

No. 1-12-0730

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SEDDIE BASTANIPOUR and JOEL BELLOWS,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiffs-Appellees,)	
)	
v.)	No. 08 L 9801
)	
BENJAMIN WARNER and CALDERA)	
PHARMACEUTICALS, INC,)	
)	
Defendants-Appellants)	The Honorable
)	Sanjay Tailor,
(Sigmund Eisenchenk, Defendant).)	Judge Presiding

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying the appellants' motion to compel arbitration.

¶ 2 The appellants, Benjamin Warner and Caldera Pharmaceuticals, Inc. (Caldera), appeal from the circuit court's order denying their motion to compel arbitration on the first amended complaint filed by the plaintiffs, Seddie Bastanipour and Joel Bellows. An additional defendant, Sigmund Eisenchenk, is not a party to this appeal. The appellants argue that the circuit court erred in finding

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both that they waived their rights to demand arbitration and that the disputed issues were not covered by the parties' arbitration agreement. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 In September 2008, the plaintiffs filed their initial complaint against the defendants, for common law fraud and violations of the Illinois Securities Law of 1953 (815 ILCS 5/1 *et seq.* (West 2008)) and the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2008)). In their complaint, the plaintiffs alleged that, in October 2005, Warner and Eisenchenk met with Bellows to solicit his investment in Caldera. At that meeting, the complaint averred, the defendants told Bellows that Caldera had exclusive and properly protected intellectual property rights to certain technology it had licensed from a university. This intellectual property protection included registration of a patent in "the U.S., Europe and Japan," a consideration the complaint characterized as "key" to the venture's success. The complaint further alleged that Warner claimed to be "intimately familiar with the patent application process" and claimed that patent was "unassailable." For his part, Eisenchenk represented that "he personally had done due diligence" and confirmed Warner's assurances regarding the strength of their patent. According to the complaint, the defendants later repeated these statements to Bastanipour, and both plaintiffs invested in Caldera. Later, the complaint asserted, the plaintiffs learned that the patent had not been registered outside the United States, and Eisenchenk had "done no due diligence" on the matter. The plaintiffs alleged that, but for the material misrepresentations made to them regarding international patent protection, they would not have invested in Caldera.

¶ 4 In January 2009, the defendants filed their answer to the complaint. In general, the answer

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denied the crucial factual allegations of the complaint. The answer raised no affirmative defenses and did not mention any arbitration agreement. For approximately two years thereafter, the cause proceeded through the discovery process, with the circuit court ruling from time to time on the parties' discovery disputes. Throughout this process, the defendants raised no issues regarding arbitration.

¶ 5 In June 2011, the plaintiffs sought leave to file a first amended complaint. The amended complaint stated that the defendants' meeting with Bellows took place in September 2005, and it added details regarding the nature and number of patents or pending patents the defendants claimed protected Caldera's exclusive right to use certain technology. The amended complaint repeated the allegations that the defendants overstated or misrepresented the extent of their patent protection and thereby induced the plaintiffs' investments in Caldera. The complaint added details that, six weeks before the September meeting, a Singapore patent application relating to the technology had been abandoned by the university that had licensed the patent to Caldera. The amended complaint also added that two additional United States patent applications the defendants cited had in fact been filed without the university's consent. The plaintiffs alleged that, under the terms of Caldera's agreement with the university, the defendants' actions may have caused Caldera to forfeit any rights it had to the technology. As in their initial complaint, the plaintiffs asserted that these material misrepresentations induced their investment in Caldera, and the plaintiffs again sought recovery for common law fraud and for violations of the Illinois Securities Law of 1953 and the Illinois Consumer Fraud and Deceptive Business Practices Act. In October 2011, the circuit court granted the plaintiffs leave to file their amended complaint. On October 26, 2011, the appellants filed their

answer to the plaintiffs' first amended complaint. The answer denied the key allegations of the complaint but included no affirmative defenses or references to any arbitration agreement.

¶ 6 The next day, the appellants filed a motion to compel arbitration. The motion cited a private placement memorandum that included a shareholders agreement executed by the parties. That shareholders agreement includes the following clause:

"In the event any dispute or controversy between the Company and any shareholder arising out of this Agreement, the Private Placement Memorandum of which it is a part, and the activities of any employee or agent of the Company cannot be resolved amicably by the parties, such controversy or dispute shall only be submitted to arbitration."

