The Bullet Point: Ohio Commercial Law Bulletin

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Do I Have Standing to Sue My LLC?

Fair Debt Collection Practices Act Statute of Limitations

***Rotkiske v. Klemm,* 6th Circuit Court of Appeals, Slip Op. No. 18-328 (Dec. 10, 2019).**

In this appeal, the United States Supreme Court held that, absent an equitable doctrine, the statute of limitations on a Fair Debt Collection Practices Act (FDCPA) claim begins to run when the alleged violation occurred, not when it was discovered.

The Bullet Point: 16 USC 1692k(d) requires an FDCPA claim to be brought "within one year from the date on which the violation occurs." A split developed among circuit courts as to when the clock started running for statute of limitation purposes under the FDCPA. The Supreme Court ultimately decided the split, finding that the statute was clear and unambiguous: a claim must be brought within one year of the occurrence of the violation. In so ruling, the Court specifically rejected the "discovery rule" and its application to FDCPA claims, finding that permitting such an exclusion would run contrary to the express language of the statute. The court declined to consider whether there were other equitable grounds to toll this rule, as they were not properly asserted by the appellant.

Establishing Default in Foreclosure

***Deutsche Bank Nat'l Trust Co. v. Omar*, 9th Dist. Summit No. 29300, 2019-Ohio-5224.**

In this appeal, the Ninth Appellate District affirmed the trial court's decision finding for the lender on a claim for foreclosure, and specifically finding that it provided sufficient evidence of a borrower's default.

The Bullet Point: In order to be entitled to foreclose, a foreclosing party must establish a default. This does not require providing proof of every single payment on the mortgage loan however. Rather, as the Ninth Appellate District noted (and other courts have as well), evidence showing when payments stop, like a partial payment history, IRS forms, debt validation letter, and testimony from an appropriate representative of the lender can establish a default for foreclosure purposes.

Merchant Exception to the Statute of Frauds

***Hornacek v. Madenfort,* 5th Dist. Stark No. 2019CA00058, 2019-Ohio-5180.**

In this appeal, the Fifth Appellate District affirmed the trial court's decision, finding an oral agreement enforceable and not barred by the statute of frauds because the "merchant" exception applied.

The Bullet Point: Ohio's statute of frauds requires certain contracts to be in writing. There are certain exceptions to this, one of which is known as the "merchant exception." This exception states: a contract for a sale of goods for five-hundred dollars or more can be enforceable "between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of division (A) of this section against such party unless written notice of objection to its contents is given within ten days after it is received."

Standing to Sue an Limited Liability Company

***North Hill Holdings, LLC v. Concheck,* 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119.**

In this appeal, the Eighth Appellate District agreed with the trial court, finding that the plaintiff lacked standing to sue a limited liability company (LLC) because it was not considered a member of the corporation and could not sue over a failure to distribute fees.

The Bullet Point: Under Ohio law, limited liability companies are governed by R.C. Chapter 1705. Unless the limited liability company has an operating agreement that provides otherwise, R.C. Chapter 1705 sets forth who is a member in a limited liability company and the rights and responsibilities of the members. Under that statute, and when there is no operating agreement, a "member" is one who became a member at the time the company was formed; or, after formation, upon acquiring an interest directly from the LLC under an operating agreement; or, if no agreement exists, upon consent of all members; or, was assigned an interest by a member with the power to assign such interest. If a party is not in fact a member of an LLC, he or she lacks standing to challenge the LLC's actions.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROTKISKE *v.* KLEMM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18–328. Argued October 16, 2019—Decided December 10, 2019

The Fair Debt Collection Practices Act (FDCPA) authorizes private civil actions against debt collectors who engage in certain prohibited practices. An FDCPA action must be brought "within one year from the date on which the violation occurs." 15 U. S. C. §1692k(d). Respondent Klemm & Associates (Klemm) sued petitioner Rotkiske to collect an unpaid debt and attempted service at an address where Rotkiske no longer lived. An individual other than Rotkiske accepted service. Rotkiske failed to respond to the summons, and Klemm obtained a default judgment in 2009. Rotkiske claims that he first learned of this judgment in 2014 when his mortgage application was denied. He then filed suit against Klemm, alleging that Klemm violated the FDCPA by contacting him without lawful ability to collect. Klemm moved to dismiss the action as barred by the FDCPA's one-year statute of limitations. As relevant here, Rotkiske argued for the application of a "discovery rule" to delay the beginning of the limitations period until the date that he knew or should have known of the alleged FDCPA violation. Relying on the statute's plain language, the District Court rejected Rotkiske's approach and dismissed the action. The Third Circuit affirmed.

Held: Absent the application of an equitable doctrine, §1692k(d)'s statute of limitations begins to run when the alleged FDCPA violation occurs, not when the violation is discovered. Pp. 4–7.

(a) The plain text of §1692k(d) unambiguously sets the date of the violation as the event that starts the FDCPA's one-year limitations period. Rotkiske argues for the application of a general discovery rule as a principle of statutory interpretation that, in effect, would read a discovery provision into §1692k(d). But adopting this approach would require improper atextual supplementation of the statute. Such supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. See, *e.g.*, 12 U. S. C. §3416. Pp. 4–6.

(b) Rotkiske cannot rely on the application of an equitable, fraud-specific discovery rule to excuse his otherwise untimely filing. This Court has noted the existence of decisions applying a discovery rule in fraud cases, see, *e.g., Merck & Co.* v. *Reynolds*, 559 U. S. 633, 644, and has characterized these decisions as applying an equity-based doctrine, see, *e.g., California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. ___, ___. Rotkiske, however, neither preserved this issue before the Third Circuit nor raised it in his petition for certiorari. Pp. 6–7.

890 F. 3d 422, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. GINSBURG, J., filed an opinion dissenting in part and dissenting from the judgment.

SUPREME COURT OF THE UNITED STATES

No. 18–328

KEVIN C. ROTKISKE, PETITIONER *v.* PAUL KLEMM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December 10, 2019]

JUSTICE THOMAS delivered the opinion of the Court.

The Fair Debt Collection Practices Act (FDCPA) authorizes private civil actions against debt collectors who engage in certain prohibited practices. 91 Stat. 881, 15 U. S. C. §1692k(a). An action under the FDCPA may be brought "within one year from the date on which the violation occurs." §1692k(d). This case requires us to determine when the FDCPA's limitations period begins to run. We hold that, absent the application of an equitable doctrine, the statute of limitations in §1692k(d) begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the violation is discovered.

I

A

In 1977, Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." §1692(e). The

FDCPA pursues these stated purposes by imposing affirmative requirements on debt collectors and prohibiting a range of debt-collection practices. §§1692b–1692j.

The FDCPA authorizes the Federal Trade Commission, the Bureau of Consumer Financial Protection, and other federal agencies to enforce its provisions. §1692*l*. The FDCPA also authorizes private civil actions against debt collectors. §1692k(a). These private civil actions "may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." §1692k(d).

B

Petitioner Kevin Rotkiske failed to pay approximately $1,200 in credit card debt.[1] His credit card company referred the debt to respondent Klemm & Associates (Klemm) for collection.[2] In March 2008, Klemm sued Rotkiske, seeking to collect the unpaid debt. Klemm attempted service at an address where Rotkiske no longer lived, and a person whose description did not match Rotkiske's accepted service of the complaint. Klemm later withdrew the suit.

Klemm refiled suit in January 2009, and a process server attempted service at the same address. Once again, someone other than Rotkiske accepted service. Rotkiske failed to respond to the summons, and Klemm obtained a default

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[1] Because this case comes to us from a decision granting a motion to dismiss, we assume the truth of the facts alleged in Rotkiske's operative complaint. See, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002).

[2] Paul Klemm, the managing partner of Klemm & Associates, moved to a new firm named Nudelman, Nudelman & Ziering, which was later renamed Nudelman, Klemm & Golub. Rotkiske has sued Paul Klemm, Klemm & Associates, Nudelman, Klemm & Golub, and Nudelman, Nudelman & Ziering. For the sake of simplicity, we refer to the respondents as Klemm.

judgment. Rotkiske claims that he was not aware of Klemm's 2009 debt-collection lawsuit until September 2014, when he was denied a mortgage because of the default judgment against him.

On June 29, 2015, more than six years after the default judgment, Rotkiske brought suit against Klemm under the FDCPA. Rotkiske's amended complaint alleged that equitable tolling excused his otherwise untimely filing because Klemm purposely served process in a manner that ensured he would not receive service. The sole FDCPA claim in the complaint asserted that Klemm commenced the 2009 debt-collection lawsuit after the state-law limitations period expired and therefore "violated the FDCPA by contacting [Rotkiske] without lawful ability to collect." First Amended Complaint in No. 2:15–cv–03638 (ED Pa.), Doc. 15, p. 4.

