The Bullet Point: Ohio Commercial Law Bulletin

Are my emails sufficient to form a contract?

Volume IV, Issue 8
April 22, 2020
Jim Sandy and Stephanie Hand-Cannane

Final Appealable Order

Milton Banking Co. v. Adkins, 4th Dist. Jackson No. 19CA07, 2020-Ohio-1481

In this case, the Fourth Appellate District dismissed the appeal, holding that the judgment entry of foreclosure was not a final and appealable order as it failed to address the interests and rights of all the lienholders.

- **The Bullet Point**
  In Ohio, appellate courts have no jurisdiction to review a matter unless the lower court entered a 'final and appealable' order. Under R.C. 2505.02(B)(1), an order is final and appealable if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." Stated differently, an order must fully dispose of liability to be a final and appealable order. A judgment decree in foreclosure fully disposes of liability if it "determines the extent of each lienholder's interest, sets forth the priority of the liens, and determines the other rights and responsibilities of each party in the action." As such, a judgment entry ordering a foreclosure sale is not final and appealable unless it resolves all of the issues involved in the foreclosure, including: 1) whether an order of sale is to be issued; 2) what other liens must be marshaled before distribution is ordered; 3) the priority of any such liens; and 4) the amounts that are due the various claimants.

Contract Formation

N. Side Bank & Trust Co. v. Trinity Aviation LLC, 1st Dist. Hamilton No. C-190021 C-190023, 2020-Ohio-1470

In this appeal, the First Appellate District vacated in part and reversed in part the trial court's decision, finding that the emails between the parties contained the basic elements for contract formation and demonstrated the required meeting of the minds sufficient to create an enforceable contract.

- **The Bullet Point**
  In order to form a valid contract, there must be a 'meeting of the minds' on the essential terms of the agreement, which is usually demonstrated by 1) an offer, 2) acceptance, and 3) consideration. In addition, the essential terms must be definite and certain. In Ohio, "the essential terms of a contract include: the identity of the parties, the subject matter, consideration, a quantity term, and a price term." These essential terms do not need to be contained in one written document. On the contrary, a party may prove the existence of an enforceable written contract with multiple writings or emails that, when taken together, demonstrate the scope of the parties' agreement.

Defamation

Johnson v. Johnson, 8th Dist. Cuyahoga No. 108420, 2020-Ohio-1381

In this appeal, the Eighth Appellate District affirmed in part and reversed in part the trial court's decision, finding that the plaintiff presented sufficient facts that the defendant allegedly defamed him with actual malice by making false statements to the police, and if proven, could warrant the plaintiff relief.

- **The Bullet Point**
  Defamation can occur in two forms — slander, which is spoken, and libel, which is written. To establish a claim for either slander or libel, a plaintiff must show: (1) a false statement of fact was made about the plaintiff, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement. However, not all false statements are defamatory. In order for a false statement to be defamatory, the false statement must be "made with some degree of fault that (1) reflects injuriously on one's reputation, or (2) exposes a person to public hatred, contempt, ridicule, shame, or disgrace, or (3) affects a person adversely in his or her trade, business, or profession." In addition, statements made to law enforcement personnel for the prevention or detection of crime are 'qualifiedly privileged' and cannot serve as the basis for a defamation claim, absent actual malice. Stated differently, a qualified privilege exists for defamatory comments made to law enforcement for the prevention or detection of crime and are not actionable unless the speaker was motivated by ill will.

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

[Cite as *Milton Banking Co. v. Adkins*, 2020-Ohio-1481.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

THE MILTON BANKING COMPANY A Division of THE OHIO VALLEY BANK COMPANY,	:	Case No. 19CA07
Plaintiff-Appellee,	:	DECISION AND JUDGMENT ENTRY
V.	:	
REBEKAH A. ADKINS, ET AL.,	:	
Defendants-Appellants.	:	

APPEARANCES:

Bruce M. Broyles, Lancaster, Ohio, for Appellants.

Lawrence A. Heiser and Jessica M. Ismond, Oths, Heiser, Miller, Waigand & Clagg, LLC, Wellston, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal of an April 16, 2019 judgment entry in foreclosure of the Jackson County Court of Common Pleas which awarded judgment in favor of The Milton Banking Company, a division of The Ohio Valley Bank Company, hereinafter "Milton Banking," and against Rebekah A. Adkins and Jason Adkins**,** hereinafter, "Appellants." Appellants raise three assignments of error challenging the trial court's entry of judgment. For the reasons which follow, we find we do

not have jurisdiction to consider this appeal. Accordingly, we dismiss the appeal for lack of a final appealable order.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On December 5, 2018, Milton Banking filed a complaint in foreclosure. Along with Appellants, Milton Banking named several additional defendants. These defendants included: State of Ohio Department of Taxation; Knight Nguyen Investments; Ohio Health Corporation; Bruce Hann; Jan Shroy; Vecron Exim Ltd; Lane Aviation Corporation; United States of America Department of the Treasury, Internal Revenue Service; Ohio Department of Job & Family Services, Bureau of Unemployment Compensation Taxation; State of Ohio Department of Job & Family Services; and the Jackson County Treasurer.

{¶3} The foreclosure complaint alleged as follows:

> 1. On November 24, 2010, the Defendant Rebekah A. Adkins, executed and delivered to Plaintiff, the Milton Banking Company, a division of The Ohio Valley Bank Company, her certain Adjustable Rate Note, in the original principal sum of Sixty-Five Thousand Dollars ($65,000.00) with interest accruing thereon at 7.50% per annum until paid in full. Said Note attached hereto as Exhibit A.

2. The Defendant was to make 240 monthly payments of $523.79 beginning December 24, 2010.
3. The Defendant is in default on said Note, and there is due and owing the sum of Fifty Thousand Five Hundred Five Dollars and Ninety-Two Cents ($50,505.92) as of November 6, 2018 plus interest at 8.00% per annum ($11.06979 per day), until paid in full plus costs.

***

4. As security for payment of the note referred to in Count One, the Defendants, Rebekah A. Adkins and Jason Adkins, husband and wife, executed and delivered to Plaintiff, The Milton Banking Company, a division of The Ohio Valley Bank Company, their certain Open End Mortgage, a copy of which is attached hereto as Exhibit B, covering the following described real estate: SEE EXHIBIT C.
   Parcel Numbers: 116-014-00-037-00, 116-014-00-00-038-00, 116-014-00-039-00
   Address of Property: 163 South Bingham Street, Oak Hill, Ohio 45656.

The Complaint requested judgment in favor of plaintiff in the above-referenced amount and also requested that the real estate be sold according to law.

{¶4} On February 25, 2019, Appellants filed a Motion for Extension of Time to File Answer to Complaint. In the motion, Appellants alleged:

> Rebekah A. Adkins and Jason Adkins say that the complaint was filed on December 5, 2018; that certified mail was returned unclaimed on December 24 and December 27, 2018, and that certificates of mailing by regular mail to Defendants were filed on December 28, 2018. Pursuant to Civil Rule 4.6(D) Defendants answer day was twenty-eight (28) days after the certificate of mailing or January 25, 2019. Defendants Rebekah and Jason Adkins further say that previous counsel did not expect to be called upon to handle the above-captioned matter, that Defendants have recently retained new counsel, and that Plaintiff has not yet moved for default judgment.

{¶5} Also on February 25, 2019, Milton Banking filed a motion for summary judgment. On March 29, 2019, Appellants filed a second Motion for Extension of Time to File Answer to Complaint. In the motion, Appellants acknowledged being granted an extension of time to answer complaint until March

24, 2019. However, Appellants asserted that "the schedule of their counsel has and will prevent the timely filing of their answer, that this motion is not interposed for the purposes of undue delay, that no party will be prejudiced and that the interests of justice will be well served if this Court were to grant them an extension of time." Appellants specifically requested an extension of time until April 24, 2019.

