2016 IL App (1st) 153296-U
No. 1-15-3296

THIRD DIVISION
November 30, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HYUNG WOOK KIM,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14 L 5315
	)	
BRUCE KIM and SHIN YOUNG KIM, a/k/a Gina Kim,	)	
	)	The Honorable
	)	John Griffin,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Where the plaintiff's claims against the defendants presumed the existence of the written contract containing the arbitration clause, the trial court did not err in dismissing the plaintiff's complaint and ordering the parties to arbitration pursuant to the contract's arbitration clause, even though the defendants were not signatories to the contract.

¶ 2 The plaintiff, Hyung Wook Kim, appeals from the trial court's order dismissing his verified complaint pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)), and ordering the parties to arbitration. The trial court held that pursuant to the franchise agreement ("Franchise Agreement") between the plaintiff and SMK

Franchising, Inc. ("SMK"), the plaintiff was required to arbitrate his claims against the defendants, Bruce Kim ("Bruce") and Gina Kim ("Gina") (collectively, "the defendants"). On appeal, the plaintiff argues that the trial court erred in so holding, because (1) the defendants waived their right to arbitration by answering the plaintiff's complaint and participating in discovery, (2) the costs of arbitrating would be prohibitively expensive, (3) the arbitration clause of the Franchise Agreement denies the plaintiff the right to seek punitive damages under the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 *et seq.* (West 2010)), and (4) the defendants, as non-signatories to the Franchise Agreement, lacked standing to compel the plaintiff to arbitrate his claims. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The plaintiff's verified complaint alleges the following. SMK grants franchises for quick service restaurants under the name of Sarku Japan Grill & Sushi. In September 2010, the plaintiff attended an informational seminar conducted by Bruce on behalf of SMK[1], during which Bruce represented that all of SMK's Sarku franchises had annual sales of over $1,000,000.00. The following month, the plaintiff met with Bruce, executed the Franchise Agreement, and tendered $30,000.00 to Bruce as a deposit toward a Sarku franchise on the east coast.

¶ 5 After unsuccessfully searching the east coast for a suitable site for his franchise, the plaintiff asked Bruce to refund $20,000.00 of his deposit. Bruce then advised the plaintiff of a Sarku restaurant that had been open for three months in Schaumburg, Illinois, and that was doing daily sales of approximately $1,800.00. Bruce told the plaintiff that although the restaurant was valued at $500,000.00, the plaintiff could buy it for $200,000.00. Bruce also told the plaintiff

[1] According to the plaintiff's complaint, SMK has one or more parent companies, which do business under SMK and other names. Because the precise nature of the relationship between these companies is not relevant here, we see no need to delve into its nuances.

that if he purchased the Schaumburg restaurant, SMK would not collect royalty fees for one year and would pay the rent on the restaurant for the first six months.

¶ 6 Thereafter, Bruce visited the plaintiff's home in Connecticut and presented him with a sublease for the Schaumburg restaurant and asked the plaintiff to sign it. After the plaintiff indicated a desire to have an attorney review the sublease first, Bruce told the plaintiff that he (the plaintiff) did not need an attorney to review a simple document. Bruce did not, however, explain any of the terms of the sublease to the plaintiff. Likewise, when the plaintiff and his wife asked Bruce about the sales at the Schaumburg restaurant, Bruce replied, "Don't worry, now you are a rich person. You are going to make a lot of money."

¶ 7 According to the plaintiff, the defendants also made the following false representations to him regarding the Schaumburg restaurant: the restaurant would succeed because it was close to other restaurants; the defendants guaranteed the success of the restaurant and would not allow it to fail; if necessary, the defendants would help the plaintiff operate the restaurant; there were several parties interested in purchasing the Schaumburg restaurant, including Gina's sister; Bruce convinced SMK to sell the Schaumburg restaurant to the plaintiff because of his prior experience in the restaurant business; purchasing the restaurant would be tantamount to purchasing a winning lottery ticket; and the plaintiff would become rich by purchasing the restaurant.

¶ 8 Ultimately, the plaintiff signed the sublease for the Schaumburg restaurant on July 13, 2011.

¶ 9 The plaintiff moved his family from Connecticut to Schaumburg to take over and run the Schaumburg restaurant, beginning on August 1, 2011. Shortly thereafter, the plaintiff realized that the sales for the Schaumburg restaurant were only a fraction of what Bruce had represented.

The plaintiff demanded rescission of the contract and the return of the purchase price, all of which the defendants refused.