Klemm moved to dismiss the action as barred by the FDCPA's one-year statute of limitations, 15 U. S. C. §1692k(d). Rotkiske argued that the court should apply a "discovery rule" to delay the beginning of the limitations period until the date he knew or should have known of the alleged FDCPA violation. To support this contention, Rotkiske relied on the Ninth Circuit's decision in *Mangum* v. *Action Collection Serv., Inc.*, 575 F. 3d 935 (2009). That case held that, under the "discovery rule," limitations periods in federal litigation generally begin to run when plaintiffs know or have reason to know of their injury. *Id.,* at 940–941.

The District Court dismissed the action. It held that the Ninth Circuit's general rule does not apply to §1692k(d), relying on the statute's plain language. The court also concluded that Rotkiske was not entitled to equitable tolling because, even accepting the truth of the allegations in the complaint, he was not misled by Klemm's conduct.

On appeal, the Third Circuit *sua sponte* reviewed the case en banc and unanimously affirmed. 890 F. 3d 422 (2018). The court held that, under the text of §1692k(d), the

FDCPA's one-year limitations period runs from the "date on which the violation occurs," not the date a potential plaintiff discovers or should have discovered the violation. *Id.,* at 425–426. The court expressly rejected the Ninth Circuit's approach, stating that there is no default presumption that all federal limitations periods run from the date of discovery. *Id.,* at 427. Rotkiske failed to raise the application of equitable doctrines on appeal, so the court did not address that issue. *Id.,* at 428–429.

Given the conflict between the Courts of Appeals, see *id.,* at 427, we granted certiorari. 586 U. S. ___ (2019).

II

The question before us is whether the "discovery rule" applies to the FDCPA's limitations period. The phrase "discovery rule," however, has no generally accepted meaning. Rotkiske's arguments invoking the discovery rule implicate two distinct concepts—the application of a general discovery rule as a principle of statutory interpretation and the application of a fraud-specific discovery rule as an equitable doctrine. We address each in turn.

A

When interpreting limitations provisions, as always, "we begin by analyzing the statutory language." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). If "there are two plausible constructions of a statute of limitations," we generally "adopt the construction that starts the time limit running when the cause of action . . . accrues" because "Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545

U. S. 409, 418–419 (2005) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997)).

Here, the text of §1692k(d) clearly states that an FDCPA action "may be brought . . . within one year from the date on which the violation occurs." That language unambiguously sets the date of the violation as the event that starts the one-year limitations period. At the time of the FDCPA's enactment, the term "violation" referred to the "[a]ct or instance of violating, or state of being violated." Webster's New International Dictionary 2846 (2d ed. 1949) (Webster's Second). The term "occur" meant "to happen," and, as Webster's Second explains, "occur" described "that which is thought of as definitely taking place as an event." *Id.,* at 1684. Read together, these dictionary definitions confirm what is clear from the face of §1692k(d)'s text: The FDCPA limitations period begins to run on the date the alleged FDCPA violation actually happened. We must presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank*, 503 U. S., at 254.

Rotkiske does not contest the plain meaning of §1692k(d)'s text or claim that he brought suit within one year of the alleged FDCPA violation. Instead, he suggests that we should interpret §1692k(d) to include a general "discovery rule" that applies to all FDCPA actions. In effect, Rotkiske asks the Court to read in a provision stating that §1692k(d)'s limitations period begins to run on the date an alleged FDCPA violation is discovered.

This expansive approach to the discovery rule is a "bad wine of recent vintage." *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (Scalia, J., concurring in judgment). It is a fundamental principle of statutory interpretation that "absent provision[s] cannot be supplied by the courts." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012). To do so "'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Nichols* v. *United States*, 578 U. S. ___, ___ (2016) (slip op., at 6) (quoting *Iselin* v. *United States*, 270 U. S. 245, 251 (1926)).

Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. Congress has enacted statutes that expressly include the language Rotkiske asks us to read in, setting limitations periods to run from the date on which the violation occurs *or the date of discovery of such violation.* See, *e.g.,* 12 U. S. C. §3416; 15 U. S. C. §1679i. In fact, at the time Congress enacted the FDCPA, many statutes included provisions that, in certain circumstances, would begin the running of a limitations period upon the *discovery* of a violation, injury, or some other event. See, *e.g.*, 15 U. S. C. §77m (1976 ed.); 19 U. S. C. §1621 (1976 ed.); 26 U. S. C. §7217(c) (1976 ed.); 29 U. S. C. §1113 (1976 ed.).

It is not our role to second-guess Congress' decision to include a "violation occurs" provision, rather than a discovery provision, in §1692k(d). The length of a limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463–464 (1975). It is Congress, not this Court, that balances those interests. We simply enforce the value judgments made by Congress.

B

Narrowing his initial assertion and moving away from the question on which we granted certiorari, Rotkiske also contends that his filing should be treated as timely under an equitable, fraud-specific discovery rule, relying on a line of decisions beginning with *Bailey* v. *Glover*, 21 Wall. 342 (1875). Rotkiske claims that *Bailey* and its progeny apply an equitable doctrine that delays the commencement of the statute of limitations in fraud actions, and that he has pleaded (or could plead) a claim within the scope of this doctrine. This Court has noted the existence of decisions applying a discovery rule in "fraud cases" that is distinct from the traditional equitable tolling doctrine. *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 644 (2010); *Gabelli* v. *SEC*, 568 U. S. 442, 450 (2013) (referring to the "fraud discovery rule"). And it has repeatedly characterized these decisions as applying an equity-based doctrine. *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. ___, ___–___ (2017) (slip op., at 10–11); *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10–11 (2014); *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 566 U. S. 221, 226–227 (2012); *Young* v. *United States*, 535 U. S. 43, 49–50 (2002). Rotkiske failed to preserve this issue before the Third Circuit, 890 F. 3d, at 428, and failed to raise this issue in his petition for certiorari. Accordingly, Rotkiske cannot rely on this doctrine to excuse his otherwise untimely filing.[3]

* * *

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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[3] We do not decide whether the text of 15 U. S. C. §1692k(d) permits the application of equitable doctrines or whether the claim raised in this case falls within the scope of the doctrine applied in *Bailey* and its progeny.

SUPREME COURT OF THE UNITED STATES

No. 18–328

KEVIN C. ROTKISKE, PETITIONER *v.* PAUL KLEMM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December 10, 2019]

JUSTICE SOTOMAYOR, concurring.

Like my colleagues in both the majority and the partial dissent, I agree that 15 U. S. C. §1692k(d) is a one-year statute of limitations that typically begins to run when the alleged violation "occurs," not when the plaintiff discovers it. Compare *ante*, at 1, with *post*, at 1 (GINSBURG, J., dissenting in part and from judgment). The only daylight between the majority and dissenting opinions is whether petitioner Rotkiske forfeited reliance on an "equitable, fraud-specific discovery rule" that forgives otherwise untimely filings. *Ante*, at 6–7; cf. *post*, at 4–5. Because I believe the Court of Appeals fairly found that Rotkiske failed to preserve an equitable argument of this sort, see 890 F. 3d 422, 429, and n. 5 (CA3 2018), and because the Court did not grant certiorari on that doctrine, I join the majority opinion.

I write separately to emphasize that this fraud-specific equitable principle is not the "'bad wine of recent vintage'" of which my colleagues speak. *Ante*, at 5 (quoting *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (Scalia, J., concurring in judgment)). Rather, the Court has long "recogni[zed]" and applied this "historical exception for suits based on fraud." *Id.*, at 37; see also *id.*, at 27 (majority opinion) (noting equitable discovery rule "in cases of fraud or concealment"); *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); *Exploration Co.* v. *United States*, 247 U. S. 435 (1918); *Bailey*

v. *Glover*, 21 Wall. 342 (1875); *Sherwood* v. *Sutton*, 21 F. Cas. 1303 (No. 12,782) (CC NH 1828) (Story, J.). Nothing in today's decision prevents parties from invoking that well-settled doctrine.

SUPREME COURT OF THE UNITED STATES

No. 18–328

KEVIN C. ROTKISKE, PETITIONER *v.* PAUL KLEMM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December 10, 2019]

JUSTICE GINSBURG, dissenting from the opinion in part and from the judgment.

