reconsider

¶ 40 In July 2016, the Board filed a motion to reconsider and a memorandum of law in support. The Board argued, in relevant part, the trial court (1) failed to consider its 2008 order staying the third-party complaint; and (2) improperly made findings "regarding the arbitrability of the claims, which are reserved for the arbitrator." As to the 2008 order, the Board highlighted Melotte's response to Hymans' 2008 motion to dismiss argued a stay rather than outright dismissal was appropriate to allow, if Hymans later elected to waive its right to arbitrate, the ability to return to its chosen forum without fear of having its claim barred by the applicable

statute of limitations. The Board asserted the court's order (1) demonstrated the court "accepted [Melotte's] arguments regarding the tolling of the statute of limitations," and (2) "appear[ed] to order mediation and arbitration between [Melotte] and [Hymans]." As to the arbitrability of the claims, the Board argued, under *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 793 N.E.2d 221 (2003), the court should have left the procedural issues involving "the timeliness, the sufficiency of a demand, and waiver" to be decided by an arbitrator.

¶ 41 K. Hymans' Response and Motion To Strike

¶ 42 On August 10, 2016, Hymans filed a response to a portion of the Board's motion to reconsider and a motion to strike a portion of the Board's motion to reconsider.

¶ 43 As to its motion to strike, Hymans asserted the Board was improperly trying to raise a new legal theory in its motion to reconsider. Specifically, Hymans highlighted the Board did not raise the issue of arbitrability and whether the trial court had the authority to determine the issues before it in either its written response or at the hearing on the 2016 motion to dismiss. Moreover, Hymans argued, the Board could not seek an adjudication from the court on factual matters and issues of waiver, and then wait until the court ruled against it to argue the court did not have the authority to so adjudicate.

¶ 44 As to its response to the other issues, Hymans asserted, in relevant part, the trial court's 2008 order did not state or imply the court accepted the arguments regarding the tolling of the statute of limitations and, in the absence of any explicit declaration in the order, the Board was not at liberty to divine the reason for the court to have made its decision. Hymans also maintained nowhere in the order did the court order or compel mediation and arbitration.

¶ 45 L. The Board's Response to Hymans' Motion To Strike

¶ 46 On August 15, 2008, the Board filed a response to Hymans' motion to strike. The Board asserted it could properly raise the issue of arbitrability because (1) Hymans raised the issue during the hearing on its 2016 motion to dismiss, and (2) Melotte raised the issue in its response to Hymans' 2008 motion to dismiss. As to Hymans' oral argument, the Board contended Hymans " 'opened the door' " by seeking to justify its actions or inactions, thereby interjecting the question of arbitrability and causing the court to make specific findings of fact on matters reserved for an arbitrator. As to Melotte's response, the Board contended Melotte advised the court of Hymans' 2008 motion to dismiss was "essentially *** a motion to compel arbitration [under the Uniform Arbitration Act], and thus, the [c]ourt's ruling should [have been] limited to whether an arbitration agreement existed." Finally, the Board suggested Hymans should have brought to the court's attention *Menard County Housing Authority*, adverse authority which it asserted was directly on point for the proposition that the resolution of procedural issues are reserved for an arbitrator.

¶ 47 M. Hearing on Hymans' Motion To Strike and the Board's Motion To Reconsider

¶ 48 On August 16, 2016, the trial court held a hearing on Hymans' motion to strike and the Board's motion to reconsider.

¶ 49 1. *Hymans' Motion To Strike*

¶ 50 Hymans requested the trial court strike any reference to the issue of arbitrability in the Board's motion to reconsider, because it was an issue improperly raised for the first time in a motion to reconsider. Hymans again highlighted the Board did not raise the issue in either its

written response or at the hearing on the 2016 motion to dismiss. Hymans argued it did not raise the issue during the hearing on the 2016 motion to dismiss and noted the court's order, which the Board had the ability to review prior to its issuance, made no reference to the issue of arbitrability. Hymans further argued Melotte's response to its 2008 motion to dismiss was devoid of any reference as to the court's authority in terms of arbitrability. Hymans noted it would not address *Menard County Housing Authority* and the merits of the Board's arbitrability argument because it did not want to "waive" the argument of the issue going in properly raised. Finally, Hymans argued, the Board waived its argument by asking the court to make substantive findings from the established facts regarding the statute-of-limitations defense and waiver.