{¶6} On April 4, 2019, Milton Banking filed a memorandum contra extension of time and requested the motion for extension be overruled. Milton Banking argued that it had already filed its motion for summary judgment and Appellants had more than adequate time. On April 16, 2019, the trial court entered judgment entry of foreclosure.

{¶7} This timely appeal followed.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT APPELLANTS A SECOND EXTENSION OF TIME TO FILE ANSWER TO COMPLAINT AND IMMEDIATELY ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN APPELLEE FAILED TO DEMONSTRATE THAT IT COMPLIED WITH ALL CONDITIONS PRECEDENT TO THE FILING OF THE FORECLOSURE COMPLAINT.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY

JUDGMENT WHEN APPELLEE FAILED TO ALLEGE IN ITS COMPLAINT THAT IT COMPLIED WITH ALL CONDITIONS PRECEDENT TO THE FILING OF THE FORECLOSURE COMPLAINT, AND THERE REMAINED GENUINE ISSUES OF MATERIAL FACT AS TO APPELLEE'S COMPLIANCE WITH ALL CONDITIONS PRECEDENT TO THE FILING OF THE FORECLOSURE COMPLAINT."

LEGAL ANALYSIS

{¶8} Appellate courts "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[.]" *Partners for Payment Relief DE L.L.C. v. Jarvis,* 4th Dist. Scioto No. 15CA3723, 2016-Ohio-7562, ¶ 6, quoting Ohio Constitution, Article IV, Section 3(B)(2); see R.C. 2505.03(A). If a court's order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal. *Jarvis, supra*; *Eddie v. Saunders*, 4th Dist. Gallia No. 07CA7, 2008-Ohio-4755, ¶ 11.

{¶9} An order must meet the requirements of R.C. 2505.02 to constitute a final, appealable order. *Jarvis, supra*, at ¶ 7, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). Under R.C. 2505.02(B)(1), an order is a final order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" To determine the action and prevent a judgment for the party appealing, the order " 'must dispose of

the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.' " *Jarvis, supra,* quoting *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

{¶10} "Foreclosure actions proceed in two stages, both of which end in a final appealable judgment: the order of foreclosure and the confirmation of sale." *Farmers State Bank v. Sponaugle,* 157 Ohio St. 3d 151, 2019-Ohio-2518, at ¶ 18. A judgment decree in foreclosure fully disposes of liability if it " 'determines the extent of each lienholder's interest, sets forth the priority of the liens, and determines the other rights and responsibilities of each party in the action.' " *Jarvis, supra,* at ¶ 8, quoting *CitiMortgage, Inc. v. Roznowski,*139 Ohio St.3d 299, 2014-Ohio-1984, ¶ 39. Thus, to qualify as a final order under R.C. 2505.02(B)(1), a foreclosure decree must account for each lienholder's interest and delineate each lienholder's rights. *Id*. at ¶ 20-21; *Second Natl. Bank of Warren v. Walling,* 7th Dist. No. 01-CA-62, 2002-Ohio-3852, ¶ 18 ("a judgment entry ordering a foreclosure sale is not final and appealable unless it resolves all of the issues involved in the foreclosure, including the following: whether an order of sale is to be issued; what other liens must be marshaled before distribution is ordered; the priority of any such liens; and the amounts that are due the various claimants");

See also Green Tree Servicing L.L.C. v. Columbus & Cent. Ohio Children's Chorus Found., 10th Dist. Franklin No. 15AP-802, 2016-Ohio-3426, ¶ 9.

{¶11} Additionally, if a case involves multiple parties or multiple claims, the court's order must meet the requirements of Civ.R. 54(B) to qualify as a final, appealable order. *Jarvis, supra* at ¶ 9. *See Chef Italiano Corp*. at 88. Under Civ.R. 54(B), "[w]hen more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." "Absent the mandatory language that 'there is no just reason for delay,' an order that does not dispose of all claims is subject to modification and is not final and appealable." *Jarvis, supra,* at ¶ 9, quoting *Noble v. Colwell,* 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); *see* Civ.R. 54(B). The purpose of Civ.R. 54(B) is " 'to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals[,]' * * * as well as to insure that parties to such actions may know when an order or decree has become final for purposes of appeal * * *." *Pokorny v. Tilby Dev. Co*.,

52 Ohio St.2d 183, 186, 370 N.E.2d 738 (1977); quoting *Alexander v. Buckeye Pipeline,* 49 Ohio St.2d 158, 160, 359 N.E.2d 702 (1977).

{¶12} The case presently before us involves multiple parties and claims. Defendants Ohio Health, Bruce Hann, Jan Shroy, and Lane Aviation filed answers. All defendants except the Ohio Department of Taxation and the Jackson County Treasurer had filed liens with the Jackson County Recorder. The Ohio Department of Taxation had filed a certificate of judgment. The complaint alleged that taxes were due and owed to the Jackson County Treasurer. However, in the April 16, 2019 judgment entry in foreclosure, only Milton Banking's interests have been resolved. On the third page of the foreclosure entry, the third full paragraph states:

> The Sheriff of Jackson County, Ohio is ordered to sale [sic]
> said real estate as upon execution and return these proceedings
> to the Court whereupon the court shall consider the marshalling
> of liens and distribution of proceeds as sale.

{¶13} The interests of the other defendants named in the foreclosure complaint are unresolved and are not addressed in the entry except for the vague reference that "the court shall consider the marshalling of liens and distribution of proceeds as sale." This language demonstrates that the April 16, 2019 order is subject to modification and not final and appealable. Thus the foreclosure decree

is not a final order under R.C. 2505.02(B)(1) because it fails to address the interests and rights of all lienholders.

{¶14} Furthermore, while the third page of the April 16, 2019 judgment entry of foreclosure sets forth " no just cause for delay" language, Civ. R. 54(B) does not apply. " 'Before Civ. R. 54(B) can apply the order at issue must qualify as a final order under R.C. 2505.02(B).' '' *Johnson v. Stone,* 2019-Ohio-4630, _N.E.3d._, at ¶ 21 (3rd Dist.), quoting *Green Tree Servicing,* at ¶ 13. "The mere incantation of Civ.R. 54(B) language does not convert an otherwise non-final order into a final, appealable order." *Id.* (finding that a judgment decree in foreclosure that did not address the interest of other lienholders was not a final order under R.C. 2505.02(B) and the trial court's use of Civ.R. 54(B) language could not transform the non-final order into a final, appealable one). The April 16, 2019 judgment decree in foreclosure is not a final order under R.C. 2505.02(B), so the trial court's use of Civ.R. 54(B) language cannot transform it into a final, appealable order.

CONCLUSION

{¶15} In light of our determination that the April 16, 2019 judgment entry of foreclosure is subject to modification and is not final and appealable, we lack

jurisdiction to consider this appeal. Accordingly, we DISMISS the appeal for lack of a final, appealable order.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and costs be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *N. Side Bank & Trust Co. v. Trinity Aviation, L.L.C.*, 2020-Ohio-1470.]

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

NORTH SIDE BANK & TRUST COMPANY,	:	APPEAL NOS. C-190021 C-190023
	:	TRIAL NO. A-1205557
Plaintiff-Appellee/Cross-Appellant,	:	*O P I N I O N.*
vs.	:	
TRINITY AVIATION, LLC, et al.,	:	
Defendants,	:	
and	:	
ARLINGTON HEIGHTS RECYCLING, LLC, d.b.a. A&A RECYCLING,	:	
Intervenor-Defendant-Appellant/Cross-Appellee,	:	
and	:	
HOLLAND ROOFING GROUP, LLC,	:	
and	:	
INDUSPRO, LLC,	:	
Third-Party Defendants-Appellants/Cross-Appellees.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Vacated in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: April 15, 2020

Markesbury & Richardson Co., LPA, and *Barry A. Rudell, II,* for Plaintiff-Appellee/Cross-Appellant,

Statman, Harris & Eyrich, LLC, William B. Fecher, Alan J. Statman and *Saba N. Alam,* for Intervenor-Defendant-Appellant/Cross-Appellee and Third-Party Defendants-Appellants/Cross-Appellees.