Generally, I agree with the Court, the "discovery rule" does not apply to the one-year statute of limitations contained in the Fair Debt Collection Practices Act (FDCPA), 15 U. S. C. §1692k(d). That limitations period ordinarily commences to run on the date "the violation occurs," *ibid*. See *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28–33 (2001). But the ordinarily applicable time trigger does not apply when fraud on the creditor's part accounts for the debtor's failure to sue within one year of the creditor's violation. *Id.*, at 37 (Scalia, J., concurring in judgment). See also *id.*, at 27 (majority opinion).

True, in the case at hand, debtor Rotkiske's FDCPA claim does not rest on any fraud inhering in the claim creditor Klemm stated in his debt-collection suit. Rather, debtor Rotkiske alleges that creditor Klemm commenced the debt-collection suit too late. But Rotkiske was disarmed from asserting that defense in Klemm's suit, for he never received notice of the suit and therefore had no opportunity to defend against it. For the same reason, he was stopped from raising an FDCPA claim challenging Klemm's suit within the one-year limitations period. By knowingly arranging for service of the complaint against Rotkiske at an address where Rotkiske no longer lived, and filing a false affidavit of service, Rotkiske alleges, Klemm engaged in fraud. Such fraud, I would hold, warrants application of the discovery rule to time Rotkiske's FDCPA suit from the date he learned of the default judgment against him.

As today's decision recognizes, see *ante*, at 6–7, this Court long ago "adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered." *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946) (internal quotation marks omitted). See also *Bailey* v. *Glover*, 21 Wall. 342, 347 (1875) ("[W]hen the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it."). Like the general discovery rule that lower courts have "appl[ied] . . . when a statute is silent on the issue" of a claim's accrual, *TRW Inc.*, 534 U. S., at 27 (quoting *Rotella* v. *Wood*, 528 U. S. 549, 555 (2000)), the fraud-based discovery rule operates as a statutory presumption "read into every federal statute of limitation," *Holmberg*, 327 U. S., at 397. This circumscribed rule is distinct from the general discovery rule in that it governs only "case[s] of fraud." *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 644 (2010). Unlike the general discovery rule, there is no reason to believe the FDCPA displaced the fraud-based discovery rule. The Court does not hold otherwise.

The fraud-based discovery rule has a thrust different from equitable tolling.* "Equitable tolling" describes a doctrine that pauses, or "tolls," a statutory limitations period

*The two doctrines are often blended or confused. See *Klehr* v. *A. O.*

after it has commenced. *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10 (2014). A litigant qualifies for equitable tolling only if he establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Tribe of Wis.* v. *United States*, 577 U. S. __, __ (2016) (slip op., at 5) (internal quotation marks omitted). For example, in *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965), a plaintiff filed an action under the Federal Employers' Liability Act (FELA) in Ohio state court, alleging that he sustained a workplace injury just under three years earlier. *Ibid.* Several months later, the state court dismissed the suit for improper venue under state law. *Id.*, at 425. The plaintiff promptly brought an identical action in federal district court. That court dismissed the action on the ground that the FELA's three-year statute of limitations began to run when the plaintiff was injured and had expired while his state-court action was pending. *Ibid.* This Court reversed. *Id.,* at 436. Yes, the limitations period began to run on the date of the plaintiff's injury. But, the Court held, the clock tolled during the pendency of the plaintiff's state-court suit. *Ibid.* Subtracting the time consumed by the state-court suit, the plaintiff's federal action was timely. *Id.*, at 426, 434–436.

By contrast, the fraud-based discovery rule sets the time

Smith Corp., 521 U. S. 179, 192 (1997). The Court has sometimes referred to *Bailey* v. *Glover*, 21 Wall. 342 (1875), and *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), as equitable tolling decisions. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 363 (1991); *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10–11 (2014). And it has described *Holmberg* as "stand[ing] for the proposition that equity tolls the statute of limitations in cases of fraud or concealment." *TRW Inc.* v. *Andrews*, 534 U. S. 19, 27 (2001). But as this Court recently clarified, each doctrine has an independent office. See *Gabelli* v. *SEC*, 568 U. S. 442, 447, n. 2, 449 (2013) (addressing whether application of the fraud-based discovery rule was appropriate after acknowledging that the plaintiff had expressly waived equitable tolling).

at which a claim accrues, *i.e.*, the time when the statute of limitations commences to run. See *Merck & Co.*, 559 U. S., at 644–645. It is "an exception to the standard rule" that "a claim accrues when the plaintiff has a complete and present cause of action." *Gabelli* v. *SEC*, 568 U. S. 442, 448–449 (2013) (internal quotation marks omitted). Accordingly, when a plaintiff is "injured by fraud . . . 'the bar of the statute does not begin to run until the fraud is discovered.' " *Holmberg*, 327 U. S., at 397 (quoting *Bailey*, 21 Wall., at 348). For example, in *Exploration Co.* v. *United States*, 247 U. S. 435 (1918), a company had unlawfully procured land from the United States through a series of fraudulent transactions in 1902. *Id.*, at 437, 438. The parties involved in the transactions successfully concealed the scheme until 1909. *Ibid.* When the Government brought suit to void the transactions, the company raised the six-year statute of limitations as a defense. *Id.*, at 445. Applying the fraud-based discovery rule, the Court held that the limitations period began to run only upon the Government's discovery of the fraud. *Id.*, at 449. The suit was filed within six years of that date and was therefore timely. *Ibid.*

I do not agree that Rotkiske failed to preserve a fraud-based discovery rule argument in the Court of Appeals. See *ante,* at 7. Rotkiske did raise the issue; he argued that "[a]t the very least, . . . the discovery rule applies to [FDCPA] claims based on false or misleading misrepresentations or other self-concealing conduct." Supp. Brief for Appellant in No. 16–1668 (CA3), p.13 (citing *Bailey*, 21 Wall., at 350). The Court of Appeals apparently declined to address that argument because Rotkiske had failed to raise "equitable tolling" in his appellate briefs. 890 F. 3d 422, 428–429, and n. 5 (CA3 2018). But failure to raise "equitable tolling" should pose no obstacle to determining whether the discrete fraud-based discovery rule applies to Rotkiske's claim.

Nor do I agree that Rotkiske forfeited the issue by not raising it in his petition for certiorari. See *ante*, at 7. Generously read, Rotkiske asked whether a discovery rule of any kind applies to the FDCPA's one-year statute of limitations. While hardly a model of the deft pleader's art, the petition for certiorari stated that Rotkiske did not learn of Klemm's debt-collection suit and default judgment until long after their occurrence because of the "intended reservice [of Klemm's complaint] at a known incorrect address." Pet. for Cert. 8. His brief on the merits in this Court noted: "Petitioner is not advocating that the Court adopt a generally applicable discovery rule." Brief for Petitioner 16, n.16. His reply brief was more precise: "The default judgment obtained by [Klemm] at issue in [Rotkiske's FDCPA complaint] was made possible by the filing of a fraudulent Affidavit of Service." Reply Brief 15. Indeed, the Court recognizes that Rotkiske's arguments included "a fraud-specific discovery rule as an equitable doctrine." *Ante,* at 4.

Rotkiske's FDCPA complaint, in my view, falls comfortably within the fraud-based discovery rule's scope. See Brief for Samuel L. Bray et al. as *Amici Curiae* 12–14. Rotkiske alleged that Klemm engaged in "sewer service"—intentionally serving process in a manner designed to prevent Rotkiske from learning of the collection suit. Klemm did so, according to Rotkiske, in order to ensure that Klemm's untimely suit would result in a default judgment that would remain undiscovered until time to oppose that judgment, and to commence an FDCPA suit, ran out. Though Rotkiske did not allege that "sewer service" is itself a practice independently proscribed by the FDCPA, such service is nonetheless a fraudulent abuse that should trigger the fraud-based discovery rule. See Reply Brief 15–17.

The Government urges that the fraud-based discovery rule applies only when the fraudulent conduct is itself the basis for the plaintiff's claim for relief. Brief for United States as *Amicus Curiae* 31–32. That is not so of Rotkiske's complaint, the Government observes, for his claim is premised on the assertion that Klemm's debt-collection suit was time barred.