¶ 10 The plaintiff characterized Bruce's words and actions as deceptive, false, misleading, and fraudulent, made with the intent of inducing the plaintiff to enter into the Franchise Agreement and to purchase the Schaumburg restaurant. Based on this, the plaintiff asserted that Bruce had violated the Illinois Franchise Disclosure Act (815 ILCS 705/5 (West 2010)), violated the Illinois Consumer Fraud and Deceptive Business Practices Act, committed common law fraud, and committed fraudulent inducement. The plaintiff also asserted that Gina committed common law fraud, fraudulent inducement, and aiding and abetting fraud.[2]

¶ 11 The defendants filed a motion to dismiss the plaintiff's complaint or, in the alternative, to stay the proceedings and compel arbitration, on the basis that the Franchise Agreement required that the plaintiff's claims against the defendants be arbitrated. After full briefing by the parties, the trial court denied the defendants' motion on the basis that there existed a question of fact regarding whether Bruce's alleged misconduct was committed while he was acting within the scope of his employment with SMK. According to the trial court, this question of fact precluded it from determining whether the defendants, as non-signatories to the Franchise Agreement, could compel arbitration.

¶ 12 After the trial court's denial of the defendants' motion, the defendants filed a verified answer and a single affirmative defense. The lone affirmative defense asserted by the defendants was that the plaintiff's claims should be stayed and the plaintiff compelled to attend arbitration.

[2] Although it is clear that counts II, III, and IV are directed against Bruce, it is less clear whether they are also intended to apply to Gina, as these counts do not clearly identify their targets. Accordingly, we assume that where Gina's name appears within the allegations of a count, that count is intended to apply to her as well as Bruce, even if the majority of the allegations within that count mention only Bruce.

The parties then engaged in some discovery, the full extent of which is not apparent from the record.

¶ 13 In September 2015, the defendants filed their "Renewed Motion to Dismiss the Complaint or, in the Alternative, to Stay the Proceedings and Compel Arbitration" ("Renewed Motion"). In their Renewed Motion, the defendants argued that under the terms of the Franchise Agreement, the plaintiff was required to arbitrate his claims against the defendants. According to the defendants, the fact that they were not signatories to the Franchise Agreement was immaterial, because they could compel arbitration under the Federal Arbitration Act ("FAA") (9 U.S.C. § 1 *et seq.* (2000)) where the plaintiff's claims were intertwined with the Franchise Agreement and where Bruce was acting as the agent of SMK, who was a signatory to the Franchise Agreement.

¶ 14 In support of their Renewed Motion, the defendants attached the transcript of the plaintiff's deposition. In that deposition, the plaintiff testified consistently with the allegations in his complaint, just with more elaboration. Of particular note, the plaintiff testified that he understood Bruce to be the director of SMK and that he was purchasing the Schaumburg restaurant from SMK. He did not believe that when he signed the Franchise Agreement, he was signing an agreement with Bruce personally. The plaintiff also testified that he understood that the information given to him by Bruce was as an employee of SMK, and that between the time he met Bruce and the time that he purchased the Schaumburg restaurant, Bruce was always working on behalf of SMK.

¶ 15 Bruce also submitted an affidavit in support of the Renewed Motion. In that affidavit, Bruce swore that all of his communications and interactions with the plaintiff regarding the Schaumburg restaurant were done in his capacity of Director of Franchise Development for

SMK and that all of his emails to the plaintiff indicated that he was Director of Franchise Development for SMK.

¶ 16 In response to the defendants' Renewed Motion, the plaintiff argued that the FAA does not apply in the present case, the defendants, as nonsignatories, could not compel arbitration under Illinois law, the defendants waived any right to arbitrate, and there existed a question of fact regarding whether Bruce was acting within the scope of his employment with SMK at the time of his alleged misconduct.

¶ 17 On November 3, 2015, the trial court issued its order granting the defendants' Renewed Motion, dismissing the plaintiff's complaint, and ordering the parties to attend arbitration. The trial court found that the defendants did not waive their right to arbitration, the FAA governed the case, and the nonsignatory defendants could compel the plaintiff to arbitrate his claims because the relationship between the parties and the issues raised in the plaintiff's complaint were intertwined with the Franchise Agreement.

¶ 18 The plaintiff then filed this timely appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, the plaintiff argues that the trial court erred in granting the defendants' Renewed Motion because (1) the defendants waived their right to arbitration by answering the plaintiff's complaint and participating in discovery, (2) the costs of arbitrating would be prohibitively expensive, (3) the arbitration clause of the Franchise Agreement denies the plaintiff the right to seek punitive damages under the Illinois Consumer Fraud and Deceptive Practices Act, and (4) the defendants, as non-signatories to the Franchise Agreement, could not compel the plaintiff to arbitrate his claims. We address each of these contentions in turn.