BERGERON, Judge.

{¶1} In this high-flying dispute over airplane parts, replete with a failing company, shenanigans with a warehouse full of inventory, and a tortured procedural history, we confront a fairly basic question that vexes first-year law students: did the parties form a contract? Although these sophisticated parties certainly knew how to dress up a contract in more formal attire, here they just sent a few email volleys. This correspondence, however, contained the necessary attributes for contract formation, and we accordingly reverse the trial court's conclusion to the contrary and remand for further proceedings.

I.

{¶2} The origins of this appeal stretch back a decade with the plaintiff-appellee/ cross-appellant North Side Bank & Trust Company ("NSBT") and one of its debtors, Trinity Aviation, LLC, ("Trinity"). After securing a loan with NSBT, Trinity subsequently defaulted. NSBT initially worked with Trinity to bring it into compliance with the loan agreement, but this proved fruitless, ultimately prompting NSBT to file a complaint in July 2012 in the Hamilton County Common Pleas Court, citing default under the loan agreement and accelerating the remaining sums due. NSBT obtained judgment in its favor based on executed cognovit provisions in the loan instruments against Trinity and its personal guarantors, Gary and Debbie Post and Charles and Lynn Young, for the remaining balance on the loan. Of course, as in so many of these types of disputes, that judgment is merely the prelude for further proceedings rather than the finale.

{¶3} Leading up to the July 2012 judgment, NSBT also worked to liquidate assets that Trinity pledged as collateral for the loan and contracted with a liquidator out of Texas, Transportation Planning, Inc., ("TPI") to handle the logistics of a sale of assets, which

involved a significant amount of airplane parts. The materials in question were located at a warehouse on Kemper Road leased by Trinity, later known as (perhaps unlucky) "Building 13." Building 13 also housed consignment inventory belonging to another entity, which was separated from Trinity's assets and enclosed in a small room within the warehouse.

{¶4} For various reasons, TPI's initial efforts to liquidate the parts failed to yield suitable results, as the bank received no legitimate offers. Consequently, TPI advised NSBT that an alternative sale of the materials as scrap might prove viable as a means of recouping some of its losses. As part of this new plan to liquidate the items as scrap, TPI contacted various entities that might be interested in purchasing scrap metals, including Arlington Heights Recycling, LLC, d.b.a. A&A Recycling ("A&A Recycling").

{¶5} Following that outreach, Douglas Blair, the owner and operator of A&A Recycling, visited and viewed material located at Trinity's Building 13 with Sam Ashmore of TPI in June 2012. Mr. Blair and Mr. Ashmore toured the building, with Mr. Blair examining the metals contained in the inventory. After completing this assessment, Mr. Blair subsequently emailed Mr. Ashmore a price-per-pound "bid" for the metals located at Building 13 on June 21, 2012, the "Phase I" purchase. Mr. Ashmore confirmed that A&A Recycling prevailed on the bid, authorizing A&A Recycling to remove the Phase I materials from Building 13. Given the volume of parts, Mr. Blair explained that this exercise took "a couple of trucks and * * * about five days to remove phase one," which they relocated to A&A Recycling's place of business.

{¶6} After the Phase I purchase, Mr. Ashmore again contacted A&A Recycling about purchasing more material located in Building 13, the so-called "Phase II" purchase. Mr. Blair explained that he initially viewed this additional material on July 2, 2012, but

returned to the warehouse on July 9. During this second visit, the parties realized that Trinity's principal, Gary Post, had moved items within the warehouse and relocated other items from Building 13 (presumably in an effort to hide more valuable collateral from NSBT). Despite recognizing that many "high-end parts" were no longer in the warehouse, Mr. Blair submitted a second bid via email on July 13. This email confirmed the per-pound prices for both the Phase I and Phase II bids, stipulated to the removal of the Phase II materials, and referenced a $20,000 deposit, with the remaining sums due to be paid by August 1 after weighing the materials. He also sent a second email July 13 asking for written confirmation of the bank's acceptance of both bids. Mr. Ashmore wasted little time in agreeing to this—the next day, he wrote "[t]his is to advise that the terms and conditions of your bid to purchase material from Trinity Aviation warehouse is accepted by North Side Bank[.]"

{¶7} A&A Recycling then enlisted the Holland Roofing Group, LLC, ("HRG") (owned by an individual named Hans Philippo) to assist it in removing the Phase II materials. In light of the volume, this effort necessitated over 50 tractor-trailers to move the parts. With HRG's help, A&A Recycling transported all of the material to a warehouse in Kentucky owned by a company called Induspro, LLC, ("Induspro"). The Phase I materials were also eventually relocated to this warehouse as well.

{¶8} As NSBT struggled to get its arms around the extent of Trinity's inventory (and its collateral), it eventually realized that assets were located at several different warehouses and potentially commingled with consignment inventory belonging to other entities. Therefore, days after giving A&A Recycling the green light to proceed with removal of the Phase II inventory, NSBT moved for appointment of a receiver "for the purpose of

carrying into effect the judgement of [NSBT], and collecting, preserving, accounting for, and determining the claims of all parties to the personal property of * * * Trinity Aviation, LLC." The court ultimately approved this motion, appointing Richard Nelson receiver to "take possession of, assemble, account for and marshal all property of Trinity Aviation, LLC."

{¶9} Understandably flummoxed by this turn of events, and concerned that the appointment of a receiver would stall the liquidation of the Phase I and Phase II materials now located in Kentucky, A&A Recycling asked the trial court in late 2012 to approve the sale and distribution of the assets in its possession. For its part, the bank opposed the sale, arguing that (1) A&A Recycling was not yet a party to the ongoing action between the bank and its debtor, (2) any sale of the assets was premature until the receiver could fully inventory the extent of the assets, and (3) "it [was] questionable whether A&A [Recycling] has a contractual right to purchase these assets for scrap[.]"

{¶10} Then, in July 2013, the receiver filed a motion requesting that the court approve a proposed online auction process to sell all the personal and consigned property of Trinity. At this time, A&A Recycling again objected, asserting that a sale of the assets already occurred, and it moved to intervene (which the court granted). For their part, the receiver and NSBT, citing the comingling of assets with consignment materials, the removal of items from the warehouse, and alleged lack of consensus on subject or quantity terms, maintained that the sale could not be enforced as there was no "meeting of the minds." In short, the bank took various inconsistent positions during these proceedings (a vice that A&A Recycling is guilty of as well) based on its vacillating view of the value of the parts. When it viewed them as relatively worthless, it was happy to send them to A&A Recycling

for scrap, but when the receiver offered a rosier view of the value, the bank concluded that no bargain was struck.

{¶11} The trial court eventually convened an evidentiary hearing to determine the propriety of the proposed receiver's sale and the contentious ownership issues, but ultimately threw up its hands in frustration as to the lack of consensus of what A&A Recycling had allegedly purchased, citing the general distribution of the materials over various locations and perceived lack of "meeting of the minds * * * as to what was being purchased for the $20,000." The court then granted the receiver's motion to sell the property, concluding that A&A Recycling failed to establish the requirements of a valid contract with NSBT.

{¶12} After an unsuccessful appeal of the decision by A&A Recycling (which we dismissed for lack of a final appealable order), the trial court eventually granted A&A Recycling leave to file various cross-claims, counterclaims and third-party claims against NSBT, the receiver, and TPI. In particular (in light of the failure of its contractual claim), A&A Recycling pursued unjust enrichment against NSBT for the moving and storage expenses related to the transport of the materials initially located at Building 13. While the trial on these matters began in November 2015, it was delayed while A&A Recycling moved to amend its claim and to add parties, which the trial court granted in 2016. The amended complaint now included A&A Recycling and the other parties involved in the removal and storage of the Phase II materials, including (among others) HRG and Induspro (collectively, the "A&A Parties").