I do not view the fraud-based discovery rule as so confined and would hold that the rule governs if either the conduct giving rise to the claim is fraudulent, or if fraud infects the manner in which the claim is presented. That understanding of the rule is consistent with its equitable roots and historic rationale. Nearly two centuries ago, Justice Story explained the rule this way: "[E]very statute is to be expounded reasonably, so as to suppress, and not to extend, the mischief[s] which it was designed to cure." *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1307 (No. 12,782) (CC NH 1828). Because statutes of limitations "preven[t] fraudulent and unjust claims from starting up at great distances of time," a limitations provision "ought not . . . be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation." *Ibid.* "[C]ases of fraud, therefore, form an implied exception [to a limitations prescription]," so as not to "permi[t] the defendant to avail himself of his own fraud." *Ibid.* This Court expressed the same understanding of the fraud-based discovery rule in *Bailey*. There, the Court stated: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." 21 Wall., at 349.

Klemm allegedly employed fraudulent service to obtain and conceal the default judgment that precipitated Rotkiske's FDCPA claim. That allegation, if proved, should suffice, under the fraud-based discovery rule, to permit adjudication of Rotkiske's claim on its merits.

* * *

For the reasons stated, I would vacate the judgment of the Court of Appeals for the Third Circuit and remand the case for further proceedings.

[Cite as **Deutsche Bank Natl. Trust Co. v. Omar**, 2019-Ohio-5224.]

STATE OF OHIO COUNTY OF SUMMIT	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
DEUTSCHE BANK NATIONAL TRUST COMPANY Appellee v. ZEKI OMAR, et al. Appellant		C.A. No. 29300 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2015-05-2868

DECISION AND JOURNAL ENTRY

Dated: December 18, 2019

TEODOSIO, Presiding Judge.

{¶1} Zeki Omar appeals the judgment of the Summit County Court of Common Pleas overruling his objections, adopting the magistrate's decision, and entering judgment against Mr. Omar. We affirm.

I.

{¶2} In May 2015, Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2005-1 ("Deutsche Bank"), filed its complaint in foreclosure against Mr. Omar. A bench trial was held before the magistrate in August 2016. After a magistrate's decision was issued, Mr. Omar filed his objections, and the trial court entered judgment on January 9, 2017. An attempted appeal to this Court followed, which we dismissed because the trial court had failed to resolve all remaining issues involved in the foreclosure.

{¶3} The trial court again entered judgment on April 26, 2017, from which Mr. Omar appealed to this Court. We reversed and remanded so that the trial court could expressly consider and rule upon all of Mr. Omar's objections to the magistrate's decision. The trial court entered judgment for the third time on December 26, 2018, finding Mr. Omar's objections to be without merit, and entering judgment in foreclosure against Mr. Omar.

{¶4} Mr. Omar now appeals, raising eleven assignments of error.

II.

{¶5} "Generally, the decision to adopt, reject, or modify a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion." *Barlow v. Barlow*, 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, ¶ 5. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). However, "[i]n so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. Medina No. 08CA0049-M, 2009-Ohio-3139, ¶ 18.

ASSIGNMENT OF ERROR ONE

> THE TRIAL COURT ERRED BY ALLOWING THE ADMISSION OF PLAINTIFF'S RECORDS AND TESTIMONY BASED UPON IT[.]

{¶6} In his first assignment of error, Mr. Omar argues the trial court erred in admitting Deutsche Bank's business records into evidence. We disagree.

{¶7} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. A trial court is afforded broad discretion in admitting evidence and we will not reject an exercise of this discretion unless it has clearly been abused and the appealing party has thereby suffered material prejudice. *Packard v. Packard*, 9th Dist. Summit No. 19870, 2000 WL 1729459, *2 (Nov. 22, 2000); *accord State v. Long*, 53 Ohio St.2d 91, 98 (1978).

{¶8} Evid.R. 803(6) provides that records of regularly conducted business activity are an admissible form of hearsay, stating:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

{¶9} "To qualify for admission under Evid.R. 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the custodian of the record or by some other qualified witness." *PNC Bank, Natl. Assn. v. West*, 9th Dist. Wayne No. 12CA0061, 2014–Ohio–161, ¶ 12. The theory supporting the business records exception is that such records are accurate and trustworthy because they are "made in the regular course of business by those who have a competent knowledge of the facts recorded and a self-interest to be served through the accuracy of the entries made and kept with knowledge that they will be relied upon in a systematic conduct of such business[.]" *Weis v. Weis*, 147 Ohio St. 416, 425–426 (1947).

{¶10} Proper authentication of a business record under Evid.R. 901(A) requires that a proponent of a document produce evidence sufficient to support a finding that the matter in question is what the proponent claims it to be, and to accomplish this, a witness must testify as to the regularity and reliability of the business activity involved in the creation of the record. *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012–Ohio–4047, ¶ 24. A witness authenticating a business record must be "'familiar with the operation of the business and with the circumstances of the preparation, maintenance, and retrieval of the record in order to reasonably testify on the basis of this knowledge that the record is what it purports to be, and was made in the ordinary course of business.'" *State v. Baker*, 9th Dist. Summit No. 21414, 2003–Ohio–4637, ¶ 11, quoting *Keeva J. Kekst Architects, Inc. v. George*, 8th Dist. Cuyahoga No. 70835, 1997 WL 253171, *5 (May 15, 1997). Evid.R. 803(6) does not require personal knowledge of the exact circumstances of the preparation and production of the document or of the transaction giving rise to the record. *Bank of America, N.A. v. Jackson*, 12th Dist. Warren No. CA2014–01–018, 2014–Ohio–2480, ¶ 12.

{¶11} Mr. Omar contends that the entire business record was unreliable because payment records are missing for the first three and one-half years of the loan and mortgage statements were not provided for the years between 2005 and 2010, and that as a result, "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *See* Evid.R. 803(6). This argument does not implicate the four elements required for admission of a business record under Evid.R. 803(6), and Mr. Omar provides us with no authority to support the notion that an incomplete record would render the entire record inadmissible. The trial court found that the admitted records were properly identified and authenticated. We cannot conclude the trial court abused its discretion on this basis.

{¶12} Mr. Omar next argues that the Internal Revenue Service Form 1098 for the years 2005, 2006, and 2007 were not provided to him by Deutsche Bank until 2011, and therefore "it is possible that the [forms] were created to satisf[y] a customer's request for these documents made in 2011 and were fabricated to avoid revealing errors by the bank." Mr. Omar provided testimony that he believed the forms were inaccurate, and points to the fact that the forms were not provided in Deutsche Bank's initial response to discovery, but rather, were provided in a supplemental response. Mr. Omar's testimony is unsupported by additional evidence, and his speculation that the forms could have been fabricated is likewise unsupported. We cannot conclude the trial court abused its discretion in admitting these documents.

{¶13} Mr. Omar further argues that the bank statements contained in the record should not have been admitted into evidence because there were no statements from the time the loan was issued in 2005 to 2010. He contends that as a result, the record fails to meet the requirement under Evid.R. 803(6) that it "must be one regularly recorded in a regularly conducted activity." Once again, Mr. Omar fails to provide any authority that would support the theory that an incomplete record renders the remaining record inadmissible. He has likewise failed to show that the absence of a particular record or records was evidence that the remaining record was not "regularly recorded in a regularly conducted activity." *See* Evid.R. 803(6). Again, we cannot conclude the trial court abused its discretion in admitting these documents.

{¶14} Mr. Omar's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

> THE TRIAL COURT ERRED BY ADMITTING PAYMENT RECORDS OFFERED BY THE BANK ON THE DEFENDANT[']S NOTE.

{¶15} In his second assignment of error, Mr. Omar argues the trial court erred by admitting the payment records proffered by Deutsche Bank. We disagree.

{¶16} Mr. Omar contends that the payment record should not have been admitted because the part of the record that would have covered the first three and one-half years of the loan were missing. The trial court noted:

> Although a portion of the payment history was missing from Mr. Omar's loan account (from origination in 2005 to July 2, 2008), [Deutsche Bank] still evidenced the amount due and owing on the loan by a preponderance of the evidence. [Deutsche Bank] produced a payment history covering over eight years from July 2, 2008[,] to the present date. The loan was current at the time the payment history begins. * * * The payment history covered the entire frame of the default to the present date.

{¶17} Mr. Omar's argument goes to the question of the weight of the evidence; he provides us with no authority to support the notion that an incomplete payment history is inadmissible. The trial court determined that despite the missing section of the payment history, Deutsche Bank provided evidence of the amount due and owing. Moreover, as noted by the trial court, the loan was current at the time the payment history began. We conclude the trial court did not abuse its discretion in admitting the payment records into evidence.

{¶18} Mr. Omar's second assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

> THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF BENJAMIN VERDOOREN[,] THE REPRESENTATIVE OF THE BANK[.]

{¶19} In his third assignment of error, Mr. Omar argues the trial court erred by allowing the testimony of Benjamin Verdooren because he had no personal knowledge relating to the subject matter of the case. We disagree.

