No. 2—10—1227
Order filed March 7, 2011

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

SECOND DISTRICT

TNI CORPORATION, INC., f/k/a TNI PACKAGING, INC.,	)	Appeal from the Circuit Court of Du Page County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10—CH—785
	)	
JACCARD HOLDINGS, LLC, JACCARD CORPORATION, and TNI PACKAGING, LLC,	)	
	)	Honorable Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: Plaintiff forfeited argument that federal rather than Illinois arbitration law applied, and claims for fraud in the inducement and rescission were properly arbitrated when contract between the parties contained a generic arbitration clause.

This appeal concerns a suit by an Illinois business, TNI Corporation, against the companies to whom the business owner agreed to sell the business. The plaintiff asserted claims of fraud in the inducement, rescission, and "common law fraud." On November 23, 2010, the trial court entered

an order dismissing the first two claims on the ground that they were required to be arbitrated. The plaintiff filed an interlocutory appeal from this order. We affirm.

According to the pleadings, Gerald Marchese is the owner of TNI Corporation (TNI), described as a successful Illinois-based food preparation product manufacturer. In 2008, with an eye toward retirement, Marchese began exploring the possibility of selling TNI. He entered into negotiations with Eric Wangler, a representative for the defendant Jaccard Corporation (another company, based in New York, that was alleged to be well-known in the food preparation products and equipment industry). Eventually, they reached an agreement that TNI would be acquired by the defendant Jaccard Holdings, a New York limited liability corporation formed by the Jaccard Corporation, and would be operated as a joint venture by TNI Packaging, LLC, an Illinois limited liability corporation formed for that purpose. TNI and Jaccard Holdings entered into two agreements, an asset purchase agreement and an operating agreement, both dated September 1, 2009. The asset purchase agreement contained, among other things, a provision stating that:

> "This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Illinois, without regard to its conflict of law principles. Any dispute arising under the terms of this Agreement shall be governed by the Dispute Resolution provisions as set forth in Article XV of the Operating Agreement."

Article XV of the operating agreement stated that "this Section shall govern in the event that there exists any dispute between the Members of the Company or relating to this Agreement," and provided that if the parties were unable to resolve their dispute during a prescribed period of negotiation, either party could submit the dispute to arbitration with the American Arbitration

Association (AAA). According to Exhibit A to the operating agreement, the "members of the company" were TNI and Jaccard Holdings.

On February 16, 2010, TNI filed a one-count complaint against Jaccard Holdings and TNI Packaging, LLC, asserting that Jaccard Holdings made material misrepresentations to TNI in order to induce TNI to enter into the agreements. The complaint sought rescission of the agreements. The defendant moved to dismiss the complaint on the ground that TNI had not complied with the contractual requirement that the parties should first attempt to resolve any dispute through good-faith negotiations. On April 15, 2010, TNI voluntarily withdrew its complaint, and the trial court granted TNI 28 days to file an amended complaint.

On May 4, 2010, Jaccard Holdings filed a request for arbitration with the AAA. Ten days later, TNI filed an amended complaint containing three counts that added a new defendant, Jaccard Corporation. Counts I and II were against Jaccard Holdings, and stated claims for fraud in the inducement (seeking damages) and rescission of the agreements. Count III, alleging "common law fraud," was directed against Jaccard Corporation.

On June 11, 2010, the defendants moved to dismiss the amended complaint pursuant to section 2—619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2—619(a)(9) (West 2008)). The defendants asserted that TNI's claims in counts I and II must be heard in arbitration pursuant to the dispute resolution provision of the operating agreement. They also asserted that the claim in count III should either be joined with the other two claims and heard in arbitration as well (on the theory that, even though the defendant named in that claim was not a party to the agreements, the claim was intertwined with the arbitrable claims), or stayed pending completion of the arbitration process. Alternatively, the defendants argued that the allegations of fraud in counts I and III were

insufficient and that the fraud claims should be dismissed on that ground. The motion was fully briefed and proceeded to oral argument on November 23, 2010. On that date, the trial court found that the claims in counts I and II were covered by the arbitration clause and should be arbitrated. In so ruling, the trial court stated: "I believe that the agreement is both broad enough to encompass these allegations and specific enough to require that at least the first two counts be sent to arbitration." The trial court therefore granted the motion to dismiss those counts, ordering that they should "proceed to arbitration for resolution." The trial court also stated that, "At a minimum, the arbitrators are charged with a responsibility of determining arbitrability of the issues." However, the written order did not indicate that any issue of arbitrability remained to be determined by the arbitrators. The trial court stayed count III pending the resolution of the first two counts in arbitration. TNI filed a timely notice of appeal. We have jurisdiction of the appeal pursuant to Supreme Court Rule 307(a)(1) (eff. July 6, 2000). *See Glazer's Distributors of Illinois, Inc. v. NWS—Illinois, LLC,* 376 Ill. App. 3d 411, 420 (2007) (grant or denial of motion relating to arbitration of claims is appealable as an injunction pursuant to Rule 307(a)).

On appeal, TNI raises two arguments. First, it asserts that the trial court improperly applied the Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq*. (West 2008)) rather than the Federal Arbitration Act (9 U.S.C. § 1 *et seq*. (2006)) and therefore incorrectly permitted the arbitrators to determine the arbitrability of the claims. Second, it asserts that the trial court erred in determining that the claims in counts I and II were arbitrable under the contract. We review issues of law, such as those involved in a motion to dismiss under section 2—619 of the Code, *de novo*. *DeLuna v. Burciaga,* 223 Ill. 2d 49, 59 (2006). We apply the same standard of review in evaluating whether the trial court properly determined that counts I and II were arbitrable insofar as that determination

rests on a construction of an arbitration clause in a contract. *Avery v. State Farm Mutual Automobile Insurance Co.,* 216 Ill. 2d 100, 129 (2005).

In response to TNI's assertion that federal law rather than the state statute applies, the defendants contend that TNI forfeited this argument by failing to present it to the trial court. *See Tortoriello v. Gerald Nissan of North Aurora, Inc.,* 379 Ill App. 3d 214, 225 (2008) (issue of whether Federal Arbitration Act applies on the basis that the contract at issue affects interstate commerce involves factual determination, and so it may not be decided in the first instance by a reviewing court). TNI invites us to overlook the forfeiture, but we decline to do so. We agree with the defendants' additional contention that, as a whole, the trial court's verbal remarks and written order reflect that it found the claims in counts I and II to be arbitrable under the agreements, not that it was deferring to the arbitrators to make this determination. Moreover, even if we were to consider the issue, we would find that the Illinois arbitration act applied in this case, as the parties' agreements specified that Illinois law would be applied. *Glazer's,* 376 Ill. App. 3d at 421 (the Federal Arbitration Act does not apply where the parties' contract contains a choice-of-law provision specifying Illinois law, regardless of the possible effect on interstate commerce).

The heart of this appeal is the second issue TNI raises, whether the trial court was correct in finding that the claims in counts I and II should be heard in arbitration. As TNI notes, the asset purchase agreement states that all "disputes that arise under the terms of this Agreement" must be resolved as per article XV of the operating agreement, and that clause of the operating agreement provides that all disputes between the members of the company or "relating to this Agreement" may be arbitrated at the request of either party. TNI argues that its claim in count I—that it was fraudulently induced to enter into the two agreements at issue here—cannot be considered a claim

arising "under the terms of" the agreements because TNI is not seeking to enforce the terms of the agreements but rather to invalidate them. Therefore, it contends, this claim is not arbitrable.

Unfortunately for TNI, Illinois courts have squarely rejected this argument. For instance, in *Diersen v. Joe Keim Builders, Inc.,* 153 Ill. App. 3d 373 (1987), this court held that the plaintiff's fraud in the inducement claim was covered under a broad arbitration clause similar to the one in this case (providing that "all claims, disputes and other matters *** relating to this Agreement, or the breach thereof" would be resolved through arbitration). We also noted other cases holding that "claims of precontract fraud may be considered arbitrable matters." *Id.* at 376, citing *J & K Cement Construction Co. v. Montalbano Builders, Inc.,* 119 Ill. App. 3d 663, 670-72 (1983). More recently, the court in *Ragan v. AT&T Corp.,* 355 Ill. App. 3d 1143, 1158 (2005), summarized the applicable legal rule: if the claim of fraudulent inducement goes to the contract as a whole rather than only to the arbitration clause of the contract, the claim must go to arbitration for resolution. Here, although TNI claims that the fraudulent misrepresentations of Wangler and the companies for which he acted induced TNI to enter into the agreements, there is no allegation that the agreement to arbitrate disputes was itself specifically procured by fraud. In the absence of such an allegation, the claim of precontract fraud is arbitrable under a generic arbitration clause (such as the one here) because it arises out of the general subject matter of the contract, *i.e.,* the acquisition of TNI by the defendants. *Cusamano v. Norrell Health Care, Inc.,* 239 Ill. App. 3d 648, 651-52 (1992), *cited with approval in Jensen v. Quik International,* 213 Ill. 2d 119, 128-29 (2004).

TNI also argues that its claim for rescission in count II is not arbitrable for the same reason—it seeks to invalidate, rather than enforce, the contracts. As we have held, however, allegations of fraud relating to the contract as a whole are not sufficient to remove a claim from the

scope of an arbitration agreement. Moreover, in *Jensen,* our supreme court rejected the argument that a claim for rescission is not arbitrable under a generic arbitration clause because it seeks to avoid rather than enforce the contract. *Id*. at 129 (holding that the issue of whether the plaintiff could rescind the contract based upon irregularities existing at the time the contract was formed was properly arbitrated pursuant to the arbitration clause in the contract). Accordingly, the trial court did not err in ruling that this claim, too, should go to arbitration.

For all of the foregoing reasons, the order of the circuit court of Du Page County compelling arbitration of counts I and II of the plaintiff's amended complaint is affirmed.

Affirmed.