{¶13} The trial finally progressed and drew to a close in late 2017, resulting in a 2018 letter decision and entry awarding the A&A Parties monetary damages against NSBT

on their unjust enrichment claim. From this judgment, the A&A Parties now appeal in two assignments of error, contesting the trial court's 2013 finding that no contract for sale existed for the Phase I and Phase II materials and challenging the award of damages on the unjust enrichment claim as erroneous for its exclusion of certain expenses. For its part, NSBT cross-appealed, asserting in a single assignment of error that the trial court erred in awarding unjust enrichment damages against it.

II.

A.

{¶14} In the first assignment of error, the A&A Parties assert that the trial court erred by declining to enforce the alleged sale between NSBT and A&A Recycling, finding that no "meeting of the minds" occurred. This implicates fundamental aspects of Ohio contract law. "Ohio recognizes three types of contracts: express, implied in fact, and implied in law (or quasi-contract)." *Linder v. Am. Natl. Ins. Co.*, 155 Ohio App.3d 30, 2003-Ohio-5394, 798 N.E.2d 1190, ¶ 18 (1st Dist.), citing *Legros v. Tarr*, 44 Ohio St.3d 1, 6, 540 N.E.2d 257 (1989). Express contracts exist when there is offer, acceptance, and mutual assent. *Id.* Implied-in-fact contracts require a showing of assent, but a court otherwise construes surrounding facts and circumstances to determine the scope of the agreement. *Id.* Finally, implied-in-law contracts are legal fictions which operate in equity when one party wrongfully receives a benefit giving rise to a legal obligation, i.e., claims for unjust enrichment and quantum meruit. *See id.*

{¶15} Thus, for either express or implied-in-fact contracts to exist, a meeting of the minds between the contracting parties must occur, demonstrated by offer, acceptance, and consideration. *See Reedy v. Cincinnati Bengals, Inc.*, 143 Ohio App.3d 516, 521, 758 N.E.2d

678 (1st Dist.2001) ("In order for a valid contract to exist, there must be a 'meeting of the minds' on the essential terms of the agreement, which is usually demonstrated by an offer and acceptance, and consideration."); *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16 ("Essential elements of a contract include an offer, acceptance, contractual capacity, consideration * * *, a manifestation of mutual assent and legality of object and of consideration."). The alleged contract must also reflect the "essential terms," with requisite definiteness and certainty. *See Reedy* at 521 ("[T]he essential terms of the contract, usually contained in the offer, must be definite and certain."). The essential terms of a contract generally include the subject matter, identity of the parties bound, consideration, price, and quantity. *See Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 311, 594 N.E.2d 668 (1st Dist.1991); *Knoop v. Orthopaedic Consultants of Cincinnati, Inc.*, 12th Dist. Clermont No. CA2007-10-101, 2008-Ohio-3892, ¶ 13 ("The essential terms of a contract include: the identity of the parties, the subject matter, consideration, a quantity term, and a price term.").

{¶16} Additionally, because this dispute involves a sale of goods over $500, the statute of frauds compels written memorialization of the agreement. *See* R.C. 1302.04; *Battle Axe Constr. L.L.C. v. H. Hafner & Sons, Inc.*, 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191, ¶ 16-17 (emails between parties sufficed to form enforceable written agreement). Of course, we may construe multiple writings together to determine the scope of the parties' agreement. *See L.B. Trucking Co., Inc. v. C.J. Mahan Const. Co.*, 10th Dist. Franklin No. o1AP-1240, 2002-Ohio-4394, ¶ 26, quoting *Juhasz v. Costanzo*, 144 Ohio App.3d 756, 762, 761 N.E.2d 679 (7th Dist.2001) (" 'In order to prove the existence of a written contract, the essential elements of the contract must be part of a writing, or part of multiple writings that

are part of the same contractual transaction.' "); *Spectrum Benefit Options, Inc. v. Med. Mut. of Ohio*, 174 Ohio App.3d 29, 2007-Ohio-5562, 880 N.E.2d 926, ¶ 28 (4th Dist.) (same).

{¶17} Finally, we determine the existence of a contract as a question of law, and our standard of review on questions of law is de novo. *See R & A Lawn Care, LLC v. Back*, 1st Dist. Hamilton No. C-160682, 2017-Ohio-4404, ¶ 15; *Oryann, Ltd. v. SL & MB, L.L.C.*, 11th Dist. Lake No. 2014-L-119, 2015-Ohio-5461, ¶ 24 ("The existence of a contract is a question of law that we review de novo."); *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.) (same).

B.

{¶18} With that background in mind, we turn our attention to the written record created by the parties—in this case a series of emails. We evaluate them to ascertain whether they "connote[ ] an exchange of promises where the parties have communicated in some manner the terms to which they agree to be bound." *Cuyahoga Cty. Hosp. v. Price*, 64 Ohio App.3d 410, 415, 581 N.E.2d 1125 (8th Dist.1989); *see Technical Const. Specialties v. Gerspacher*, 9th Dist. Medina No. C.A. 2785-M, 1999 WL 247297, *1 (Apr. 28, 1999), citing *Legros*, 44 Ohio St.3d at 6, 540 N.E.2d 257 (noting that a meeting of the minds indicates that the parties have a distinct and common intention which they have communicated to each other because "[i]n an express contract, the meeting of the minds is manifested by offer and acceptance.").

{¶19} On July 13, Mr. Blair sent two emails to Mr. Ashmore, one delineated the per-pound price of each metal involved in the Phase I and Phase II purchases, removal plans for the Phase II materials, and mentioned the $20,000 deposit as well as the process for weighing and payment in full for the materials. The remaining July 13 email asked Mr.

Ashmore for written acceptance from the bank "on both * * * bids." An "offer" may be found where there is a " 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' " *Reedy*, 143 Ohio App.3d at 521, 758 N.E.2d 678, quoting *Garrison v. Daytonian Hotel*, 105 Ohio App.3d 322, 325, 663 N.E.2d 1316 (2d Dist.1995). Therefore, because the terms of the July 13 email were such that all that remained was for NSBT's assent to form a binding agreement (and, indeed, they invited acceptance), this constituted an offer. *See SST Bearing Corp. v. MTD Consumers Group, Inc.*, 1st Dist. Hamilton No. C-040267, 2004-Ohio-6435, ¶ 16 (price quotation constituted valid offer where it included essential terms and all that was necessary was other party's acceptance); *Extreme Machine & Fabricating, Inc. v. Avery Dennison Corp.*, 2016-Ohio-1058, 49 N.E.3d 324, ¶ 25 (7th Dist.) (offer exists where terms are such that only the party's assent is needed to form a binding agreement).

{¶20} In response to these emails, Mr. Ashmore replied on July 14: "[T]his is to advise that the terms and conditions of your bid to purchase material from Trinity Aviation warehouse is accepted by North Side Bank[.]" In contract formation, "[t]he manifestation of assent by the offeree constitutes the acceptance." *McSweeney v. Jackson*, 117 Ohio App.3d 623, 632, 691 N.E.2d 303 (4th Dist.1996); *see Motorists Mut. Ins. Co. v. Columbus Fin., Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090, 861 N.E.2d 605, ¶ 8 (10th Dist.) ("[C]onduct sufficient to show agreement * * * constitutes acceptance."). Here, NSBT's answer in response to A&A Recycling's offer, which conveyed its assent to the terms, constituted a proper acceptance. In other words, at that point all the basic elements for contract formation were present, i.e., an offer, acceptance, and consideration in the form of A&A Recycling's promise to pay and its $20,000 deposit. *See Forbes v. Showmann, Inc.*, 1st Dist. Hamilton No. C-180325, 2019-Ohio-2362, ¶ 6 (under Ohio law consideration consists

of a benefit to the promisor or a detriment to the promisee); *Motorists Mut. Ins. Co.* at ¶ 8-9 (noting that basic requirements of contract formation are met when there is offer, acceptance, and consideration).

