FOURTH DIVISION
September 6, 2012

No. 1-11-3736

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

VINCENT G. DUFFY and THOMAS TINERELLA,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	No. 11 L 05891
	)	
CENTRUST BANK, N.A.,	)	Honorable
	)	Bill Taylor,
Defendant-Appellee.	)	Judge Presiding.
	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting bank's motion for dismissal of plaintiff's fraud claim relating to the assignment of a bank account where claim could not be proven without reference to the parties' alleged oral agreement, in violation of the Illinois Credit Agreements Act.

¶ 2 Plaintiffs Vincent G. Duffy and Thomas Tinerella filed a complaint against defendant CenTrust Bank, N.A. alleging that as a result of defendant's "misrepresentations" and "fraudulent conduct," plaintiffs were "wrongfully deprived of the efficient use" of $200,000 plaintiffs had

deposited in a deposit account with defendant to secure certain commercial indebtedness. Defendant filed a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(7) and (9) (West 2010), arguing that the writing and signature requirements imposed by the Illinois Credit Agreements Act, 815 ILCS 160/1 *et seq.* (the ICAA) barred plaintiffs' fraud claim. The trial court granted the motion to dismiss, and plaintiffs timely filed this appeal. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 According to the complaint, defendant "executed an aggressive business plan to make a large number of Construction [sic] loans secured by the ever increasing value of real estate in a booming market." Defendant hired and promoted "aggressive loan marketers" like Ruben Ybarra, a Vice President of defendant, to put together "unorthodox" loan deals to increase defendant's profits.

¶ 5 Defendant pursued 5962 East End LLC (borrower) and its principals, Teresa Giannini and Michael Fazio, to make a $2.6 million construction loan to borrower secured by a mortgage on a condominium building. "[F]or reasons known only to [defendant]," borrower's mortgage lien and the personal guarantees of Giannini and Fazio were insufficient collateral for the proposed loan.

¶ 6 Ybarra, with the knowledge of defendant, solicited plaintiffs to partially guarantee borrower's loan through a "joint venture" with defendant. Duffy, Tinerella and defendant agreed that each would place $100,000 in a savings account at Defendant with 4.25% interest, "with this sum to be held in escrow to partially guaranty Borrower's faithful performance under the subject $2,600,000.00 Promissory Note; with each contributor taking 1/3 responsibility for any default by Borrower, with each share of liability not to exceed the amount contributed plus accrued

interest on that contributed share." To further induce plaintiffs to participate in the "joint venture," defendant required borrower to hire plaintiffs' limited liability company as the general contractor for the rehabilitation of the condominium building as a condition of the loan.

¶ 7 On April 27, 2007, plaintiffs and Ybarra met to execute an Assignment of Deposit Account (the assignment). The assignment was signed by Duffy and Tinerella, by "Borrower" through Giannini and Fazio, each as a "Member of 5962 East End LLC," and by defendant through Ybarra, as its Vice President.

¶ 8 The assignment describes the "Collateral" as "the following described deposit account (the Account): Savings Account Number 40000046 with Lender with an approximate balance of $310,000.00" together with, among other things, all interest, additional deposits and proceeds. Plaintiffs assert that, in "reliance upon said representation and warranty," plaintiffs tendered their respective $100,000 contributions to defendant for deposit "along with [defendant's] $100,000 contribution."

¶ 9 The assignment also includes, among other things, the following provisions: (a) information regarding the underlying loan, including the principal amount, the loan date (which is the same as the date of the assignment), the maturity date and the loan number; (b) the plaintiffs' warranty that "this Agreement is executed at Borrower's request and not at the request of Lender"; (c) the plaintiffs' representation and promise that they are "the lawful owner of the Collateral free and clear of all loans, liens, encumbrances, and claims except as disclosed and accepted by Lender in writing"; (d) the plaintiffs' representation and promise that they have "the full right, power, and authority to enter into this Agreement and to assign the Collateral to

Lender"; and (e) a statement that "[t]his Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment."

¶ 10 In December, 2009, defendant withdrew $5,584.91 from the account to cover a mortgage payment of equal amount, missed by borrower. Upon discovery of the withdrawal, plaintiffs noticed that the stated balance in the account was $210,881.74, "when it should have exceeded $310,000." When plaintiffs inquired about the seeming error in the Account balance, defendant stated that its $100,000 contribution–originally adjusted to $110,000 at defendant's "unexplained insistence"– was never actually deposited into the account.