In response, the plaintiffs argued that the appellants had waived their right to arbitration by participating in the litigation without objection, that they had not executed any agreements containing an arbitration clause, and that their claims fell outside the scope of the arbitration agreement. In February 2012, the circuit court denied the appellants' motion to compel arbitration. No transcript of the hearing on that motion appears in the record on appeal.¹ The appellants thereafter filed a timely notice of interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (eff. July 6, 2000). See *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 9 ("An order denying a motion to compel arbitration is injunctive and is appealable pursuant to Illinois Supreme Court Rule

¹The parties agree that a hearing transcript contained in the appendix to the appellants' brief is an accurate memorialization of the circuit court's reasoning. However, that transcript is nonetheless not part of the record on appeal, and we do not consider it. See *Macknin v. Macknin*, 404 Ill. App. 3d 520, 527, 937 N.E.2d 270 (2010).

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307(a)(1)"). On appeal, Bellows filed an appellee's brief, but Bastanipour did not.

¶ 7 We begin by defining the issues on appeal, and their standards of review. The standard of review to be applied to an interlocutory appeal of a denial of a motion to compel arbitration is, like all other appeals, "ultimately dictated by the nature of the issue" presented on appeal. *Brown*, 2012 IL App (2d) 111086, ¶ 10. Thus, where the issue presented on appeal is one of law, our review is *de novo*. *Brown*, 2012 IL App (2d) 111086, ¶ 11. Here, the parties present three issues, all coinciding with the issues the plaintiffs presented in opposition to the appellants' motion to compel arbitration. We, however, reach only one of those issues: the question of whether the plaintiffs' allegations fall within the scope of the arbitration agreement. This issue presents a question of law to be reviewed *de novo*. *Brown*, 2012 IL App (2d) 111086, ¶ 11.

¶ 8 We note at the outset that the parties dispute whether the circuit court actually relied on this scope argument as a basis for denying the appellants' motion to compel. The appellants insist in some portions of their briefs that the court relied solely on waiver and the idea that no valid arbitration agreement was executed, but Bellows counters that the circuit court did, in fact, rely on the scope argument. Nonetheless, as Bellows notes in his brief, under the *de novo* standard of review we may affirm the circuit court's judgment on any basis supported by the record, regardless of the circuit court's reasoning. See *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037, 842 N.E.2d 140 (2005) (stating that, under *de novo* review of a ruling on a motion to dismiss, a court may affirm for any basis appearing in the record). Further, the plaintiffs raised this issue both at the trial court level, and Bellows raises it in his brief on appeal. Our considering the issue, therefore, does not subject the appellants to unfair surprise.

¶ 9 Our considering the issue does, however, defeat the appellants' appeal. Although, as noted, this scope issue has been pressed both to the circuit court and on appeal, the appellants offer no rebuttal to the argument in their briefs on appeal. Instead, in their opening brief, they concede that the plaintiffs made a scope argument below but state that "[t]he trial court did not address this issue, and did not base its decision to deny the motion on interpreting the somewhat ambiguous language of the arbitration clause." "Given that there is no other basis for the court's determination," the appellants continue, "the judgment denying the motion must be reversed." As we have noted, we are not bound by the reasoning employed by the circuit court. Indeed, even the appellants agree that we should consider this appeal *de novo*.

¶ 10 Bellows very clearly reprises the plaintiffs' scope argument in his brief on appeal, which argues that his claims "do not arise out of [the private placement memorandum]," "nor do they arise out of the Shareholders Agreement," because he "purchased his shares before [those documents] were even created." Bellows also notes in his brief that the appellants offer no argument that the issue of the scope of the arbitration agreement was, itself, subject to arbitration. In reply, the appellants acknowledge that Bellows challenged "whether the arbitration provision *** is applicable to the contested matters," but their argument is directed entirely to refuting the proposition that the circuit court could declare the contract itself valid or invalid. Thus, although Bellows has presented the scope issue squarely, the appellants do not address it. They have, as a result, failed to carry their burden of persuasion on appeal. See *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 364, 947 N.E.2d 366 (2011) (noting the appellant's burden to present authority, and stating that at an appellant's failure to cite to relevant authority "would be enough to resolve the issue"

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against him).

¶ 11 Further, without any argument from the appellants on the scope issue, we ourselves find no reason to dispute Bellows's position. As he observes, an arbitration agreement is a matter of contract, and parties to that contract are bound to arbitrate "only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language." *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13, 761 N.E.2d 724 (2001). Here, the clear language of the parties' arbitration agreement compels arbitration for any disputes arising out of their shareholder agreement or private placement memorandum. The plaintiffs' claims are based not on those documents, but on the alleged misrepresentations that induced them to execute those documents. For that reason, and absent any argument to the contrary from the appellants, we agree with Bellows that the plaintiffs' claims fall outside the scope of the arbitration agreement. Accordingly, we agree with the circuit court's decision to deny the appellants' motion to compel arbitration of those claims.

¶ 12 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 13 Affirmed.