IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JASON and DOMONIE BOCHNIAK,	)	
Plaintiffs,	)	C.A. No. N10C-12-245 PLA
v.	)	
BLENHEIM AT BAY POINTE, LLC,	)	
Defendant.	)	

ON DEFENDANT'S MOTION TO DISMISS
DENIED

Submitted: April 6, 2011
Decided: May 31, 2011

George H. Seitz, III, and Kevin A. Guerke, Esquires, SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Jeffrey M. Weiner, Esquire, LAW OFFICES OF JEFFREY M. WEINER, P.A., Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiffs Jason and Domonie Bochniak contracted with Defendant Blenheim at Bay Pointe, LLC ("Blenheim") for the construction of a new home, which was completed in 2004. After the Bochniaks experienced recurring problems with water leaks and moisture in the house, they filed suit against Blenheim. The Bochniaks allege that Blenheim did not satisfy an express warranty of good workmanship contained in their sales agreement, and that Blenheim misrepresented the condition of the house while making unsuccessful repair attempts. Blenheim has moved to dismiss the Complaint, arguing that the Bochniaks' claims are time-barred and subject to mandatory arbitration under either the sales agreement or a third-party homebuyer warranty covering the house.

The Court finds that conflicts in the parties' agreements prevent it from determining at this early stage in the case what effect, if any, the homebuyer warranty may have upon the express warranty language contained in the sales agreement. Furthermore, the Bochniaks have raised an argument that the arbitration provision of the homebuyer warranty is unconscionable, an issue that cannot be resolved without a developed factual record. Consequently, the Court cannot hold that the Bochniaks' claims are necessarily subject to the homebuyer warranty's arbitration provision, or that the homebuyer warranty constitutes the Bochniaks' exclusive remedy for defective workmanship or materials. Factual

development will also be required to determine whether the statute of limitations has run on the Bochniaks' causes of action. Blenheim's motion to dismiss, which will be converted to a motion for summary judgment, must therefore be denied.

II. Factual and Procedural Background

In March 2003, the Bochniaks contracted with Blenheim for the construction and purchase of a new home to be built in Newark ("the Sales Agreement"). Closing occurred approximately one year later, on or about March 19, 2004. After moving into the house, the Bochniaks allegedly experienced recurring leaks, which they attribute to defects and faulty or non-existent installation of the house's exterior stone veneer, siding, roofing, window and door flashing, sealing, and house wrap.[1] According to the Bochniaks, they notified Blenheim of the leaks, and Blenheim made multiple unsuccessful repair efforts, during which Blenheim personnel offered reassurances that the problems had been definitively diagnosed and fixed. Despite these reassurances, the Bochniaks contend that they continue to experience leaking, water damage, excessive moisture, and mold growth that have necessitated extensive repairs and diminished the value of the house.

The parties' present dispute centers upon the terms of several documents: the Sales Agreement; the Bochniaks' application for a third-party homebuyer warranty; and the homebuyer warranty itself, which became effective upon

[1] Pls.' Compl. ¶ 7.

closing. The Sales Agreement incorporated several addenda, including a Standard Residential Construction addendum and a Limited Warranty, Representations and Disclaimer ("the Limited Warranty addendum"), which were both signed by the Bochniaks and Blenheim.[2]

The Standard Residential Construction addendum to the Sales Agreement explained that the house was "built or to be built . . . in a good and workmanlike manner" and that "Seller's warranty and liability are as stated on the 'Limited Warranty; Responsibilities and Disclaimer' which accompanies this Addendum."[3] The Standard Residential Construction addendum also contained integration and no-oral-modification clauses applicable to the entire Sales Agreement:

> This Agreement and any Addenda to this Agreement contain the entire agreement between the parties. . . . No dealing between the parties shall be permitted to contradict, add to or modify the terms hereof. . . . No modifications of this Agreement shall be binding unless in writing and signed by the Parties hereto.[4]

The Limited Warranty addendum indicated that the Bochniaks "acknowledge[] receipt of the 2-10 Home Buyer's Warranty."[5] The Limited Warranty addendum further stated as follows:

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[2] Def.'s Mot. to Dismiss, Ex. A.

