NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3321-12T1

THOMAS McCLOY and SUSAN McCLOY,

Plaintiffs-Respondents,

v.

QUALITY BUILDERS WARRANTY CORPORATION,

Defendant-Appellant.

Submitted February 25, 2014 – Decided March 13, 2014

Before Judges Fisher, Koblitz and O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4301-12.

Ridgeway & Ridgeway, attorneys for appellant (Brian D. Heun and John A. Gill, on the brief).

Fleischer, Fleischer & Suglia, attorneys for respondents (Allison L. Domowitch, on the brief).

PER CURIAM

Defendant Quality Builders Warranty Corporation appeals the denial of its motion to dismiss plaintiffs' complaint, which seeks a declaratory judgment that plaintiffs are entitled to coverage for alleged defects in their home pursuant to a

warranty agreement. Defendant's argument that plaintiff was required to arbitrate this dispute was rejected by the trial judge. And, although the claims asserted in the complaint have yet to be adjudicated, Rule 2:2-3(a) requires that the order denying defendant's motion to dismiss be treated as a final judgment. Having reviewed the matter, we find no merit in defendant's arguments and affirm.

The record reveals that plaintiffs purchased a newly-constructed home in Egg Harbor Township from another entity on March 2, 2004. Prior to the purchase, plaintiffs enrolled in a home warranty agreement with defendant, an approved alternative new home warranty security plan in compliance with N.J.A.C. 5:25-4.1,[1] to become effective on the purchase date. Pursuant to this agreement, defendant provided plaintiffs with coverage against certain defects in the home throughout the first ten years of ownership, including a warranty against "major structural defects" during years three through ten of the agreement. The warranty agreement defined "major structural defect" as including:

> Only actual physical damage to the load-bearing portion of the home or damage to the home itself, damage due to subsidence,

[1]N.J.A.C. 5:25-4.1 allows establishment of private plans for insurance coverage, the payment of claims, and dispute settlement.

> expansion or lateral movement of the soil (excluding movement caused by flood or earthquake) which affects its load-bearing function and which vitally affects or is imminently likely to vitally affect use of the home for residential purposes.

The warranty agreement also delineated procedures for filing a claim. During years three through ten, the agreement required that claims of alleged major structural defects were to be brought to defendant's attention in writing via "certified mail, return receipt requested, within a reasonable time after [the defect arose] but in no event later than thirty days after the expiration of the term of" the agreement. Upon the notification of such a claim, defendant was obligated to make an investigation.

Significant to the issues raised in this appeal is the fact that the warranty agreement required submission of a claim in the first two years of coverage to "arbitration . . . for resolution in accordance with the rules and regulations of the [American Arbitration Association] or such other service." The agreement did not, however, impose the same or similar obligation upon the assertion of a claim after those first two years. But the warranty agreement also specified under the subheading "Remedy Exclusive" -- directly under the procedures set forth for years three through ten -- that pursuant to the

New Home Warranty and Builder's Registration Act, N.J.S.A. 46:3B-1 to 20:

> the filing of a claim against the warranty specified by this subchapter shall constitute the election of a remedy and shall bar the owner from all other remedies. Nothing herein shall be deemed to limit the owner's right to elect other remedies except that such election shall bar the owner from pursuing the same claim under the limited warranty specified in this agreement and in accordance with procedures related hereto. For the purpose of this section, election of other remedies shall mean the filing of a complaint, counter-claim, cross-claim or third party complaint in any court that alleges matters covered by the limited warranty in particular or unworkmanlike construction in general.

This is the same election of remedy language set forth in N.J.A.C. 5:25-3.10 for warranties issued through the State plan.

In 2011, during the eighth year of the agreement's coverage, plaintiffs discovered what they allege to be major structural defects, including a large crack from near a beam at the top of the basement ceiling down to the basement floor resulting in water and soil leakage through the wall, and "several substantial cracks" on the front porch causing portions of the steps to break away from the porch. On January 24, 2012, plaintiffs gave defendant written notice of these problems. Their letter was accompanied by a written inspection report that detailed what they claimed were major structural defects.

On January 27, 2012, defendant requested additional information, including photographs and a completed "Major Structural Defect Form," necessary to determine whether these problems were in fact major structural defects. Plaintiffs complied with this request by submitting additional materials on February 9, 2012, and April 12, 2012. Without a site visit, defendant wrote to plaintiffs on April 16, 2012, to advise the complained-of conditions, in defendant's view, constituted "minor settlement cracking [that] would not be considered major structural defects" for purposes of the warranty agreement. Plaintiffs thereafter commenced this suit.

Defendant reprises here the same argument rejected by the trial judge — that plaintiffs were barred from filing suit and required to arbitrate once they filed with defendant a claim of a structural defect. Stressing that the agreement's arbitration clause appeared only in the procedure governing claims arising in the first two years of coverage, and not in the claims procedure governing the remainder of the agreement's duration, the trial judge held that plaintiffs' claim did not constitute an election of remedies. We agree and affirm substantially for the reasons set forth by Judge James E. Isman in his thorough and well-reasoned written opinion. We add only the following brief comments.

The Regulations Governing New Home Warranties and Builders' Registration, N.J.A.C. 5:25-1.1 to -5.5, govern public home insurance coverage plans. These regulations also permit the establishment of private plans for insurance coverage, such as that in which the parties engaged. N.J.A.C. 5:25-4.1. When such a private agreement differs from the language used in the Regulations, "the policy language, under a private plan, controls." Yaroshefsky v. ADM Builders, Inc., 349 N.J. Super. 40, 53 (App. Div 2002); see also Oak Trail Road Homeowners Ass'n v. Royal Mile Corp., 246 N.J. Super. 590, 596 (App. Div. 1991). Our courts have, therefore, declined to "rescue [a] warranty program from its misleading language by incorporating inferentially the provisions of . . . N.J.A.C. 5:25-3.10 into its warranty policy" because such a contract is "designed to protect new homeowners." Postizzi v. Leisure & Technology, 235 N.J. Super. 285, 290 (App. Div. 1989). Moreover, a clause in such an agreement that provides for arbitration "'as the exclusive remedy' and deprives a homeowner of 'access to the courts' must clearly and unequivocally do so." Yaroshefsky, supra, 349 N.J. Super. at 53 (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)); see also Spolitback v. Cyr Corp., 295 N.J. Super. 264, 270 (App. Div. 1996).

Plaintiffs' claim arose and was asserted in the eighth year of coverage. Unlike the agreement's procedures for claims asserted in the first two years, the agreement does not specify that disputes arising in the last eight years must be submitted to arbitration. Therefore, the agreement plainly failed to "clearly and unequivocally" deem arbitration the exclusive remedy, and the trial judge appropriately determined that plaintiffs were permitted to seek a remedy in our courts.

The order denying dismissal of the complaint is affirmed, and the matter is remanded for the disposition of the suit on its merits. We do not retain jurisdiction.