STATE OF MINNESOTA
IN COURT OF APPEALS
A08-929

Day Masonry,
Respondent,

vs.

Independent School District 347,
Appellant,

Commercial Roofing, Inc.,
Respondent,

GenFlex Roofing Systems, LLP,
Respondent,

Lovering-Johnson Construction,
Respondent.

Filed August 31, 2010
Reversed
Bjorkman, Judge

Kandiyohi County District Court
File No. 34-CV-07-199

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Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

On remand from the Minnesota Supreme Court's decision, *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321 (Minn. 2010), respondents argue that the statute of repose contained in Minn. Stat. § 541.051, subd. 1 (2004), bars arbitration of appellant's breach-of-warranty claims. Because we conclude that the arbitration agreement does not incorporate the repose statute, we reverse.

FACTS

The factual and procedural background of this case is set forth in detail in our previous opinion, *Day Masonry v. Indep. Sch. Dist. No. 347*, No. A08-929 (Minn. App. May 5, 2009), and in the supreme court's opinion. The following facts pertain to the issue presented on remand.

Respondents Commercial Roofing, Inc. and Lovering-Johnson Construction contracted with appellant Independent School District 347 (school district) in January 1993 to build a new high school. Lovering-Johnson subcontracted with respondent Day

Masonry to perform masonry work on the project, and Commercial Roofing installed a waterproof membrane for the roof that respondent GenFlex Roofing Systems, LLP manufactured.

In their construction contracts, the parties agreed to arbitrate all potential claims but agreed that "[t]he demand for arbitration . . . in no event shall . . . 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." Lovering-Johnson's and Commercial Roofing's construction contracts also included express written warranties, and GenFlex separately provided the school district express written warranties.[1]

The project was substantially completed in September 1994, and water leakage problems arose shortly thereafter. The school district notified Lovering-Johnson and Commercial Roofing in December 2004 of potential warranty problems and sent a similar notice to GenFlex in August 2005. On March 13, 2006, the school district filed a demand for arbitration, asserting contract and warranty claims against Lovering-Johnson, Commercial Roofing, and GenFlex. Lovering-Johnson joined Day Masonry in the action.

Day Masonry subsequently filed an action in district court requesting a stay of the arbitration pursuant to Minn. Stat. § 572.09(b) (2006). Day Masonry, joined by the other respondents, argued that the statute of limitations and statute of repose set forth in Minn.

[1] GenFlex provided two warranties: a full-roofing system warranty and a limited membrane-only warranty. This appeal concerns only GenFlex's full-roofing system warranty.

Stat. § 541.051, subd. 1 (2006), were incorporated into the parties' arbitration agreement and barred the school district's claims. The district court determined that the arbitration demand was time-barred and permanently enjoined the arbitration, with the exception of claims under one warranty, which are not involved in this appeal. However, the district court based its determination on the 2002 version of section 541.051, which excluded warranty claims from its repose provision, and declined to address respondents' statute-of-repose argument.

The school district appealed. We concluded that the district court properly held that the school district's contract claims are time-barred under the statute of limitations but erred in determining that the school district's warranty claims are also time-barred by the limitations period. Respondents reiterated their statute-of-repose argument on appeal, but we declined to address the argument because the case had been decided in respondents' favor and respondents had not filed a notice of review. On cross-petitions for further review, the supreme court affirmed our decision on the contract claims and our decision that the statute of limitations does not bar the school district's warranty claims. *Day Masonry*, 781 N.W.2d at 323. But the supreme court held that respondents were not required to file a notice of review on the statute-of-repose issue and remanded for us to consider "whether the statute of repose operates to bar the School District's warranty claims." *Id.* at 332.

D E C I S I O N

The construction and application of a statute of repose presents a question of law subject to de novo review. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883

(Minn. 2006). But because this issue arises in the context of an action to stay arbitration, our review must focus on the terms of the arbitration agreement. *See Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating, Inc.*, 660 N.W.2d 146, 149 (Minn. App. 2003) ("In actions to stay arbitration, the limited issue presented . . . is the existence and scope of the arbitration agreement."). It is fundamental that parties "are generally free to structure their arbitration agreements as they see fit," including controlling "the time within which an existing claim may be brought." *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 608-09 (Minn. 2002) (quotation omitted). We, therefore, look to the parties' arbitration agreement to determine whether the statute of repose affects or is incorporated into the agreement. *See Holm Bros.*, 660 N.W.2d at 149-50.

Determining the scope of an arbitration agreement presents a question of contract interpretation, which we review de novo. *See Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005). The primary goal of contract interpretation is to determine and enforce the intent of the contracting parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). The intent of the parties is determined from the plain language of the contract, viewed as a whole. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

The portion of the arbitration agreement that all parties agree is central to this appeal provides:

> All claims, disputes and other matters in question between the Contractor and the Owner arising out of or relating to the Contract Documents or the breach thereof . . .

> shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. . . .
>
> . . . The demand for arbitration shall be made within the time limits specified in Subparagraph 2.3.15 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen; and in no event shall it 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.

This agreement does not, by its plain terms, refer to the statute of repose.

Respondents principally argue that the reference to "the applicable statute of limitations" in the arbitration agreement incorporates the statute of repose. We disagree. Statutes of limitations are distinct from statutes of repose. *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 102 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008); *see also* 54 C.J.S. *Limitations of Actions* § 7 (2010) (noting that a statute of limitations runs from the accrual of a cause of action and is conditional, while a statute of repose runs from a specific event, limits the time within which an action may be brought, and is absolute). And the supreme court and this court have specifically recognized that section 541.051, subdivision 1, contains both a statute of limitations and a statute of repose. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 643 (Minn. 2006) (criticizing failure "to properly distinguish between the limitations and repose provisions of section 541.051"); *U.S. Home*, 749 N.W.2d at 102; *see also Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 357 (Minn. App. 2001) (describing similar earlier version of the statute as the "general Minnesota statute of limitations" for

claims based on improvements to real property, but emphasizing that the statute contains both a statute of limitations and a statute of repose, which are distinct), *review denied* (Minn. Feb. 19, 2002). Indeed, although the statute of repose in effect at the time of the parties' contract did not apply to warranty claims, it did apply to other potential claims within the scope of the arbitration agreement. *See* Minn. Stat. § 541.051 (1992); *see also Sartori v. Harnishfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988) (recognizing legitimate purpose of repose period in section 541.051). We presume that the parties were aware of the applicable law when they entered into their contract and could have explicitly incorporated a repose period into the arbitration agreement. *See Miller v. Osterlund*, 154 Minn. 495, 496, 191 N.W. 919, 919 (1923) (stating that parties to a contract are presumed to be equally knowledgeable of the law). The reference to the statute of limitations, therefore, does not demonstrate intent to also incorporate a repose period.[2]

Alternatively, respondents argue that the arbitration agreement incorporates the statute of repose because another section of the construction contract provides that the contract is governed by "the law of the place where the Project is located." But the arbitration agreement is a distinct section of the construction contract and identifies its

[2] Day Masonry also invites us to "conclude, as a matter of law, that the fact that the statute of repose has run demonstrates that the demand for arbitration was not brought within a reasonable amount of time," as required under the arbitration agreement. But nothing in the record indicates that Day Masonry or any other respondent presented this argument to the district court as a basis for staying the arbitration. Nor does Day Masonry cite any authority that directly supports its argument. This argument, therefore, is distinct from the statute-of-repose issue and is not properly before us. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

own governing law—the "Construction Industry Arbitration Rules of the American Arbitration Association then obtaining." Minnesota law thus is largely irrelevant to the parties' arbitration agreement unless explicitly incorporated, such as the "applicable statute of limitations." Moreover, the "law of the place" provision can incorporate the statute of repose only if read so broadly as to also incorporate the statute of limitations, which would make the statute-of-limitations provision contained in the arbitration agreement redundant. We reject such an interpretation. *See Current Tech. Concepts, Inc. v. Irie Enters. Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (stating that a contract "must be interpreted in a way that gives all of its provisions meaning").

Finally, respondents assert that the statute of repose is incorporated into the arbitration agreement through the construction contract's provision that "the rights and remedies available [under the contract] shall be in addition to, and not a limitation of, any duties, obligations, rights and remedies otherwise imposed or available by law." We disagree. This provision is broadly phrased and does not reference the statute of repose. And by agreeing to arbitrate all potential disputes subject only to the Construction Industry Arbitration Rules of the American Arbitration Association and the applicable statute of limitations, the parties contemplated that remedies available through arbitration under the contract may be broader than those that would be available in a court proceeding. To interpret the "rights and remedies" provision to impose statutory limitations on the parties' agreement that they could have but chose not to adopt is contrary to the purpose of the "rights and remedies" provision and fundamental principles of contract interpretation. We, therefore, decline to do so.

Because the parties' arbitration agreement does not, by its plain terms, incorporate the repose period contained in Minn. Stat. § 541.051, subd. 1, the school district's warranty claims are not barred because it failed to assert them within ten years of substantial completion. The district court erred in staying arbitration based on Minn. Stat. § 541.051, subd. 1.

Reversed.