[Cite as *Choice Hotels Internatl., Inc. v. C & O Developers, L.L.C.*, 2022-Ohio-3234.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CHOICE HOTELS
INTERNATIONAL, INC., :

Plaintiff-Appellee, :
No. 111182
v. :

C & O DEVELOPERS, L.L.C., ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 15, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-953957

Appearances:

Calfee, Halter, & Griswold LLP, Kimberly Moses, and Brandon E. Brown; Bass, Berry, & Sims PLC, Brian R. Iverson, and David Esquivel, pro hac vice, *for appellee*.

Baker & Hostetler LLP, Michael A. VanNiel, Adam L. Fletcher, and Scott E. Prince, *for appellants*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendants-appellants, C&O Developers, L.L.C. ("C&O Developers"), OHI, L.L.C. ("OHI"), FRC Family Enterprises, L.L.C. ("FRC"), David A. Crisafi ("David Crisafi"), Frank R. Crisafi ("Frank Crisafi"), and David B. Orlean ("Orlean")

(collectively "Appellants"), appeal a judgment of the Cuyahoga County Court of Common Pleas denying their motion to stay proceedings pending arbitration. They claim the following error:

> The trial court erred when it denied the Franchisee Parties' motion of defendants to stay proceedings pending arbitration.

{¶ 2} We find that the present dispute does not fall within the scope of the arbitration agreement and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} In December 2014, plaintiff-appellee, Choice Hotels International, Inc. ("Choice Hotels") entered into a franchise agreement with Frank and David Crisafi (the "Franchise Agreement") for the operation of a "Cambria Suites" hotel in Westfield, Indiana. The Franchise Agreement contains an arbitration provision, which states, in relevant part, that

> any controversy or claim arising out of or relating to this Agreement or any other related agreements * * * will be sent to final and binding arbitration before either the American Arbitration Association, J.A.M.S., or National Arbitration Forum in accordance with the Commercial Arbitration Rules of the American Arbitration Association * * *.

{¶ 4} Nearly two years later, in September 2016, Frank and David Crisafi assigned their rights and obligations under the Franchise Agreement to C&O Westfield L.L.C. ("C&O Westfield"), in order to allow C&O Developers, the sole owner of C&O Westfield, to obtain financing for the construction of the hotel. C&O Developers received a senior loan from Heartland Bank, which was secured by a lien on the hotel and on the personal property of C&O Westfield. However, the senior

loan prohibited other encumbrances on the bank's collateral and did not cover the full cost of the hotel construction. Consequently, C&O Developers needed to find additional funding elsewhere, and Choice Hotels agreed to provide the necessary financing by way of a mezzanine-structured loan.

{¶ 5} As part of the mezzanine-loan transaction, Choice Hotels and C&O Westfield entered into a loan agreement ("Loan Agreement"). The Loan Agreement provided, as preconditions to the loan, that the Franchise Agreement had to remain in full force and effect, with no default thereunder, and the Franchise Agreement had to be assigned to C&O Westfield. Section 3.1(g) of the Loan Agreement provides, in relevant part:

> The Franchise Agreement shall be in full force and effect and no default shall exist under the Franchise Agreement. Lender shall have received fully executed originals of the Assignment, and amendment to the Franchise Agreement and such other documents requested by franchisor in connection with the transactions contemplated hereby.

{¶ 6} Pursuant to the Loan Agreement, Choice Hotels agreed to lend C&O Developers the sum of $2,075,739, and C&O Developers issued a promissory note, with a confession of judgment, in favor of Choice Hotels. The remaining appellants, Frank and David Crisafi, OHI, Orlean, and FRC, executed a Guaranty Agreement in favor of Choice Hotels, and C&O Developers entered into a Pledge and Security Agreement with Choice Hotels. The Guaranty Agreement required the guarantors to guarantee the obligations owed by C&O Developers under the Loan Agreement, as well as certain other obligations, including "the construction and completion of the Hotel in strict accordance with the terms and conditions of * * * the Franchise

Agreement * * *." (See Guaranty Agreement, section 1.1.) (The Loan Agreement, Promissory Note, Guaranty Agreement, and Pledge and Security Agreements, are collectively referred to as the "Loan Documents".)