¶ 11 In late spring 2010, plaintiffs went to defendant to close the account and demand defendant restore the $5,584.91 withdrawal and disburse the entire account balance to plaintiffs. Plaintiffs claim that, in response, defendant requested time to restructure the underlying loan but, after lengthy negotiations, defendant stated that any loss defendant sustained due to restructuring would be deducted from the account.

¶ 12 Plaintiffs filed a complaint alleging fraud, requesting the court to order a judgment in their favor in excess of $219,000 and to direct defendant to disburse all monies in the Account to plaintiffs. According to plaintiffs, defendant "knew or should have known" that plaintiffs would not have contributed the $200,000 to the joint venture if they had known that defendant would "fail or refuse to contribute its share of money and assume its share of risk." Plaintiffs claimed

that they "reasonably relied" on defendant's "false representation that the risk pool had been fully funded, because the money was held in a bank account exclusively managed and controlled by [defendant], wherein [defendant] was required by exhaustive federal and state banking regulations to act in good faith in all such banking transactions." As a "direct and proximate result" of defendant's "misrepresentations and deceptive conduct," plaintiffs claim that the "joint venture agreement" between the parties was void *ab initio*, leaving defendant with "no valid possessory claim or title interest whatsoever" in the account monies.

¶ 13 Defendant filed a motion to dismiss, arguing that any fraud claim alleged by plaintiffs would be barred by the ICAA because such claim is premised on plaintiff's attempt to modify or amend the terms of a credit agreement and upon alleged oral misrepresentations made by a representative of defendant.

¶ 14 In their response to the motion to dismiss, plaintiffs contended that the language in the assignment–describing the collateral as "Savings Account Number 40000046 with Lender with an approximate balance of $310,000.00"–is the "writing" upon which plaintiffs rely to establish the alleged fraud. Plaintiffs alleged that their pre-closing negotiations with Defendant regarding their "joint venture agreement" were reduced to a "succinct writing at closing that describes a *fait accompli*" and that defendant deliberately misrepresented that it "*did* deposit $100,000" into the Account to "instantly induce Plaintiffs to deposit their money with the Bank, sign the *Assignment* and lock-in the Plaintiffs' $200,000.00 contribution at closing." (Emphasis in original.)

¶ 15 The trial court granted defendant's motion to dismiss, finding that "the Complaint relied on an oral agreement to extend credit and thus is subject to the ICAA and must be in writing."

With "no such writing attached to the Complaint," the court granted the dismissal. Plaintiffs filed this appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiffs argue that the assignment, as it is written, establishes the alleged deception. Plaintiffs contend that the trial court "apparently recognized that there was no actual modification or amendment of any loan documents and therefore disregarded Defendant's theory that exposing Defendant's alleged fraudulent conduct was an attempt to modify or amend the terms of an existing credit agreement." However, plaintiffs challenge the trial court's finding that the complaint relied on an oral agreement to extend credit and was thus subject to the ICAA's writing requirement.

¶ 18 Defendant argues on appeal that the plaintiff's claim is based on an oral agreement to modify the terms of the assignment. The assignment does not contain language regarding an agreement by defendant to contribute $100,000 to the account or any "joint venture agreement" between plaintiffs and defendant. Therefore, because such alleged oral promises were not reduced to a writing in compliance with the ICAA, defendant contends plaintiffs' claim–which is based on those promises–is barred by the statute.

¶ 19 We review a trial court's section 2-619 dismissal of a complaint *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). Section 2-619 provides, in part:

> Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

*** (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

735 ILCS 5/2-619(a)(9) (West 2010). "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter*, 207 Ill. 2d at 367. The court must treat as true all well-pleaded facts and reasonable inferences that can be drawn from the complaint. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). "An 'affirmative matter,' in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely. [Citation.]" *Van Meter*, 207 Ill. 2d at 367.

