IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RICHARD DISHER, ERIC KLINE and JOHN O'MALLEY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. TAMKO BUILDING PRODUCTS, INC. and TAMKO ROOFING PRODUCTS, INC., Defendants.	Case No. 14-cv-740-SMY-SCW

MEMORANDUM AND ORDER

Before the Court is Defendant Tamko Building Products, Inc.'s ("TAMKO") "Motion to Compel Arbitration of the Claims of Eric Kline in the Event They Are Not Dismissed" (Doc. 67). Plaintiffs responded (Doc. 76). For the following reasons, the motion is **GRANTED.**

Background

Plaintiff Eric Kline's home in Denver, Colorado was built in 2005 using TAMKO shingles which came with a limited warranty that contains an arbitration provision. Kline bought the house in 2011 and claims that he discovered the shingles were faulty in 2013. When his wife contacted TAMKO's warranty department, she was told that as secondary owners of the home, they were not covered by the warranty.

The instant putative class action, alleging multiple causes of action, was filed by four named plaintiffs, including Kline, on June 27, 2014. TAMKO filed 12(b)6) motions to dismiss the claims of each plaintiff on August 13, 2014. A key aspect of TAMKO's argument regarding Kline's claims was that the benefits of the warranty did not transfer to Kline (Doc. 41). Alternatively, TAMKO asserted that if the warranty were found to have transferred to Kline, it

includes an arbitration clause that precludes judicial resolution of Kline's claims (Doc. 42 at 7 n. 6).

While the Court's rulings on the motions to dismiss were still pending, TAMKO filed the instant motion to compel Kline to arbitrate (Doc. 67). The Court subsequently entered an Order on the motions to dismiss, finding in part, that the warranty transferred to Kline (Doc. 100).

Discussion

TAMKO asserts that the warranty contains an arbitration provision which covers Kline's claims, and that he is estopped from avoiding arbitration by his attempts to enforce the warranty. Kline advances several arguments in response: that TAMKO waived the arbitration provision as a result of its participation in the case before moving to compel arbitration; that he never agreed to arbitration; and that he is not estopped from resisting arbitration because TAMKO has denied him the benefit of the warranty and because he "expressly disclaims any breach-of-contract, breach-of-warranty and failure-of-essential purpose claims against Defendant…" (Doc. 76 at 9).

Arbitration is a matter of contract and the language of the arbitration clause determines the scope of what the parties intended to arbitrate. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). All doubts or ambiguities concerning the scope of the parties' agreement should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Thus, a claim belongs in arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Welborn Clinic v. MedQuist, Inc.,* 301 F.3d 634, 639 (7th Cir.2002).

State contract law governs whether the parties entered into a valid and enforceable agreement to arbitrate. *Sanchez v. CleanNet USA, Inc.*, 78 F.Supp.3d 747, 753 (N.D. Ill. 2015).

"The party seeking to invalidate or oppose the arbitration agreement bears the burden of demonstrating that the arbitration agreement is unenforceable and that the claims are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000).

Kline first contends that by litigating the case for five months before moving to compel arbitration, TAMKO has waived any right it might have had to do so. Specifically, Kline argues that TAMKO's filing of its motion to dismiss and participation in discovery evince its election to proceed with litigation. However, TAMKO maintains that it was bound to participate in discovery by the Court's Scheduling Order and that the "motion to compel arbitration is necessarily an alternative to the motion to dismiss." (Doc. 78 at 3).

As to this issue, the question is whether "considering the totality of the circumstances, a party acted inconsistently with the right to arbitrate." *Cooper v. Asset Acceptance, LLC*, 532 Fed. App'x 639, 641 (7th Cir. 2013)(citing *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011). In making this determination, the Court must consider the diligence of the party attempting to invoke arbitration, whether that party participated in the litigation, whether its request for arbitration was substantially delayed, whether it participated in discovery and the degree of prejudice the resisting party might suffer if the motion were granted. *Id.*

In light of the totality of circumstances, TAMKO did not waive its right to invoke arbitration by its conduct in this case. It filed a motion to dismiss, but that alone does not trigger the presumption of waiver or constitute an action inconsistent with the right to arbitrate. *Kawasaki* at 995-996 (citations omitted). Moreover, in its motion to dismiss, TAMKO expressly asserted that if the warranty were held to apply to Kline, it was subject to an arbitration provision. TAMKO also moved for arbitration while the motion to dismiss was still pending.

Although there was a four-month gap between the filing of the two motions, under the circumstances, the Court does not find this timing or TAMKO's participation in court ordered discovery tantamount to an intent to ultimately resolve the claim judicially.[1]

The question that remains is whether the asserted claims are within the scope of an arbitration provision to which the parties are bound. *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004). TAMKO identifies the following warranty language in support of its motion:

> **MANDATORY BINDING ARBITRATION:** EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION . . . BETWEEN YOU AND TAMKO . . . RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY.
>
> (Doc. 67 at 11).

This language is sufficiently broad to cover Kline's claims. But is Kline bound by the provision? Kline did not directly purchase the shingles from TAMKO and he never expressly assented to the terms of the warranty. Nevertheless, under Colorado law, a party who did not actually sign an agreement to arbitrate can be "estopped from avoiding the arbitration provisions of the same agreements whose benefits they seek to enforce." *Smith v. Multi-Fin. Sec. Corp.*, 171 P.3d 1267, 1274 (Colo. App. 2007). Among the claims asserted by Kline is a breach of express warranty claim, which survived TAMKO's motion to dismiss. Thus, by bringing this

[1] Plaintiff, in passing seems to suggest that TAMKO prejudiced it by using "litigation to obtain discovery it could not obtain in arbitration." (Doc. 76 at 6). Though the Federal Rules of Civil Procedure are typically more generous regarding discovery than arbitration rules, the parties have been under substantially the same discovery obligations for the pendency of the case; this situation does not demonstrate prejudice. *See Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (finding no prejudice where party agreed to match in arbitration disclosures made during judicial proceeding).

action, Kline clearly sought to enforce an agreement that contains an arbitration provision. He is therefore estopped from avoiding arbitration. It matters not that TAMKO argued in the alternative that the warranty did not apply to Kline. The Court has rejected that argument.

Finally, in his response, Kline asserts that he now "expressly disclaims any breach-of-contract, breach-of-warranty and failure-of-essential purpose claims against Defendant." (Doc. 76 at 9). He argues that this assertion obviates any claim that he is attempting to enforce the warranty and thereby prevents a finding of estoppel. However, Kline does not cite to any authority that supports his attempt to disclaim an asserted cause of action via a sentence in a motion response, as opposed to, for instance, an amended complaint or motion to voluntarily dismiss the claim. Therefore, Kline's "disclaimer" is of no effect. Accordingly, Defendant's motion is **GRANTED**, and the proceedings in this matter are **STAYED** as to Plaintiff Eric Kline, pending the conclusion of arbitration.

IT IS SO ORDERED.

DATED: August 11, 2017

s/ Staci M. Yandle
STACI M. YANDLE
United States District Judge