{¶ 7} C&O Developers and the guarantors also promised to cause C&O Westfield to keep the Franchise Agreement in force and to comply with its terms. Section 6.2(j) of the Loan Agreement states, in relevant part:

> The Guarantors will cause Franchisee to, and Borrower shall cause the Franchisee to, comply with and perform on a timely basis all of Franchisee's obligations under the Franchise Agreement, * * *.

{¶ 8} Under to the terms of the promissory note, C&O Developers agreed to repay the full amount of the loan by March 29, 2020. C&O Developers defaulted on the loan by failing to repay it by the deadline, and Choice Hotels filed a complaint against Appellants, asserting claims for a confessed judgment, breach of contract based on an alleged breach of the promissory note, and breach of contract based on an alleged breach of the Guaranty Agreement.

{¶ 9} Appellants filed a motion to stay the proceedings pending arbitration, arguing that the arbitration clause in the Franchise Agreement mandated that the parties' dispute be resolved in binding arbitration. Appellants argued that the Loan Documents constituted "Related Agreements" as described in the arbitration clause and that they, therefore, fell within the scope of the mandatory arbitration provision.

{¶ 10} Choice Hotels opposed the motion to stay, arguing that none of the defendants were parties to the Franchise Agreement's arbitration clause because Frank and David Crisafi, the only defendants who were signatories to the Franchise

Agreement, assigned their rights and obligations under the Franchise Agreement to C&O Westfield, which is not a party to the Loan Documents. Choice Hotels further asserted that the Loan Documents are not "Related Agreements" as that term is used in the Franchise Agreement's arbitration clause because they were executed two years after the Franchise Agreement, and the Loan Documents expressly state that all disputes arising under the Loan Documents shall be resolved in a state or federal court.[1] Finally, Choice Hotels argued that the integration clause contained in Section 8.5 of the Loan Agreement expressly states that the Loan Documents "embody the entire agreement of the parties with the respect to their subject matter" and that the Loan Documents "supersede all prior agreements and understandings between the parties with respect to its subject matter."

{¶ 11} The trial court denied Appellant's motion to stay pending arbitration. Appellants now appeal the trial court's judgment.[2]

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[1] Paragraph 19 of the Guaranty Agreement states, in relevant part:

> Guarantors hereby consents [sic] to the exclusive jurisdiction of any state or federal court located within the State of Maryland, and irrevocably agrees that, subject to Lender election, all actions or proceedings relating to the Loan Documents or transactions contemplated hereunder shall be litigated in such courts, and Guarantors waives [sic] any objection which Guarantors may have based on lack of personal jurisdiction, improper venue or forum non conveniens to the conduct of any proceeding in any such court and waives personal service of any and all process upon Guarantors, and consents that all such service of process be made by mail or messenger directed to Guarantors at the address set forth in Section 10 hereof.

[2] Pursuant to R.C. 2711.02(C), an order "that grants or denies a stay of a trial of any action pending arbitration * * * is a final order that may be reviewed on appeal."

II. Law and Analysis

A. Choice of Law

{¶ 12} Before addressing Appellant's sole assignment of error, we must first decide which state's law to apply when determining whether the parties agreed to arbitrate their dispute. Appellants' argument that the parties agreed to arbitrate the present dispute is based on the Franchise Agreement, which contains the arbitration provision they wish to enforce. Section 20(f) of the Franchise Agreement, titled "Governing Law," states, in relevant part:

> This Agreement becomes valid and effective only when we have signed it, and it will be interpreted under the substantive laws of Maryland, not including its conflict of laws provision or such provisions of any other jurisdiction; except that nothing herein shall be construed to establish independently your right to pursue claims under Maryland's Franchisee Registration and Disclosure Law.

{¶ 13} Section 8.5 of the Loan Agreement also includes a choice-of-law provision, which states that the Loan Agreement "shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to its conflict of law rules."

{¶ 14} Notwithstanding the choice-of-law provisions in the various contracts, Appellants argue that Ohio law and federal law govern the standard for arbitrability because the law of the jurisdiction in which relief is sought controls all matters pertaining to the parties' remedial rights. They cite *Shafer v. Metro-Goldwyn-Mayer Distrib. Corp.*, 36 Ohio App. 31, 172 N.E. 689 (10th Dist. 1929), in support of their argument.

{¶ 15} In *Shafer*, the court held that while the law selected in a choice-of-law provision of a contract governs substantive rights, the issue of arbitration is a procedural remedy to be decided pursuant to the law of the forum state. *Id.* at paragraph one of the syllabus. Other Ohio courts have also held that the law of the forum state controls the resolutions of procedural remedies, including motions to enforce arbitration. *See, e.g.*, *Philpott v. Pride Techs. of Ohio, L.L.C.*, 1st Dist. Hamilton No. C-140730, 2015-Ohio-4341, ¶ 11; *Guider v. Lci Communications Holdings Co.*, 87 Ohio App.3d 412, 417, 622 N.E.2d 415 (10th Dist.1993).

{¶ 16} Moreover, a choice-of-law determination is unnecessary if the laws of each forum would reach the same result. *Philpott* at ¶ 11, citing *Holliday v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86069, 2006-Ohio-284, ¶ 19. Choice Hotels concedes we would reach the same result regardless of whether we apply Ohio law or Maryland law. (Brief of plaintiff-appellee Choice Hotels p. 7, stating "Nonetheless, as illustrated below by application of Ohio, Delaware, and Maryland law, the trial court's ruling must be affirmed regardless of which state's law applies.") We, therefore, apply Ohio law to the question of whether the parties agreed to arbitrate disputes arising under the Loan Documents.

B. Arbitrability

{¶ 17} In the sole assignment of error, Appellants argue the trial court erred in denying their motion to stay proceedings pending arbitration. They contend the trial court erroneously found that (1) David and Frank Crisafi, Orlean, OHI, and FRC are not parties to the Franchise Agreement, (2) the Loan Documents are not

"Related Agreements" within the scope of the arbitration agreement in the Franchise Agreement, (3) an integration clause in the Loan Agreement precludes application of the arbitration provision to disputes under the Loan Documents, and (4) arbitrability of this dispute must be determined by the court rather than an arbitrator.

1. Standard of Review

{¶ 18} The standard of review applicable to a trial court's ruling on a motion to stay and compel arbitration depends on "the type of questions raised challenging the applicability of the arbitration provision." *Kaminsky v. New Horizons Computer Learning Ctr. of Cleveland,* 2016-Ohio-1468, 62 N.E.3d 1054, ¶ 12 (8th Dist.), citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543.

{¶ 19} In this case, we are asked to decide whether the arbitration provision in the Franchise Agreement applies to the Loan Documents. This question involves the interpretation of written contracts, and the interpretation of a written contract is a question of law subject to de novo review. *Estate of Millstein*, 8th Dist. Cuyahoga No. 110546, 2021-Ohio-4610, ¶ 50; *Westlake v. Cleveland*, 8th Dist. Cuyahoga No. 109894, 2021-Ohio-2929, ¶ 11, quoting *Gill v. Guru Gobind Sikh Soc. of Cleveland*, 8th Dist. Cuyahoga No. 104634, 2017-Ohio-7163, ¶ 29 ("'[L]egal questions are subject to de novo review whereby no deference is given to the trial court's decision[.]'").

{¶ 20} In a de novo review, we afford no deference to the trial court's decision and independently review the record to determine whether the trial court's judgment is appropriate. *Johnson v. Cleveland City School Dist.*, 8th Dist. Cuyahoga No. 94214, 2011-Ohio-2778, ¶ 53.

2. Parties to the Franchise Agreement

{¶ 21} Appellants argue the trial court erred in finding that they were not parties to the Franchise Agreement and they, therefore, lacked the capacity to enforce the arbitration provision contained therein.

{¶ 22} It is undisputed that four of the Appellants, namely OHI, Orlean, FRC, and C&O Developers, were never parties to the Franchise Agreement. It is, therefore, undisputed that none of these parties may enforce the arbitration provision contained in that agreement. David and Frank Crisafi are the only appellant-signatories to the Franchise Agreement, but they assigned their interest in the Franchise Agreement to C&O Westfield, which is not a party to the Loan Documents.

{¶ 23} As a matter of basic assignment law, an assignor who has transferred his or her contract rights is no longer a party to the contract and cannot enforce it. *Cameron v. Hess Corp.*, 974 F.Supp.2d 1042, 1055 (S.D. Ohio 2013), citing 6 Am. Jur.2d, Assignments, Section 1 (2012) ("[A]n assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished * * * and the assignee acquires a right to such performance[.]"); *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys.*,

590 F.Supp.2d 677, 684 (D.N.J. 2008), (where a party executes a complete assignment of its interest in an arbitration agreement, the assignor's "right to compel arbitration under those agreements is 'extinguished.'"). Thus, by assigning all of their interests in the Franchise Agreement to C&O Westfield, David and Frank Crisafi ceased to be parties to the Franchise Agreement.

{¶ 24} Appellants nevertheless argue they remain parties to the Franchise Agreement despite the assignment because, under the "Survival of Obligations" clause of the Assignment and Assumption of Franchise Agreement ("Assignment"), they agreed to remain "liable for all Franchisee's obligations under the Franchise Documents[.]" (Assignment ¶ 2.) However, by stating that the Crisafis remained liable under the Franchise Agreement does not mean they remained parties to the agreement since the Franchise Agreement does not impose any future obligations upon them, and nothing in the Assignment indicates that the Crisafis retained any rights under the Franchise Agreement. The Assignment expressly states that "Franchisee [the Crisafis] assigns to Successor Trustee [C&O Developers] * * * *all of Franchisee's interest* in the Franchise Documents[.]" (Assignment ¶ 1.) The Assignment further provides that, as successor franchisee, C&O Developers "accepts the assignment and agrees to assume *all of the Franchisee's rights* and obligations under the Franchise Documents." (Assignment ¶ 3, emphasis added.) Having assigned all of their rights in the Franchise Agreement to C&O Developers, the Crisafis relinquished the right to enforce the arbitration provision in the Franchise

Agreement notwithstanding their agreement to remain liable for "all Franchisee's obligations."

{¶ 25} Still, Appellants contend the Crisafis and Orlean are parties to the Franchise Agreement because they agreed to personally guarantee C&O Westfield's obligations. However, a "guarantee is a promise to answer the debt of another * * *." *Digital Equip. Corp. v. Ebert*, 5th Dist. Stark No. CA-9240, 1993 Ohio App. LEXIS 4130, 4 (Aug. 16, 1993), citing *Barron's Law Dictionary* 212 (3d Ed.1991). In *Ebert*, the court explained that "a guarantee is an independent promise from the underlying debt. The responsibilities which are imposed by the contract of guarantee differ from those which are created by the contract to which the guarantee is collateral." *Id.*, citing *Madison Natl. Bank v. Weber*, 117 Ohio St. 290, 158 N.E. 543 (1927). Since one cannot act as one's own surety, the existence of a guarantee agreement precludes characterization of the guarantor as a co-party to the underlying agreement. *In re Steve's Furniture Warehouse, Inc.*, 46 B.R. 80 (Bankr. S.D.Cal. 1985). Therefore, despite Appellants' argument to the contrary, the personal guarantees of the Crisafis and Orlean provide further proof that they are not parties to the Franchise Agreement.

{¶ 26} Finally, Appellants argue they are parties to the Franchise Agreement because they are named in a confidentiality clause set forth in the Assignment. The confidentiality clause provides that Appellants shall keep any modifications contained in the Assignment "in strict confidence," and that "[a]ny unauthorized disclosure is a default under the Franchise Agreement." (Assignment ¶ 10.)

However, the Crisafis and Orlean are direct or indirect owners of the assignee, C&O Westfield. In that context, it is clear the confidentiality clause is intended to require the direct or indirect owners of C&O Developers to maintain confidentiality. Moreover, in light of the Crisafis' assignment of all of their rights under the Franchise Agreement and their agreement to personally guarantee C&O Developers' assumed obligations, it is clear Appellants are not parties to the Franchise Agreement as assigned. Therefore, the trial court properly concluded that Appellants are not parties to the Franchise Agreement and, therefore, lack the capacity to enforce the arbitration agreement contained therein.

3. Related Agreements

{¶ 27} Appellants argue that even if Appellants are no longer parties to the Franchise Agreement, the arbitration provision in the Franchise Agreement nevertheless applies to this controversy because the Loan Documents are "Related Agreements" within the meaning of the Arbitration Provision. They also assert that the trial court ignored the well-established policy in Ohio favoring arbitration for resolution of commercial disputes when it concluded that the Loan Documents are not subject to the arbitration provision.

{¶ 28} However, arbitration agreements are a matter of contract. We are, therefore, guided by "'the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.'" *N. Park Retirement Community Ctr., Inc. v. Sovran Cos.*, 8th Dist. Cuyahoga No. 96376, 2011-Ohio-

5179, ¶ 4, quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

{¶ 29} Since arbitration agreements are creatures of contract, we analyze the issues presented in accordance with the rules of contract interpretation. *Bentley v. Cleveland Browns Football Co.*, 194 Ohio App.3d 826, 2011-Ohio-3390, 958 N.E.2d 585, ¶ 14 (8th Dist.), citing *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 668, 687 N.E.2d 1352 (1998).

{¶ 30} In interpreting contracts, our role is "to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11, citing *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Companies.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). Where the contract terms are clear and unambiguous, we may determine the parties' rights and obligations from the plain language of the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989).

{¶ 31} Although the Franchise Agreement provides that disputes under that agreement or "Related Agreements" must be submitted to arbitration, neither the arbitration clause nor the Franchise Agreement, generally, define what constitutes a "Related Agreement." Nevertheless, the Franchise Agreement, which was executed in December 2014, anticipates that the parties or their affiliates may enter into "Related Agreements" such as "promissory notes or other incentive agreements" at some time in the future. (Franchise Agreement, Section 3.) The Loan Agreement, which was executed in September 2016, acknowledges the

Franchise Agreement and the Assignment in its recitals. In Section 6.2(j) of the Loan Agreement, the parties agreed, in relevant part, that

> the Guarantors will cause Franchisee to, and Borrower shall cause the Franchisee to, comply with and perform on a timely basis all of Franchisee's obligations under the Franchise Agreement, and will give Lender prompt written notice of the occurrence of any default by Franchisee or any other Credit Party under the Franchise Agreement. * * *

{¶ 32} Under the terms of the Guaranty Agreement, Appellants agreed to comply with certain "Guaranteed Obligations," including, but not limited to

> the full, timely and complete compliance with, and punctual performance by Borrower of, each and every obligation, covenant, agreement, representation and warranty to be complied with or performed by Borrower under the Note and Loan Agreement * * *.

{¶ 33} Thus, C&O Developers and the guarantors promised to comply with the terms of the Franchise Agreement. Thus, although the Loan Documents do not expressly incorporate the Franchise Agreement by reference thereto, they are related to one another.

{¶ 34} However, just because the Loan Documents and the Franchise Agreement are generally related to each other does not mean the Loan Documents qualify as "Related Agreements" for purposes of the Franchise Agreement's arbitration provision. The plain language of the integration clause in the Loan Agreement combined with specific dispute-resolution clauses contemplating litigation in court suggest the parties did not intend the arbitration clause to apply to the Loan Documents. Section 8.5 of the Loan Agreement includes the following integration clause:

> *The Loan Documents embody the entire agreement of the parties with respect to their subject matter.* There are no restrictions, promises, representations, warranties, or undertakings other than those expressly set forth or referred to in the Loan Documents. *The Loan Documents supersede all prior agreements and understandings between the parties with the respect to its subject matter.*

(Emphasis added.) Since the Loan Documents relate solely to the mezzanine loan provided to C&O Developers by Choice Hotels, the loan is clearly the "subject matter" of the Loan Documents.

{¶ 35} Section 1.2 of Loan Agreement defines "Loan Documents" as "this Agreement, the Note, the Guaranty, the Pledge Agreement and any and all other documents required to be executed and delivered in connection with the loan[.]" The Loan Documents unambiguously provide that disputes arising thereunder will be litigated in a court of law rather than in an arbitration proceeding. Paragraph 19 of the Guaranty Agreement expressly states, in relevant part:

> **Submission to Jurisdiction.** Guarantors hereby consents [sic] to the exclusive jurisdiction of any state or federal court located within the State of Maryland, and irrevocably agrees [sic] that, subject to Lender's election, all actions or proceedings relating to the Loan Documents or the transactions contemplated hereunder shall be litigated in such courts, and Guarantors waives [sic] any objection which Guarantors may have based on lack of personal jurisdiction, improper venue or forum non conveniens to the conduct of any proceedings in any such court and waives personal service of any and all process upon Guarantors, and consents to all such service of process be made by mail or messenger directed to Guarantors at the address set forth in **Section 10** hereof. Nothing in this **Section 20** shall affect the right of Lender to serve legal process in any other manner permitted by law or affect the right of Lender to bring any action or proceeding against Guarantors or Guarantors property in the court of any other jurisdiction.

(Emphasis sic.)

{¶ 36} The Promissory Note similarly provides, in relevant part:

> Upon the occurrence of an Event of Default, Maker irrevocably authorizes any attorney at law to appear for it in any court of record at any time after any past due balance remains unpaid and to confess a judgment against Maker, without process, in favor of Holder, in the principal sum of the then-due amount under this Note. * * *

(Promissory Note, Section 4.2(b).)

{¶ 37} The "submission to jurisdiction" provision in the Guaranty Agreement and the confession of judgment provision in the Promissory Note unequivocally provide that disputes arising under the Loan Documents shall be resolved in a court of law. Each and every one of the Loan Documents also includes a jury waiver. A jury waiver would be unnecessary if the parties intended to resolve disputes involving the loan in arbitration. We cannot ignore the plain language of these provisions. "In interpreting contracts, courts should avoid interpretations that render terms or phrases superfluous or meaningless." *Bates v. Bates*, 7th Dist. Noble No. 21 NO 0482, 2022-Ohio-1055, ¶ 38, citing *Fifth Third Mtg. Co. v. Rankin*, 4th Dist. Pickaway No. 10CA45, 2011-Ohio-2757, ¶ 24, citing *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. Franklin No. 08AP-769, 2009-Ohio-6835, ¶ 30 ("When interpreting a contract, we will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary."). To ignore the submission to jurisdiction provision in the Guaranty Agreement, the confession of judgment in the promissory note, and the multiple jury waivers in the Loan Documents would render these

terms meaningless and would inappropriately rewrite the terms of the parties' agreements.

{¶ 38} Appellants argue the integration clause in the Loan Agreement is nevertheless irrelevant "because the parole evidence rule does not exclude contemporaneous written agreements regardless of whether a contract contains an integration clause." (Appellants' brief p. 14-15.) They assert that the Franchise Agreement, which was executed in 2014, may be considered as a contemporaneous agreement with the Loan Documents, which were executed in 2016, because the parties executed the Assignment of the Franchise Agreement contemporaneously with the Loan Documents. They cite *Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961 (8th Dist.), and *Mazzella Lifting Techs., Inc. v. Farmer*, N.D. Ohio No. 1:16 CV 395, 2017 U.S. Dist. LEXIS 216808 (Jan. 20, 2017), in support of their argument.

{¶ 39} In *Mazzella*, the parties entered into an asset-purchase agreement wherein Mazzella agreed to buy business assets from the defendant. As a condition precedent to the purchase of assets, the defendant was required to execute and deliver an employment agreement, which was incorporated by reference into the asset-purchase agreement. The asset-purchase agreement included a forum-selection clause, which was not included in the employment agreement. The forum-selection clause provided that disputes were to be submitted to the venue and jurisdiction of Ohio courts and governed by Ohio law. The asset-purchase agreement also contained an integration clause that provided that the agreement, together with all exhibits and "other Transaction Documents" constituted the

parties "entire understanding of the parties concerning the subject matter hereof." *Id.* at 4. Unlike the asset-purchase agreement, the employment agreement did not contain a forum-selection clause, but it provided a choice-of-law provision, specifying that disputes were to be governed by the laws of the state of West Virginia.

{¶ 40} Following the sale, Mazzella filed a complaint in a federal district court in Ohio, alleging that the defendant violated the employment agreement. The defendant filed a motion to dismiss for improper venue. Mazzella opposed the motion, arguing that the defendant waived any argument against the venue when he executed the asset-purchase agreement, which contained the forum-selection clause. The defendant replied, arguing that the court could not consider the asset-purchase agreement in determining the appropriate venue because the asset-purchase agreement contained an integration clause and the employment agreement was unrelated to the asset-purchase agreement. Therefore, the defendant argued, the asset-purchase agreement was extrinsic evidence that could not be considered.

{¶ 41} After construing the agreements, the court found that it was the parties' intention to have the asset-purchase agreement and the employment agreement construed together. In reaching this conclusion, the court observed that the asset-purchase agreement incorporated the employment agreement into the asset-purchase agreement by reference and, therefore, made it part of the overall transaction. *Id.* at *12. The court noted that the agreements were executed contemporaneously and that the sale of the defendant's assets was expressly

conditioned on the execution and delivery of the employment agreement. *Id.* The court also found that the asset-purchase agreement and the employment agreement were negotiated, in part, for the same consideration. *Id.* Consequently, the court concluded that although the two agreements were to be construed in accordance with the laws of different states, they were "sufficiently intertwined to be considered together." *Id.* Thus, the court held that the defendant could not avoid application of the forum-selection clause in the asset-purchase agreement despite the integration clause contained therein because the two agreements were part of the same transaction.

{¶ 42} In *Seyfried*, 2017-Ohio-286, 81 N.E.3d 961, a consumer's estate filed a class action complaint against a car dealership, alleging that the dealership failed to disclose that the vehicle the consumer purchased had been used as a rental car. The dealership moved to stay the proceedings pursuant to an arbitration agreement the consumer signed at the time of his purchase. The plaintiff opposed the motion, arguing that the purchase contract was fully integrated and did not incorporate the separately executed arbitration agreement. The trial court found that the consumer was bound by the arbitration agreement and stayed the proceedings.

{¶ 43} On appeal to this court, the plaintiff argued that the purchase agreement was a fully integrated contract that superseded the separately executed arbitration agreement. We rejected that argument and found that the consumer was bound by the arbitration agreement. In reaching this conclusion, we explained that the purchase agreement and the arbitration agreement "were executed moments

apart, not separated by any meaningful lapse of time." *Id.* at ¶ 24. Consequently, we held that "the two documents should more appropriately be considered as multiple documents executed as part of a transaction." *Id.*

{¶ 44} We find *Mazzella* and *Seyfried* distinguishable from the facts of this case. Whereas the contracts at issue in *Mazzella* and *Seyfried* were executed contemporaneously with each another, the Loan Documents in this case were executed almost two years after the Franchise Agreement was executed. At the time the Loan Documents were executed, the franchisee's circumstances had changed because the franchisee apparently needed additional financing to complete the construction of the hotel. And, unlike the contracts in *Mazzella* and *Seyfried*, which were related to the original transactions involved in those cases, the Loan Documents were executed solely for the limited purpose of providing additional financing that was not provided in the original contract. That the Crisafis executed the Assignment contemporaneously with the Loan Documents does not change the fact that the Loan Documents involved a new, separate transaction.

{¶ 45} The integration clause in the Loan Agreement clearly and unequivocally states that the Loan Documents embody the parties' entire agreement with respect to the mezzanine loan. Although the Loan Documents are generally related to the Franchise Agreement, the Loan Agreement expressly states that the "Loan Documents supersede all prior agreements and understandings between the parties with respect to its subject matter[,]" i.e., the loan. And, the Franchise Agreement does not convey any intent that the Loan Documents, which were

executed almost two years later, should be considered "Related Agreements" for purposes of arbitration. Although the Crisafis executed the Assignment of the Franchise Agreement contemporaneously with the Loan Documents, it would be nonsensical for them to assign their interest in the Franchise Agreement to C&O Developers as a precondition of the loan if they considered the Loan Documents and Franchise Agreements as "Related Agreements." The purpose of the Assignment would be defeated.

{¶ 46} The parties' intent to treat the Loan Documents as separate agreements for purposes of the arbitration clause may also be found in the plain language of the Loan Agreement. Section 3.1(g) of the Loan Agreement requires as a precondition to closing on the loan that the Franchise Agreement be in full force and effect, with no default existing thereunder, and that it be assigned C&O Westfield (a nonparty to the Loan Documents). Two paragraphs later, in Section 3.1(i), the Loan Agreement separately provides that all "Related Agreements" shall also be in full force and effect and no default thereunder. The fact that the preconditions relative to these agreements are listed separately demonstrates an intent to treat the Franchise Agreement as something other than a "Related Agreement," otherwise it would have been included with the "Related Agreements."

{¶ 47} The distinction between the Franchise Agreement and "Related Agreements" is also evident in Section 7 of the Loan Agreement, which governs events of default and remedies. Section 7.1(g) defines an event of default as: "A default by Borrower in the payment or performance when due (after giving effect to

any applicable notice and grace periods), whether by acceleration or otherwise, of any Related Agreement." Section 7.1(i) separately defines another event of default as: "The occurrence of a default or an event of default, or the occurrence of any event that, after notice or the passage of time or both, would constitute or cause a default or any event of default, under the Franchise Agreement." There would be no need to separately define the occurrence of default under the Franchise Agreement from the occurrence of default under any Related Agreement if the Franchise Agreement were a Related Agreement. Again, the fact that they are treated separately demonstrates the parties' intent to distinguish the Franchise Agreement from Related Agreements. Therefore, the trial court properly concluded that the Loan Documents are not "Related Agreements" subject to the Franchise Agreement's arbitration clause. The Loan Documents are not subject to the arbitration provision in the Franchise Agreement because they are not "Related Agreements."

{¶ 48} Lastly, Appellants argue the trial court erred in deciding the actual issue of arbitrability itself. They contend the arbitration clause in the Franchise Agreement empowers the arbitrator, and not the court, to decide the threshold issue of arbitrability. However, having determined that the arbitration clause does not apply to the Loan Documents, any provision in the arbitration clause authorizing an arbitrator to decide the issue of arbitrability is likewise inapplicable.

{¶ 49} The sole assignment of error is overruled.

{¶ 50} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN T. GALLAGHER, JUDGE

ANITA LASTER MAYS, P.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR