2025 IL App (5th) 240716-U

NO. 5-24-0716

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

HUBERT PLUMBING AND HEATING COMPANY, INC.,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellee,	)	No. 23-LA-825
v.	)	
MORRISSEY CONSTRUCTION COMPANY,	)	Honorable Kevin T. Hoerner,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Barberis and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: The court erred in denying defendant's motion to stay and compel arbitration.

¶ 2 Defendant, Morrissey Construction Company, appeals the circuit court's order denying its motion to stay the proceedings and compel arbitration. For the following reasons, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On July 18, 2023, plaintiff, Hubert Plumbing and Heating Company, Inc. (Hubert), filed a three-count complaint against defendants, Morrissey Construction Company and Old Republic Surety Company (Old Republic). The complaint alleged that Morrissey entered a contract with the Housing Authority for the City of East St. Louis (Housing Authority) to complete a public works

project in renovating nine homes owned by the Housing Authority. On February 16, 2023, Hubert entered into a subcontract with Morrissey to complete the plumbing work for the homes listed in the subcontract. The complaint stated the subcontract between Hubert and Morrissey was attached as Exhibit A. The complaint contended the subcontract provided that, within 10 days after Morrissey was paid by the Housing Authority, Hubert was to be paid 90% of each progress payment at the time the work was performed, with 10% withheld as "retention." The complaint further alleged that Morrissey, as the bond principal, and Old Republic, as the bond surety, executed performance and payment bonds for the project. It contended the payment bond provided that Morrissey and Old Republic were jointly liable to pay for labor, materials, and equipment furnished for performance of the construction contract and when a claimant sent a claim, the Surety was required to promptly arrange for payment for any undisputed amounts.

¶ 5 Count I asserted a breach of contract claim against Morrissey, alleging that Hubert performed about 90% of its work under the subcontract and submitted five pay applications, the first of which on March 24, 2023, and the last on June 21, 2023. The first three applications included the withholding of retainage from the progress payments. It stated that when Hubert stopped working after not receiving payment, it had completed $75,624 worth of work on the project, but had been paid only $7,020, leaving a balance due of $68,604. It further contended that Morrissey was paid by the Housing Authority for the work described in Hubert's pay applications but failed to pay Hubert the amount due as required by the subcontract. It argued Morrissey's breach damaged Hubert in the sum of $168,604. Count I further asserted that the subcontract provided that the prevailing party may recover attorney fees, and Hubert had incurred and would incur attorney fees in excess of $30,000.

¶ 6 Count II asserted a claim against Morrissey under the Local Government Prompt Payment Act (50 ILCS 505/9 (West 2022)), which provided that subcontractors would recover interest at the rate of 2% per month if not paid within 15 days after payment to the general contractor. It alleged this would add $2,743 to the amount due, plus $45.09 per day for every day after July 17, 2023.

¶ 7 Count III asserted a claim of breach of the payment bond against Old Republic and Morrissey. It contended Hubert performed its obligations under the payment bond but Old Republic, as bond surety, and Morrissey, as bond principal, failed and refused to perform their obligations by failing to pay the amounts due Hubert in the sum of $68,604, plus consequential damages in excess of $100,000, plus prejudgment interest in a sum exceeding $12,000 plus attorney fees in a sum exceeding $30,000.

¶ 8 The subcontract attached to the complaint, effective February 16, 2023, provided the terms regarding plumbing work to be completed by Hubert for a total sum of $91,900, including a provision for progress payments each month "less retention of Ten percent (10%)." The subcontract included a provision under section 15, titled "Miscellaneous" and subsection I titled "Attorney's Fees," which stated "in the event of any dispute, claim, arbitration or litigation arising out of or relating to this Subcontract, the prevailing party shall be awarded its attorney's fees, expert witness fees, expenses, arbitration fees and expenses, and court costs at the trial and appellate levels."

¶ 9 The subcontract also included a provision, under section 15, titled "Miscellaneous" and subsection H titled "**Disputes**," which provided that any controversy or claim arising out of or relating to the subcontract, "shall be settled by arbitration in accordance with the Construction

Industry Arbitration Rules of the American Arbitration Association." The subcontract was not signed by either party.