¶ 20 Under the ICAA, "[a] debtor may not maintain a cause of action on or in any way related to a credit agreement unless the credit agreement is in writing *** and is signed by the creditor and debtor." 815 ILCS 160/2 (West 2010). Simply put, the ICAA's writing requirement is a "strong form of the statute of frauds." *Help at Home, Inc. v. Medical Capital, L.L.C.* 260 F.3d 748, 754 (2001). Applying the ICAA, "[c]ourts have uniformly barred the claims and defenses of debtors which have relied on the existence of oral credit agreements." *LaSalle Business Credit, Inc. v. Lapides*, 2003 WL 722237, No. 00 C 8145 (N.D. Ill. Mar. 3, 2003), *15. The ICAA "is to be construed broadly to prohibit all claims arising from alleged extra-contractual representations, omissions or conduct in a credit relationship." *Id*.

¶ 21 Illinois courts have concluded that they must apply the ICAA even in the face of harsh consequences. See, *e.g., First National Bank in Staunton v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d at 372-73 (1994) (recognizing that the broad wording of the ICAA causes a "harsh result

for bank customers in some circumstances. The Act is very broadly worded, however, and dictates such a result.").

¶ 22 *Scope of term "credit agreement" under section 1 of ICAA*

¶ 23 A threshold question is whether the assignment is a credit agreement, thus triggering application of the ICAA. The term "credit agreement" is defined in section 1 of the ICAA as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1 (West 2010).

¶ 24 The assignment appears to be, as a practical matter, akin to a limited guaranty. Under Illinois law, "a guaranty contract is an agreement between a guarantor and a creditor wherein the guarantor agrees to be secondarily liable to the creditor for a debt or obligation owed to the creditor by a third party (the debtor)." *Int'l Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 448-49 (2009). In the assignment, plaintiffs assigned and granted to defendant a security interest in the amount in the Account to secure the indebtedness incurred by Borrower.

¶ 25 Guaranty agreements may fit within the definition of "credit agreement" in the ICAA. For example, in *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048 (1999), the court held:

> In the instant case, the guaranty was a condition precedent to the loan, and, without it, there would have been no credit agreement at all. The guaranty, together with the note, the floor plan, and possibly other documents, constituted the comprehensive credit agreement. In fact, as [the guarantor] himself emphasizes in his brief, the guaranty contained an integration clause that integrated it with 'any related documents.'"

Id. at 1058. The court noted that "the [ICAA] does not limit the definition of 'credit agreement' to being a single document" and that "[i]solating the guaranty, as the trial court did, limits the application of the [ICAA]," contrary to prior decisions. *Id.* See also, *Household Commercial Financial Services Inc. v. Suddarth,* 2002 WL 31017608, No. 01 C 4355 (N.D. Ill. Sept. 9, 2002), *5 (noting that "Illinois courts have found that where a guaranty agreement forms an integral part of a loan, it should not be viewed in isolation from the underlying loan but rather in connection with other loan documents, and thus the guaranty agreement constitutes a credit agreement for purposes of the ICAA"); *General Electric Business Financial Services, Inc. v. Silverman*, 693 F. Supp. 2d 796, 803 (2010) (concluding that guaranty agreement and limited joinder were part of the "credit agreement" between the parties and noting that "Illinois courts regard a guaranty agreement, when set forth as a 'condition precedent' to a loan, as part of a 'comprehensive credit agreement' between the parties and therefore governed by the ICAA"); *Finova Capital Corp. v. Slyman*, 2002 WL 318294, No. 01 C 6244 (N.D. Ill. Feb. 25, 2002), *3 (finding that guaranty agreements were part of the "credit agreement" between the parties).

¶ 26 Even if the assignment is not characterized as a guaranty, courts have considered other loan-related documents to constitute a part of a "credit agreement." In *R and B Kapital Development LLC v. North Shore Community Bank and Trust Company*, 358 Ill. App. 3d 912 (2005), the court held that an escrow agreement was "an integral part of the construction loan," and concluded that causes of action for negligent misrepresentation and breach of fiduciary duty were barred by the ICAA "because they are based on oral statements relating to a credit agreement." *Id.* at 919. The court noted the language in the borrower's mortgage with the lender

defining "Related Documents" as including all other agreements "now or hereafter existing, executed in connection with the indebtedness." *Id.* The court also was persuaded by the fact that the loan documents included a request and authorization to disburse funds to the borrower through the escrow agent to finance the escrow trust, even though the escrow agreement was executed prior to the promissory note and mortgage. *Id.*