{¶20} Proper authentication of a business record under Evid.R. 901(A) requires that a proponent of a document produce evidence sufficient to support a finding that the matter in question is what the proponent claims it to be, and to accomplish this, a witness must testify as to the regularity and reliability of the business activity involved in the creation of the record. *State* *v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012–Ohio–4047, ¶ 24. A witness authenticating a business record must be "'familiar with the operation of the business and with the circumstances of the preparation, maintenance, and retrieval of the record in order to reasonably testify on the basis of this knowledge that the record is what it purports to be, and was made in the ordinary course of business.'" *State v. Baker*, 9th Dist. Summit No. 21414, 2003–Ohio–4637, ¶ 11, quoting *Keeva J. Kekst Architects, Inc. v. George*, 8th Dist. Cuyahoga No. 70835, 1997 WL 253171, *5 (May 15, 1997). Evid.R. 803(6) does not require personal knowledge of the exact circumstances of the preparation and production of the document or of the transaction giving rise to the record. *Bank of America, N.A. v. Jackson*, 12th Dist. Warren No. CA2014–01–018, 2014–Ohio–2480, ¶ 12.

{¶21} Mr. Omar provides us with no authority in support of his argument, nor does he point to the record to support his contention that Mr. Verdooren had no personal knowledge relating to the subject matter of the case. *See* App.R. 16(A)(7). As such, we may disregard this argument. App.R. 12(A)(2). Moreover, Mr. Verdooren testified that he was a Senior Loan Analyst for Ocwen Financial Corporation, that he has access to Ocwen's business records, that he was familiar with their record retention system, that he had viewed the original note in question, and had reviewed the file in question. Mr. Omar has failed to show Mr. Verdooren was not qualified to authenticate the business record.

{¶22} Mr. Omar's third assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR

THE TRIAL COURT'S DECISION GRANTING A FORECLOSURE AND A JUDGMENT IN THE AMOUNT OF $357,488.77 [WAS] AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]

{¶23} In his fourth assignment of error, Mr. Omar argues the trial court erred because its judgment in foreclosure was against the manifest weight of the evidence. Mr. Omar contends that the incomplete payment record is insufficient to show a breach of the note. We disagree.

{¶24} "[B]efore an appellate court will reverse a judgment as against the manifest weight of the evidence in a civil context, the court must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice." *Boreman v. Boreman*, 9th Dist. Wayne No. 01CA0034, 2002-Ohio-2320, ¶ 10. "Only in the exceptional case, where the evidence presented weighs heavily in favor of the party seeking reversal, will the appellate court reverse." *Id.* In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 21.

{¶25} As we have noted, the loan was current at the time the payment history began. Deutsche Bank provided evidence of the amount due and owing, offering the payment history, multiple 1098 I.R.S. forms, mortgage statements, copies of checks sent from Mr. Omar for payment on the debt, a debt validation letter, default notice letters, a divorce decree acknowledging the debt due and owing as of September 2010, and the testimony of Benjamin Verdooren, Senior Loan Analyst for Ocwen Financial Corporation. As noted by the trial court, the payment history provided covered the entire frame of the default. In contrast, Mr. Omar offered no evidence to support his testimony that he had made payments not indicated in the bank records.

{¶26} We conclude that the trial court did not clearly lose its way or create a manifest miscarriage of justice, and that this is not the exceptional case, where the evidence presented weighs heavily in favor of the party seeking reversal. Mr. Omar's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE

> THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE AND CONSIDERING A LETTER PROPOSING A COMPROMISE SENT BY THE ATTORNEY FOR THE DEFENDANT TO THE PLAINTIFF.

{¶27} In his fifth assignment of error, Mr. Omar argues the trial court erred when it admitted into evidence a letter sent by Mr. Omar to Deutsche Bank. We disagree.

{¶28} "[We] review a trial court's admission of evidence for abuse of discretion." *State v. Truitt*, 9th Dist. Summit No. 25527, 2011–Ohio–6599, ¶ 30. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶29} Evid.R. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

"Evid.R. 408 is applicable only to bar the admission of evidence which is offered to show that because a settlement offer was made, the offeror must be liable, because people don't offer to pay for things for which they are not liable." *Kane v. Inpatient Med. Servs., Inc.*, 9th Dist. Summit

No. 29087, 2019-Ohio-1975, ¶ 18, quoting *USCA/USA, Inc. v. High Tech Packaging, Inc.*, 6th Dist. Wood Nos. WD-05-088 and WD-05-089, 2006-Ohio-6195, ¶ 34, quoting *Boyle v. Daimler Chrysler Corp.*, 2d Dist. Clark No. 2001-CA-81, 2002-Ohio-4199, ¶ 95.

{¶30} The letter in question is captioned as a "Request for the Removal of all Late Fees." The letter is not an offer of settlement, but rather, a request that late fees on the account be removed. As such, the letter does not fall under Evid.R. 408 because it is not evidence of "furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount."

{¶31} Mr. Omar's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR SIX

> THE TRIAL COURT ERRED BY FINDING THAT THE DEFENDANT'S DIVORCE DECREE [WAS] AN ADMISSION AS TO THE CORRECT AMOUNT OWED[.]

{¶32} In his sixth assignment of error, Mr. Omar argues the trial court erred in finding that his divorce decree was an admission as to the correct amount owed to Deutsche Bank. Mr. Omar contends that "he did not pay attention to this document" at the time of his divorce, and that the debt he acknowledged at that time was not, in fact, accurate.

{¶33} In its judgment entry, the trial court concluded Mr. Omar's objection with regard to the divorce decree was barred by the doctrine of res judicata, and noted that the divorce decree acknowledged the debt and the amount due and owing as of September 2010, which was "more than two years after Mr. Omar allegedly made additional payments." The amount of the subject mortgage debt listed in the divorce decree was $389,000.00. The trial court went on to grant judgment against Mr. Omar in the amount of $357,488.77, plus interest from March 1, 2012, plus late fees and advances made for real estate taxes, insurance, assessments, and protection of the property. Mr. Omar's contention that the prior litigation occurred in a previous divorce and measured the debt owed at a different date than the foreclosure trial is not contradicted by the trial court's entry of judgment, as indicated by the fact that the two amounts are not identical. The trial court recognized the amount referenced in the divorce decree as an acknowledgment by Mr. Omar of the amount due and owing in September 2010, and did not simply incorporate the amount of debt listed in the decree into its judgment entry.

{¶34} Mr. Omar's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR SEVEN

THE TRIAL COURT ERRED BY FINDING THAT THE DEFENDANT PROVIDED NO PROOF OF PAYMENTS AT TRIAL[.]

{¶35} In his seventh assignment of error, Mr. Omar argues the trial court erred by finding that he had provided no proof that he had made payments not recorded in the payment history. We disagree.

{¶36} In support of his argument, Mr. Omar points to his testimony that he sent sums of money from Greece to pay off his mortgage in sums between $10,000.00 to $35,000.00 during the years of 2005, 2006 and 2007. Mr. Omar further testified that he believed the mortgage had either been paid, or close to being paid, and that the payment history produced by Deutsche Bank was inaccurate.

{¶37} In its judgment entry, the trial court found that "[a]lthough Mr. Omar testified that he made large payments from banks both in the United States and Greece to pay off the principal amounts on this [m]ortgage, this unsupported testimony was not credible. There was no evidence to support Mr. Omar's position that he made payments to pay off the principal amounts on this [m]ortgage." The trial court further found that "Mr. Omar provided no evidence, *other* *than his own testimony*, to challenge or question Mr. Verdooren's testimony or the veracity of the loan account." (Emphasis added.) The trial court clearly recognized that Mr. Omar provided testimony that he made payments not recorded in the payment history; it did not, however, find said testimony credible, nor was it supported by additional evidence.

{¶38} Mr. Omar's seventh assignment of error is overruled.

ASSIGNMENT OF ERROR EIGHT

> THE TRIAL COURT ERRED BY CONCLUDING THAT THE DEFENDANT'S BURDEN FOR THE AFFIRMATIVE DEFENSE OF PAYMENT WAS NOT MET.

{¶39} In his eighth assignment of error, Mr. Omar argues the trial court "placed the burden in this case upon the [d]efendant" and that Deutsche Bank "failed to establish the amount of payments made on this loan for the first three[-]and[-]a[-]half years of the loan." We disagree.