¶ 10 Also attached to the complaint was a performance bond and payment bond. Both bonds, dated January 23, 2023, referred to the construction contract between Morrissey, as the contractor, and the Housing Authority, as the owner, for the nine sites of single-family home renovations. The bonds listed Old Republic as the surety. Both bonds were for the amount of $1,585,000. The payment bond provided that a claimant who had a "direct contract" with Morrissey must send a claim to the surety and notice to Morrissey through mail or personal delivery. The claim was required to be a written statement including, *inter alia*, a copy of the agreement for labor, materials, or equipment used in performance of the project, a description of the labor, materials, or equipment furnished, the total amount earned by the claimant, the total amount of previous payments received by the claimant, and the total amount to the claimant. The payment bond further provided that once notified, the surety would send an answer to the claimant within 60 days stating the amounts that were undisputed and the basis for challenging any disputed amounts. The surety would then arrange for payment for any undisputed amounts.

¶ 11 Attorneys Steven M. Cockriel and Philip J. Christofferson entered their appearance for both defendant Morrissey and defendant Old Republic on December 14, 2023. The same day, Morrissey filed a motion to stay and compel arbitration. The motion referred to section 15(H) of the subcontract that specified any controversy or claim arising out of or relating to the subcontract shall be settled by arbitration. Morrissey contended it chose to resolve the disputes with Hubert by arbitration and notified Hubert's counsel of its election in writing on August 17, 2023. It asserted counts I and II of the complaint fell within any controversy or claim arising out of or relating to the subcontract. It further contended, citing *Premier Electrical Construction Co. v. American*

National Bank of Chicago, 276 Ill. App. 3d 816, 829 (1995), that a stay of count III was also appropriate because if Hubert did not prevail on its contract action against Morrissey, Hubert could not prevail on its payment bond claim as a matter of law. Morrissey thus requested that the court order Hubert to arbitrate the disputes set forth in counts I and II and stay the proceedings until the conclusion of arbitration. The same subcontract attached to the complaint was also attached to the motion.

¶ 12 On February 21, 2024, Hubert filed a response to Morrissey's motion to stay and compel arbitration. The response noted that the subcontract was not signed by either party. Hubert argued that while the "unsigned (purported) subcontract" agreement was used by the parties as a general guideline for the work to be performed, the parties never agreed to all of the terms and never signed "the (purported) subcontract" agreement. Specifically, the parties did not agree to arbitrate any disputes. Hubert also argued that irrespective of the ruling on Morrissey's motion to stay and compel arbitration, there was no reason to stay Hubert's claims against Old Republic, as it did not have a written agreement to arbitrate with Hubert.

¶ 13 On February 26, 2024, the court entered an order, stating the motion to stay the proceedings and compel arbitration was argued and submitted. The order granted Morrissey 10 days to file a reply and allowed the parties to obtain limited Zoom discovery depositions of the managers that negotiated the unsigned subcontract agreement and then submit those discovery depositions to the court. The order further stated the depositions would be limited to issues related to why the parties did not sign the written subcontract agreement. No report of proceedings for the hearing on this date is found in the record.

¶ 14 On March 3, 2024, Morrissey filed a reply brief in support of its motion to stay and compel arbitration. Morrissey argued that paragraph five of Hubert's complaint judicially admitted that

the attached subcontract was the contract entered into by the parties. It contended that Hubert should not now be able to backtrack. It asserted that Hubert not only identified the subcontract as the agreement between the parties, but Hubert specifically cited subsection 15(I) of the contract as the basis to recover attorney fees. Morrissey further argued that Hubert could not now contend that the preceding section 15(H)—or any other part of the subcontract—was not binding.

¶ 15 Alternatively, Morrissey contended that the lack of signatures did not render the arbitration clause unenforceable. It noted that the Federal Arbitration Act (FAA) (9 U.S.C. § 2 (2018)) said nothing about a signature and numerous courts of appeal, including the Seventh Circuit, concluded that the FAA did not require a signature for an arbitration agreement to be binding. Morrissey acknowledged there were no reported cases on the need for a signature under the Illinois Uniform Arbitration Act (IUAA) (710 ILCS 5/1 *et seq.* (West 2022)), but argued the operative language of the IUAA is identical to that of the FAA and both required a "written agreement." It further argued that because Hubert admitted the existence of a written agreement containing an arbitration clause, the lack of signatures was irrelevant. Citing *West Bend Mutual Insurance Co. v. DJW-Ridgeway Building Consultants, Inc.*, 2015 IL App (2d) 140441, ¶ 24, Morrissey also contended "[i]t is well settled that a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by is provisions even though he has not signed it."

¶ 16 On May 10, 2024, the court enter an order, denying Morrissey's motion to stay and compel arbitration. Morrissey filed a timely interlocutory appeal under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017).

¶ 17 II. ANALYSIS

¶ 18 On appeal, Morrissey contends the court erred in denying its motion to stay the proceedings and compel arbitration for the same reasons it argued in favor of the motion below. Hubert argues that the FAA does not control here, and the court did not err based on the unsigned subcontract.

¶ 19 Before we address the merits of the issue on appeal, we must first address Hubert's argument that this court lacks jurisdiction because the supporting record was filed a day late, appellant's brief was untimely filed, and the supporting record was not authenticated by the clerk, or by an affidavit, as required by Illinois Supreme Court Rule 328 (eff. July 1, 2017). We find these arguments meritless.

¶ 20 "The filing of a notice of appeal is the only jurisdictional step in the appellate process." *People v. Jones*, 104 Ill. 2d 268, 283 (1984). While the appeal may be dismissed for some other procedural defect, jurisdiction is only affected by perfecting the appeal. *Id.* Rule 307(a) provides "the appeal must be perfected within 30 days from the entry of the interlocutory order by filing a notice of appeal designated 'Notice of Interlocutory Appeal' conforming substantially to the notice of appeal in other cases." Ill. S. Ct. R. 307 (eff. Nov. 1, 2017). Morrissey perfected its appeal by filing a notice of appeal designated "Notice of Interlocutory Appeal" within 30 days of the entry of the interlocutory order. Any other procedural defects would therefore not affect our jurisdiction.

¶ 21 Moreover, Morrissey followed both Rule 307 and 328. Rule 307(a) requires the appellant to file a Rule 328 supporting record within 30 days from the entry of the interlocutory order. Ill. S. Ct. R. 307 (eff. Nov. 1, 2017). The order from which Morrissey appealed was filed May 10, 2024. Thirty days later would be June 9, 2024. However, when computing the time frame required for any act by law, a Sunday is excluded from the computation if it is the last day. 5 ILCS 70/1.11 (West 2022). June 9, 2024, was a Sunday. As such, Morrissey filing the supporting record on the

following day, June 10, 2024, was timely pursuant to Rule 307(a). See *City of Chicago v. Greene*, 47 Ill. 2d 30, 33 (1970) ("while the post-trial motion was filed 31 days after judgment, the 30th day was a Sunday and, hence, the filing of the motion on Monday was timely").

¶ 22 Rule 307 also requires the appellant to file its brief "within 7 days from the filing of the Rule 328 supporting record." Ill. S. Ct. R. 307(c) (eff. Nov. 1, 2017). Morrissey's brief was filed on June 14, 2024, which was four days after timely filing the supporting record. Therefore, Morrissey's brief was timely filed.

¶ 23 The record also rebuts Hubert's argument regarding the Rule 328 affidavit. Rule 328 requires the supporting record to "be authenticated by the certificate of the clerk of the trial court or by the affidavit of the attorney or party filing it." Ill. S. Ct. R. 328 (eff. July 1, 2017). Morrissey's attorney filed an affidavit attesting to the veracity of the supporting record on the same date the record was filed. This requirement was therefore met.

¶ 24 We further reject Hubert's argument that there is an insufficient record to determine the merits of the issue on appeal. Hubert contends that where the record on appeal fails to contain a transcript of the initial hearing on the motion to stay the proceedings and compel arbitration and the motion for reconsideration of that order, we must presume that the circuit court's judgment conforms to the law and has a sufficient factual basis.

¶ 25 It is the appellant's burden to provide the appellate court with a sufficient record to support the alleged error on appeal. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). We find a sufficient record here. The motion to reconsider the court's February 26, 2024, order was in the common law record authenticated by the circuit clerk filed on June 11, 2024. While the transcript of the February 26, 2024, hearing is not in the record on appeal, the court's order for that date was also included in the record authenticated by the circuit clerk and the order makes clear it did not rule on the

issues or make findings of fact. Rather, it heard argument, granted Morrissey time to file a reply brief, and allowed the parties to take discovery depositions. The record also contains the written argument in support of each party's respective position regarding the motion to stay the proceedings and compel arbitration and the court's order denying the motion. Moreover, where the circuit court did not hold an evidentiary hearing, our review of the court's decision on the motion to compel the arbitration is *de novo*. *Smith v. Jones*, 2025 IL App (5th) 231136, ¶ 28. The parties agree that this standard of review applies to this case. As such, in reviewing this issue we give no deference to the circuit court's decision or rationale and review the matter as if the circuit court had made no decision on the matter. *Freeburg Community Consolidated School District No. 70 v. Country Mutual Insurance Co.*, 2021 IL App (5th) 190098, ¶ 80. Because we need not give deference to the circuit court's decision regarding arbitration and the parties' arguments are in the record, we find there is a sufficient record to address the issue on the merits.

¶ 26 Turning to the merits, "[a] motion to compel arbitration raises the sole and narrow issues of whether the parties agreed to arbitrate the dispute." *Clark v. Foresight Energy, LLC*, 2023 IL App (5th) 230346, ¶ 22. As stated above, our review is *de novo*.

¶ 27 Morrissey contends the circuit court erred where the IUAA does not require a signed agreement and Hubert admitted the subcontract was the agreement of the parties. We agree.

¶ 28 In interpreting a statute, our primary objective is to ascertain and give effect to the legislature's intent. *People v. Clark*, 2024 IL 130364, ¶ 15. The best indicator of the legislature's intent is the plain language of the statute. *Id.* "A court must not depart from a statute's plain language by reading into it exceptions, limitations, or conditions that the legislature did not express." *People v. Clark*, 2019 IL 122891, ¶ 23.

¶ 29 The Illinois Uniform Arbitration Act provides that a court shall order arbitration if there is a valid arbitration agreement. See 710 ILCS 5/1, 2 (West 2022). The IUAA provides that a valid arbitration agreement is as follows: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract ***." *Id.* § 1.

¶ 30 The plain language of the IUAA speaks nothing of a *signed* agreement. Rather, it only requires a written agreement. While the parties have not cited and we have not found a case directly addressing whether the IUAA requires the written agreement to arbitrate to be signed, *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill. App. 3d 379, 382 (1988), provides guidance.

¶ 31 In *Landmark Properties*, an architectural firm orally agreed to assist real estate developers with a project. *Id.* at 380-81. A few months later, the architects sent the developers a written agreement to sign. *Id.* at 380. The written agreement included an arbitration clause. *Id.* The developers never signed the form but accepted the architects' services. *Id.* Subsequently, the architects sent another written agreement regarding the second phase of the project; the developers never signed that agreement but later promised in writing that payment would be made in accordance with that agreement. *Id.* at 381. After negotiations regarding the interest rates for delinquent invoices failed, the architects filed for arbitration proceedings. *Id.* The developers requested a mediation conference prior to arbitration and executed a submission asserting a counterclaim against the architects. *Id.* The developers, however, later withdrew from mediation, claiming that they were not required to arbitrate. *Id.* The developers then filed a complaint and emergency motion to stay arbitration proceedings in the circuit court. *Id.* The developers argued

they did not sign the written agreement, and the parties had an oral contract which did not include an agreement to arbitrate disputes. *Id.* at 382.

¶ 32 The appellate court affirmed the trial court's grant of the architects' summary judgment motion, finding that the parties entered into a written contract which included the requirement to arbitrate disputes by their conduct. *Id.* at 382, 384. In doing so, the appellate court noted that despite not having signed a contract, a party may nevertheless assent to the contract's provisions by his acts or conduct. *Id.* at 383. It found that the developers' conduct showed it assented to the written agreement where they never rejected the written agreement sent by the architects, sent correspondence indicating payment would be forthcoming if the services were performed in accordance with the written agreement, and asserted their own claim during mediation. *Id.* at 384.

¶ 33 We also find guidance in federal case law concerning the Federal Arbitration Act. The FAA requires courts to compel arbitration upon application of one of the parties if the issue in the proceeding is "referable to arbitration under an agreement in writing." 9 U.S.C. § 3 (2018). Regarding the validity of an agreement to arbitrate, the FAA provides:

> "A written provision in *** a contract *** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract ***." *Id.* § 2.

¶ 34 Federal law interpreting these statutes held that while a written agreement is required, a *signed* agreement is not required under the FAA. *Tinder v. Pinkerton Security*, 305 F.3d 728, 736 (7th Cir. 2002); see also *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960); *Galloway*

v. Santander Consumer USA, Inc., 819 F.3d 79, 89 (4th Cir. 2016) (collecting cases). While the federal cases are not binding here, because they interpret a statute similar to our state statute, we find them persuasive. *Illinois Central Gulf R.R. Co. v. Sankey Brothers*, 78 Ill. 2d 56, 59 (1979).

¶ 35 Based on the plain language of the IUAA there is no requirement that a written agreement to arbitrate must be signed. We agree with the federal case law and will not depart from the plain language of the statute to impose a limitation not expressed by the legislature. *Clark*, 2019 IL 122891, ¶ 23. We therefore find the IUAA does not require a *signed* written agreement.

¶ 36 In the absence of such requirement in the statute, we adhere to the longstanding rule that arbitration agreements are controlled by state-law contract principles. *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 1148 (2005); see also *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2023 IL 129067, ¶ 30. Under contract law principles, it is well settled that a party named in the contract may assent to the contract's provisions by his acts or conduct, even when the party did not sign it. *Soelzer v. Soelzer*, 382 Ill. 393, 399 (1943); *Welsh v. Jakstas*, 401 Ill. 288, 299 (1948); *West Bend Mutual Insurance Co.*, 2015 IL App (2d) 140441, ¶ 24.

¶ 37 Here, the allegations in Hubert's complaint show that Hubert assented to the subcontract. Hubert alleged that it completed 90% of the work under the subcontract and submitted payment applications pursuant to the terms of the subcontract. See *Amelco Electric Co. v. Arcole Midwest Corp.*, 40 Ill. App. 3d 118, 125 (1976) (finding there was a written contract because although unsigned, performance was rendered after delivery of the contract and party complied with several terms of the contract without expressing objection to any terms of the agreement). Significantly, Hubert's complaint explicitly stated the subcontract was the agreement of the parties. A fact alleged in an unverified complaint is "an admission against interest which may be contravened or explained." *Chavez v. Watts*, 161 Ill. App. 3d 664, 673 (1987). While Hubert attempted to explain

such admission by claiming the subcontract was merely a general guideline for the work to be performed and the parties never agreed to all of the terms after Morrissey moved to compel arbitration, its own pleading and conduct belies such contention. As just explained, Hubert adhered to more terms of the agreement than the terms regarding the work to be performed. Moreover, Hubert not only asserted a breach of the subcontract based on Morrissey's failure to pay but also sought attorney fees pursuant to the provision of the subcontract that was listed immediately after the provision regarding arbitration. Even construing the allegations of the pleading in the light most favorable to Hubert, its conformance with provisions of the written contract, admission that the subcontract was the parties' agreement, and filing suit as well as requesting attorney fees based on the written contract show it assented to the provisions of the subcontract. See *Amelco Electric Co.*, 40 Ill. App. 3d at 125 (finding there was a written contract and rejecting a party's affidavit that it took exception to a specific provision of the unsigned written contact where the party never expressed exception to any portion of the contract and the party acted in accordance with other provisions of the contract). Because we find the parties mutually assented to the written subcontract and there is no dispute such contract contains an arbitration clause applicable to counts I and II of this case, the court erred in denying Morrissey's motion to compel arbitration.

¶ 38 With regard to count III premised on the payment bond, Hubert contends the court did not abuse its discretion in denying staying the proceedings regarding Old Republic. Hubert argues Old Republic did not move to compel arbitration and Hubert could recover the payment due for its plumbing work. We disagree.

¶ 39 Under the IUAA, the court must stay the proceedings for all issues subject to arbitration and has the discretion to stay issues not subject to arbitration if the issues are severable. 710 ILCS 5/2(d) (West 2022). "Policies favoring arbitration support a stay of all court proceedings pending

arbitration 'where the arbitrable and nonarbitrable issues, although severable, are also interrelated in terms of a complete resolution of the cause between the parties.' " *Casablanca Trax, Inc. v. Trax Records, Inc.*, 383 Ill. App. 3d 183, 189 (2008) (quoting *Kelso-Burnett Co. v. Zeus Development Corp.*, 107 Ill. App. 3d 34, 41 (1982)). "[W]here the issues and relationships are sufficiently interrelated and the result of arbitration may be to eliminate the need for court proceedings, then the goals of judicial economy and of resolving disputes outside of the judicial forum are met." *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 76 (1998).

¶ 40 Here, count III against Old Republic alleged breach of the payment bond. Such bond was executed to pay for all work done in relation to the housing project. "The obligation of a surety under a payment bond is coextensive with that of its principal." *Premier Electrical Construction Co.*, 276 Ill. App. 3d at 829. Morrissey, the principal of the bond, is liable to Hubert to the extent that Hubert completed its work for the project. Hubert's performance and the amount due for its work is controlled by the terms of the subcontract and are all issues subject to arbitration. We therefore find the claims interrelated such that the proceeding as a whole should be stayed.

¶ 41 III. CONCLUSION

¶ 42 The parties entered into a written agreement, which included a provision to arbitrate all issues and disputes arising from the subcontract. Because all counts of the complaint sufficiently relate to the work provided pursuant to the written agreement, the proceedings as a whole should be stayed. Accordingly, we reverse the circuit court's denial of the motion to stay the proceedings and compel arbitration and remand for further proceeding once arbitration is completed.

¶ 43 Reversed and remanded.