NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0754

TONYA B. HIDALGO WIFE OF/AND SIDNEY HIDALGO

VERSUS

SUN CONSTRUCTION, L.L.C. D/B/A SUNRISE HOMES, BONDED BUILDERS WARRANTY GROUP, ABC INSURANCE COMPANY, JOHN DOE SUPPLY AND JOHN DOE SUBCONTRACTORS

Judgment rendered December 22, 2010.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 2009-14698
Honorable Raymond S. Childress, Judge

Judge Kline concurs

* * * * * *

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BEFORE: KUHN, PETTIGREW, JJ. and KLINE, J., *pro tempore.*[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

In this case, plaintiffs, Tonya B. Hidalgo and Sidney Hidalgo ("the Hidalgos"), challenge the trial court's judgment sustaining the prematurity exceptions filed by defendants, Sun Construction, L.L.C. ("Sun Construction") and Bonded Builders Warranty ("Bonded Builders"), and dismissing their action without prejudice. For the reasons that follow, we affirm as amended.

FACTS AND PROCEDURAL HISTORY

According to the record, the Hidalgos signed a purchase agreement with Sun Construction on July 18, 2005, to purchase a lot located in Penn Mill Lakes Subdivision in Covington, Louisiana, and for Sun Construction to build a home for the Hidalgos on said lot. Around June 8, 2006, after construction was substantially complete, the Hidalgos closed on the actual sale of the property and the home. At the time of the closing, the Hidalgos signed an application for an Express Limited Warranty that was offered by Bonded Builders, with coverage for workmanship/materials beginning on June 8, 2006 and expiring on June 8, 2007. Both the purchase agreement and the Bonded Builders' warranty contained arbitration clauses.

The Hidalgos did not file the instant suit for damages until August 2009, alleging breach of contract and breach of warranty as a result of defective Chinese drywall that was used in the construction of the home. The Hidalgos named Sun Construction, Bonded Builders, and several fictitious parties as defendants. In response to the suit, Sun Construction and Bonded Builders each filed an exception raising the objection of prematurity, arguing that the matter should be dismissed because the Hidalgos failed to submit it to binding arbitration. The exceptions were argued on December 17, 2009, at which time the trial court heard from the parties and considered the evidence in the record. The trial court granted the exceptions raised by Sun Construction and Bonded Builders, dismissing the Hidalgos' action, without prejudice. A judgment in accordance with these findings was signed by the trial court on January 4, 2010.

It is from this judgment that the Hidalgos have appealed, assigning the following specifications of error:

> (1) The trial court erred in ruling the Hidalgos were required to arbitrate [their] Chinese Drywall and New Home Warranty Act dispute with Sun because these causes of action arise out of their Act of Sale contract and out of statute, and do not arise out of the Purchase Agreement that contained the arbitration provision.
>
> (2) The trial court erred in ruling the Hidalgos were subject to Bonded Builder's arbitration provisions, because the provision was not signed, and only appears in documentation unilaterally provided to them.
>
> (3) In the alternative that the arbitration clause(s) are enforceable against Hidalgo, the trial court erred by dismissing the case rather than staying it.[2]

LAW AND ANALYSIS

The defense of prematurity may be raised by the dilatory exception pleading the objection of prematurity. La. Code Civ. P. art. 926(1). The function of the exception is to permit a defendant to raise the issue that the judicial cause of action has not come into existence because some prerequisite condition has not been fulfilled. **Tresch v. Kilgore**, 2003-0035, p. 4 (La. App. 1 Cir. 11/7/03), 868 So.2d 91, 93. When the issue of an arbitration clause is raised by the exception pleading the objection of prematurity, the defendant pleading the exception has the burden of showing the existence of a valid contract to arbitrate. *Id.*

In the case of **Aguillard v. Auction Management Corp.**, 2004-2804 (La. 6/29/05), 908 So.2d 1, the Louisiana Supreme Court observed that the positive law of Louisiana favors arbitration, and any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration. **Aguillard**, 2004-2804 at 7-8, 908 So.2d at 7-8. The supreme court explained in **Aguillard** that "states may invalidate an

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[2] The well-settled jurisprudence of this court establishes that as a general matter, appellate courts will not consider issues raised for the first time, which are not pleaded in the court below and which the district court has not addressed. **Council of City of New Orleans v. Washington**, 2009-1067, p. 3 (La. 5/29/09), 9 So.3d 854, 856; **Boudreaux v. State, Dept. of Transp. and Development**, 2001-1329, p. 2 (La. 2/26/02), 815 So.2d 7, 9. See also, Uniform Rules--Courts of Appeal, Rule 1-3 ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.") Given that the Hidalgos never raised the issue of staying the proceedings at the trial court level, that argument has been waived. Thus, we need not address the Hidalgos third assignment of error.

arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" **Aguillard**, 2004-2804 at 9, 908 So.2d at 8 (quoting **Allied-Bruce Terminix Companies, Inc. v. Dobson**, 513 U.S. 265, 281, 115 S.Ct. 834, 843, 130 L.Ed.2d 753 (1995)). The supreme court further held that a presumption of arbitrability exists, concluding as follows:

> [E]ven when the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.

Aguillard, 2004-2804 at 25, 908 So.2d at 18.

One of the basic reasons for the existence of arbitration agreements is to allow the parties to achieve speedy settlement of their differences out of court. This purpose would be thwarted if, before being required to perform under the arbitration agreement, parties were permitted to litigate in order to secure an initial judicial determination (preliminarily to arbitration) that procedural formalities of the agreement have been complied with. **Bartley, Inc. v. Jefferson Parish School Bd.**, 302 So.2d 280, 283 (La. 1974).

The Louisiana Arbitration Law is set forth in La. R.S. 9:4201 through 4217. Louisiana courts look to federal law in interpreting the act because it is virtually identical to the Federal Arbitration Act, 9 U.S.C. §§ 1-16. **Snyder v. Belmont Homes, Inc.**, 2004-0445, p. 4 (La. App. 1 Cir. 2/16/05), 899 So.2d 57, 60, writ denied, 2005-1075 (La. 6/17/05), 904 So.2d 699. Louisiana Revised Statutes 9:4201 sets forth the following:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract ... or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In determining whether a party is bound by an arbitration agreement, we apply ordinary contract principles. A party cannot be required to submit to arbitrate a dispute that he has not agreed to submit. **Tresch**, 2003-0035 at 4, 868 So.2d at 93. The

determination of whether to compel arbitration is a question of law. Appellate review of questions of law is simply to determine whether the trial court was legally correct or incorrect. **Lafleur v. Law Offices of Anthony G. Buzbee, P.C.**, 2006-0466, p. 6 (La. App. 1 Cir. 3/23/07), 960 So.2d 105, 109.

Pursuant to the Purchase Contract entered into by the Hidalgos and Sun Construction, the parties agreed to arbitrate any "dispute or difference" arising out of the purchase of the new home that was the subject of the contract. The Purchase Contract specifically provided, in pertinent part, as follows:

> If any dispute or difference shall arise between BUYER and SELLER with respect to any matter or thing arising out of, or in any way relating to this Contract, such difference or dispute shall, immediately after it has arisen, be referred for final and binding determination to Maps Professional Systems, Inc. a recognized arbitration expert. ... The decision of the expert shall be final and conclusive as to matters referred to him .... This agreement for settlement of disputes shall be the sole method for dispute resolution.

Moreover, Sun Construction provided a warranty on the home through Bonded Builders, which too contains an arbitration provision. The Bonded Builders' warranty sets forth the following:

> **B. WORKMANSHIP, MATERIALS and SYSTEMS WARRANTY COVERAGE**
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> 1. **Workmanship and Materials** -- Commencing on the Warranty Start Date, Your Builder warrants Your Home will be free from defects in workmanship and materials as such defects are defined in the Construction Performance Standards set forth herein. The Workmanship and Materials Warranty ends on the Warranty Expiration Date shown on the Warranty Confirmation page.
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> . . . .
>
> **G. Alternative Dispute Resolution For Workmanship, Materials and Systems Warranty**
>
> You, Your Builder and [Bonded Builders] hereby agree that any dispute, controversy, claim or matters in question regarding the Workmanship, Materials and Systems Warranty between Builder, You, Your successors in interest and/or [Bonded Builders] arising out of or relating to this Warranty including without limitation, a claim of subrogation, negligent or intentional misrepresentation or nondisclosure in the inducement, and breach of any alleged duty of good faith and fair dealing, (herein referred to collectively as a "Dispute"), shall be submitted to [Bonded Builders] Conciliation© Process where the parties will endeavor to resolve the Dispute in an amicable manner. ...

> In the event any Dispute cannot be resolved by [Bonded Builders'] Conciliation Process, the Dispute shall be submitted to a Claim Review Group consisting of the conciliator, and qualified third party representatives for You and the Builder. ...In the event any Dispute cannot be resolved by the Claim Review Group, You must submit the Dispute to binding arbitration pursuant to the terms and conditions of the Arbitration Section of this warranty.

The arbitration section of the General Warranty Provisions provides as follows:

> **C. ARBITRATION PROVISION**
>
> In the event any Dispute under any [Bonded Builders] warranty, including without limitation, a claim of subrogation, negligent or intentional misrepresentation or nondisclosure in the inducement, breach of any alleged duty of good faith and fair dealing, and/or any dispute over the scope of this Arbitration Provision, cannot be resolved by one of the Alternative Dispute Resolution processes described herein, You, the Builder and [Bonded Builders] agree to submit the Dispute to binding arbitration. You will have the right to select the arbitration company from the list of approved arbitration companies [Bonded Builders] will provide to You when arbitration is requested. The arbitration will be conducted under the arbitration company's rules in effect at the time of the arbitration.
>
> The decision of the arbitrator shall be final and binding on all parties and may be entered as a judgment in any State or Federal court of competent jurisdiction. **By accepting the warranty, You are agreeing to waive Your right to a trial by either judge or jury in a court of law.**

On appeal, the Hidalgos argue that the Purchase Contract between them and Sun Construction is irrelevant to this dispute as there has been no breach or alleged breach of same in the current controversy. The Hidalgos point to the provision that requires the parties to arbitrate only with respect to matters "arising out of, or in any way relating to this Contract." The Hidalgos allege that the Purchase Contract is between them as buyers of real estate and Sun Construction as a seller of real estate. Although the contract notes that a home will be constructed and that the home will be covered by the New Home Warranty Act (hereinafter "Act"), La. R.S. 9:3141, *et seq.*, the Hidalgos maintain that the warranty obligation does not arise from the Purchase Contract. Because there is no allegation that Sun Construction refused to sell the property or that the Hidalgos refused to buy the property, the Hidalgos assert the arbitration agreement contained in the Purchase Contract should not be extended to require arbitration between the parties for breach of separate obligations and statutory warranties.

With regard to Bonded Builders, the Hidalgos assert they did not agree to arbitrate any warranty disputes with Bonded Builders. While they admit they signed a page acknowledging receipt of the warranty documents, they maintain that their signatures did not indicate an acceptance of any of Bonded Builders' specific terms and conditions, including the requirement to arbitrate disputes. Citing the case of **Rico v. Cappaert Manufactured Housing, Inc.**, 2005-141 (La. App. 3 Cir. 6/1/05), 903 So.2d 1284, the Hidalgos argue that because Bonded Builders unilaterally imposed the arbitration agreement on them, they cannot be subject to same. We find no merit to either of the Hidalgos' arguments.

In the Purchase Contract between Sun Construction and the Hidalgos, it was clearly established that the home to be built would be covered by the Act. Pursuant to La. R.S. 9:3147, a builder may insure all or part of its warranty obligations for the benefit of the purchaser through an insurance company.[3] Sun Construction provided a warranty on the home through Bonded Builders, as evidenced by the application for Express Limited Warranty signed by the Hidalgos at the time of the closing on their new home.

In **Aguillard**, 2004-2804 at 22-23, 908 So.2d at 17, the Louisiana Supreme Court explained that a party who signs a written agreement is presumed to know its contents:

> The Civil Code recognizes the right of individuals to freely contract. "'Freedom of contract' signifies that parties to an agreement have the right and power to construct their own bargains."
>
> It is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him. *See, e.g., Tweedel v. Brasseaux,* 433 So.2d 133, 137 (La.1983) (stating: "The presumption is that parties are aware of the contents of writings to which they have affixed their signatures ... The burden of proof is upon them to establish with reasonable certainty that they have been deceived." "If a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentatively whilst this is being done."). The plaintiff in this case

[3] Futhermore, pursuant to La. R.S. 9:3149(B), "[t]he parties may provide for the arbitration of any claim in dispute."

> signed the contract "acknowledg[ing] that he ... read and [understood the] *AUCTION TERMS & CONDITIONS* and agree[d] to be bound thereby." [Citations omitted.]

Similarly, in the instant case, it is undisputed that the Hidalgos signed the Bonded Builders' warranty, acknowledging receipt of the home warranty documents. A review of the warranty documents provided to the Hidalgos reveals that the arbitration provision is set forth in clear and unambiguous language. According to the warranty language, any dispute under the warranty must first be submitted to binding arbitration. Moreover, the warranty application directed the Hidalgos to read the warranty language, as was stated just below the signature line in bold print: "**Certain items and events are not covered by this warranty. Please refer to the exclusions listed in your warranty document in the section titled "EXCLUSIONS".**" The Hidalgos were further advised that by accepting the warranty, they were agreeing to waive their right to trial by judge or jury in a court of law. The first page of the warranty documents advised the Hidalgos in bold print to read the entire warranty and further provided a method for returning the warranty for cancellation as follows:[4]

> **Be sure to read these documents to understand the benefits and limitations of Your warranty. You may return the warranty for cancellation within 30 days of Your receipt of it. If cancelled [Bonded Builders] will refund the full Warranty Enrollment Fee paid to the Builder. Cancellation of this warranty does not extend or alter the Builder's responsibilities.**

Having signed the Express Limited Warranty Application and not returning it for cancellation within the thirty-day period allowed, the Hidalgos cannot now seek to avoid their obligations by contending that they did not read or understand what they were signing. As the Louisiana Supreme Court observed over a century ago in **Ray v. McLain**, 106 La. 780, 790, 31 So. 315, 319 (La. 1901):

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[4] The **Rico** case cited by the Hidalgos in their brief to this court is factually distinguishable from the instant case. In **Rico**, the purchasers of an allegedly defective mobile home sued the manufacturer and the retailer of the mobile home. The manufacturer filed an exception raising the objection of prematurity, arguing that the Ricos were bound by an arbitration agreement contained in the homeowner's manual that was delivered to the house. The court found that the arbitration provision was unenforceable because it was never signed by the Ricos and it did not contain an "accept-or-return" offer. **Rico**, 2005-141 at 4-9, 903 So.2d at 1288-1291. In the case before us, not only did the Hidalgos sign the application acknowledging receipt of the warranty documents, but they were given the option to cancel the warranty by returning it to Bonded Builders within thirty days of receipt of same.

> We have only to say that the law does not compel people to read, or to inform themselves of the contents of, instruments which they may choose to sign; but that, save in certain exceptional cases, it holds them to the consequences in the same manner and to the same extent as though they had exercised those rights.

As the parties pleading the exceptions, Sun Construction and Bonded Builders bore the burden of proving a valid arbitration agreement. Based on our review of the record before us, we find they satisfied that burden. The Hidalgos were bound by a valid arbitration agreement. Thus, the trial court did not err in sustaining the prematurity exceptions filed by Sun Construction and Bonded Builders.[5]

CONCLUSION

For the above and foregoing reasons, we amend the trial court's judgment to provide as follows: "Plaintiffs' action as to Sun Construction and Bonded Builders Warranty Group is DISMISSED WITHOUT PREJUDICE with each party to bear their own costs." In all other respects, the judgment is affirmed. All costs associated with this appeal are assessed against Tonya B. Hidalgo and Sidney Hidalgo.

AFFIRMED AS AMENDED.

[5] In reviewing the trial court's judgment, we note that the only matters before the court at the December 17, 2009 hearing were the prematurity exceptions filed by Sun Construction and Bonded Builders. The language of the trial court's judgment is definitive in that it specifically grants the exceptions filed by Sun Construction and Bonded Builders. However, the judgment lacks sufficient decretal language as to the dismissal as it merely states "Plaintiffs' action is DISMISSED WITHOUT PREJUDICE." Because the Hidalgos named three fictitious defendants in their petition and there is no indication that the suit against these three defendants has been settled or dismissed, we find it necessary to amend the judgment to provide that only the Hidalgos' action as to Sun Construction and Bonded Builders is dismissed without prejudice.