{¶21} This acceptance of A&A Recycling's terms evidenced the necessary "meeting of the minds" to create an enforceable contract as it expressed the parties' "common intention" as to the essential terms of the contract, i.e., that A&A Recycling purchased the materials located in Trinity Aviation's warehouse at the per-pound prices for each metal listed for Phase I and Phase II. *See Spoerke v. Abruzzo*, 11th Dist. Lake No. 2013-L-093, 2014-Ohio-1362, ¶ 20, 30, citing *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982) ("To constitute a valid contract, there must be an offer on the one side and an acceptance on the other resulting in a meeting of the minds of the parties."); *Super Food Servs., Inc. v. Munafo, Inc.*, 1st Dist. Hamilton No. C-990383, 2000 WL 238027, *3 (Mar. 3, 2000) ("A 'meeting of the minds' is the manifestation of mutual assent by the parties."); *Altercare of Mayfield Village, Inc. v. Berner*, 2017-Ohio-958, 86 N.E.3d 649, ¶ 28 (8th Dist.), quoting *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 631, 620, 622 N.E.2d 1093 (8th Dist.1993) (meeting of the minds requires manifestation of intent to be bound and that the parties communicate " 'distinct and common intention' " to each other).

{¶22} In fact, it is difficult to understand what NSBT meant to convey based on these emails other than acceptance of a contractual offer. The bank protests, however, that the offer lacked sufficient definiteness with respect to the quantity term. *See Salameh v. Doumet*, 5th Dist. Delaware Nos. 19 CAF 01 0009 and 19 CAF 01 0008, 2019-Ohio-5391, ¶ 67, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio

St.3d 366, 369, 575 N.E.2d 134 (1991) ("[T]o declare the existence of a contract, the parties must consent to its terms, there must be a meeting of the minds of the parties, and the contract must be definite and certain."). The bank maintains that "without basic terms, such as the description and quantity of the goods, a contract may not exist." But here we find that the emails meet that burden with the requisite clarity, i.e., we can discern the contours of their agreement in a manner sufficient for its enforcement. *See First Natl. Bank of Omaha v. iBeam Solutions, L.L.C.*, 2016-Ohio-1182, 61 N.E.3d 740, ¶ 53 (10th Dist.) (terms of a contract must be reasonably certain and satisfied when they provide a basis for determining the existence of a breach and manner for providing an appropriate remedy); *Mr. Mark Corp v. Rush, Inc.*, 11 Ohio App.3d 167, 169, 464 N.E.2d 586 (8th Dist.1983) (same).

{¶23} To be sure, unlike many purchase contracts for the sale of goods, the correspondence here does not request x number of widgets. But the emails evidence the parties' agreement that A&A Recycling purchase "[a]ll material" located in Trinity's Building 13 in two phases, and that it agreed to payment on a per-pound basis for various metals, with a $20,000 deposit; which satisfies this inquiry. *Compare Episcopal Retirement Homes*, 61 Ohio St.3d at 369, 575 N.E.2d 134 (no contract existed where the court could not determine from writings "plans and specifications necessary for construction" nor "work timetable, monetary remuneration and other items[.]"); *see Alligood*, 72 Ohio App.3d at 311, 594 N.E.2d 668 (so long as court can discern that parties intended to be bound, less essential terms omitted may be fashioned in order to reach a "just result"). Moreover, this satisfies the writing requirements for contracts involving the sale of goods. *See Mezher v. Schrand*, 1st Dist. Hamilton No. C-180071, 2018-Ohio-3787, ¶ 8 (statute of frauds only requires writing to contain essential terms of the agreement); 1961 Official Comment, R.C. 1302.04 ("[R]equired writing need not contain all the material terms of the contract and * *

* need not be precisely stated. * * * The only term which must appear is the quantity term which need not be accurately stated[.]").

{¶24} NSBT also posits that no contract exists because of the confusion caused by the debtor's relocation of certain assets, resulting in "hopelessly commingled parts," and asserting that this justified the trial court's determination of no "meeting of the minds." The fact that subsequent events rendered performance of the contract (or an evaluation of its breach) more difficult, however, does not negate the validity or obligations of the contract. *See Coady Contracting Co. v. Brand Road Invest. Co., Ltd.*, 10th Dist. Franklin Nos. 88AP-986 and 88AP-1195, 1990 WL 80652, *4 (June 14, 1990), quoting *London & Lancashire Indem. Co. of Am. v. Bd. of Commrs. of Columbiana Cty.*, 107 Ohio St. 51, 140 N.E. 672 (1923), syllabus (" 'An express contract to do an act which is possible in the nature of things and not contrary to law will not be discharged by subsequent events * * * which do not render performance physically impossible, but merely make performance more burdensome[.]' "); *Leon v. State Farm Fire and Cas. Co.*, 2017-Ohio-8168, 98 N.E.3d 1284, ¶ 11 (8th Dist.) (contracting party not excused from performance because performance proved difficult or burdensome). Therefore, any possible difficulty that the parties may encounter in determining the extent of the purchased materials due to circumstances after the fact presents a problem of proof at trial rather than an impediment to contract formation.

{¶25} We clarify, however, that we reject A&A Recycling's more expansive argument based on its claimed entitlement to *all* Trinity inventory, regardless of where located. That is not what the emails provide; rather, they limit the scope of offer (and, by extension, acceptance) to the inventory in Building 13 at a certain time and thus the contract cannot extend beyond that. But what of inventory initially housed at Building 13 but subsequently

moved to other locations? Again, that represents a problem of proof that will have to be sorted out upon remand and not something that we can resolve on the present state of the record before us. NSBT may well be able to show that A&A Recycling knew of the relocation and thus such items (or maybe at least some of them) fell outside the scope of the contract; we express no view on the point.

{¶26} In sum, as the parties' writings contain all the basic elements for contract formation and demonstrate the required "meeting of the minds," they sufficed to create an enforceable contract between the parties, and we find that the trial court erred in declining to enforce the sale. This also obviated the need for the trial court to explore these issues at an evidentiary hearing because this legal determination should have been made as a threshold matter on the terms of the written record. We therefore sustain the A&A Parties' first assignment of error.

C.

{¶27} But the resolution of the contract question implicates the relief awarded for unjust enrichment. The trial court allowed unjust enrichment in light of the failure to establish a contract, and thus the A&A Parties cannot recover under both theories. *See Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 2016-Ohio-4611, 66 N.E.3d 1226, ¶ 24 (1st Dist.) (equitable action in quasi-contract for unjust enrichment not available when claim covered by an express contract); *Padula v. Wagner*, 2015-Ohio-2374, 37 N.E.3d 799, ¶ 48 (9th Dist.), citing *Ullmann v. May*, 147 Ohio St. 468, 476, 72 N.E.2d 63 (1947) ("Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject."). The A&A Parties acknowledge the point, conceding that success in establishing a contract wipes away the relief that they already obtained.

{¶28} Therefore, based on our resolution of the first assignment of error, we vacate the trial court's unjust enrichment award, which moots the A&A Parties' second assignment of error, challenging the trial court's award of unjust enrichment damages, and NSBT's cross-appeal disputing the same. On remand, the trial court should limit the case to breach of contract *unless* the A&A Parties can show entitlement to unjust enrichment for any inventory *not* located in Building 13 (i.e., inventory for which they have no contractual right, but can establish some basis for equitable relief). We express no view on whether the A&A Parties could succeed on such a claim, but only note that it remains theoretically possible consistent with our contractual ruling above.

III.

{¶29} We accordingly sustain the A&A Parties' first assignment of error, vacate the unjust enrichment remedies, and find A&A Parties' second assignment of error and NSBT's cross-appeal moot. We remand this case for further proceedings in accordance with this opinion.

Judgment accordingly.

ZAYAS, P. J., and **CROUSE, J.,** concur.

Please note:

The court has recorded its own entry this date.

[Cite as *Johnson v. Johnson*, 2020-Ohio-1381.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STEPHEN EARLY JOHNSON,	:	
Plaintiff-Appellant,	:	No. 108420
v.	:	
CLAUDE STEPHANIE JOHNSON, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: April 9, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-902590

Appearances:

Stephen Early Johnson, *pro se*.

Claude Stephanie Johnson, *pro se*.

RAYMOND C. HEADEN, J.:

{¶ 1} Plaintiff-appellant Stephen E. Johnson ("Stephen"), pro se, appeals the trial court's decision granting defendant-appellee, Claude S. Johnson's ("Claude") motion to dismiss pursuant to Civ.R. 12(B)(6). For the reasons that

follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Factual and Procedural History

{¶ 2} In Cuyahoga C.P. No. CV-18-902590, Stephen, pro se, filed a five-count complaint against his wife, Claude, on September 28, 2018.[1] Claude, pro se, answered the amended complaint on October 25, 2018.

{¶ 3} The trial court conducted a case management conference on November 1, 2018, when it set a discovery deadline for January 4, 2019, and required the submission of dispositive motions by January 11, 2019. The trial court also referred the case to arbitration, pursuant to Loc.R. 29 of the Court of Common Pleas of Cuyahoga County, General Division ("Loc.R. 29"), with a request that the arbitration be completed by January 18, 2019.[2]

{¶ 4} Prior to the arbitration hearing, Stephen filed the following discovery requests on December 28, 2018: request for admissions, request for production of documents, and request for first set of interrogatories.

{¶ 5} An arbitration hearing was held on January 3, 2019, and Stephen appealed the arbitration panel's decision on February 4, 2019. The case was

---

[1] Stephen filed a two-count complaint on August 22, 2018, and an amended five-count complaint on September 28, 2018. Claude answered the amended complaint and this appeal addresses Stephen's amended complaint.

[2] The trial court's referral to arbitration was premature since Loc.R. 29 does not permit a referral until after all discovery is completed. Loc.R. 29, Part I(D). Due to the parties' failure to raise this issue with the trial court, we do not now need to consider the alleged error on appeal. *Hohmann, Boukis & Curtis Co. v. Brunn*, 138 Ohio App.3d 693, 699, 742 N.E.2d 192 (8th Dist.2000).

returned to the trial court's docket on February 6, 2019. Per a February 14, 2019 journal entry, the dispositive motion deadline was extended to March 8, 2019, and all other dates remained the same.

{¶ 6} On February 25, 2019, Stephen filed a motion requesting the court to (1) deem admitted Claude's unanswered requests for admissions, and (2) grant Stephen's motion for summary judgment based upon those admissions. On February 26, 2019, Claude filed two motions: (1) a motion for extension of time to complete discovery, and (2) a motion to dismiss in accordance with Civ.R. 12(B)(6).[3]

{¶ 7} On March 11, 2019, the trial court granted Claude's motion to dismiss because Stephen's complaint failed to state a claim upon which relief could be granted.

{¶ 8} Following the court's granting of Claude's Civ.R. 12(B)(6) motion, Stephen filed this timely appeal arguing one assignment of error:

> The trial court erred and abused its discretion ruling in favor of the appellee after the appellant established for the record the appellee had procedural[ly] defaulted by failing to timely answer the admissions as required by Civ.R. 36(C)[.]

---

[3] Claude attached a memorandum in support of her motion to dismiss that included a copy of the Report and Award of the Arbitrators as well as the arbitrators' five-page award summary. We do not consider the arbitrators' report and award in our de novo review of Claude's motion to dismiss nor does the trial court's judgment entry provide any basis to assume the trial court considered this document when it reviewed Claude's motion to dismiss. Further, Claude's motion to dismiss referenced the complaint's allegations of slander, libel, and theft, and we do not presume Claude intended the motion to rely exclusively on the arbitrators' report and award simply because she attached a copy of that document to her motion.

II. Law and Analysis

{¶ 9} Stephen contends that the trial court erred and abused its discretion when it found his February 25, 2019 motion moot rather than (1) finding Claude's unanswered admissions deemed admitted, and (2) based upon those admissions, granting Stephen's motion for summary judgment. Claude's argument is difficult to discern, but it appears to focus on the lack of discovery prior to the arbitration hearing and the trial court's granting of her Civ.R. 12(B)(6) motion.

{¶ 10} After reviewing the issues and arguments, we find that Stephen is not challenging the trial court's finding that his February 25, 2019 motion was moot; rather, Stephen contends that the trial court's granting of Claude's Civ.R. 12(B)(6) motion to dismiss was in error.

{¶ 11} Technically, because Claude filed her Civ.R. 12(B)(6) motion to dismiss after she filed an answer, Claude sought a Civ.R. 12(C) motion for judgment on the pleadings rather than a motion to dismiss. *Shingler v. Provider Servs. Holdings, L.L.C.*, 8th Dist. Cuyahoga No. 106383, 2018-Ohio-2740, ¶ 17, fn. 6. A motion for judgment on the pleadings raises only questions of law that are reviewed under a de novo standard of review. *Cohen v. Bedford Hts.*, 8th Dist. Cuyahoga No. 101739, 2015-Ohio-1308, ¶ 7.

{¶ 12} Claude's motion will be reviewed under a Civ.R. 12(B)(6) standard:

> The Ohio Supreme Court has held that a Civ.R. 12(C) motion for judgment on the pleadings is to be considered as if it were a belated motion to dismiss for failure to state a claim upon which relief can be granted. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591, 592, 1994 Ohio 208, 635 N.E.2d 26. Therefore, we will analyze the

> [Civ.R 12(C) motion] under the same principles which we would apply in reviewing a Civ.R. 12(B)(6) dismissal.

Black v. Coats, 8th Dist. Cuyahoga No. 85067, 2005-Ohio-2460, ¶ 6.

{¶ 13} The test to determine whether a complaint can be dismissed pursuant to Civ.R. 12(B)(6) is "[i]n order to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must find beyond doubt that plaintiff can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true, and construes all reasonable inferences in plaintiff's favor." *Black* at ¶ 7, citing *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Thus, a complaint will be dismissed, pursuant to Civ.R. 12(B)(6), if it appears beyond doubt that the plaintiff can prove no set of facts entitling the plaintiff to relief. *Cohen* at ¶ 8.

{¶ 14} In his amended complaint, Stephen raised five counts.

A. <u>Count 1</u>

{¶ 15} In Count 1, Stephen alleges Claude committed libel and slander that are both forms of defamation. The proposed facts provided in support of these allegations are: "Later on that day [Claude] decided to call [the] [S]econd [D]istrict Police and make a false claim that [Stephen] threaten[ed] to kill her after [Stephen] abandoned her at Rite Aid located in Lakewood, OH * * *." (Amended complaint at ¶ 6.)

{¶ 16} Defamation occurs when a publication containing a false statement is made with some degree of fault that (1) reflects injuriously on one's reputation, or

(2) exposes a person to public hatred, contempt, ridicule, shame or disgrace, or (3) affects a person adversely in his or her trade, business or profession. *Sullins v. Raycom Media, Inc.*, 2013-Ohio-3530, 996 N.E.2d 553, ¶ 15 (8th Dist.).

> To establish a claim for defamation, a plaintiff must show: (1) a false statement of fact was made about the plaintiff, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement.

Id. at ¶ 15, citing *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 77, citing *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996).

{¶ 17} Defamation can occur in two forms — slander, which is spoken, and libel, which is written. *Stohlmann v. WJW TV, Inc.*, 8th Dist. Cuyahoga No. 86491, 2006-Ohio-6408, ¶ 8. Stephen alleged Claude committed both slander and libel.

1. Slander

{¶ 18} In reviewing his claim of slander, Stephen alleges that (1) Claude told the police that Stephen threatened to kill her; (2) the statement was untrue; and (3) he suffered damages.

{¶ 19} In Ohio, under notice pleading, a plaintiff need not prove his case at the pleading stage. *DSS Servs., L.L.C. v. Eitel's Towing, L.L.C.*, 10th Dist. Franklin No. 18AP-567, 2019-Ohio-3158, ¶ 10. A plaintiff is required under Civ.R. 8(A)(1) to provide a short and plain statement of the claim demonstrating that the claimant is entitled to relief. *McBride v. Parker*, 5th Dist. Richland No. 11 CA 122, 2012-Ohio-2522, ¶ 27.

{¶ 20} A plaintiff is not generally required to anticipate affirmative defenses and allege facts within the complaint that disprove those defenses. *DSS Servs.* at ¶ 10. Qualified privilege is an affirmative defense to a defamation claim. *Boyd v. Archdiocese of Cincinnati*, 2d Dist. Montgomery No. 25950, 2015-Ohio-1394, ¶ 37. The qualified privilege exists for statements made to law enforcement for the prevention or detection of crime, absent actual malice:

> "'Any communications made by private citizens to law enforcement personnel for the prevention or detection of crime are qualifiedly privileged and may not serve as the basis for a defamation action unless it is shown that the speaker was motivated by actual malice.'"

Allen v. Pirozzoli, 8th Dist. Cuyahoga No. 103632, 2016-Ohio-2645, ¶ 14, quoting *Lewandowski v. Penske Auto Group*, 8th Dist. Cuyahoga No. 94377, 2010-Ohio-6160, ¶ 26, quoting *Oswald v. Action Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 71089, 1997 Ohio App. LEXIS 1642, 8 (Apr. 24, 1997). Thus, an allegedly defamatory statement may not be actionable if the comment is privileged and was not made with ill will or actual malice. *Boyd* at ¶ 36. Here, Claude did not raise qualified privilege in her answer.[4]

{¶ 21} Upon a review of the pleadings, we find that Stephen asserted that Claude told the police he threatened to kill her after Stephen abandoned Claude at a local drugstore. Stephen denies the veracity of the statements and claims he suffered damages including emotional distress, poverty of inconvenience, and missing his child's third-grade graduation. Presuming the allegations are true and

[4] Claude is not precluded from seeking to amend her answer under Civ.R. 15, if appropriate, to incorporate qualified privilege.

construing them most strongly in Stephen's favor, Stephen presented sufficient facts which, if proven, could warrant him relief. We, therefore, find the trial court erred in granting Claude's Civ.R. 12(C) motion on the slander claim.

2. Libel

{¶ 22} Libel, generally, is a false written publication that meets the elements of defamation. *McKee v. McCann*, 2017-Ohio-7181, 95 N.E.3d 1079, ¶ 36 (8th Dist.). Stephen does not allege any written publication resulted from Claude's meeting with the police. Stephen can prove no set of facts in support of his libel claim that would entitle him to relief, and as a result, the trial court correctly dismissed the libel cause of action under Count 1.

B. Counts 2–4

{¶ 23} For ease of analysis, Counts 2 through 4 will be discussed collectively.

{¶ 24} In Count 2, Stephen alleges Claude's "negligence and frivolous filings" caused great harm to Stephen and his relationship with his son. The complaint does not include any facts to support negligent behavior or frivolous filings by Claude.

{¶ 25} Count 3 of the amended complaint asserts (1) Claude breached an oral contract to act as Stephen's caregiver, and (2) Claude "has taken personal property after verbally agreeing not to do so." The complaint does not contain facts from which the existence of an oral agreement can be inferred. The complaint is also silent as to an agreement whereby Claude was restrained from taking personal property.

{¶ 26} Stephen alleges in Count 4 that Claude tampered and took personal property without Stephen's consent. The only statement arguably related to this claim is Stephen's allegation that "[d]efendant had packed up all her belongings."

{¶ 27} The mere recitation of legal standards, such as negligence, breach of contract, or theft, is not sufficient to prevail on a Civ.R. 12(B)(6) motion to dismiss. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 24 (8th Dist.). Stephen's unsupported conclusions in Counts 2-4 of his complaint were not sufficient to withstand a motion to dismiss. *Id*. at ¶ 28. Accordingly, the trial court did not err when it dismissed Counts 2–4.

C. Count 5

{¶ 28} In Count 5, Stephen alleges Claude committed fraud when she misled the domestic court, Cleveland school system, Second District of the Cleveland Police Department, TSA, and family members. Specifically, Stephen alleges that Claude spread "rumors that [Stephen] committed certain acts" and omitted portions of the story to Claude's advantage. One must prove the following elements for a claim of fraud:

> (1) a representation or, where there is a duty to disclose, omission of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Cord v. Victory Solutions, L.L.C., 8th Dist. Cuyahoga No. 106006, 2018-Ohio-590, ¶ 12, citing *Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 49, 570 N.E.2d 1076 (1991).

Further, a fraud claim must be pled with particularity pursuant to Civ.R. 9(B). *Schmitz v. NCAA*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 66 (8th Dist.). "This means that a plaintiff must state "'the time, place, and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud.'"" *Cord* at ¶ 14, quoting *Carter-Jones Lumber Co. v. Denune*, 132 Ohio App.3d 430, 433, 725 N.E.2d 330 (10th Dist.1999), quoting *Baker v. Conlan*, 66 Ohio App.3d 454, 458, 585 N.E.2d 543 (1st Dist.1990). Stephen provided no detail regarding the fraud allegation except to state Claude misled the court, school system, police department, TSA, and family members "by spreading rumors that [Stephen] committed certain acts and leaving out parts of the story to suit her advantage and continue to use the Justice System as a sword rather than a shield." (Amended complaint at 20). Because Stephen's fraud claim was not pleaded with the necessary particularity, the trial court properly granted dismissal of Count 5.

{¶ 29} Accordingly, we affirm the trial court's dismissal of the libel claim under Count 1 as well as Counts 2, 3, 4, and 5. We find the trial court erred in concluding, as a matter of law, that Stephen failed to state a claim of slander for which relief can be granted, and therefore, reverse the court's ruling on the slander claim under Count 1 and remand on that issue. However, we note that our holding should not be construed as commenting on the merits of Stephen's slander claim.

{¶ 30} In addition to our findings regarding Claude's motion to dismiss, we note that once Stephen appealed the arbitrators' report and award on February 4,

2020, that report and award was no longer binding on the parties and the case was correctly returned to the trial court judge for a trial de novo. Loc.R. 29, Part VII (B) and (C).

{¶ 31} A trial de novo requires that the trial judge to proceed as if no arbitration decision had been rendered, *Finke v. Farley*, 1st Dist. Hamilton No. C-920223, 1993 Ohio App. LEXIS 4922 (July 22, 1993), citing *Black's Law Dictionary* 392 (5th Ed.1979); *accord* Loc.R. 29, Part VII(C). "In other words, upon the filing of an arbitration appeal, the arbitration award is effectively disregarded and the matter is returned to the trial court for a de novo review." (Emphasis omitted.) *Pickering v. Nationwide Mut. Fire Ins. Co.*, 9th Dist. Summit No. 19881, 2000 Ohio App. LEXIS 3092, 4 (July 12, 2000).

{¶ 32} While a trial court must afford a trial de novo following an appeal of an arbitration report and award, the trial court is not mandated to only set the matter for trial. Under Loc.R. 29, it is within the trial court's discretion to grant dispositive motions following an appeal from the arbitration report and award and prior to holding a trial de novo. *Temkin v. Lotter*, 8th Dist. Cuyahoga No. 87092, 2006-Ohio-6164, ¶ 8-9 (it was within a trial court's discretion, after an arbitration report and award was rendered and appealed and the case was returned to the trial court's docket, to grant leave to file a motion for summary judgment and rule on said motion).

{¶ 33} The trial court had great latitude to follow its local rules, and therefore, could consider Claude's motion to dismiss following Stephen's appeal of

the arbitration award and the case's return to the trial court for a trial de novo. *State Farm Fire & Cas. Co. v. Holland*, 12th Dist. Madison No. CA2007-08-025, 2008-Ohio-4436, ¶ 32, citing *Paramount Parks, Inc. v. Admiral Ins. Co.*, 12th Dist. Warren No. CA2007-05-066, 2008-Ohio-1351, ¶ 37, citing *Business Data Sys., Inc. v. Gourmet Cafe Corp.*, 9th Dist. Summit No. 23808, 2008-Ohio-409. *See also Pollock v. Jones,* 6th Dist. Lucas No. L-99-1106, 2000 Ohio App. LEXIS 2799, 13 (June 23, 2000) ("[a] trial court is vested with broad discretion in controlling its docket and regulating the proceedings before it."); *In re T.W.*, 8th Dist. Cuyahoga Nos. 88360 and 88424, 2007-Ohio-1441, ¶ 39 ("courts are to be given latitude in following their own local rules; the enforcement of rules of court is held to be within the sound discretion of the court").

{¶ 34} Here, following Stephen's appeal from the arbitrators' award and report, the trial court entered an order extending the dispositive motion deadline and subsequently ruled on Claude's motion to dismiss — actions within the trial court's discretion.

{¶ 35} Judgment is affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

RAYMOND C. HEADEN, JUDGE

MICHELLE J. SHEEHAN, J., CONCURS;
SEAN C. GALLAGHER, P.J., DISSENTS WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶ 36} I respectfully dissent. I recognize that the parties have been representing themselves throughout the entirety of these proceedings and that the briefing and the trial court record are a bit convoluted. Nevertheless, Stephen is entitled to a trial de novo in light of the fact that the trial court invoked Loc.R. 29 to refer the parties to mandatory arbitration at their initial appearance. Loc.R. 29 is the sole authority for the trial court's referral, but in exchange for the parties' reluctant participation in the arbitration process, the rule permits an unsatisfied party the opportunity to appeal the arbitration decision and award. If the appeal is timely perfected, the rule provides that the matter shall proceed to a "trial de novo" upon all claims. *Calhoun v. Drain*, 8th Dist. Cuyahoga No. 84442, 2004-Ohio-6412, ¶ 8. There is no ambiguity. Trial courts cannot invoke the referral portion of the rule, to the exclusion of the appeal portion after the parties endured the mandatory arbitration process.

{¶ 37} At the case management conference conducted five days after Claude filed an answer to the complaint, the trial court sua sponte referred the case to

arbitration under Loc.R. 29. That referral was premature and, in large part, has appeared to cause the parties' confusion — Stephen's primary argument in this appeal focuses on his inability to conduct discovery. The local rule does not permit a referral to arbitration until after all discovery is completed. Loc.R. 29, Part I(D). In fact, the referral is to occur only once all issues are joined and the matter is ready for trial. *Id.* This is because after the referral to arbitration, no further motions, pleadings, or discovery is permitted by rule. *Id.* This complicates the matter before us; however, it is acknowledged that neither party objected to the trial court's referral process.

{¶ 38} After the report and award of the arbitrators was filed, Stephen timely appealed the decision under Loc.R. 29, Part VII. Because he timely appealed the report and award, Stephen was entitled to a trial de novo. Loc.R. 29, Part VII (C) ("[a]ll cases which have been duly appealed *shall* be tried de novo."); *Weber v. Castelli*, 8th Dist. Cuyahoga No. 92158, 2009-Ohio-1677, ¶ 13. Further, the arbitrators' report and award was no longer binding or informative under the express terms of Loc.R. 29, Part VI (B), which provides that the report and award "shall be final and shall have the attributes and legal effect of a verdict" *unless* appealed.

{¶ 39} Instead of preparing for trial, Claude filed a motion to dismiss in which she claimed that the arbitrators' award in her favor required dismissal of the complaint. Claude's motion solely relied on the arbitrators' decision (her entire motion is as follows):

> Plaintiff and Defendant have a divorce case pending in domestic relations court. Prior to the divorce case, Defendant had filed a protective order against plaintiff and plaintiff was found guilty of domestic violence. Plaintiff and Defendant have one child which temporary custody was granted to the Defendant pending divorce proceedings. On September 28, 2018 Plaintiff filed a complaint against defendant for Slander and Libel, false statement to court resulting to plaintiff to become homeless by a protection order being granted to Defendant and Defendant took Pictures and a futon belonging to plaintiff.
>
> The case was referred for Arbitration on January 3, 2019.
>
> The Arbitration panel finds against Plaintiff on all claims. (*See* attached Exhibit. A) Therefore, Defendant asks this Honorable Court to dismiss this case with prejudice. Costs to Plaintiff.

There were no other arguments presented for the trial court's consideration.

{¶ 40} The arbitrators' report and award was of no legal significance in consideration of the timely appeal and the matter being returned to the assigned trial court judge for trial. Loc.R. 29, Part VII (B). Further, the report could not be relied upon by the trial court in considering the arguments raised in the motion to dismiss. In light of the fact that the motion to dismiss was entirely based upon the report and award of the arbitrators, the trial court erred in granting the motion to dismiss for any reason.

{¶ 41} The majority concludes that Loc.R. 29 is inconsistent with the Rules of Civil Procedure, and therefore, the de novo trial requirement is unenforceable. Rule 15(A) of the Rules of Superintendence for the courts of Ohio expressly permits courts to adopt a plan for mandatory arbitration of civil cases. Under Rule 15(A)(2), however, every plan for mandatory arbitration of civil cases adopted by the common pleas court shall be filed with the Ohio Supreme Court

and must include language requiring the ability to appeal the mandatory arbitration. Loc.R. 29 authorizes mandatory arbitration in Cuyahoga County. *Thrower v. Bolden*, 8th Dist. Cuyahoga No. 97813, 2012-Ohio-3956, ¶ 11. "It is well settled that Loc.R. 29 is constitutional and consistent with Sup.R. 15." *Id.*, citing *Kuenzer v. Teamsters Union Local 507*, 66 Ohio St.2d 201, 420 N.E.2d 1009 (1981); *Cavalry Invests., L.L.C. v. Dzilinski*, 8th Dist. Cuyahoga No. 88769, 2007-Ohio-3767.

{¶ 42} Loc.R. 29, Part VII (A)(1) provides that "[t]he filing of a single appeal shall be sufficient to *require a de novo trial of the entire case on all issues* and as to all parties." (Emphasis added.) The trial court expressly relied on Loc.R. 29 in referring Stephen's claims to mandatory arbitration without the consent of the parties. Stephen properly appealed the unfavorable arbitration decision under Loc.R. 29, an appeal that is mandated by the Ohio Supreme Court. Under Loc.R. 29, Part VII(A)(1) as adopted by the Cuyahoga County Court of Common Pleas, the trial court was required to conduct a trial de novo on all claims and all issues. We should not condone the trial court ignoring its own rules, especially when those rules were the sole source of authority to force the mandatory arbitration upon the unwilling plaintiff. It is one thing to permit trial courts some latitude in enforcing deadlines within their local rules, *see, e.g.*, *In re T.W.*, 8th Dist. Cuyahoga Nos. 88360 and 88424, 2007-Ohio-1441, at ¶ 39; it is another altogether to permit trial courts to ignore their own rule requiring a trial de novo upon a party's timely perfecting an appeal from an unsolicited arbitration proceeding.

{¶ 43} In light of the fact that Claude's motion to dismiss was entirely based on the arbitration decision that bore no force or effect following Stephen's timely appeal, the motion to dismiss (whether considered as a Civ.R. 12(B)(6) or 12(C)) should have been denied. The majority's implication that the trial court could sua sponte review the complaint, independent of Claude's motion, is contrary to all notions of due process. Because Stephen appealed the unfavorable decision following the mandatory arbitration, the trial court was required to conduct a trial de novo on all claims and upon all issues. *Calhoun*, 8th Dist. Cuyahoga No. 84442, 2004-Ohio-6412, at ¶ 7 ("Absent any evidence of a party's waiver of the right to appeal, the trial court shall conduct a trial de novo on all issues once a party has timely appealed the arbitrators' award. Loc.R. 29 Part VIII(A)(1) & (C).") Stephen's argument regarding the lack of discovery and his unanswered requests for admissions all stem from the premature referral to arbitration. Thus, the issues are inextricably intertwined. I would reverse the decision of the trial court and remand for the trial de novo on all claims and all issues that Loc.R. 29, Part VII(A)(1) and (C) requires.