¶ 27 The assignment here appears to be a integral part of the parties' transaction and thus part of the overall "credit agreement" for purposes of the ICAA. Among other things, the assignment provides certain details regarding defendant's loan to Borrower and sets forth a broad definition of "Related Documents" that includes all agreements and documents executed in connection with the Borrower's indebtedness. Furthermore, the plaintiffs warrant that "this Agreement is executed at Borrower's request and not at the request of Lender." The Borrower was a signatory to the assignment, and the assignment also indicates that the note executed by the Borrower has the same date as the assignment. *Cf. In re American Consolidated Transportation Companies, Inc.*, 433 B.R. 242, 263 (Bankr. N.D. Ill. 2010) (noting that "[c]ertain elements of a credit transaction may be governed by the [ICAA] even though they are not themselves 'credit agreements,' " but concluding that swap agreement was not part of the credit agreement because the loan and security agreement referenced swap agreements generally but did not specifically refer to the swap agreement in question). The assignment appears to be part of the overall transaction of the parties and falls within the definition of "credit agreement" for purposes of the ICAA.

¶ 28 *Writing requirement of Sections 2 and 3 of ICAA*

¶ 29 The next question is whether the plaintiffs' claim is based on or in any manner related to an oral credit agreement, in violation of section 2 of the ICAA, or based on an oral modification of an existing credit agreement or the creation of a new oral credit agreement, in violation of section 3 of the ICAA. Section 2 of the ICAA provides as follows:

> "Credit agreement to be in writing. A debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and debtor."

815 ILCS 160/2 (West 2010). This provision bars "all claims 'on or in any way related to' an oral credit agreement–whether sounding in contract or tort." *Whirlpool Fin. Corp. v. Seveaux*, 96 F.3d 216, 225 (7th Cir. 1996). "There is no limitation as to the type of actions by a debtor which are barred by the [ICAA], so long as the action is in any way related to a credit agreement." *First National Bank in Staunton v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d 367, 372 (1994); see also *Nordstrom v. Wauconda National Bank*, 282 Ill. App. 3d 142, 145 (1996) (noting that the ICAA "bars all actions based on or related to an oral credit agreement"); *Klem v. First National Bank of Chicago*, 275 Ill. App. 3d 64, 67 (1995) (noting that traditional common law statute of frauds exceptions, such as equitable estoppel and fraud, are barred by the broad "on or related to" language in section 2 of the ICAA).

¶ 30 Section 3 of the ICAA provides, in part:

> "Actions not considered agreements. The following actions do not give rise to a claim,

> counter-claim, or defense by a debtor that a new credit agreement is created unless the agreement satisfies the requirements of Section 2: ***
>
> (3) the agreement by a creditor to modify or amend an existing credit agreement or to otherwise take certain actions, such an entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement."

815 ILCS 160/3 (West 2010). Defendant argues that because the "Assignment is devoid of any language whatsoever which would evidence an agreement by Defendant to contribute $100,000 to the Account, nor does the Assignment mention any sort of 'joint venture agreement' " between plaintiffs and defendant, the plaintiffs' claim is based on an oral agreement to modify the terms of the assignment in violation of the ICAA. Plaintiffs contend that because defendant "represented in writing, at closing, not that it *would* but that it *did* deposit its $100,000.00 contribution, plus $10,000.00 more," there is "no need to 'modify or amend the terms of a credit agreement," to establish the "operative fact for the fraud." (Emphasis in original.) Plaintiffs contend "[t]here was nothing *in futuro* about Defendant's statement of account in the *Assignment*." (Emphasis in original.)

¶ 31 Initially, we disagree with plaintiffs' statement that "[d]efendant represented in the *Assignment* that its contribution to the $310,000.00 escrow fund was a *fait accompli* at closing." (Emphasis in original.) The plaintiffs, not the defendant, made express representations in the assignment regarding the "Collateral" in the Account, including a representation and promise to defendant that plaintiffs were the "lawful owner of the Collateral free and clear" of undisclosed

encumbrances and that plaintiffs have the "full right, power, and authority to *** assign the Collateral to [defendant]." We also note that the assignment states that "[t]his Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement." The assignment further provides that "[n]o alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment."