¶ 51 The Board requested the trial court consider "the big picture" and find the issue of arbitrability was raised both by (1) Hymans during oral argument on the 2016 motion to dismiss, and (2) Melotte in its response to Hymans' 2008 motion to dismiss. As to Hymans' oral argument, the Board suggested Hymans "brought up the question about whether these issues would even be arbitrable." As to Melotte's 2008 response, the Board suggested "there was a discussion about whether some of these matters might be arbitrable at some point in time." Finally, the Board highlighted *Menard County Housing Authority*, which it maintained was adverse authority directly on point.

¶ 52 The trial court indicated it would take Hymans' motion to strike under advisement and proceed with a hearing on the Board's motion to reconsider.

¶ 53 2. *The Board's Motion To Reconsider*

¶ 54 The Board requested the trial court reconsider its prior order dismissing its third-party complaint because, in relevant part, the court (1) failed to consider its prior order staying

the proceedings, and (2) exceeded its authority by ruling on procedural issues reserved for an arbitrator. The Board substantially reiterated its arbitrability arguments raised in response to Hymans' motion to strike. As to the trial court's 2008 order, the Board highlighted Melotte's response to Hymans' 2008 motion to dismiss suggested (1) Hymans' motion was in fact a motion to compel arbitration under section 2(d) of the Uniform Arbitration Act, and (2) a stay would preclude any statute-of-limitations issues at a later date. The Board asserted, because a stay under section 2(d) required an order to arbitrate, the court implicitly ordered the parties to proceed to mediation and arbitration when it issued the stay. The Board also asserted the court's acceptance of Melotte's request to stay the proceedings and order arbitration tolled the statute of limitations. In its final remarks, the Board suggested an evidentiary issue existed as to when the breach occurred.

¶ 55 Hymans maintained (1) no evidence existed indicating Melotte sought an order to compel arbitration, (2) its 2008 motion to dismiss was not a motion to compel arbitration, and (3) the trial court's 2008 order did not compel arbitration. Hymans again asserted it would not address the merits of the Board's arbitrability argument as it did not want to "waive" the argument of the issue going in properly raised. Finally, as to the date of the breach, Hymans asserted the Board's argument was improper, as it had not previously presented any argument on the issue or any evidence contesting the correspondence attached to its motion to dismiss.

¶ 56 The trial court indicated it would take the matter under advisement.

¶ 57 N. Order Denying the Board's Motion To Reconsider

¶ 58 On August 29, 2016, the trial court entered an order denying the Board's motion to reconsider. The record fails to disclose a ruling on Hymans' motion to strike. In a

memorandum of its decision, the court indicated it considered "the fact that this case was stayed and not dismissed in 2008." The court further found the issue of arbitrability was not raised "either in writing or orally at the *** hearing on the [m]otion to [d]ismiss." The court noted, citing *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 71, 886 N.E.2d 1193, 1200 (2008), "[i]t is not appropriate to raise new arguments in reconsideration motions unless the [c]ourt, in its discretion, allows it." The court declined to consider the merits of the Board's newly raised argument.

¶ 59 This appeal followed.

¶ 60 II. ANALYSIS

¶ 61 On appeal, the Board argues the trial court erred by (1) denying its motion to reconsider on the basis the issue of arbitrability was a legal theory not previously raised; and (2) dismissing its third-party complaint where (a) an order granting a stay was previously granted, and (b) genuine issues of material fact existed as to the affirmative matter asserted.

¶ 62 A. Trial Court's Denial of the Board's Motion To Reconsider

¶ 63 The Board asserts the trial court erred by denying its motion to reconsider on the basis the issue of arbitrability was a legal theory not previously raised. The Board contends the court improperly delved into the realm of an arbitrator by ruling on issues involving timeliness, the sufficiency of a demand, and waiver.

¶ 64 Hymans maintains the trial court properly declined to address the issue because it was first raised in the Board's motion to reconsider. Hymans further asserts the court's judgment may be sustained on the basis the issue was waived by the Board when it sought a ruling on factual issues and whether the statute-of-limitations defense was waived.

¶ 65 1. *Forfeiture*

¶ 66 a. Motions To Reconsider

¶ 67 "The purpose of a motion to reconsider is to bring to the [trial] court's attention newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158.

¶ 68 In *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248-49, 571 N.E.2d 1107, 1111 (1991), this court held:

> "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (Emphasis in original.)

Recently, in *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 46, 71 N.E.3d 1, this court extended the *Gardner* holding to arguments, not just evidence, which are presented after the fact to the court. See also *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158 (finding the defendant had forfeited its argument raised for the first time in a motion to reconsider); *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 13, 987 N.E.2d 818 ("Issues cannot be raised for the first time in the trial court in a motion to reconsider and issues raised for the first time in a motion to reconsider cannot be

raised on appeal."); *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶¶ 36-37 ("To allow [the] defendants to raise objections *** for the first time in a motion for rehearing and reconsideration would require this court to ignore long-standing precedent on how issues are litigated both in the [trial] court and before this court."). An argument raised for the first time in a motion to reconsider is forfeited. *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158.

¶ 69 While a trial court has the discretion to relax the procedural bar of forfeiture and entertain an argument raised for the first time in a motion to reconsider, it should do so only where the party has provided a reasonable explanation for why it did not raise the argument earlier in the proceedings. See *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195, 545 N.E.2d 689, 695 (1989). The party who forfeited the argument undoubtedly faces an arduous hurdle to supply an explanation sufficient to overcome the (1) opposing party's interest in having the case expeditiously resolved without being burdened with unnecessary costs, and (2) trial court's interest in not squandering its scarce judicial resources. See *Vantage Hospitality Group, Inc.*, 2016 IL App (4th) 160271, ¶¶ 53-58, 71 N.E.3d 1 (finding the trial court abused its discretion in entertaining an argument raised for the first time in a motion to reconsider).

¶ 70 b. The Applicable Standard of Review

¶ 71 The parties dispute the applicable standard of review. The Board contends, citing *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 837-38, 781 N.E.2d 1114, 1117-18 (2002), our review is *de novo* because it "raises the question of the propriety of the trial court's application of substantive law to the facts presented." Conversely, Hymans contends, citing *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330, 887 N.E.2d 878, 885-86 (2008), our

review is for an abuse of discretion because we are tasked with considering "whether the [trial court] erred in refusing to consider the issue of arbitrability because the Board raised the issue only for the first time in its [m]otion [to] [reconsider]."

¶ 72 "When reviewing a trial court's denial of a motion to reconsider that was based on new matters, such as additional facts or new arguments or legal theories that were not presented during the course of the proceedings leading to the issuance of the order being challenged, this court employs an abuse of discretion standard." *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415, 844 N.E.2d 49, 55-56 (2006); see also *Compton*, 382 Ill. App. 3d at 330, 887 N.E.2d at 885; *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 55, 7 N.E.3d 889. However, where a trial court's denial of a motion to reconsider was based only on the court's application or purported misapplication of existing law, rather than on new facts or legal theories not previously presented, we review *de novo* the trial court's decision. *Muhammad*, 363 Ill. App. 3d at 415, 844 N.E.2d at 56; *O'Shield*, 335 Ill. App. 3d at 838, 781 N.E.2d at 1118.

¶ 73 In determining the applicable standard of review, we turn first to whether the issue of arbitrability was before the trial court prior to the motion to reconsider. From the outset, we note the Board does not suggest it raised the issue in either its written response or at the hearing on Hymans' 2016 motion to dismiss. Rather, the Board contends, the issue was previously raised by (1) Melotte in response to Hymans' 2008 motion to dismiss, and (2) Hymans during oral argument on its 2016 motion to dismiss.

¶ 74 The Board contends the "Uniform Arbitration Act and its related issue of arbitrability" was before the trial court in 2008. Specifically, the Board highlights Melotte raised the applicability of the Uniform Arbitration Act in its response to Hymans' 2008 motion to

dismiss, and the court thereafter ordered the matter stayed pending mediation and arbitration. The Board asserts the court's order demonstrates it (1) recognized the applicability of the Uniform Arbitration Act, and (2) found Hymans' motion to dismiss was in fact a motion to compel. The Board maintains this confirms the tenets of arbitrability were previously before the court.

¶ 75 Our review of Melotte's response to Hymans' 2008 motion to dismiss fails to demonstrate it raised the issue of whether the court had the authority to address certain procedural issues. We also reject the Board's inferences drawn from the trial court's 2008 order, which merely stayed the third-party complaint pending mediation and arbitration. The Board has denied this court the opportunity to review any argument or discussion on this issue by failing to include in the record on appeal a transcript from the hearing on Hymans' 2008 motion to dismiss or a bystander's report. It is axiomatic the appellant has the burden to present a sufficiently complete record of the proceedings to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984). Without any record from the hearing, the Board's inferences from the court's order are merely speculative. Finally, even if we found Melotte's response highlighting the Uniform Arbitration Act implicitly raised the related issue of arbitrability, the Board has failed to persuade us why the burden would be on the trial court to recognize the issue was implicitly raised eight years earlier. See *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158 (finding the plaintiff forfeited an argument it failed to raise in its response to the defendant's motion to dismiss).

¶ 76 The Board further contends the issue of arbitrability was previously raised by Hymans during the hearing on Hymans' 2016 motion to dismiss. The Board asserts, like the

party in *Montano v. City of Chicago*, 308 Ill. App. 3d 618, 720 N.E.2d 628 (1999), Hymans interjected the issue of arbitrability into the proceedings, thereby precluding it from asserting the issue was not timely raised by the Board.

¶ 77 In *Montano*, the defendant argued—on appeal—the plaintiff had "waived" an argument raised for the first time in a motion for rehearing. *Id*. at 622, 720 N.E.2d at 632. The appellate court rejected the defendant's argument, finding the defendant had "waived its right to argue that the *** argument was not timely when [it] substantively responded to the argument in its written reply to [the plaintiff's] motion for rehearing." *Id.* Unlike the defendant in *Montano*, Hymans did not substantively respond in a written reply to an argument raised by the Board, but rather, it merely relayed its position on the arbitrability of the claim in response to a hypothetical question posed by the trial court, which the Board did not address or dispute. In fact, when the Board later raised the issue of arbitrability in its motion to reconsider, Hymans sought to strike any reference to the issue and declined to substantively respond during oral argument to avoid forfeiting an argument regarding the Board's ability to raise such an issue. We reject the Board's suggestion Hymans' remarks during the hearing on its 2016 motion to dismiss raised the issue of whether the court had the authority to rule on the issues presented.

¶ 78 Our review of the record presented demonstrates the Board raised the issue of arbitrability for the first time in its motion to reconsider. Because the motion to reconsider rested on a legal argument not previously before the trial court, it was within the court's discretion whether to consider the issue. Absent an abuse of that discretion, the court's decision will not be disturbed. *Muhammad*, 363 Ill. App. 3d at 415, 844 N.E.2d at 55-56; *Compton*, 382 Ill. App. 3d at 330, 887 N.E.2d at 885; *Heinrich*, 2014 IL App (2d) 121333, ¶ 55, 7 N.E.3d 889. "In

determining whether the trial court abused its discretion, 'the question is not whether the reviewing court agrees with the trial court, but whether the trial court acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted.' " *In re Marriage of Gowdy*, 352 Ill. App. 3d 301, 307, 816 N.E.2d 372, 377 (2004) (quoting *In re Marriage of Aud*, 142 Ill. App. 3d 320, 326, 491 N.E.2d 894, 898 (1986)).

¶ 79 c. The Trial Court's Decision

¶ 80 We find the trial court did not abuse its discretion in declining to address the Board's newly raised argument. The Board failed to supply any explanation to overcome (1) Hymans' interest in having the case expeditiously resolved without being burdened with unnecessary costs, and (2) the trial court's interest in not squandering its scarce judicial resources. See *Vantage Hospitality Group, Inc.*, 2016 IL App (4th) 160271, ¶¶ 53-58, 71 N.E.3d 1. As succinctly stated:

> "[A] party filing or opposing a dispositive motion, such as a motion for involuntary dismissal under section 2-619 of the Code, should always be required to muster everything the party has at the hearing on that motion. The other party and the court are entitled to no less. When, as here, a dispositive motion is granted, leading to the dismissal of a complaint or counterclaim, permitting the losing party to file a motion to reconsider based upon evidence or arguments fully known and available prior to the hearing on that motion is exactly what the *Gardner* holding was designed to

prevent: 'Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be.' " (Emphasis in original.) *Id.* ¶ 57 (quoting *Gardner*, 213 Ill. App. 3d at 248-49, 571 N.E.2d at 1111).

¶ 81 d. Request To Relax Forfeiture

¶ 82 The Board requests we relax its forfeiture and address the issue of arbitrability in the interest of preserving the existing area of law. The Board highlights the rule of forfeiture is an admonition to the parties, and the reviewing court may look beyond considerations of forfeiture in order to maintain a sound and uniform body of precedent or where the interests of justice so require. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438, 892 N.E.2d 994, 1005 (2008). The Board fails to recognize, however, the trial court concluded the issue was improperly raised for the first time in a motion to reconsider and, therefore, forfeited. If the Board believed the matter warranted relaxing the procedural bar of forfeiture, it should have presented such an argument before the trial court. See *Delgatto*, 131 Ill. 2d at 195, 545 N.E.2d at 695. The Board's request before this court is untimely.

¶ 83 2. *Waiver*

¶ 84 Having concluded the trial court did not abuse its discretion in declining to address the issue of arbitrability, we need not address Hymans' alternative argument suggesting the trial court's judgment may be sustained on the basis of waiver.

¶ 85 B. Trial Court's Dismissal of the Board's Third-Party Complaint

¶ 86 Arbitrability aside, the Board asserts the trial court erred by dismissing its third-party complaint where (1) an order staying the proceedings was previously granted, and (2) genuine issues of material fact existed as to the affirmative matter asserted. Hymans disagrees, maintaining the court's dismissal was proper as the requisite period to file a demand for arbitration under its subcontract had plainly expired.

¶ 87 1. *Section 2-619(a)(9) Motions To Dismiss*

¶ 88 Section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)) provides a defendant may file a motion for dismissal of the action on the basis "the claim asserted against [the] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." A section 2-619(a)(9) motion to dismiss "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984.

¶ 89 An "affirmative matter" has been defined as follows:

> " '[A] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion[s] of material fact unsupported by allegations of specific fact contained [in] or inferred from the complaint *** [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.' " *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121, 896 N.E.2d 232, 238 (2008) (quoting 4 Richard A. Michael, Illinois Practice § 41.7, at 332 (1989)).

See also *id*. at 120-21, 896 N.E.2d at 238; *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003).

¶ 90 The defendant, as the movant, has the initial burden to demonstrate the affirmative matter is either (1) apparent on the face of the complaint, or (2) supported by affidavits or other evidentiary materials. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993). If the defendant satisfies its initial burden of going forward, the burden shifts to the plaintiff, who must establish the affirmative matter either is "unfounded or requires the resolution of an essential element of material fact before it is proven." *Id.* The plaintiff may satisfy its burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2014).

¶ 91 When ruling on a section 2-619(a)(9) motion, the trial court must construe the pleadings in the light most favorable to the nonmoving party, and it should grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. *Reynolds*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. We review a trial court's dismissal under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)) *de novo*. *Reynolds*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984.

¶ 92 2. *The Trial Court's 2008 order*

¶ 93 The Board argues the trial court erred by dismissing its third-party complaint where an order staying the proceedings was previously granted. Specifically, the Board asserts the court, in issuing the stay in 2008, "implicitly accepted the argument of [Melotte] that [section 2(d) of the Uniform Arbitration Act (710 ILCS 5/2(d) (West 2008))] was applicable, and [Hymans'] [s]ection 2-619[(a)(9)] motion should be accorded a motion to compel status." The

Board contends, because the matter was stayed under section 2(d), the limitations period was tolled beginning in 2008.

¶ 94 Initially, we note, this argument was first presented to the trial court in the Board's motion to reconsider. As previously indicated, arguments first raised in a motion to reconsider are deemed forfeited, and a party requesting the trial court to excuse its forfeiture and entertain such an argument faces a difficult hurdle to surmount. *Vantage Hospitality Group, Inc.*, 2016 IL App (4th) 160271, ¶¶ 46, 53-58, 71 N.E.3d 1; *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158; *Delgatto*, 131 Ill. 2d at 195, 545 N.E.2d at 695. Nevertheless, (1) Hymans substantively responded to the Board's argument both in its written response and at the hearing on the Board's motion to reconsider; and (2) the court entertained the Board's argument, noting it considered "the fact that this case was stayed and not dismissed in 2008." Given the actions below, we will proceed with our consideration of the Board's argument.
See *Montano*, 308 Ill. App. 3d at 622, 720 N.E.2d at 632.

¶ 95 We reject, for the reasons previously addressed, the Board's inferences drawn from the trial court's 2008 order, which merely stayed the third-party complaint pending mediation and arbitration. The Board has failed to demonstrate the trial court (1) found the Uniform Arbitration Act to be applicable, (2) accorded Hymans' 2008 motion to dismiss a motion to compel status, (3) stayed the matter under section 2(d) of the Uniform Arbitration Act, or (4) compelled the parties to mediate and arbitrate. The Board has further failed to demonstrate—given the arguments presented before the trial court—the filing of the third-party complaint or the order staying the third-party complaint would affect the purported requirement under the subcontract to file a demand for arbitration within the limitations period. In reaching

this conclusion, we recognize the Board attempts to present argument on appeal suggesting the subcontract only requires a demand be filed for mediation *or* arbitration within the limitations period, and the subcontract makes no reference as to the time required to complete mediation or arbitration. We decline to entertain the Board's argument as it was not presented to the trial court at the hearing on the motion to dismiss. See *Vantage Hospitality Group, Inc.*, 2016 IL App (4th) 160271, ¶ 49, 71 N.E.3d 1 ("It has long been the law of the State of Illinois that a party who fails to make an argument in the trial court forfeits the opportunity to do so on appeal."). Given the record presented, we find the court's 2008 order staying the third-party complaint simply allowed Melotte to move forward with mediation and arbitration as outlined under its subcontract, which it ultimately failed to do.

¶ 96 3. *Genuine Issues of Material Fact*

¶ 97 The Board argues the trial court erred by dismissing its third-party complaint where genuine issues of material fact existed as to the affirmative matter asserted. Specifically, the Board asserts the trial court failed to consider "the multitude of disputed facts related to the determination of when the limitations period would have begun to run, as well as the demand for mediation and arbitration filed by Hymans."

¶ 98 The Board asserts Hymans failed to satisfy its initial burden of going forward on its motion to dismiss because the project correspondence used to support the commencement of the running of the limitations period was unsupported by an affidavit. While we acknowledge the Board argued before the trial court the date the action accrued was a factual determination, it did not otherwise dispute the validity of the correspondence based on the lack of an affidavit. We decline to entertain such an argument for the first time on appeal. See *id*. The Board further

asserts the trial court's decision is unsupportable because a factual dispute existed as to whether Hymans made a demand for mediation and arbitration. The Board fails to recognize, however, the court was first presented with the legal issue of whether it was Hymans' or the Melotte's responsibility to pursue mediation and arbitration under the subcontract. The court determined, as a matter of law, it was the Board's responsibility as it was pursuing the claim against Hymans. Any factual dispute as to whether Hymans made a demand for mediation and arbitration is irrelevant to the affirmative matter defeating the claim.

¶ 99 We find the correspondence attached to Hymans' motion was sufficient to satisfy Hymans' initial burden of moving forward on its motion. The Board thereafter failed to proffer any affidavits or other proof to dispute Melotte was placed on notice of the alleged injury in 2004. Given the arguments presented and the undisputed facts, we find the trial court did not err in dismissing the Board's third-party complaint because Melotte, and therefore the Board as its assignee, forfeited the only remedy available under the subcontract by failing to make a timely demand for arbitration.

¶ 100 III. CONCLUSION

¶ 101 We affirm the trial court's judgment.

¶ 102 Affirmed.