¶ 21 Section 2-619(a)(9) Motions and Standard of Review

¶ 22 Before turning to the merits of the plaintiffs' contentions, we first address the appropriate standard of review to be used on appeal. The plaintiff contends that the trial court's dismissal is subject to *de novo* review, while the defendants argue that a trial court's order dismissing a complaint to compel arbitration is reviewed for an abuse of discretion. The cases relied upon by the defendants, however, did not involve situations where the trial court dismissed the plaintiffs' causes of action in their entirety by entering a final order pursuant to section 2-619(a)(9). Instead, the cases cited by the defendants involved only motions to compel arbitration or to stay arbitration and/or litigation pending arbitration. See *Northeast Illinois Regional Commuter R.R. Corp. v. Chicago Union Station Co.*, 358 Ill. App. 3d 985, 992 (2005); *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1187 (2000). The defendants' motion here was, first and foremost, a motion to dismiss the plaintiff's complaint. It was only in the alternative that the defendants sought to stay the proceedings and compel arbitration. The trial court ultimately dismissed the plaintiff's complaint pursuant to section 2-619(a)(9) and, thus, review of the trial court's order is subject to *de novo* review. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997).

¶ 23 Dismissal under section 2-619(a)(9) is permitted where "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). The Illinois Supreme Court has explained the review process for orders granting dismissal under this section:

> "The 'affirmative matter' asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. [Citation.] Once a defendant satisfies this initial burden of going forward on the section 2-619(a)(9) motion to dismiss, the burden then shifts to the plaintiff, who must establish

> that the affirmative defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' [Citation.] The plaintiff may establish this by presenting 'affidavits or other proof.' [Citation.] 'If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.' [Citation.]
>
> A dismissal of this type resembles the grant of a summary judgment motion. For that reason, the reviewing court conducts *de novo* review and considers whether 'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' "

Epstein, 178 Ill. 2d at 383.

¶ 24 While on the topic of section 2-619 motions to dismiss, we briefly note that such motions are untimely and procedurally improper where they are filed after an answer is filed, as was the case here. *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943, ¶ 33. The plaintiff has not, however, made any contention that he was prejudiced by the tardy filing of the Renewed Motion; accordingly, it was not error for the trial court to consider it, and there is no reason we cannot now review it. See *Id.* at ¶ 34; *Thompson v. Heydemann*, 231 Ill. App. 3d 578, 581 (1992).

¶ 25 Choice of Law

¶ 26 Before we can assess the parties' respective positions on the trial court's order granting the Renewed Motion, we must first determine what law governs the parties' dispute. The defendants contend, and the trial court found, that the current dispute over the arbitrability of the plaintiff's claims is governed by the FAA because the Franchise Agreement relates to interstate

commerce. The plaintiff, on the other hand, denies that the FAA applies, instead pointing out that the Franchise Agreement—in two sections—invokes the application of Delaware law. Despite this, however, the plaintiff relies on Illinois law in arguing that the defendants, as non-signatories to the Franchise Agreement, cannot compel the plaintiff to attend arbitration. In an attempt to resolve this apparent inconsistency, the plaintiff argues that "[w]hile [Delaware law] may apply to interpreting and conducting the arbitration, it does not apply to whether the circuit court erroneously dismissed the complaint under [the] Illinois Code of Civil Procedure."

¶ 27 The FAA applies to all arbitration agreements contained in a contract that affects interstate commerce (*Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995)), and requires courts to enforce such agreements according to their terms, just as the courts would any other contract (*Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478 (1989)). Although the FAA has a broad reach, its purpose is simply to place agreements to arbitrate on the same footing as other contracts and to overcome courts' refusal to enforce such agreements. *Id.* Accordingly, the parties to a contract are not required to arbitrate anything they did not agree to arbitrate, and they are free to limit the scope of claims subject to arbitration and to specify which rules will apply to their arbitration agreement. *Id.* at 478-79.

¶ 28 The Franchise Agreement's arbitration clause provides in relevant part as follows:

> "The parties hereto agree that if a controversy, claim or dispute between them arises out of or relates to this Franchise Agreement or the relationship between the parties and results in a dispute the resolution of which cannot be mutually agreed upon by the parties, the parties shall submit the determination thereof to Arbitration *** [T]he Arbitration shall be conducted in the manner provided by the laws and decisions of the

> State of Delaware, in the United State [*sic*] of America and amendments thereto *** and each party hereby submits to the said laws and decisions of the State of Delaware and the United States of America ***."

The Franchise Agreement also contains a general choice-of-law provision, which provides, "This Franchise Agreement is accepted by the Franchisor in the State of Delaware and shall be governed by and interpreted in accordance with Delaware law, which law shall prevail in the event of any conflict of law."

¶ 29 Relying on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the defendants argue that a choice-of-law provision in a contract does not extend to the contract's arbitration clause absent express evidence that the parties intended it to apply to the arbitration clause. Quoting only the general choice-of-law provision of the Franchise Agreement, the defendants claim that "the Franchise Agreement contains no language to suggest the parties intended the choice of law provision to extend to the arbitration clause." Even assuming that the defendants' characterization of *Mastrobuono*'s holding is accurate, we can conceive of no clearer evidence that the parties to the Franchise Agreement intended Delaware law to apply to the arbitration clause than the express statements in the arbitration clause that "the Arbitration shall be conducted in the manner provided by the laws and decisions of the State of Delaware" and that the parties "submit[] to the said laws and decisions of the State of Delaware."

¶ 30 The plaintiff, on the other hand, acknowledges the plain language of the Franchise Agreement invoking Delaware law, but nevertheless argues that Illinois law should apply to determine the issues raised on appeal, because the central issue is whether the trial court correctly dismissed the plaintiff's complaint under the Illinois Code of Civil Procedure. Generally, choice-of-law provisions are given their full effect in Illinois on issues of substantive

law; procedural matters, however, are governed by the laws of the forum state. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 351 (2002). Although the overarching question in this appeal is whether the trial court correctly dismissed the plaintiff's complaint under section 2-619(a)(9) of the Illinois Code of Civil Procedure, the issues that must be resolved to make that determination (with the exception of waiver, which will be discussed below) present questions of substantive law and, thus, must be determined by reference to Delaware law.

¶ 31 Accordingly, we conclude that, pursuant to the terms of the Franchise Agreement, Delaware law governs the disputes in this appeal.

¶ 32 Waiver

¶ 33 The plaintiff first argues that the trial court erred in concluding that the parties were required to attend arbitration, because the defendants waived their right to arbitrate by filing an answer and participating in discovery. Because waiver is a procedural question, our determination of this issue is governed by Illinois law. *Hyatt v. Cox*, 57 Ill. App. 2d 293, 297-98 (1965).

¶ 34 To waive its right to arbitrate, a party must act inconsistently with that right. *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 22. More specifically, a party waives its right to arbitration when it submits an arbitrable issue to a court for decision. *Id.*; *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536 (1986). Here, the defendants did not submit any arbitrable issues to the trial court for decision. Rather, they simply filed their answer and raised as their sole affirmative defense the contention that the plaintiff's claims were subject to arbitration under the terms of the Franchise Agreement. Such actions, however, are not inconsistent with the defendants' claimed right to arbitrate and, thus, do not constitute waiver.

See *Kessler, Merci, and Lochner, Inc. v. Pioneer Bank & Trust Co.*, 101 Ill. App. 3d 502, 509 (1981) (party's actions of raising arbitration agreement as affirmative defense and bringing counterclaim in the alternative were not inconsistent with its rights to arbitrate and did not constitute waiver); compare with *Koehler*, 2016 IL App (1st) 142767, ¶ 25 (holding that the defendants waived their right to arbitrate the plaintiff's claims where they filed an answer asserting affirmative defenses unrelated to the arbitration provision).

¶ 35 In addition, the fact that the defendants participated in discovery does not constitute waiver, as "[t]he existence of waiver is determined by the types of issues submitted, not by the number of papers filed with the court." *Kostakos*, 142 Ill. App. 3d at 536-37. The discovery that appears in the record—a copy of the plaintiff's deposition transcript—appears to have been directed at establishing the necessary facts to support the defendants' claim for arbitration. If the defendants participated in any other discovery, it does not appear on the record. Therefore, we must assume that any other discovery conducted by the defendants did not evidence an intent on their part to abandon their arbitration rights. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) ("Any doubts which may arise from the incompleteness of the record will be resolved against the appellant."). Accordingly, we conclude that the defendants did not waive their right to arbitration.

¶ 36 Costs of Arbitration & Punitive Damages

¶ 37 The plaintiff next argues that he should not be forced to arbitrate his claims against the defendants because the costs of arbitration in Buffalo, New York—the forum selected in the Franchise Agreement's arbitration clause—would far exceed the costs of resolving the claims in the Circuit Court of Cook County. He also contends that he should not be forced to arbitrate because the Franchise Agreement denies him the ability to pursue punitive damages under the

Illinois Consumer Fraud and Deceptive Business Practices Act. The defendants argue that the plaintiff has waived these arguments by failing to raise them in response to the Renewed Motion. We agree.

¶ 38 A party is not permitted to raise an issue on appeal that was not raised in the trial court. *Buckner v. O'Brien*, 287 Ill. App. 3d 173, 177 (1997). The purpose of this rule is to preserve judicial resources by providing the trial court the opportunity to correct its mistakes and to prevent a party from springing new arguments on the opposing party on appeal when it is too late to present evidence on the issue. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007).

¶ 39 The plaintiff argues that his contentions are not waived because although he did not raise them in response to the defendants' Renewed Motion, he did raise them in response to the defendants' first motion to dismiss. We find this argument unavailing, as we are reviewing the trial court's decision on the Renewed Motion, not its decision on the defendants' first motion to dismiss. If the plaintiff wished the trial court consider these contentions in ruling on the Renewed Motion, he should have raised them in his response to the Renewed Motion, just as he did his other contentions. Neither the defendants nor the trial court were under any obligation to speculate as to whether the plaintiff intended to renew these contentions in response to the Renewed Motion. The plaintiff having failed to do so, the defendants were not given the opportunity to present argument or evidence on those contentions in the trial court, and the trial court was not given the opportunity to rule on them. Accordingly, by failing to renew these contentions in response to the Renewed Motion, the plaintiff effectively abandoned them and they are considered waived. See generally *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 870 (2008) (stating that although arguments against the admissibility of evidence might have

been raised during pre-trial proceedings, those arguments needed to be renewed at the time the evidence was offered for admission or they would be considered waived).

¶ 40 Defendants' Ability to Compel Arbitration

¶ 41 The plaintiff's final argument on appeal is that the defendants cannot compel the plaintiff to arbitrate his claims against them because they are not signatories to the Franchise Agreement. The trial court, applying federal law under the FAA, found that the defendants were, in fact, able to compel the plaintiff to attend arbitration under equitable estoppel and agency theories. Although, as discussed earlier, we look to Delaware law to decide this issue, we reach the same result as the trial court.

¶ 42 Before getting into the substance of our analysis, however, we first pause to note that the defendants, in their brief, address the issue of whether the plaintiff's claims fall within the scope of the arbitration clause of the Franchise Agreement. This issue need not be addressed for several reasons. First, the plaintiff did not argue in his opening brief that the trial court's order should be reversed because his claims do not fall within the scope of the arbitration clause. Rather, he assumes that they do fall within the scope of the arbitration clause, instead focusing on whether the defendants may compel arbitration of the claims. Second, the defendants, as appellees, may respond to the plaintiff's arguments or raise alternative grounds for affirmance; the issue of the scope of the arbitration clause is neither, as the plaintiff did not raise it in his brief and, even if the defendants are correct that the claims fall within the scope of the arbitration clause, that does not answer the ultimate question of whether they may compel the plaintiff to attend arbitration. Finally, the plaintiff's response to the defendants' argument on this issue is a cursory and undeveloped single sentence that his claims fall within the scope of the arbitration clause because they do not depend on the existence of the Franchise Agreement. Not only would

that alone support a conclusion that the plaintiff waived any argument for reversal in this regard (*Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 924 (2007)), but as will be discussed below, we conclude that the plaintiff's claims do, in fact, depend on the existence of the Franchise Agreement. Thus, it is unnecessary for us to consider this issue, and we instead turn to whether the defendants had standing to compel the plaintiff to arbitrate his claims.

¶ 43 As a general rule, contract provisions can only be enforced by the parties and intended third-party beneficiaries of those contracts; non-parties, on the other hand, have no right to enforce them. *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 434 (2007); *Kuroda v. SPJS Holdings, LLC*, 2010 WL 4880659, *3.[3] There are, however, a number of exceptions to this rule. Of relevance here are the exceptions of equitable estoppel and agency.

¶ 44 With respect to equitable estoppel, case law indicates that Delaware applies the exception to compel signatories to arbitrate in three circumstances: (1) where a signatory to the written agreement containing the arbitration clause must rely on the terms of that agreement to make its claims against the nonsignatory, *i.e.*, where "each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate," (2) where the signatory "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract," (*Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 WL 2473665, *5, quoting *Grigson v. Creative Arts Agency*, 210 F.3d 524, 527 (5th Cir. 2000)) and (3) where there is a close relationship between the entities involved, where there is a close relationship between the alleged wrong and the nonsignatory's obligations and duties under the contract, and where the claims are intimately founded in and

[3] Because there is a dearth of published Delaware case law on the issues before us, we must, at times, rely on unpublished Delaware decisions.

intertwined with the contract requirements (*Ishimaru v. Fung*, 2005 WL 2899680, *18 (citing *Thomson-CSF, SA v. American Arbitration Assoc.*, 64 F.3d 773, 778 (2d Cir. 1995)).

¶ 45 The parties do not cite and we could not find any cases out of the Delaware state courts answering the specific question of whether equitable estoppel applies where a signatory contends that a nonsignatory wrongfully induced the signatory to enter into the written agreement containing the arbitration clause. Two federal courts have addressed similar questions, however, and the Delaware state courts have relied heavily on federal case law in developing Delaware's jurisprudence on arbitration. See, *e.g.*, *NAMA*, 922 A.2d at 430 n.25 (relying on federal case law regarding circumstances under which nonsignatory can be bound by arbitration clause); *Wilcox & Fetzer*, 2006 WL 2473665, *4-5 n. 38-42 (relying on federal case law in discussing the application of equitable estoppel to permit a nonsignatory to compel a signatory to arbitrate); *Ishimaru*, 2005 WL 2899680, *18 n. 46-49 (same).

¶ 46 In *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 944-45 (1999), the purchaser of an automobile alleged that the dealership, service provider, and the assignee of the retail installment contract conspired and colluded to defraud the purchaser into the purchase of a service contract. According to the purchaser, the three conspired to charge her an excessive amount for the service contract so that they could profit. *Id.* at 945. The service provider sought to compel the purchaser to arbitrate her claims against it, pursuant to a "Buyers Order," which incorporated the retail installment contract in which the purchaser was charged $990.00 for the service contract. *Id.* at 945-45. The trial court found that the service provider did not have standing to compel the purchaser to attend arbitration, because the service provider was not a signatory to the Buyers Order. *Id.* at 945. On appeal, the Eleventh Circuit reversed, concluding that the doctrine of equitable estoppel applied because

> "[e]ach of Franklin's claims against MS Dealer makes reference to and presumes the existence of the $990.00 charge contained in the Retail Installment Contract, which was incorporated by reference into the Buyers Order. Although Franklin does not allege that the service contract has been violated or breached in any way, each of her fraud and conspiracy claims depends entirely upon her contractual obligation to pay $990.00 for the service contract."

Id. at 947-48.

¶ 47 Similarly, in *Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1005 (N.D. Ill. June 1, 2001), the court found that the plaintiffs' claims that they were fraudulently induced into entering into the contracts "[o]bviously *** all make reference to and presume the existence of the written agreements." The court also concluded that because the plaintiffs' claims alleged fraudulent inducement, they were directly related to and arose out of the written agreements at issue. *Id.* at 1004. Accordingly, the court found that the application of the equitable estoppel doctrine was triggered, thereby permitting the defendants to compel the plaintiffs to attend arbitration. *Id.* at 1005.

¶ 48 We find the present case analogous to *MS Dealer* and *Hoffman*. As in those cases, the plaintiff alleges that the defendants acted so as to wrongfully induce him into an agreement to purchase the Schaumburg restaurant. The plaintiff's allegations that he was induced into an agreement to purchase the Schaumburg restaurant necessarily presume the existence of such an agreement, *i.e.*, the Franchise Agreement. After all, one cannot be induced into an agreement that does not exist. Thus, although the plaintiff does not allege that the defendants were bound by and/or breached any specific terms of the Franchise Agreement, his claims nevertheless presume the existence of and relate directly to the Franchise Agreement, and he is equitably

estopped from avoiding arbitration. Therefore, the trial court did not err in dismissing the plaintiff's complaint and ordering the parties to attend arbitration.

¶ 49 Having concluded that the trial court was correct in ordering the parties to arbitration based on equitable estoppel, we need not address the plaintiff's arguments regarding agency and whether there exists a question of fact regarding Bruce's scope of employment with SMK.

¶ 50 CONCLUSION

¶ 51 For the reasons stated above, the judgment of the Circuit Court of Cook County is affirmed.

¶ 52 Affirmed.