¶ 32 Regardless of whether the plaintiff's claim is characterized as based on the failure of the existing assignment to accurately memorialize the parties' oral agreement as of the time of its execution–invoking section 2 of the ICAA–or a subsequent oral modification of the assignment–invoking section 3 of the ICAA–the plaintiffs' claim fails.

¶ 33 For example, in *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, the borrower argued that the credit agreement signed by the parties did not accurately memorialize the parties' agreement. The borrower claimed it had an agreement with the lender that the interest rate for the loan would be calculated on the "365/365" method. *Id.* at ¶ 25. The parties' written agreement instead provided for a "365/360" calculation method. *Id.* Because the borrower could not show in writing, or in any other way, that they had a "365/365" method agreement with the lender, the court concluded that the borrower's fraud counterclaim was barred by the ICAA. *Id.* In *VR Holdings, Inc. v. LaSalle Business Credit, Inc.*, 2002 WL 356515, No. 01 C 3012 (N.D. Ill. Mar. 6, 2002), the plaintiff-borrower sued the lender for fraud and other claims based on the lender's alleged failure to disclose to the borrower prior to the loan closing date that the lender was reducing the credit availability under the credit facility because it was not

including certain inventory in the borrowing base calculation. The plaintiffs argued that the ICAA did not act as a bar because "these claims do not depend upon the existence of any oral agreements. They do, however, depend on alleged omissions from the credit agreement." *Id.* at *3. The court disagreed, holding that, pursuant to the ICAA, the lender "cannot be liable for pre-contractual omissions" and thus dismissed the claims. *Id.*

¶ 34 In other cases, court have invoked section 3 to preclude claims based on an oral agreement to modify an existing credit agreement or to create a new credit agreement. For example, in *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048 (1999), the court concluded that the lender's account manager's promise to vigilantly monitor the borrower's activities was an unenforceable "oral agreement to 'modify or amend an existing credit agreement' under section 3" of the ICAA. *Id.* at 1059. In *Teachers Insurance and Annuity Association of America v. LaSalle National Bank*, 295 Ill. App. 3d 61 (1998), the court barred the plaintiff's counterclaims and affirmative defenses based on the lender's alleged conduct in reneging on its alleged agreement to restructure the parties' loan as an agreement to "modify or amend" the loan within section 3 of the ICAA.

¶ 35 Courts have denied fraud claims, both under sections 2 and 3 of the ICAA. In *W.E. Davis v. Merrill Lynch Business Financial Services*, 2004 WL 406810, No. 03 C 2680 (N.D. Ill. Feb. 13, 2004), a construction company-borrower and its principals-guarantors sued the lender for fraudulent misrepresentation and other claims based on the lender's oral representations. The lender sought dismissal of the claims based on section 2 of the ICAA. *Id.* at *2. The plaintiffs countered that they were not seeking to enforce the oral representations, and the representations

were only pled to demonstrate fraud. The court held that "without the oral representations, there cannot be an actionable cause for the fraudulent misrepresentation claim" and another claim and thus dismissed the claims. *Id.* at *3. In *Household Commercial Financial Services, Inc. v. Suddarth*, 2002 WL 31017608, the guarantors asserted that they were fraudulently induced into signing the guaranty by the lender's agent's oral promises to, among other things, extend a new line of credit to the borrower. The court concluded that "[u]nfortunately for [the guarantors], these contentions fit squarely within the language of Section 3 of the ICAA; they tend to show the agreement by a creditor to enter into a new credit agreement and to forbear from exercising remedies in connection with an existing agreement and therefore do not give rise to a defense." *Id.* at *6. See also *McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758 (1995) (dismissing breach of contract and fraud actions based on alleged oral representations and written but unsigned proposal based on application of ICAA); *General Electric Capital Corporation v. Donogh Homes, Inc.*, 1993 WL 524814, No. 93 C 5614 (N.D. Ill. Dec. 15, 1993), *2 (dismissing and striking guarantor's affirmative defenses and counterclaims, noting, "while the defendants are purportedly not seeking to directly enforce an oral promise to create a new credit agreement, they are, in effect, attempting to give GECC's oral representations regarding the extension and modification of the Loans binding effect.")

¶ 36 In *Whirlpool Financial Corporation v. Sevaux*, 96 F.3d 216 (7th Cir. 1994), a lender sued to recover on a borrower's promissory note. The borrower's defenses were based on the lender's supposed fraud in allegedly inducing borrower to sign the note through oral promises to advance money to borrower's corporation which could be used to satisfy borrower's obligations under the

note. The Seventh Circuit Court of Appeals analyzed the parties' transaction under both Sections 2 and 3 of the ICAA. The court concluded that whether the lender's alleged promise to apply the funds to extinguish the liability under the note was a modification of an "existing credit agreement" or a "new credit agreement," section 3 of the ICAA was fatal to the borrower's defenses. The court also concluded that, even if the parties' transaction was viewed as a single agreement, "[s]uch an arrangement would amount to a credit agreement whose essential terms were not committed to writing and would run afoul of section 2 of the [ICAA]." *Id.* at 224.

¶ 37 Applying the *Whirlpool* analysis, if the assignment is a credit agreement (or a part of a credit agreement), any claims based on any terms omitted from the assignment or any modification of the assignment or any new credit agreement between the parties require compliance with the writing and signature requirements of the ICAA. As noted above, plaintiffs expressly represented in the assignment that they were the lawful owner with full rights to assign the "Collateral"– defined as the "Account" that had "an approximate balance of $310,000.00." The assignment– signed by plaintiffs and defendant–provides that it reflects the entire understanding and agreement of the parties. In light of the plain language of the assignment, there is no maintainable fraud claim absent evidence of, among other things, defendant's agreement to contribute $100,000 and to assume 1/3 responsibility for any default by Borrower, even considering the reference to the $310,000. As set forth in plaintiffs' appellate brief, two of the elements of fraud are false statement of material fact and intent to induce the other party to act. *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980) (setting forth the elements of a fraudulent misrepresentation claim); *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1085 (1998)

(discussing elements of fraudulent misrepresentation, a form of common law fraud). Those elements cannot be proven without reference to the alleged agreement regarding the defendant's $100,000 contribution and 1/3 risk share. Because the defendant's contribution and risk share cannot be proven absent a writing–which plaintiffs have not produced and apparently does not exist–the plaintiffs' claim must fail under the ICAA.

¶ 38 *Section 3.1 and privity of contract*

¶ 39 Section 3.1 of the ICAA provides, in part:

> No creditor shall be liable to a person not in privity of contract with the creditor for civil damages arising out of a credit agreement, or any conditions precedent thereto, except for acts or conduct by the creditor that constitute fraud against the person.

815 ILCS 160/3.1 (West 2010). There appear to be no published decisions addressing this statutory provision. The plaintiffs argue that "both the Defendant and the trial court used the pre-closing relationship, where Plaintiffs and Defendant designed their joint venture, to exclude the written/signed false statement by Defendant in the *Assignment* from any consideration whatsoever. *** The 'privity' inherent in this pre-closing relationship should have triggered § 160/3.1 and exempted Plaintiffs' fraud claim from the requirements of § 160/2." (Emphasis in original.) Defendant disagrees with plaintiffs' reading of the statute, noting that "[i]nstead, Section 3.1 expands the scope of protection afforded by the Act by extending its application to those not in privity of contract with a creditor." We agree with defendant and do not find any basis for interpreting section 3.1 of the ICAA as an exemption from the requirements otherwise imposed by the ICAA. Section 3.1 is inapplicable to this case.

¶ 40 *Conclusion*

¶ 41 We conclude that the ICAA precludes recovery on the plaintiffs' claim, even if such result may appear harsh. *Machinery Transports of Illinois v. Morton Community Bank*, 293 Ill. App. 3d 207, 210 (1997) (noting that "we reluctantly agree" with cases applying the ICAA to bar all actions relying on an oral agreement, the court stated that "[o]ur reluctance stems from our acute awareness that strict application of this statute can easily lead to disastrous consequences in the hands of unscrupulous lenders"). Furthermore, we are not persuaded by plaintiffs' argument that the "manner in which the Defendant utilized the subject *Assignment* herein employs the [ICAA] as an 'engine of fraud.' " (Emphasis in original). The cases cited by plaintiffs for this proposition do not address the ICAA and are not otherwise analogous to this case. See, *e.g., Grundy County National Bank v. Westfall*, 13 Ill. App. 3d 839 (1973). The trial court correctly granted the defendant's motion to dismiss pursuant to 2-619.

¶ 42 Affirmed.