[3] Def.'s Mot. to Dismiss, Ex. B.

[4] *Id.*

[5] Def.'s Mot. to Dismiss, Ex. C.

> As restricted by the foregoing the Home is warranted by a ten (10) year limited warranty program. The limited warranty will be effective and will be provided on the day of final settlement. . . . Seller warrants that all construction work and additional improvements performed by Seller in connection with the Home shall have been, or shall be, completed in a good workmanlike manner. In the event that any defect resulting from substandard workmanship or substandard materials appears in any portion of the Home (excluding Common Elements) covered by this warranty, and in the event that written notice of such defect is mailed to Seller . . . no later than thirty (30) days after such defect appears, and in all events no later [than] the expiration of the applicable warranty period [*sic*]. Seller shall be obligated at its expense and election either to repair or to replace the defective work or materials within ninety (90) days of the date on which such notice was mailed.[6]

The same paragraph also set forth the Bochniaks' remedy in the event that Blenheim did not fulfill its repair-or-replace obligation:

> Failure by the Seller to perform its obligations under such warranty shall entitle the Buyer to recover against the Seller in an action at law, the reasonable cost of repairing or replacing the defective work or materials, whichever is less; but in no event shall Seller be liable to Buyer for incidental or consequential damages, or for any other loss or damage except the reasonable cost of repair or replacement as aforesaid. Buyer shall have no other rights or remedies against Seller, either at law or in equity. . . . The provisions of this paragraph shall survive final settlement.[7]

In addition, the Limited Warranty addendum included an arbitration provision, which provided in part:

> Seller shall have the right, at any time before Seller is required to plead or otherwise respond to any court action brought by Buyer, to

[6] *Id.*

[7] *Id.*

> submit any dispute between Seller and Buyer to binding arbitration under the Delaware Uniform Arbitration Act, by sending written notice of arbitration to Buyer, by certified or registered mail, return receipt requested, naming a proposed arbitrator who shall be an impartial, independent and licensed architect, engineer, attorney, accountant, banker or real estate broker having at least seven (7) years experience in real estate matters. . . . This provision shall survive final settlement.[8]

The final clause of the Limited Warranty addendum stated in bold print that "The above provisions concerning warranties, representations, remedies, and liabilities are sole, exclusive and in lieu of all others, express or implied."[9]

According to the Bochniaks, they were not given a full copy of a sample third-party homebuyer warranty referred to in the Limited Warranty addendum when they signed the Sales Agreement in March 2003. Rather, they assert that Blenheim only provided a cover page for the 2-10 Home Buyer Warranty ("the HBW"), marked "SAMPLE," which did not convey any details of the warranty's terms.[10] The Bochniaks signed an application for the HBW at closing in March 2004. The application listed a total warranty fee due of $939.80, although the Bochniaks deny that they specifically paid for the HBW.[11] A section labeled

[8] *Id.*

[9] *Id.*

[10] Pls.' Resp. to Def.'s Mot. to Dismiss, Ex. D.

[11] Jason E. Bochniak Aff. ¶ 5.

"Buyer's Acknowledgement and Consent" appeared above the Bochniaks' signatures on the application, and stated as follows:

> Your Builder is applying to enroll your home in the 2-10 HBW insured warranty program. By signing below, you acknowledge that you have read a sample copy of the Warranty Booklet, and CONSENT TO THE TERMS OF THESE DOCUMENTS INCLUDING THE BINDING ARBITRATION PROVISION contained therein. You further understand that when the warranty is issued on your new home, it is an Express Limited Warranty and that all claims and liabilities are limited to and by the conditions of the Express Limited Warranty as stated in the 2-10 HBW Booklet.[12]

The application was approved, and the Bochniaks received a certificate of warranty coverage, as well as two copies of a 31-page HBW booklet, one of which was marked "SAMPLE."[13]

The HBW provided express limited warranties of one year for defects in workmanship; two years for electrical, plumbing, and mechanical distribution system defects; and ten years for structural defects. On the fifth page of the HBW, the following warranty waiver language appeared in bold print:

> WAIVER OF IMPLIED WARRANTIES[.] You have accepted the express Limited Warranty provided in this Warranty booklet, and all other express or implied warranties, including any oral or written statements or representations made by Your Builder or any implied warranty of habitability, merchantability or fitness, are hereby

[12] Def.'s Mot. to Dismiss, Ex. E.