{¶40} Mr. Omar fails to support this contention with any reference to the record and provides no authority in support of his argument. *See* App.R. 16(A)(7). As such, we may disregard this argument. App.R. 12(A)(2). Moreover, as we have previously determined, although the payment history was incomplete, the trial court determined that Deutsche Bank provided evidence of the amount due and owing.

{¶41} Mr. Omar's eighth assignment of error is overruled.

ASSIGNMENT OF ERROR NINE

> THE TRIAL COURT ERRED BY RULING THAT THE ADMISSION OF A LEDGER FOR A MORTGAGE IS PROPER [] IF IT STARTS WITH A ZERO BALANCE[.]

{¶42} In his ninth assignment of error, Mr. Omar argues the trial court erred in determining that an account in a foreclosure action is not required to start at zero. We disagree.

{¶43} The only authority provided by Mr. Omar under this assignment of error is *WUPW TV–36 v. Direct Results Marketing, Inc.*, 70 Ohio App.3d 710 (10th Dist.1990), which he states is the "one case that suggests that it is proper for a [c]ourt in a credit card dispute to accept a latter start on a balance than the beginning balance." Mr. Omar fails, however, to point to any authority in support of his argument. *See* App.R. 16(A)(7). Therefore, we may disregard this argument. App.R. 12(A)(2).

{¶44} Mr. Omar's ninth assignment of error is overruled.

ASSIGNMENT OF ERROR TEN

THE TRIAL COURT ERRED BY GIVING WEIGHT TO A DEBT VALIDATION LETTER FROM THE PLAINTIFF TO THE DEFENDANT.

{¶45} In his tenth assignment of error, Mr. Omar contends the trial court erred by giving weight to a debt validation letter. We disagree.

{¶46} The trial court noted that Deutsche Bank had sent Mr. Omar a debt validation letter, dated March 4, 2013, indicating that the sum of $357,488.77 was due and owing on the principal of the loan. Mr. Omar appears to argue that because the letter was "self[-]serving," it had no weight as evidence. Mr. Omar fails to point to any authority in support of his argument. *See* App.R. 16(A)(7). As such, we may disregard this argument. App.R. 12(A)(2). Moreover, as we have previously stated, the weight given to the evidence is a matter primarily for the trier of fact to determine. *Lumpkin v. Lumpkin*, 9th Dist. Summit No. 21305, 2003–Ohio–2841, ¶ 20, citing *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23 (1990).

{¶47} Mr. Omar's tenth assignment of error is overruled.

ASSIGNMENT OF ERROR ELEVEN

THE TRIAL COURT ERRED BY FINDING THAT EQUITY SUPPORTS A FORECLOSURE IN THIS CASE[.]

{¶48} In his eleventh assignment of error, Mr. Omar argues the trial court erred by finding that equity supported foreclosure. We disagree.

{¶49} In its judgment entry, the trial court determined: "No equitable reason exists to prohibit [Deutsche Bank] from going forward with this foreclosure action. Mr. Omar has lived in the Property since 2012 without making any payments on the loan or paying property taxes." Mr. Omar again raises the issue of incomplete payment records, this time in support of his argument that equity was not served. We find this argument without merit. This Court finds no absence of equity in the trial court's judgment.

{¶50} Mr. Omar's eleventh assignment of error is overruled.

III.

{¶51} Mr. Omar's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

THOMAS A. TEODOSIO
FOR THE COURT

HENSAL, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

RANDALL D. WEISSFELD, Attorney at Law, for Appellant.

BROOKE TURNER BAUTISTA, Attorney at Law, for Appellee.

[Cite as **Hornacek v. Madenfort**, 2019-Ohio-5180.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHRIS HORNACEK	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
MITCHELL MADENFORT, ET AL.	:	Case No. 2019CA00058
	:	
Defendants-Appellees	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2018CV00277

JUDGMENT: Affirmed

DATE OF JUDGMENT: December 9, 2019

APPEARANCES:

For Plaintiff-Appellant

DARREN W. DEHAVEN
3500 Massillon Road
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For Defendants-Appellees

RONALD K. STARKEY
ADAM M. RUNKLE
638 West Maple Street
Hartville, OH 44632

Wise, Earle, J.

{¶ 1} Plaintiff-Appellant, Chris Hornacek, appeals the March 18, 2019 judgment entry of the Court of Common Pleas of Stark County, Ohio, granting summary judgment to Defendant-Appellee, Madenfort Excavating, Ltd.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On or about August 3, 2017, the parties verbally agreed that Mitchell Madenfort and appellee would sell an excavator to appellant for $40,000. The excavator was to be delivered in November or December, 2017. At some point, the excavator was sold to a third party, Ohio CAT.

{¶ 3} On February 22, 2016, appellant filed a complaint against Mr. Madenfort and appellee, claiming breach of agreement and promissory estoppel. The case was referred to mediation which was unsuccessful.

{¶ 4} On February 8, 2019, Mr. Madenfort and appellee filed a motion for summary judgment, claiming statute of frauds (R.C. 1302.04), neither party fell under the "merchant" exception of the statute, and promissory estoppel was inapplicable. In an opposition memorandum filed February 22, 2019, appellant removed Mr. Madenfort as a party as well as the claim for promissory estoppel. By judgment entry filed March 18, 2019, the trial court granted summary judgment to appellee.

{¶ 5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶ 6} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT MADENFORT EXCAVATING, LTD."

I

{¶ 7} In his sole assignment of error, appellant claims the trial court erred in granting summary judgment to appellee. We disagree.

{¶ 8} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 663 N.E.2d 639 (1996):

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶ 9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

{¶ 10} As explained by this court in *Leech v. Schumaker,* 5th Dist. Richland No. 15CA56, 2015-Ohio-4444, ¶ 13:

It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment is delineated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280 at 293: " * * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

{¶ 11} In his complaint filed February 5, 2018, appellant claimed Mr. Madenfort and appellee would sell him an excavator for $40,000. Delivery was to be in November or December 2017, depending on when appellee's new excavator was going to be delivered. The agreement between the parties was not reduced to writing. The excavator was subsequently sold to a third party. Appellant alleged claims of breach of agreement and promissory estoppel.

{¶ 12} In their motion for summary judgment, Mr. Madenfort and appellee argued the oral agreement was unenforceable under the statute of frauds [R.C. 1302.04(A)], neither party fell under the "merchant" exception of the statute [(R.C. 1302.04(B) and 1302.01(A)(5)], and promissory estoppel was inapplicable. In his opposition memorandum, appellant removed Mr. Madenfort as a party as well as the claim for promissory estoppel. Appellant argued appellee, as an excavation company, was a merchant "who deals in goods of the kind" (excavators), and held itself "out as having knowledge or skills peculiar to the practices or goods involved in the transaction."

{¶ 13} R.C. 1302.04(A) states the following:

> Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

{¶ 14} R.C. 1302.04(B) states:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of division (A) of this section against such party unless written notice of objection to its contents is given within ten days after it is received.

{¶ 15} R.C. 1302.01(A)(5) defines "merchant" as:

> [A] person who deals in goods of the kind or otherwise by the person's occupation holds the person out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary who by the agent's, broker's, or other intermediary's occupation holds the person out as having such knowledge or skill.

{¶ 16} In his affidavit attached to the February 8, 2019 motion for summary judgment, Mr. Madenfort averred at ¶ 8: "Madenfort Excavating is not now, nor has it ever been, in the business of buying and selling excavators." Mr. Madenfort averred the same for himself, individually, at ¶ 7. In response to appellant's admissions request attached to the February 22, 2019 memorandum in opposition, Mr. Madenfort admitted at Nos. 11

and 12 that "Madenfort Excavating uses excavators" and "Madenfort Excavating uses excavators and that Mitch Madenfort knows how to operate an excavator."

{¶ 17} In response to appellee's admissions request attached to the motion for summary judgment at No. 9, appellant admitted his "primary business is not buying or selling excavators." In his affidavit attached to the memorandum in opposition, appellant averred at ¶ 4 and 5: "Madenfort Excavating, Ltd., is an excavation company that holds itself out to the public as having knowledge or skills in excavating and using excavators" and "I own and operate a landscaping business [that] regularly utilizes an excavator."

