[Cite as *Cuyahoga Metro. Hous. Auth. v. Roth Bros., Inc.*, 2005-Ohio-6491.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86106

CUYAHOGA METROPOLITAN HOUSING AUTHORITY,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY and
vs.	:	OPINION
ROTH BROS., INC.,	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	DECEMBER 8, 2005
CHARACTER OF PROCEEDING:	:	Civil appeal from Common Pleas Court Case No. 540339
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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MICHAEL J. CORRIGAN, J.:

{¶ 1} Appellant, Roth Bros., Inc. ("Roth"), appeals the trial court's denial of its motion to stay the action filed by appellee, Cuyahoga Metropolitan Housing Authority ("CMHA"), and compel to binding arbitration.

{¶ 2} CMHA contracted with Roth to replace a roof at one of CMHA's high rise apartment buildings (the "project"). Roth used materials manufactured by Performance Roof Systems, Inc. ("manufacturer") to complete the project. After the project was completed, Roth gave CMHA the manufacturer's standard 20-year warranty ("warranty"), which covered "the repair or replacement of any portion of the [roof] damaged by leaks, which are a result of the improper installation of the [roof], membrane performance or ordinary wear and tear by the elements." The warranty also included an arbitration provision, which provided in pertinent part as follows:

{¶ 3} "In the event [the manufacturer], [Roth] and [CMHA] cannot agree as to the responsibilities under this Guaranty, since such issue is primarily a technical issue based upon reasonable application of custom and usage, rather than legal theory, the

parties agree to submit any such disagreement to arbitration as an exclusive remedy for resolution of such disagreement. The parties specifically waive any litigation alternative for resolution of such dispute."

{¶ 4} Shortly after Roth replaced the roof, a portion of it blew off resulting in damage to the building and a need for a new roof replacement. CMHA filed the instant action against Roth alleging that Roth failed to perform in accordance with the contract, Roth was negligent in replacing the roof, Roth breached an express warranty to repair any deficiencies in its work, and Roth breached an implied warranty to perform the project in a workmanlike manner. Roth answered the complaint, denying each of the allegations. Approximately three months after the complaint was filed, Roth moved the trial court for a stay of the action and to compel binding arbitration based on the arbitration provision in the warranty. The trial court denied Roth's motion to stay the action and to compel to binding arbitration. Roth now appeals.

{¶ 5} Roth's sole assignment of error argues that the trial court erred in denying its motion to stay the action and to compel to binding arbitration. In support, it argues that the Federal Arbitration Act and the Ohio Arbitration Act mandate arbitration of CMHA's claims, the warranty's arbitration clause is enforceable against CMHA, and that CMHA agreed to submit all claims relating to the warranty to binding arbitration. However, Roth's arguments lack merit.

{¶ 6} First, this court reviews the trial court's denial of a motion to stay proceedings pending arbitration under an abuse of discretion standard. *Harsco Corp. v. Crane Carrier Co.* (1977), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040; see, also, *Walker v. Ganley Lincoln Mercury, Inc.*, Cuyahoga App. No. 85941, 2005-Ohio-3732, ¶8; *Cohen v. PaineWebber, Inc.*, Hamilton App. No. C-010312, 2002-Ohio-196, ¶9; *McKee v. Merrill, Lynch, Pierce, Fenner, etc.*, Cuyahoga App. No. 83936, 2004-Ohio-3874, ¶5. Although the trial court here did not provide any explanation for denying Roth's motion to stay the action and to compel to binding arbitration, this court must only substitute its judgment if the trial court's judgment is unreasonable, arbitrary or unconscionable.

{¶ 7} While both the Federal Arbitration Act and the Ohio Arbitration Act strongly favor arbitration, it is axiomatic that arbitration is a matter of contract and only those who are parties to the contract are bound by the arbitration clause. *Glenmoore Builders v. Kennedy*, Portage App. No. 2001-P-0007, 2001-Ohio-8777. Here, the contract between CMHA and Roth did not contain an arbitration clause. Roth maintains that the warranty provided by the manufacturer, which Roth subsequently gave to CMHA, contains an arbitration clause and is incorporated into the contract by virtue of the term "technical specifications" listed in the contract.

{¶ 8} However, nowhere in the contract is the warranty provided by the manufacturer mentioned or otherwise incorporated. Indeed, by the express terms of the contract between CMHA and Roth:

{¶ 9} "This contract and all documents and clauses in this Contract shall constitute the entire agreement between the parties."

{¶ 10} There is also no mention in the contract of the manufacturer, the manufacturer's roofing materials, or that Roth was skilled in installing the manufacturer's materials. Roth is attempting to bind CMHA to arbitration through the warranty that was neither expressly nor impliedly incorporated in the contract.

{¶ 11} By the express terms of the manufacturer's warranty:

{¶ 12} "FOR A PERIOD OF 20 years from the above completion date, [manufacturer] GUARANTIES TO [CMHA] that [it] will undertake all actions necessary to keep the [roof] described above which has been applied through the work of [Roth], in a watertight condition and will repair deficiencies in the [roof's] condition which could endanger the [roof's] ability to remain watertight during its guaranteed life."

{¶ 13} Although the warranty provides CMHA as the building owner and lists Roth as its performance-approved contractor, the warranty is not a tripartite relationship - indeed the guaranty is from the manufacturer directly to CMHA. Once the roof blew off, CMHA was entitled, pursuant to the warranty, to make demands to the manufacturer to replace the roof. CMHA was also entitled, pursuant to the contract, to make demands to Roth to replace the roof. At that point, it is entirely conceivable that the manufacturer would place blame on Roth's installation of the roof and Roth would, in

turn, place blame on the manufacturer's roofing materials. Had the parties not agreed "as to the responsibilities" under the warranty, the arbitration clause in the warranty would have been triggered and Roth would have stood a better chance to seek a stay pending arbitration.

{¶ 14} That did not occur here. The arbitration clause in the warranty was never triggered as the manufacturer, Roth, and CMHA failed to disagree "as to the responsibilities" under the warranty. CMHA's lawsuit stems from the contract it had with Roth, not the warranty it received from the manufacturer. The arbitration provision in the warranty does not require or bind CMHA to arbitration where the warranty was not incorporated in the contract between CMHA and Roth. Thus, the trial court did not act unreasonably, arbitrarily, or unconscionably when it denied Roth's motion to stay.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
JUDGE

JOYCE J. GEORGE, J.*, CONCURS.

COLLEEN CONWAY COONEY, P.J., CONCURS IN JUDGMENT ONLY.

(*SITTING BY ASSIGNMENT: Judge Joyce J. George, Retired, of the Ninth District Court of Appeals.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).