[13] Jason E. Bochniak Aff. ¶ 6. Plaintiffs have not indicated that the content of the two copies differed beyond the "SAMPLE" designation.

> disclaimed by Your Builder and are hereby waived by You to the extent possible under the laws of Your state.[14]

Directly below the waiver language, also in bold print, was an exclusive remedy provision:

> EXCLUSIVE REMEDY AGREEMENT[.] Effective one year from the Effective Date of Warranty, You have waived the right to seek damages or other legal or equitable remedies from Your Builder . . . under any other common law or statutory theory of liability, including but not limited to negligence and strict liability. . . . Your only remedy in the event of a defect in or to Your Home or in or to the real property on which Your Home is situated is as provided to You under this express Limited Warranty.[15]

The HBW also included a binding arbitration provision, which stated in relevant part:

> Any and all claims, disputes and controversies by or between the homeowner, the Builder, the Warranty Insurer and/or HBW, or any combination of the foregoing, arising from or related to this Warranty, to the subject Home, to any defect in or to the subject Home or the real property on which the subject Home is situated, or the sale of the subject Home by the Builder, including without limitation, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing, shall be settled by binding arbitration. Agreeing to arbitration means you are waiving your right to a jury trial.[16]

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[14] Def.'s Mot. to Dismiss, Ex. D.

[15] *Id.*

[16] *Id.*

On December 28, 2010, the Bochniaks filed suit against Blenheim. By their Complaint, the Bochniaks allege that Blenheim failed to remedy defects in the house's construction and that Blenheim's assertions that it had corrected the defects misled them into foregoing independent repair efforts. The Bochniaks present claims for breach of the Sales Agreement (Count I), breach of warranty (Count II), fraudulent misrepresentation (Count III), fraudulent concealment (Count IV), and consumer fraud (Count V). In addition, the Bochniaks seek a declaratory judgment to establish that the arbitration provision contained in the Limited Warranty addendum to the Sales Agreement is unconscionable and ambiguous, and therefore unenforceable (Count VI).

III. Parties' Contentions

Blenheim has moved to dismiss the Complaint, arguing that the Bochniaks' claims are time-barred, that the HBW excludes any implied warranties on the house, and that the Bochniaks are required to submit to arbitration based upon the arbitration provisions in the HBW and the Limited Warranty addendum. Blenheim submits that each of these grounds entitle it to dismissal of the Complaint.

In response, the Bochniaks argue that their claims arise from the Limited Warranty addendum, not the HBW, and cannot be subject to the HBW arbitration provision, which they contend is unconscionable. Because Blenheim has not sent them an arbitration notice, the Bochniaks urge that arbitration is not required by

the Limited Warranty addendum's arbitration provision. The Bochniaks further submit that Blenheim's alleged repair attempts and misrepresentations tolled the running of the limitations periods on their claims.

IV. Standard of Review

Pursuant to Superior Court Civil Rule 12(b)(6), a motion to dismiss shall be treated as a motion for summary judgment under Rule 56 if "matters outside the pleading are presented to and not excluded by the Court."[17] Here, Blenheim has submitted documents not relied upon by the Bochniaks in their Complaint, and the Bochniaks have provided an affidavit to support their response. The Court will therefore treat Blenheim's motion as one for summary judgment.

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[18] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[19] Summary judgment will also be denied "if, upon an examination of all the facts, it seems desirable to inquire

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[17] Super. Ct. Civ. R. 12(b)(6).

[18] Super. Ct. Civ. R. 56(c).

[19] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

thoroughly into them in order to clarify the application of the law to the circumstances."[20]

V. Analysis

The parties dispute whether the Bochniaks can maintain an action for breach of the Limited Warranty addendum more than a year after the HBW went into effect, and if so, whether their claims have expired or are subject to binding arbitration under either document. The Court agrees with the Bochniaks that Blenheim has not shown that it "triggered" the Limited Warranty addendum's arbitration provision by sending a written arbitration notice before the expiration of its time to file a pleading or other response to the Complaint. Thus, arbitration is required only if the HBW's arbitration provision is both enforceable and applicable to the Bochniaks' claims. Discovery has not begun, and further factual development is necessary on both points: the validity of the HBW's arbitration provision is uncertain due to the Bochniaks' colorable argument that it is unconscionable, and ambiguities created by conflicting terms in the parties' agreements raise a factual dispute as to whether the HBW constitutes the Bochniaks' exclusive remedy or requires arbitration of claims brought under the Limited Warranty addendum. Finally, the running of the statute of limitations presents another factual issue based upon the Bochniaks' allegations that Blenheim

[20] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

engaged in fraudulent concealment and misrepresentation during its course of unsuccessful repair attempts. Accordingly, for the reasons discussed herein, the Court must deny Blenheim's motion.

A. Conscionability of the HBW's Arbitration Provision

As the Bochniaks point out, the New Castle County Code requires builders of new residential dwellings to participate in approved new-home warranty programs.[21] The warranty program requirement was intended to "protect[] buyers of new homes from defects in their homes."[22] An approved new-home warranty program must therefore "[p]rovide plan coverage that meets or exceeds protections afforded by the New Castle County new home warranty guidelines."[23]

The county's warranty guidelines provide in part:

> The warranty agreement shall be independent of the contractual agreement between the Homeowner(s) and the Builder for the construction of the Home and/or its sale. Nothing contained in such contract or any other contract between the Builder and Homeowner(s) can restrict or override the standards set forth herein.[24]

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[21] New Castle Cty. C. § 6.03.007.

[22] *See, e.g.*, New Castle Cty. Ordinance 85-101 (June 11, 1985) (noting that predecessor code section requiring new home builder registrations and warranties "has proven to be effective in protecting buyers").

[23] New Castle Cty. C. § 6.03.007.

[24] New Castle Cty. C. ch. 6 App. 1, at 8.

The Bochniaks' response to Blenheim's motion raises a different but related issue: whether and to what extent a homebuyer warranty program can "restrict or override" terms contained in the sales agreement between buyer and builder.

Homebuyer warranties frequently include terms limiting buyers' rights and remedies, such as disclaimers of implied warranties. In ostensible exchange for these restrictions on their rights, buyers benefit from receiving warranty protection that is guaranteed by a third-party insurer, rather than solely by the builder.[25] Homebuyer warranty programs may also permit builders to control costs, and thus prices.[26]

This Court recognizes the decision reached by the Court of Chancery in *Country Life Homes, Inc. v. Shaffer*, which held that the dispute resolution provisions contained in a homebuyer warranty agreement would prevail over an earlier-signed construction contract.[27] The Chancery Court reasoned that a "later-in-time contract . . . as a general matter, will control over the old contract with respect to the same subject matter to the extent that the new contract is inconsistent with the old contract or if the parties expressly agreed that the new contract would

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[25] *See Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *6 n.29 (Del. Ch. Jan. 31, 2007); *Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478, at *2 (Del. Super. Nov. 21, 2007).

[26] *Country Life Homes, Inc.*, 2007 WL 333075, at *6 n.29.

[27] *Id.* at *5.

supersede the old one."[28] However, the *Country Life Homes* decision explicitly noted that the conscionability of the homebuyer warranty was not under consideration, and acknowledged a Nevada Supreme Court case that found a third-party homebuyer warranty to be an unconscionable contract of adhesion.[29]

In this case, unlike *Country Life Homes*, the conscionability of the HBW's arbitration provision is squarely before the Court.[30] Whether a contract or contractual provision is unconscionable is ordinarily a question for the trier of fact.[31] This case presents no exception to that general rule. The HBW is a lengthy, pre-printed form document. The Bochniaks allege that its terms were not subject to negotiation, that no consideration was provided to support the HBW, and that the HBW should be treated as an adhesion contract and scrutinized accordingly. The Court has no evidence regarding potentially crucial questions, including whether Blenheim offered homebuyer warranties on a "take it or leave it" basis

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[28] *Id.*

[29] *See id.* at *6 n.29 (citing *Burch v. Second Judicial Dist. Court*, 49 P.3d 647 (Nev. 2002)).

[30] As previously noted, the Bochniaks' Complaint also sought a declaratory judgment that the arbitration provision in the Limited Warranty addendum is unconscionable. Because the Court has accepted the Bochniaks' present position that Blenheim has not demonstrated adherence to the Limited Warranty addendum's procedure for submitting claims to arbitration, it will address the validity of the HBW's arbitration provision only.

[31] *See, e.g.*, *Hampton v. Warren-Wolfe Assocs.*, 2004 WL 838847, at *3 (Del. Super. Mar. 25, 2004); *Trethewey v. Basement Waterproofing Nationwide*, 1994 WL 680072, at *3 (Del. Super. Oct. 19, 1994) (noting that unless the evidence is so clear that the Court can reach a decision as a matter of law, "[n]ormally, the determination of unconscionability is one for the trier of fact to make"); *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 552 (Del. Super. 1977).

that excluded the possibility of negotiation and what level of sophistication and knowledge the Bochniaks brought to the parties' transactions. On a broader level, a builder's use of its mandatory participation in new-home warranty programs as an opportunity to limit or exclude pre-existing warranties and enforcement rights implicates both conscionability and public policy considerations that must be fleshed out in the context of a developed factual record.

B. Conflicts in the Parties' Agreements

Even if the Bochniaks had not contested the validity of the HBW's arbitration provision, the parties' agreements are ambiguous as to whether that provision applies to claims arising from the Limited Warranty addendum. The Court must consider the Limited Warranty addendum, the HBW application, and the HBW booklet together and construe them as a whole.[32] Read in tandem, the documents conflict with regard to their express warranty terms and the parties' arbitration rights.

The Limited Warranty addendum refers to the existence of the HBW, but does not contain explicit representations that the Bochniaks consented to the HBW's terms by executing the Sales Agreement. The Limited Warranty addendum expressly promises that the house will be constructed in "good

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[32] *Tumey v. Home Owners Warranty Corp.*, 1991 WL 53450, at *2 (Del. Super. Apr. 8, 1991) (citing *Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 231 A.2d 450 (Del. Ch. 1967)).

workmanlike manner" and provides the Bochniaks the right to enforce breaches through "an action at law," while also reserving to Blenheim the option of electing to pursue arbitration at any time before it is "required to plead or otherwise respond to any court action."

By contrast, the HBW states that it represents the Bochniaks' "only remedy in the event of a defect" in the house, and that "all other express or implied warranties" are disclaimed by their acceptance of the HBW. The exclusive remedy provision also indicates that the Bochniaks "waived the right to seek damages or other legal or equitable remedies" from Blenheim, effective one year after the HBW coverage began. The HBW broadly requires that claims or disputes between the Bochniaks and Blenheim relating to the house or defects in it be submitted to binding arbitration.

In *Reid v. Thompson Homes at Centreville, Inc.*, this Court addressed the question of whether a homebuyer warranty became an exclusive remedy by virtue of the plaintiffs' signing the warranty program application.[33] The plaintiffs in *Reid* executed a sales agreement by which they acknowledged receipt of a sample homebuyer warranty booklet. The sales agreement further stated as follows:

> Buyer(s) understands and agrees that, if the above Limited Warranty is validated by [the homebuyer warranty program], it is provided to Seller in lieu of all other warranties, oral agreements or

[33] 2007 WL 4248478, at *5.

> representations and *SELLER MAKES NO WARRANTY EXPRESS OR IMPLIED, AS TO QUALITY, FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, HABITABILITY OR OTHERWISE, EXCEPT AS IS EXPRESSLY SET FORTH IN THE LIMITED WARRANTY PROGRAM.*[34]

A new construction addendum incorporated into the sales agreement provided an express warranty of good workmanship.

At closing, the plaintiffs in *Reid* signed an application for a third-party homebuyer warranty, which explained that the homebuyer warranty would constitute an express warranty and that "all claims and liabilities are limited to and by the terms and conditions of the Express Warranty as stated in the Home Buyers Warranty Booklet."[35] After experiencing mold and water damage in their new home, the homebuyers filed suit for breaches of express and implied warranties, breach of contract, and negligence. The defendant builder moved to dismiss, arguing, *inter alia*, that the homebuyers had agreed to an exclusive remedy by applying for the homebuyer warranty and that the homebuyer warranty contained a provision requiring arbitration of their claims.[36] The plaintiffs specifically denied bringing claims under the homebuyer warranty, and asserted that their breach of

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[34] *Id.* at *3.

[35] *Id.* at *5.

[36] *Id.* at *1.

warranty and breach of contract claims arose from the sales agreement and its addenda.

The *Reid* Court denied the builder's motion to dismiss, finding that a fact question existed as to whether the homebuyer warranty would constitute an exclusive remedy. The Court noted that Delaware case law disfavored construing a contract to exclude common law remedies "unless that result is imperatively required."[37] The homebuyer warranty application did not mandate exclusion of other remedies by indicating "that the express warranty [was] being given in lieu of other remedies" or was "to serve as the exclusive remedy."[38] Moreover, the application was ambiguous as to whether the "claims and liabilities limited to and by" the homebuyer warranty would include only those claims and liabilities arising from the homebuyer warranty, as opposed to common law claims and liabilities.[39]

As a corollary to its finding that a factual dispute existed regarding the exclusivity of the homebuyer warranty, the *Reid* Court held that it could not determine whether the arbitration clause contained in the homebuyer warranty would apply. Notably, the arbitration clause in *Reid* was narrowly drawn to

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[37] *Id.* at *5.

[38] *Id.*

[39] 2007 WL 4248478, at *5.

require arbitration only of "claims, disputes and controversies arising under or relating to" the homebuyer warranty.[40]

Consistent with *Reid*, the Court cannot conclude as a matter of law that the HBW in this case limited or disclaimed the express warranty of good workmanship provided by Limited Warranty addendum. Although the documents in *Reid* are not identical to those at issue here, the *Reid* homebuyers signed a home warranty program application that contained similar phrasing to the HBW application signed by the Bochniaks. As in *Reid*, the HBW application here leaves unclear whether the application adequately conveyed to the buyers that the "claims . . . limited to and by the conditions" of the HBW would include claims *not* arising from the HBW's terms. Moreover, the homebuyer warranty application in this case is similarly devoid of any explanation that the HBW would constitute an exclusive remedy or was provided "in lieu of" earlier representations and warranties in the Limited Warranty addendum.

The most significant distinctions between this case and *Reid* pertain to the wording and placement of warranty disclaimers and exclusivity provisions. The HBW provided by Blenheim included an exclusive remedy provision, as well as a disclaimer provision stating that "all other express or implied warranties, including any oral or written statements or representations" were disclaimed by Blenheim

[40] *Id.* at *6-7.

and waived by the Bochniaks. Both provisions were printed in bold type. By contrast, the homebuyer warranty in *Reid* contained a more abbreviated, non-conspicuous disclaimer of "all other warranties, express or implied," and apparently did not include any language declaring its remedy provisions to be exclusive.[41] However, the sales agreement in *Reid* did state that the homebuyer warranty was provided "in lieu of all other warranties, oral agreements or representations."[42]

These differences do not eliminate the need for further factual development to ascertain the effect and scope of the HBW, as was necessary in *Reid*. Given the conflicts between the Limited Warranty and the HBW, the Court perceives a factual dispute as to whether HBW's disclaimer and exclusive remedy provisions eliminated the Bochniaks' ability to pursue an action at law for breach of the Limited Warranty addendum's express warranty and representations more than a

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[41] The homebuyer warranty in *Reid* provided that "To the extent possible under the laws of your state, all other warranties, express or implied, including but not limited to any implied warranty of habitability, are hereby disclaimed and waived." The disclaimer language was printed in the same font as the surrounding text in the warranty booklet. Upon a review of the record filed in *Reid*, the Court could not locate a separate exclusive remedy provision in the homebuyer warranty. Opening Br. in Support of Defs.' Mot. to Dismiss, Ex. 4, *Reid v. Thompson Homes at Centreville, Inc.*, C.A. No. 06C-10-075 (Del. Super. Jan. 1, 2007). The *Reid* opinion did not explore the disclaimer language in the homebuyer warranty booklet, possibly because the provision was not conspicuously printed and did not include any reference to the homebuyer warranty being "exclusive" or "in lieu of" other warranties. Under those circumstances, the *Reid* Court may have omitted discussion of the booklet's disclaimer on the basis that it would not have affected the Court's conclusion that factual issues existed regarding the scope and effect of the various warranties in dispute.

[42] *Reid*, 2007 WL 4248478, at *3.

year after the HBW's effective date. While express warranties can be disclaimed, "where a contracting party has bargained for a certain standard of performance, the exculpatory language of a stipulation purporting to be a disclaimer must be clear and unequivocal, and will be construed strictly against the draftsman."[43] As a result, when a builder-drafted provision in a contract related to a residential dwelling can be reasonably interpreted as an additional remedy or warranty, rather than an exclusive remedy exonerating the builder from a previously bargained-for standard of performance, interpreting the agreement involves a factual inquiry and may require a jury determination.[44]

The HBW's warranty disclaimer and exclusive remedy clause appear on the fifth page of a booklet containing more than twenty-five pages of text. The express warranty disclaimer in the HBW refers non-specifically to the exclusion of "all other warranties," without stating that particular workmanship warranty previously provided by the Limited Warranty addenda was to be disclaimed. The HBW application's reference to the exclusion of other express or implied warranties is ambiguous at best. Nowhere does the HBW application mention the existence of

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[43] *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. 1972). Blenheim's motion discusses disclaimers of implied warranties; however, as the Bochniaks' Complaint alleges breaches of an express warranty and their response does not evince an intent to pursue an implied warranty claim, the Court focuses its analysis on whether Blenheim disclaimed the representations and express warranties contained in the Limited Warranty addendum.

[44] *See id.* at 695.

the disclaimer and exclusive remedy provisions in the HBW booklet. In addition, the public policy and conscionability considerations previously explored in the context of the HBW's arbitration provision may also be implicated by Blenheim's attempt to apply the HBW to limit or eliminate an express warranty incorporated into the earlier sales agreement. Given the conflicts between the Limited Warranty addendum and the HBW, and the possibility that the HBW may be found to be an adhesion contract, it would be premature for the Court to attempt a definitive interpretation of the parties' agreement—and indeed, all or part of that task may ultimately fall to a jury.

C. Applicability of the Homebuyer Warranty Arbitration Provision to Claims Brought Under the Limited Warranty Addendum

Assuming for the sake of argument that the Limited Warranty addendum's express warranty is not effectively excluded or limited by the HBW, the Court cannot hold as a matter of law that the HBW's arbitration provision necessarily applies to the Bochniaks' claims. Blenheim urges that *Ashe v. Blenheim Homes, L.P.*[45] "expressly or impliedly rejected" the Bochniaks' arguments that they are not compelled to submit to binding arbitration. In *Ashe*, the Court enforced a binding arbitration provision contained in the sales contract for a new home after the

[45] 2007 WL 3380121 (Del. Super. Mar. 12, 2007).

defendant builder made a timely election to pursue arbitration.[46] Because the plaintiff in *Ashe* attempted to "bypass" an apparently valid and applicable binding arbitration clause by filing claims in Superior Court, the Court refused on jurisdictional grounds to consider their arguments that they were "barred from arbitrating" any of the claims before the matter had been heard by an arbitrator.[47]

Ashe is factually dissimilar to the case at bar, and the Court finds it distinguishable. Unlike *Ashe*, this case involves two conflicting arbitration provisions, and the Court generally may determine "whether parties have contractually agreed to arbitrate" and whether a given dispute falls within a particular arbitration clause.[48] The Bochniaks have alleged breaches of the Limited Warranty addendum only. Although the HBW application conspicuously stated that the Bochniaks' execution would constitute consent to the HBW's binding arbitration provision, it is uncertain that the application properly alerted the Bochniaks that the HBW's arbitration provision would apply to claims based upon the earlier Limited Warranty addendum, which contained its own dispute resolution terms. The Limited Warranty addendum mandated arbitration only if Blenheim sent written notice of arbitration to the Bochniaks prior to the time

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[46] *Id.* at *3.

[47] *Id.*

[48] *Zeleny v. Thompson Homes at Centreville, Inc.*, 2006 WL 2382829, at *2 (Del. Super. July 10, 2006).

Blenheim was required to plead or otherwise respond to the Bochniaks' suit. Blenheim has not shown that it timely sent such a notice, which further distinguishes this case from *Ashe*, where the defendant elected to pursue its right to arbitration. This state's strong policy in favor of arbitration does not extend to enforcing unconscionable clauses or to distorting clear agreements between parties.[49] If the HBW's arbitration provision does not apply, the Bochniaks have proceeded properly in bringing their claims to this Court.

As it did in *Reid*, the Court must acknowledge the possibility that discovery may not shed much additional light on the parties' intent, and that "the somewhat bizarre outcome of a jury trial may well be that the case (or some portion of it) should go to arbitration."[50] That possibility, however, does not render summary judgment any less inappropriate at this pre-discovery stage.

D. Timeliness of Plaintiffs' Suit

Blenheim submits that "any claims" by the Bochniaks "expired more than four years ago,"[51] although it does not set forth the limitations periods upon which it relies for this argument. Actions for breach of contract are generally subject to a

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[49] *See id.* ("Any doubt as to arbitrability should be resolved in favor of arbitration. However, the court will not compel a party to arbitrate, unless there is a clear expression of such an intent." (citations omitted)).

[50] *Reid*, 2007 WL4248478, at *8.

[51] Def.'s Mot. to Dismiss ¶ 6.

three-year statute of limitations under 10 *Del. C.* § 8106; however, the Bochniaks contend that because the Agreement of Sale was signed under seal, it is actionable for twenty years.[52] The Bochniaks also argue that factual questions regarding the dates on which they discovered defects, Blenheim's repair attempts, and Blenheim's representations prevent dismissal.

A plaintiff generally "need not 'plead in anticipation' of an affirmative defense based upon the statute of limitations," particularly where the bar of the statute of limitations is not evident from the face of the Complaint.[53] In this case, although the relevant documents were executed more than six years before the Bochniaks filed suit, the Complaint alleges that Blenheim engaged in repeated repair attempts after the Bochniaks purchased their house and provided reassurances that the alleged defects had been resolved. These allegations raise the possibility that the statute of limitations on the Bochniaks' claims may have been tolled for some period of time following their purchase of the house based upon the discovery rule or another theory. Determining the running of limitations periods in this case will likely require inquiry into several factual questions, including when the plaintiffs discovered their injury and whether any delay in that discovery was

[52] Pls.' Resp. to Def.'s Mot. to Dismiss ¶ 4 (citing *Wittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 10 (Del. 2009)).

[53] *State Farm Fire & Cas. Co. v. General Elec. Co.*, 2009 WL 5177156, at *4 (Del. Super. Dec. 1, 2009) (citing 54 C.J.S. *Limitations of Actions* § 340 (2009)).

objectively reasonable under the circumstances.[54] The Court therefore cannot determine at this juncture whether the Bochniaks' claims are time-barred

VI. Conclusion

For the foregoing reasons, this case is certainly one in which a consideration of the limited facts available supports the need for a more thorough inquiry to clarify the application of the law to the circumstances.[55] Therefore, Blenheim's motion to dismiss, treated as a motion for summary judgment, is hereby **DENIED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

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[54] *See, e.g.*, *Reid*, 2007 WL 4248478, at *8.

[55] *Ebersole*, 180 A.2d at 468-69.