{¶ 18} In its March 18, 2019 judgment entry granting summary judgment to appellee, the trial court determined the oral agreement did not comply with the statute of frauds ($40,000), and the "merchant" exception did not apply as "[n]either of the parties in this matter are in the primary business of buying and/or selling excavators." The trial court found appellant operates a landscaping business that uses excavators and appellee is an excavating company that uses excavators. In support of its decision, the trial court cited the case of *Advanced Dirt Works v. C.L. Bridges Equipment Co.,* 2d Dist. Champaign No. 97-CA-11, 1998 WL 151102 (Apr. 3, 1998). In *Advanced* at *3, our colleagues from the Second District found an excavating contractor was not a "merchant" as defined in R.C. 1302.01(A)(5) in a dispute involving a backhoe. Appellant correctly points out this case involved R.C. 1302.44(B), a good faith purchaser of goods, not the statute of frauds. R.C. 1302.44(B) refers to a "merchant who deals in goods of that kind." It does not consider the person's knowledge or skill as set forth in R.C. 1302.01(A)(5) cited above.

{¶ 19} Nevertheless, in reviewing the affidavits and admissions filed in this case, we concur with the trial court's analysis that the "merchant" exception does not apply sub judice. Neither party "deals" in excavators. Each party uses excavators to provide services, appellee/landscaping and appellant/excavating. Although their respective occupations providing these services holds each party "out as having knowledge or skill peculiar to the practices or goods involved in the transaction," we find said knowledge and skill pertains to the operation and use of excavators, not the selling of excavators. Each party is merely a consumer of excavators. We find R.C. 1302.04(B) applies "to a merchant in his mercantile capacity." 1961 Official Comment, UCC 2-104(2) [R.C. 1302.01]. The "mercantile capacity" of each party in this case is to provide a service.

{¶ 20} Upon review, we find the trial court did not err in granting summary judgment to appellee.

By Wise, Earle, J.

Baldwin, J. concurs.

Hoffman, P.J. dissents.

EEW/db

Hoffman, P.J., dissenting

{¶21} I respectfully dissent from the majority opinion. I do agree with the majority neither party "deals" in excavators in the sense neither party is in the primary business of buying and/or selling excavators. As such neither party qualifies for the merchant exception to the statute of fraud under the first part of the definition of a "merchant" found in R.C. 1302.01(A)(5).

{¶22} But, unlike the majority, I find, when considering the evidence in a light most favorable to Appellant as required as Civ.R. 56, reasonable minds could disagree whether both of the parties are merchants under the second part of the statutory definition of "merchant." The fact Appellee runs an excavation business and necessarily needs to purchase and possibly sell or trade-in excavators to transact its business, reasonably supports a finding Appellee holds itself out to the public as having knowledge or skills peculiar to excavating. Such knowledge is further demonstrated by Appellee's willingness to purchase a new excavator at a certain price and to determine what constitutes a fair price for the used excavator Appellee agreed to sell to Appellant.

{¶23} In a similar fashion, Appellant's use of an excavator in his landscape business and his assessment of the fair market value of the used excavator he intended to purchase from Appellee, would reasonably support a finding Appellant holds himself out as having knowledge or skill peculiar to the excavation practice or good(s) involved.

{¶24} I find the parties knowledge or skill goes beyond the mere operation and use of excavators, and, in fact, extends to the selling of excavators as evidenced by their mutual agreement as to the fair market value for the used excavator, a knowledge of which is certainly beyond that of most people (including this writer and I venture to say my colleagues on the bench), but not of those engaged in the excavation business.

{¶25} Accordingly, I would sustain Appellant's assignment of error and reverse the trial court's grant of summary judgment in favor of Appellee.

[Cite as *N. Hill Holdings, L.L.C. v. Concheck*, 2019-Ohio-5119.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

NORTH HILL HOLDINGS, L.L.C., :

Plaintiff-Appellant, :

No. 108168

v. :

JOSEPH E. CONCHECK, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 12, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-14-825474

Appearances:

Calabrese & Associates, L.L.C., and Maria L. Calabrese, *for appellant*.

Benesch, Friedlander, Coplan and Aronoff, L.L.P., Yelena Boxer, Trevor G. Covey, and Anthony Charles Sallah, *for appellees*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} North Hill Holdings, L.L.C. ("North Hill" or "appellant") appeals from a judgment of the trial court that granted a motion for summary judgment filed by Joseph E. Concheck and Buckeye Hoya, L.L.C. (collectively as "appellee"). Buckeye

Hoya, L.L.C. ("Buckeye") was a limited liability company, and Concheck was its managing member. The matter involved certain fees earned by Buckeye. North Hill claimed it was a member of Buckeye and Buckeye failed to distribute to North Hill its share of the fees. The trial court found that North Hill was not a member of Buckeye pursuant to R.C. 1705.14 and, therefore, North Hill lacked standing to bring the instant lawsuit. On appeal, appellant North Hill raises two assignments of error for our review:

> I. The trial court erred in its December 31, 2018 Judgment Entry by granting the Appellee's Motion for Summary Judgment. The trial court incorrectly ruled that Appellant North Hill Holdings, L.L.C. was not a member of Buckeye Hoya, L.L.C. since its inception.
>
> II. The trial court erred in its December 31, 2018 Judgment Entry by granting the Appellee's Motion for Summary Judgment. As an alternative to Assignment of Error No. 1, the trial court incorrectly ruled that the Appellees never consented to Appellant North Hill Holdings, L.L.C. becoming a member of Buckeye Hoya, L.L.C. after its inception.

After a review of the record and applicable law, we find no merit to the appeal and affirm the trial court's judgment.

Formation of Buckeye

{¶ 2} Buckeye was a limited liability company in the "transactional advisory business." Concheck and Anthony O. Calabrese, III, ("Anthony Calabrese") worked together to generate business opportunities for Buckeye. The company was formed on September 7, 2010. Anthony Calabrese prepared and filed its articles of organization with the Ohio Secretary of State. The company's articles of organization was signed by Concheck alone and no other signatures appear in the document. While there is no indication whether Concheck signed the articles of organization as a member, manager or other representative, it is undisputed by the parties that Concheck was a 50 percent managing member of Buckeye. Buckeye had no operating agreement governing the company and its members. North Hill, solely owned by Anthony's wife, Maria Calabrese, claimed it was the other 50 percent member of Buckeye since its inception. Appellee disputed it.

Buckeye Income from the BGL Transaction

{¶ 3} The case specifically concerns the fees Buckeye earned from a 2012 transaction involving Brown Gibbons Lang ("BGL"), an investment banking firm, and National Entertainment Network ("NEN"), which was looking for refinancing capital. As alleged in the complaint, Anthony Calabrese introduced Concheck to two principals in the investment banking firm and the introduction enabled Concheck to obtain a consulting agreement in late 2010 with the investment banking firm. Under the consulting agreement, the investment banking firm would pay Buckeye 20 percent of fees earned from business opportunities brought by Buckeye. The agreement specifically concerned a recapitalization transaction involving NEN. Allegedly, NEN's recapitalization transaction was completed in November 2012 and Buckeye earned a fee of $231,000 for the transaction.[1]

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[1]An exhibit submitted by appellee in its motion for summary judgment reflects an email communication from a representative of the investment banking firm BGL notifying Concheck that the contract between BGL and Buckeye relating to NEN was void because Buckeye was not registered as a broker and BGL could not pay Buckeye for the NEN transaction. The fee was allegedly paid by NEN instead.

{¶ 4} Appellant North Hill filed the instant lawsuit in April 2014, claiming it was the other 50 percent member of Buckeye.[2] It sought what it claimed to be its share of the $231,000 fees earned by Buckeye in the NEN transaction. North Hill sought the recovery of the money under three causes of action. It asserted Concheck (1) violated a fiduciary duty as the managing company member of Buckeye owed to North Hill, and (2) failed to maintain and provide records to members of the company, and (3) was unjustly enriched.

{¶ 5} Appellee moved for summary judgment, claiming that appellant North Hill lacked standing to bring the suit because it was not a member of Buckeye. Appellee alleged that Anthony Calabrese, not North Hill, was the other 50 percent member of Buckeye and, therefore, North Hill did not have standing to bring the instant complaint.

Appellee's Exhibits

{¶ 6} To support its claim that North Hill was not a member of Buckeye, appellee's motion for summary judgment attached several documents. The exhibits included Buckeye's articles of organization, which was signed by Concheck alone and identified no other members, and (2) two agreements dated September 1, 2010, and November 1, 2010, respectively, between Buckeye and other entities, in which

[2] By the time the lawsuit was filed, Anthony Calabrese was serving a nine-year prison term for RICO and other offenses in a federal case; he was ordered to pay over $130,000 in restitution and was subsequently permanently disbarred for his misconduct. *Disciplinary Counsel v. Calabrese*, 143 Ohio St.3d 229, 2015-Ohio-2073, 36 N.E.3d 151.

Anthony Calabrese signed as a member of Buckeye.[3] While the exhibits did not include Concheck's deposition testimony, the exhibits included the deposition testimony by Maria Calabrese (the sole owner of North Hill), which reflected that she was somewhat uncertain as to who the other 50 percent member of Buckeye was when asked about it.[4]

Appellant's Exhibits

{¶ 7} Appellant North Hill opposed appellee's motion for summary judgment, claiming North Hill was a member of Buckeye since Buckeye's inception. Appellant submitted various exhibits to support its claim. The exhibits included a 2011 tax year Schedule K-1 ("Partner's Share of Income, Deductions, Credits") issued by Buckeye to Maria Calabrese, which listed a 2011 distribution of $14,000 to her as a 50 percent individual partner of Buckeye. Another exhibit showed a check from Buckeye for $14,000 dated January 18, 2011, payable to "Maria L. Calabrese North Hill Holdings." There was also an exhibit showing a check for

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[3] These two documents were filed under seal as part of the trial court record, but they were missing from the file on appeal. The trial court alluded to the September 1, 2010 agreement in its decision but not the November 1, 2010 agreement. Appellant does not dispute the authenticity of these documents but points to Anthony Calabrese's deposition testimony that he made a mistake in signing these agreements as a member of Buckeye and that he should have signed as an "authorized representative of North Hill." Appellant characterizes them as "inconsequential errors."

[4] Maria Calabrese testified at her deposition as follows:

Q. Okay. You're not sure whether you're a member of North Hill Holdings and a member of Buckeye Hoya?

A. I know I have 50 percent of Buckeye Hoya. I believe it's North Hill. I don't believe it's me, personally.

$45,000 dated December 6, 2012, paid to "North Hill Holdings." Appellant in addition submitted tax years 2012 and 2013 K-1 issued by Buckeye, which listed North Hill Holdings, L.L.C. as a 50 percent partner.

The Trial Court's Decision

{¶ 8} Reviewing the evidence submitted by the parties, the trial court noted that the September 1, 2010 agreement between Buckeye and another entity, in which Anthony Calabrese signed as a member of Buckeye, was evidence that he was a member at that time; the January 18, 2011 check was evidence that Maria Calabrese was a member at that time; and the 2012 and 2013 K-1's were evidence that North Hill was a member that year. The trial court also cited Anthony Calabrese's deposition testimony that North Hill was a 50 percent member of Buckeye and Maria Calabrese's deposition testimony that she "believed" North Hill was a 50 percent member of Buckeye. The trial court determined, however, that there was no documentary or testimonial evidence showing *when* or how North Hill became a member of Buckeye in accordance with R.C. 1705.14.

{¶ 9} Construing the evidence most strongly in favor of North Hill, the trial court found that Concheck and Anthony Calabrese were each a 50 percent member of Buckeye at the time of Buckeye's formation, and that there was no evidence that North Hill later became a member of Buckeye in accordance with R.C. 1705.14. Accordingly, the trial court concluded that North Hill did not have standing to bring the instant complaint regarding the fees earned in the NEN transaction.

Appeal

{¶ 10} We address the two assignments of error together. A trial court's granting of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate where: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 11} Civ.R. 56(C) states that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Analysis

{¶ 12} In this case, the trial court granted summary judgment in favor of appellee on the ground that North Hill was not a member of Buckeye and therefore lacked standing to bring the breach of fiduciary duties and related claims against Buckeye and its managing member. Accordingly, we limit our review to the narrow question of whether North Hill was a member of Buckeye at its inception or subsequently became its member, as the resolution of that question disposes of this appeal.

{¶ 13} "'It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.'" *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). Standing is defined as a party's "'"right to make a legal claim or seek judicial enforcement of a duty or right."'" *Id.*, quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting *Black's Law Dictionary* 1442 (8th Ed.2004).

{¶ 14} Turning to the instant case, limited liability companies are governed by R.C. Chapter 1705 ("Limited liability companies"). Unless the limited liability company has an operating agreement that provides otherwise, R.C. Chapter 1705 sets forth who is a member in a limited liability company and the rights and responsibilities of the members. Pursuant to R.C. 1705.081,

> an operating agreement governs relations among members and between members, any managers, and the limited liability company. * * * To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members and between the members, any managers, and the limited liability company.

{¶ 15} "Operating agreement" is defined in R.C. 1705.01(J) as "all of the valid written or oral agreements of the members * * * as to the affairs of a limited liability company and the conduct of its business." A limited liability company's operating agreement determines the actual membership in the limited liability company and the rights and responsibilities of the limited liability company. *Matthews v. D'Amore*, 10th Dist. Franklin No. 05AP-1318, 2006-Ohio-5745, ¶ 36. Many of the provisions of R.C. Chapter 1705 are subject to or dependent upon related provisions in an operating agreement. *McConnell v. Hunt Sports Ents.*, 132 Ohio App.3d 657, 688-689, 725 N.E.2d 1193 (10th Dist.1999). Buckeye, however, has no operating agreement, and therefore, it is governed by Chapter 1705 of the Revised Code. *Germano v. Beaujean*, 2013-Ohio-3846, 997 N.E.2d 1238, ¶ 16 (6th Dist.) (absent an operating agreement, statutory provisions govern the relationship between the members and the operation of the company).

{¶ 16} Pursuant to R.C. 1705.01(G), a member is one "whose name appears on the records of the limited liability company as the owner of a membership interest in that company." R.C. 1705.14 ("When a person becomes member; admission of additional members") sets forth how one becomes a member of a limited liability company. It states:

> (A) A person becomes a member at the time that a limited liability company is formed or at any later time that is specified in the records of the company for becoming a member.
>
> (B) After the filing of the articles of organization of a limited liability company, a person may be admitted as an additional member in either of the following ways:
>
> (1) If he acquires an interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the written consent of all of the members;
>
> (2) If he is an assignee of the interest of a member who has the power as provided in writing in the operating agreement to grant the assignee the right to become a member, upon the exercise of that power and compliance

> with any conditions limiting the grant or exercise of the power.

{¶ 17} Under the statute, the "[i]nitial membership in a[n] LLC is controlled by either the articles of organization or the operating agreement." *Hackenburg v. Zeller*, 3d Dist. Logan No. 8-15-02, 2015-Ohio-3813, ¶ 13, citing R.C. 1705.14(A). Here, the only available corporate record is the articles of organization. The articles of organization only reflects Concheck's signature; North Hill does not appear anywhere on the articles of organization as a member. Thus, there were no corporate records to show North Hill was a member at the time Buckeye was formed pursuant to R.C. 1705.14(A).

{¶ 18} Thus, the only mechanism for North Hill to become a member of Buckeye was by utilizing either of the two provisions of R.C. 1705.14(B). *Id.* Under R.C. 1705.14(B)(1), North Hill could become a member by "the written consent of all the members," yet no such written consent was in the evidence. North Hill argues that even if North Hill was not a member of Buckeye at its formation, it became a member through consent under R.C. 1705.14(B)(1), as manifested by the distribution checks and Schedule K-1's. The statute by its plain language requires a "written consent of all members." North Hill cites no case law authority for its claim that a distribution to a nonmember or a tax document such as a Schedule K-1 constitutes a written consent for purposes of R.C. 1705.14(B)(1).

{¶ 19} As for R.C. 1705.14(B)(2), North Hill could become a member by being assigned "the interest of a member who has the power as provided in writing in the operating agreement to grant the assignee the right to become a member." In the absence of a written operating agreement, however, North Hill could not become a member by way of assignment pursuant to R.C. 1705.14(B)(2).

{¶ 20} In sum, without an operating agreement, appellant North Hill must establish it became a member by written consent of existing member(s), yet no such evidence exists in the record. *See B.T. Environmental Solutions, L.L.C. v. B.T. Energy Group, Inc.*, 7th Dist. Columbiana No. 17 CO 0010, 2018-Ohio-5113, ¶ 17 (plaintiffs were not members of the limited liability company because they did not appear on the limited liability company's records as members, the limited liability company had no written operating agreement, and its existing members did not grant them membership).

{¶ 21} The record is devoid of evidence showing North Hill was a member of Buckeye at the time Buckeye was formed or subsequently became a member under R.C. 1705.14. The 2012 and 2013 tax documents identifying North Hill as a member of Buckeye and the deposition testimony by Anthony and Maria Calabrese failed to create a genuine issue of material fact regarding the question of whether North Hill was a member of Buckeye pursuant to the requirements and provisions of R.C. 1705.14. The first and second assignments of error are both without merit.

{¶ 22} Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing 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.

____
MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR